To be Argued by:
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Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.: 2024-11753

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

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Appellant.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

In an action for relief under Election Law §17-206(2)(a)(b)(i), a provision of New York's John R. Lewis Voting Rights Act ("NYVRA"), Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy appeal from an order of the Supreme Court, Orange County (Maria S. Vazquez-Doles, J.), dated November 7, 2024, granting Defendants the Town of Newburgh's ("the Town" or "Newburgh") and the Town Board of the Town of Newburgh's ("the Town Board") motion for summary judgment, declaring the NYVRA facially unconstitutional, and dismissing Plaintiffs' complaint. NYSCEF-Doc-147 (Summ. J. Order) at 2.

Issue Presented

Issue: Like Section 2 of the federal Voting Rights Act ("federal VRA") as well as state voting rights acts ("state VRAs") across the country, the NYVRA prohibits vote dilution. Building on these voting rights laws, the NYVRA requires proof *either* that voting is racially polarized in a political subdivision *or* that the ability of protected class members to elect candidates of their choice is impaired, *as well as* a showing that a reasonable alternative policy would remedy the vote dilution. Election Law §17-206(2). Is the NYVRA facially unconstitutional in that

its every conceivable application would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Answer: No.

Summary of Argument

Named for civil rights icon (and former Georgia congressman) John R. Lewis, the NYVRA is a landmark New York law that seeks to prevent "the denial or abridgment of the voting rights of members of" all racial and ethnic groups. Election Law §17-200. To this end, the law forbids voter suppression, vote dilution, and voter intimidation, *id.* §§17-206, 17-212, institutes a system of preclearance, *id.* §17-210, and directs that electoral rules be construed broadly to protect the franchise, *id.* §17-202. The NYVRA is one of a growing number of state VRAs enacted by states across the country. These laws provide safeguards for voting rights beyond those supplied by the federal VRA.

Prior to the Supreme Court's decision, courts nationwide had uniformly upheld the constitutionality of state VRAs. The question was an easy one since state VRAs neither classify by race nor require unlawful racial gerrymandering—but do further the vital state interest in stopping racial discrimination in voting. *See, e.g.*, *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1011-12 (Wash. 2023); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 680-90 (Cal. Ct. App. 2006). In a brief ruling marred by legal errors, however, the Supreme Court shattered this consensus and

decreed that the whole NYVRA—including a myriad of provisions not before it—violates the Equal Protection Clause of the federal Constitution. The Court thus ordered the NYVRA "stricken in its entirety from further enforcement and application." NYSCEF-Doc-147 at 2.

The Supreme Court took this unprecedented step in an otherwise ordinary case. For decades, minority voters have challenged at-large electoral systems under the federal Constitution and the federal VRA because of their tendency to dilute minority representation. Numerous state VRAs now authorize plaintiffs to bring analogous claims under state law. When these suits succeed, federal and state courts routinely order jurisdictions to replace at-large electoral systems with single-member districts or alternative methods of election, without triggering strict scrutiny. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 19 (2023) (noting that courts have applied this doctrine "in one ... case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country").

Invoking the NYVRA's prohibition of vote dilution, Plaintiffs—all Black and Latino residents of Newburgh—objected to the Town's at-large system for electing the Town Board. Under this system, no Black or Latino individual has *ever* been elected to the Town Board, even though more than *forty percent* of the Town's population is Black or Latino. NYSCEF-Doc-72 (Pls.' Statement of Facts) ¶¶39, 42. The reason the Town's electoral system produces such glaring underrepresentation

is that voting in the Town is highly racially polarized. Members of the white majority vote cohesively for certain Town Board candidates (who generally prevail), while Black and Latino voters jointly prefer other Town Board candidates (who universally lose). *Id.* ¶¶60-64. But this situation is easily rectifiable. If the Town were to switch to any number of other electoral systems, Black and Latino voters would, for the first time, be represented on the Town Board. *Id.* ¶¶74-79.

The Supreme Court went astray at the beginning of its analysis by allowing Defendants to pursue their facial challenge to the NYVRA. The Court acknowledged the general rule that municipalities and their governing bodies, as creatures of the State, may not attack the State's own laws. But the Court thought Defendants qualified for one of the exceptions to this rule because they "assert that if they are required to comply with the NYVRA ... it will require them to violate the Equal Protection Clause." NYSCEF-Doc-147 at 12-13. To trigger this exception, however, it is not enough for a political subdivision merely to assert that it will be compelled to violate some constitutional provision. If it were, then every jurisdiction would make such a claim and the exception would swallow the rule. Instead, the exception applies only when the political subdivision pleads facts supporting its claim and, at the summary judgment stage, shows that a future constitutional violation is, at least, *likely* to occur. If the violation is "steps removed" and "speculative," then the general

rule holds and the jurisdiction lacks capacity to sue. *Merola v. Cuomo*, 427 F. Supp. 3d 286, 293 (N.D.N.Y. 2019).

Here, the Supreme Court failed to subject Defendants' allusion to a future constitutional injury to any scrutiny at all. Had the Court examined this claim, it would have found it wholly implausible. Defendants' argument is that, if they are found liable under the NYVRA, they will be forced to design one or more districts that are illegal under federal racial-gerrymandering doctrine. But *if* liability does arise, and *if* Defendants are unwilling to cure the violation on their own, the NYVRA includes a precaution aimed at preventing the judicial imposition of unlawful districts. "[A]n appropriate remedy" should take into account whether "members of a protected class are geographically compact or concentrated." Election Law §17-206(2)(c)(viii). If these individuals are spatially dispersed, a court-ordered district should not zig and zag to take them in. The NYVRA also contemplates "alternative method[s] of election" as relief, *id.* §17-206(5)(a)(ii), such as "ranked-choice voting, cumulative voting, and limited voting," *id.* §17-204(3). These electoral systems cannot possibly be racial gerrymanders since they involve no district-drawing in the first place.

The Supreme Court's constitutional holding—that a law fighting racial discrimination in voting somehow offends the federal Equal Protection Clause—is still more problematic. The Court applied strict scrutiny to the NYVRA on the

ground that it "classifies people according to their race, color and national origin." NYSCEF-Doc-147 at 16. Remarkably, however, the Court never specified the statutory provision(s) it believed to be racial classifications. The Court did not name them because it could not have done so. The NYVRA *refers* to race-related concepts but nothing in it *classifies* by race. This would have been apparent had the Court mentioned the definition of a racial classification—another omission from its opinion. A racial classification is a provision that distributes burdens or benefits to individuals on the basis of their race. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007). No element of the NYVRA meets this definition because none allocates anything to *individuals*—as opposed to *jurisdictions*—and none hinges on anyone's race per se.

In support of its view that the NYVRA classifies by race, the Supreme Court stated that "[a] person can only seek relief on the basis of their race, color or national origin." NYSCEF-Doc-147 at 16. But this description of the statute is incorrect. The law actually says that "*[a]ny* aggrieved person"—of *any* race—can bring a vote dilution claim. Election Law §17-206(4) (emphasis added). Moreover, if the Court meant that the NYVRA is subject to strict scrutiny because plaintiffs of the same race often (though hardly always) sue pursuant to it, this stance would threaten huge swaths of antidiscrimination law. Plaintiffs of the same race also typically bring claims under the federal VRA, state VRAs, Title VII of the Civil Rights Act, the Fair

Housing Act, and many other antidiscrimination statutes. All these laws would be in danger under the Court's reasoning.

Even when the Supreme Court applied strict scrutiny to the NYVRA, it did so with a thumb on the scale. *First*, the Court refused to credit the indisputably compelling interest that motivates the statute: preventing racial discrimination in voting. The Court complained that it was "unable to find [this interest] within [the law's] text." NYSCEF-Doc-147 at 17. But the NYVRA's very first section declares that the statute seeks to halt "the denial or abridgement of the voting rights of [protected class] members." Election Law §17-200. This "denial or abridgement" is a synonym for racial discrimination in voting. And even if the law were not so explicit, there is no drafting guide the Legislature must follow. A state interest must be considered even if it has to be inferred rather than copied verbatim. The Court also objected that liability may arise under the NYVRA without proof of past discrimination. NYSCEF-Doc-147 at 17-18. But this has no legal bearing. Past discrimination is not an element of a vote dilution claim under the federal VRA either. In fact, *eliminating* the need to show that the challenged practice "was adopted ... with the intent to discriminate against minority voters" was precisely why Congress amended Section 2 of the federal VRA in 1982. *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).

Second, the Supreme Court's tailoring discussion was curious. Because the Court declined to recognize any state interest, it had to evaluate the NYVRA's fit in the abstract. The Court thus opined on the "breadth" of the statute's remedies, which did not seem "'narrow'" to the Court "in any sense of that word." NYSCEF-Doc-147 at 20. But this is not how tailoring is assessed. The task *requires* identifying a state interest, and cannot be performed without doing so, since the issue is whether a law is too under- or over-inclusive in its promotion of that interest. If a court cannot think of an interest served by a law, the correct response is to terminate the inquiry—not to analyze the law's tailoring untethered from any goal the law might be trying to achieve.

And *third*, the Supreme Court mistakenly ascribed constitutional significance to the NYVRA's modest divergence from the *Gingles* framework that governs vote dilution claims under the federal VRA. *Id.* at 21-25. To know the Court was wrong, one merely has to read *Gingles*. The federal Constitution is *never cited* in the thirty-plus pages of the United States Reports in which the *Gingles* prongs are introduced. 478 U.S. at 42-74. This is because the U.S. Supreme Court adopted the first *Gingles* prong, in particular—the only one absent from the NYVRA—for a prudential, not a constitutional, reason. The Court thought that majority-minority districts would usually be the remedies in federal vote dilution cases, and it wanted to ensure that such districts could feasibly be created. *Id.* at 50 n.17. In any event, the NYVRA

includes a requirement that functionally parallels the first *Gingles* prong. To establish liability, plaintiffs must prove that one or more alternative policies exist that would improve their representation relative to the status quo.

Finally, and most troublingly, the Supreme Court purported to invalidate the *entire* NYVRA. NYSCEF-Doc-147 at 2, 25. But the NYVRA is a sprawling statute with many different provisions, of which only one—the prohibition of vote dilution through an at-large method of election in Election Law §17-206(2)(b)(i)—is implicated in this case. The Court had no authority to address other aspects of the statute: the prohibitions of voter suppression and voter intimidation, the institution of preclearance, the construction of electoral rules, and so on. By nullifying all these elements with nary a word of explanation, the Court failed to heed the "fundamental principle of our jurisprudence that the power of a court ... is limited to[] determining the rights of persons which are actually controverted in a particular case pending before the tribunal." *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980).

This Court should therefore reverse the Supreme Court's order, deny Defendants' motion for summary judgment, and remand this case for further proceedings on Plaintiffs' vote dilution claims.

Factual and Procedural Background

Plaintiffs are residents of, and registered voters in, the Town of Newburgh. NYSCEF-Doc-72 ¶¶1-18. Clarke, Reed, and Flournoy are Black; Perez, Ramon, and

Tirado are Latino. *Id.* The Town is a political subdivision of the State of New York. *Id.* ¶19. The Town's governance authority is the Town Board, whose current members are Town Supervisor Gil Piaquadio and Board members Paul Ruggiero, Scott Manley, and Anthony LoBiondo. *Id.* ¶¶20-22. A vacant seat will be filled by Jim Politi, a white Republican who defeated a Black Democrat in a recent special election. *Id.* ¶23; *see also Politi wins in Town of Newburgh,* Mid-Hudson Times (Nov. 6, 2024), https://www.timeshudsonvalley.com/mid-hudson-times/mid-hudson-times/stories/politi-wins-in-town-of-newburgh,148151. Board members are elected through at-large elections. *Id.* ¶24.

On January 26, 2024, Plaintiffs sent a letter to the Town Clerk advising that the Town's at-large system of elections violated the NYVRA. *Id.* ¶27. On March 15, 2024, the Town Board adopted a resolution to investigate Plaintiffs' allegations. *Id.* ¶29. Because the Town Board's response did not satisfy Election Law §17-206(7), it did not trigger the NYVRA's "safe harbor" provisions, and Plaintiffs subsequently filed suit. NYSCEF-Doc-31. Defendants previously appealed the Supreme Court's denial of their motion to dismiss. Docket No. 2024-04378. That appeal was heard on October 1, 2024, and the parties are awaiting a decision from this Court.

The Black and Hispanic populations in the Town have grown significantly in recent decades. While they comprised only 6.6% of the population combined in 1980, at present, 15.4% identify as Black and 25.2% as Hispanic. NYSCEF-Doc-72

¶¶33-39. The Town's government has not adapted to reflect Newburgh's changing demographics. In particular, there has never been a Black or Hispanic member of the Town Board. *Id.* ¶42.

There is extensive evidence that the Town's at-large election system dilutes the electoral influence of Black and Hispanic voters. Plaintiffs' expert, Dr. Matt Barreto, analyzed dozens of elections using court-approved techniques and reported a "clear, consistent, and statistically significant finding of racially polarized voting in the Town of Newburgh." *Id.* ¶¶48-64. Specifically, he found that "Latino and Black voters are cohesive in local elections for Town [Board]," but that these voters' preferred candidates "typically receive very low rates of support from white voters, who effectively block [them] from winning office." *Id*. Dr. Barreto also opined that various alternative election systems would provide Black and Hispanic voters with a reasonable opportunity to elect candidates of their choice. *Id.* ¶¶74-79. He identified multiple viable district plans that would improve Black and Hispanic voters' representation by their preferred candidates. *Id*. Defendants' rebuttal expert, Professor Brad Lockerbie, did not dispute Dr. Barreto's analysis and reached no conclusions regarding racially polarized voting. *Id.* ¶¶67-73.

There is a long history of discrimination in New York, Orange County, and the Town affecting Black and Hispanic residents. *Id.* ¶¶80-82. Black and Hispanic people were excluded from the housing market through restrictive covenants. *Id.*

¶33. They were excluded from the political process through English-literacy requirements, racial gerrymandering, a lack of Spanish-language information and interpreters, and other barriers. *Id.* ¶¶80-81. The consequences of this historical and ongoing discrimination are stark: on average, Black and Hispanic residents of the Town experience significantly worse outcomes than white residents across most socioeconomic indicators. *Id.* ¶¶91-96.

There have been numerous high-profile racial incidents within the Town. In 1992, members of the Ku Klux Klan and neo-Nazi groups hosted a rally at a local businessman's property. *Id.* ¶83. There was a counterprotest in the neighboring City of Newburgh, but no reported response in or by the Town. *Id.* In 2012, a Black Town employee filed a lawsuit alleging that his supervisors created a racially hostile work environment. *Id.* ¶¶87-90. The lawsuit quickly settled, and four years later, one of the employees named in the 2012 complaint was again accused of racial discrimination. *Id.* And after Orange County declared a state of emergency in 2023 due to the arrival of around sixty asylum seekers, elected officials promoted a story that these individuals were displacing homeless veterans at a local hotel, even though the story was fabricated (as the hotel's manager quickly confirmed). *Id.* ¶¶111-18. The Town later sued the hotel based on alleged zoning violations, arguing that housing "single male asylum seekers from the City of New York will result in potential disaster." *Id.*

The Town has been nonresponsive to the needs and interests of Black and Hispanic residents. The Town does not provide information to residents in Spanish, except for a notice regarding mosquito-borne viruses issued after this litigation commenced. *Id.* ¶41. Town officials supported expanding a power plant over the opposition of racial justice advocates who raised concerns about the environmental and health impacts on communities of color. *Id.* ¶¶104-110. And the Town has offered no justification for maintaining its at-large election system—a system widely adopted historically to reduce the political strength of minority voters—beyond its assertion that it "has relied on [at-large elections] since at least 1865." *Id.* ¶¶43-47.

Legal Background

"The essence of a [vote dilution] claim," the U.S. Supreme Court explained in *Gingles*, "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [voters of different races or ethnicities] to elect their preferred representatives." 478 U.S. at 47. Like Section 2 of the federal VRA, the NYVRA's prohibition of vote dilution, Election Law §17-206(2), directly targets the diminution of a protected class's electoral influence due to a specific electoral practice. Section 17-206(2) is broadly similar to Section 2 though it diverges from the federal model in certain particulars.

When a jurisdiction (like the Town) uses an at-large electoral system, the NYVRA authorizes two kinds of vote dilution claims. *First*, plaintiffs may show that the "voting patterns of members of the protected class within the political subdivision are racially polarized" from the voting patterns of other members of the electorate. *Id.* §17-206(2)(b)(i)(A). Social scientists rely on several techniques to measure racial polarization in voting, including King's ecological inference and ecological inference RxC. NYSCEF-Doc-72 ¶¶52-53. These methods generate estimates of the proportion of each racial or ethnic group that supported a given candidate in a given election. When members of the protected class vote cohesively for certain candidates, while other members of the electorate vote cohesively for other candidates, voting is racially polarized. *See, e.g.*, *Gingles*, 478 U.S. at 52-74.

Second, instead or in addition, plaintiffs may show that, "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." Election Law §17-206(2)(b)(i)(B). The "factors that may be considered," listed in the next subsection, focus on historical and ongoing racial discrimination both within and outside the political process. *Id.* §17-206(3). This list strongly resembles both the one used in vote dilution litigation under the federal Constitution, *see, e.g.*, *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), and the one set forth by the U.S.

Senate in the crucial report that accompanied Section 2's revision in 1982, *see* S. Rep. No. 97-417, at 28-29 (1982).

Under either of these theories, plaintiffs must *also* prove that one or more reasonable alternative policies exist that would improve the protected class's representation relative to the status quo.[1] This element follows from the NYVRA's description of the "[p]rohibition against vote dilution." Election Law §17-206(2). A challenged practice only "*ha[s] the effect*" of "*impairing*" a protected class's electoral influence "*as a result of vote dilution*" if, under some other reasonable policy, the protected class would be better represented than it currently is. *Id.* §17-206(2)(a) (emphasis added). Construing the highly similar language of the California Voting Rights Act ("California VRA"), the California Supreme Court agreed that a vote dilution plaintiff "must identify a reasonable alternative voting practice to the existing ... system that will serve as the benchmark 'undiluted' voting practice." *Pico Neighborhood Ass'n. v. City of Santa Monica*, 534 P.3d 54, 65 (2023) (internal quotation marks omitted). This element, the court held, was required by the California VRA's use of the terms "impairs" and "dilution." *Id.* at 313-15. These terms are also part of—and pivotal to—the NYVRA. Election Law §17-206(2)(a).

[1] Defendants agree that this is an element of any vote dilution claim. NYSCEF-Doc-70 at 11, 21-24.

The NYVRA's reasonable-alternative-policy requirement plays the same role as *Gingles*'s first prong. That prong asks whether the protected class is "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. If so, then that hypothetical district is one plausible remedy for the protected class's dilution. Likewise, if the NYVRA's reasonable-alternative-policy requirement is satisfied, then at least one viable vote dilution remedy exists. Unlike *Gingles*'s first prong, the NYVRA's reasonable-alternative-policy requirement *itself* does not mention compactness. But a separate provision states that "an appropriate remedy" should consider "whether members of a protected class are geographically compact or concentrated." Election Law §17-206(2)(c)(viii). Like *Gingles*'s first prong, this clause discourages the remedial use of oddly-shaped districts that bring together far-flung protected class members.

Federal and state courts have uniformly held that state VRAs mirroring the NYVRA do not facially violate the federal Constitution. *See, e.g.*, *Higginson v. Becerra*, 786 F. App'x. 705, 706-07 (9th Cir. 2019) (California VRA); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *8 (N.D. Ill. Oct. 21, 2011) (Illinois Voting Rights Act); *Portugal*, 530 P.3d at 1011-12 (Washington Voting Rights Act ("Washington VRA")); *Yumori-Kaku v. City of Santa Clara*, 59 Cal. App. 5th 385, 426-28 (Cal. Ct. App. 2020) (California VRA); *Sanchez*, 145 Cal. App. 4th at 680-90 (same). These courts have recognized that state

VRAs do not classify by race and so are not subject to strict scrutiny. *See, e.g.*, *Sanchez*, 145 Cal. App. 4th at 680-83. The courts have further explained that judicially mandated remedies for vote dilution are constitutional unless they are unlawfully racially-gerrymandered districts (in which case they may be challenged on an as-applied basis). *See, e.g.*, *id.* at 688-90.

Standard of Review

"It is well settled that facial constitutional challenges are disfavored." *Overstock.com, Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586, 593 (2013). "Legislative enactments enjoy a strong presumption of constitutionality," and "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (internal quotation marks omitted). "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *Id.* Instead, courts may only declare a statute facially unconstitutional after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992). The Supreme Court's constitutional ruling is a pure question of law reviewed *de novo*. *Cf. Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc.*, 61 A.D.2d 1030 (2d Dep't 1978), *aff'd*, 47 N.Y.2d 61 (1979).

Argument

I Defendants Lack Capacity to Challenge the NYVRA.

The Supreme Court should never have reached the merits of Defendants' facial constitutional challenge to the NYVRA. It is well-settled that "municipalities ... and their officers lack capacity to mount constitutional challenges to ... State legislation." *City of New York v. State*, 86 N.Y.2d 286, 289 (1995). The Court held that Defendants qualified for an exception to this rule based solely on their assertion that compliance with the NYVRA would force them to violate the federal Equal Protection Clause. A political subdivision's self-interested say-so, however, is not enough to trigger the so-called "dilemma exception." Rather, it must be *likely* that a jurisdiction will be compelled to violate a clear constitutional proscription if the jurisdiction is not allowed to proceed with its suit.

Here, it is highly implausible that Defendants will be ordered to draw unlawfully racially-gerrymandered districts because of this litigation. The NYVRA includes safeguards against this outcome. The statute also authorizes numerous remedies that cannot be racial gerrymanders. And in all state VRA cases to date, *no* losing jurisdiction has ever been obliged to racially gerrymander. Defendants never state why they would conduct illegal activity that, until now, every losing jurisdiction has managed to avoid.

i. The Dilemma Exception Applies Only if Defendants Are Likely to Be Forced to Violate a Clear Constitutional Proscription.

The Supreme Court began its capacity analysis on the right track by recognizing "the doctrine of no capacity to sue by municipal corporate bodies" like the Town. NYSCEF-Doc-147 at 11. But the Court misconstrued the exception to this rule that applies when "municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription." *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977). In the Court's view, successfully invoking this exception requires nothing more than saying the right words. This understanding explains why the Court's discussion of the exception was so brief. The Court noted that "Defendants assert that if they are required to comply with the NYVRA ... it will require them to violate the Equal Protection Clause." NYSCEF-Doc-147 at 12-13. The Court then immediately deemed the exception applicable. *Id.*

But the Court's conclusion was too hasty. To begin with, to invoke the dilemma exception properly, a party must plead the exception specifically and, more importantly, plead facts to support the claim. *See, e.g.*, *Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. N.Y. State Teachers Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995). But Defendants neither pled the exception specifically nor identified any facts demonstrating that, if this case continues, they will have to choose between complying with a Court order and violating a constitutional proscription. NYSCEF-

Doc-34 at 26. This alone suffices to establish Defendants' incapacity to mount their facial constitutional challenge.

Under relevant precedent, moreover, the Supreme Court was required to *evaluate* Defendants' assertion, not simply to accept it at face value. One aspect of this evaluation should have been determining if the scenario imagined by Defendants is likely—or if, instead, it is "steps removed" and "speculative." *Merola*, 427 F. Supp. 3d at 293. In *Merola*, a county clerk challenged a law that expanded the forms of identification that could be used to obtain a driver's license. *Id.* at 289. The clerk argued that he had capacity to bring this suit because the law would compel him to violate New York's "prohibition against disenfranchisement." *Id.* at 293. *If* ineligible voters secured driver's licenses, and *if* these individuals later voted, *then* "watering down the vote with ineligible voters who fraudulently register [would] disenfranchise[] lawful voters." *Id.* at 293 n.7. Unlike the Supreme Court, the *Merola* court assessed the plausibility of this sequence of events and found it too unlikely to satisfy the dilemma exception. *Id.* at 293.

Relatedly, the Supreme Court should have scrutinized the substantive merits of Defendants' assertion. If the claim was "not persuasive" or "unconvincing," the Court should have applied the usual rule. *Cnty. of Nassau v. State*, 32 Misc.3d 709, 713-14 (Sup. Ct., Albany County [Michael C. Lynch, J.] 2011). In *County of Nassau*, a county objected to a law that required it to use certain electronic voting machines.

Id. The county maintained that this requirement would force it to violate New York's constitution. *Id.* Unlike the Supreme Court, the *County of Nassau* court carefully examined these supposedly looming constitutional infringements. *Id*. Concluding that New York's constitution would not, in fact, be breached, the court ruled that the county lacked capacity to sue. *Id.* The Appellate Division, Third Department, affirmed this judgment. *County of Nassau v. State of New York*, 100 A.D.3d 1052 (3d Dep't 2012).

The Supreme Court should further have considered the clarity of the relevant constitutional command. "New York courts have interpreted constitutional proscriptions to [mean] something *expressly forbidden*"—as opposed to something whose invalidity becomes evident only after extensive study. *Blakeman v. James*, No.2:24-cv-1655, 2024 WL 3201671, at *14 (E.D.N.Y. Apr. 4, 2024) (emphasis added and cleaned up). In *Blakeman*, a county disputed a directive from the New York Attorney General to rescind a policy that barred transgender women from participating in certain sporting events on county property. *Id.* at *3. The county averred that it would violate the federal Equal Protection Clause if it had to abandon this policy because the county would then transgress "the constitutional rights of women as a protected class." *Id.* at *14. Reasoning that the Equal Protection Clause does not clearly (or even likely) suggest a violation in this situation, the court held that the county could not continue its suit. *Id.*

Under the case law on the dilemma exception, then, the Supreme Court should have addressed the likelihood that Defendants will be forced to draw unlawfully racially-gerrymandered districts, the substantive merits of this argument, and the clarity of racial-gerrymandering doctrine. But the Court did none of this. It merely cited Defendants' assertion of a future constitutional violation and held this claim sufficed to trigger the exception. This was a pure error of law that warrants reversal.

ii. Defendants Are Virtually Certain Not to Be Forced to Violate a Clear Constitutional Proscription.

Had the Supreme Court performed the requisite analysis, the inapplicability of the dilemma exception would have been apparent. Start with the likelihood that Defendants will be compelled to racially gerrymander in defiance of the federal Equal Protection Clause. For this unwelcome outcome to arise, the following things would have to happen: *First*, Defendants would need to be found liable for vote dilution. *Second*, they would need to be unable or unwilling to cure the dilution themselves. *Third*, the Court would need to select single-member districts as a remedy. And *fourth*, the Court would need to order the use of at least one unlawfully racially-gerrymandered district, that is, a district drawn predominantly and unjustifiably with a racial motive. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). The sheer number of acts between the present and the potential future offense is enough to make that violation "steps removed" and "speculative." *Merola*, 427 F.

Supp. 3d at 293. Notably, this chain of events is substantially *longer* than the one deemed too implausible in *Merola*.

But the improbability of a future racial-gerrymandering violation here stems from more than the length of the causal chain. Focus on the chain's third step: the Supreme Court's choice of single-member districts as a remedy. To reiterate, the NYVRA explicitly contemplates remedies *other than* single-member districts, including ranked-choice voting, cumulative voting, and limited voting. *See* Election Law §§17-204(3), 17-206(5)(a)(ii). Plaintiffs' expert also studied ranked-choice voting and cumulative voting in the Newburgh context and determined that both systems would provide Black and Latino voters with an opportunity to elect candidates of their choice in Town Board elections. NYSCEF-Doc-72 ¶¶74, 78-79. These alternative methods of election cannot constitute unlawful racial gerrymandering because "[a] racial gerrymandering claim ... applies to the boundaries of individual districts." *Ala. Legis. Black Caucus v. Alabama* (*ALBC*), 575 U.S. 254, 262 (2015). It does *not* apply to an electoral system that involves no district-drawing at all.

To break the chain between the present and the potential future offense, then, all the Supreme Court would have to do is order an alternative method of election as a remedy. (Assuming the Court even got to that point after first finding liability and then being unsatisfied with any party's proposed relief.) But say the Court

nevertheless decided to order the use of districts. Even at this fourth step in the chain, the odds of the Court requiring unlawfully racially-gerrymandered district(s) are exceedingly low. For one thing, Plaintiffs would not support such districts. Plaintiffs are keenly aware of the federal courts' racial-gerrymandering jurisprudence and would object at once to proposed remedial districts that prioritized race above traditional redistricting criteria. Not only are such districts presumptively illegal, they are also unnecessary to cure the vote dilution in the Town. Plaintiffs' expert submitted multiple maps of districts that comply with traditional criteria and would give Black and Latino voters an opportunity to elect candidates of their choice in Town Board elections. NYSCEF-Doc-72 ¶¶75-77.

Additionally, as flagged earlier, the NYVRA affirmatively discourages the imposition of remedial districts that might be unlawfully racially-gerrymandered. The law states that "whether members of a protected class are geographically compact or concentrated … may be a factor in determining an appropriate remedy." Election Law §17-206(2)(c)(viii). This language implies that, where minority members live close to one another, a reasonably shaped district encompassing this minority population is a viable remedy. But where minority members are *not* geographically clustered, a "bizarrely shaped" district winding hither and thither to find dispersed minority members is *not* a suitable cure. *Bush v. Vera*, 517 U.S. 952,

979 (1996) (plurality opinion). The drawing of such a district, then, is overtly deterred by the NYVRA.

The efficacy of these precautions against racial gerrymandering is revealed by the impressive record of other state VRAs (which contain comparable provisions). Hundreds of political subdivisions have been required to switch from at-large elections to single-member districts under other state VRAs. *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 329 (2023). Yet "*not a single district* created to remedy or avoid a [state VRA] violation has been found to be an illegal racial gerrymander." *Id.* In fact, only one suit has even alleged that any districts drawn because of state VRAs are unlawful, and it was dismissed due to its "fail[ure] to plausibly state that [the plaintiff] is a victim of racial gerrymandering." *Higginson*, 786 F. App'x at 706.

Defendants might respond that *any* remedy for their vote dilution would *necessarily* be unconstitutional. This response would indeed shorten the chain between the present and the potential future offense. But it would do so at the cost of becoming "not persuasive" and "unconvincing," *Cnty. of Nassau*, 32 Misc.3d at 713, and thus still not a valid basis for capacity to bring this challenge. Voting rights history again poses an insuperable obstacle for the categorical claim that any relief for vote dilution inherently violates the Equal Protection Clause. As just noted, hundreds of jurisdictions have been obliged to convert from at-large elections to

single-member districts under other state VRAs. Hundreds more have been forced to do so under the federal Constitution and the federal VRA. *See, e.g.*, *The Evolution of Section 2: Numbers and Trends*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/findings/. If Defendants' categorical theory were correct, then *all* of these conversions were unlawful because all of them took place due to legal claims that refer to race. In reality, though, *no* such conversion has been reversed simply because it was a cure for vote dilution. Courts have nullified vote dilution remedies *only* when they amounted to illegal racial gerrymanders. But as explained above, that prospect is remote here.

In case more evidence is needed against this categorical theory, the U.S. Supreme Court supplied it just last year. In *Allen*, the Court affirmed a federal district court's ruling that Alabama's congressional plan likely violated Section 2 of the federal VRA. Among other things, Alabama echoed Defendants by arguing that the federal Constitution "does not authorize race-based redistricting as a remedy for § 2 violations." 599 U.S. at 41. The Court emphatically rejected this claim. "[F]or the last four decades, this Court and the lower federal courts ... *have authorized race-based redistricting* as a remedy for state districting maps that violate § 2." *Id.* (emphasis added). Sure enough, on remand, what Defendants (wrongly) say is inherently unlawful is exactly what happened. Alabama was compelled to use a congressional plan that includes a second district in which Black voters have the

opportunity to elect their preferred candidate. *See Singleton v. Allen*, Nos. 2:21-cv-1291-AMM, 2:21-cv-1530-AMM, 2023 WL 6567895, at *16 (N.D. Ala. Oct. 5, 2023).

Finally, recall that the exception to the no-capacity rule applies only when a constitutional proscription "expressly forbid[s]" an action "along the lines of 'no (blank) shall (blank).'" *Merola*, 427 F. Supp. 3d at 292. Compared to this archetype, racial-gerrymandering doctrine is highly opaque. To determine if race predominated over other factors, a court must consider a vast array of material: "direct evidence of legislative intent, circumstantial evidence of a district's shape and demographics, or a mix of both." *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (internal quotation marks omitted). If a jurisdiction defends a district on the ground that its rationale was partisan, not racial, a plaintiff should (but does not need) to submit an alternative map showing that this partisan goal could have been achieved by districts with different racial compositions. *See Alexander v. S.C. State Conf. NAACP*, 602 U.S. 1, 34-35 (2024).

And when a court concludes that race did predominate in a district's design, the inquiry is still not over. This only means the district is subject to strict scrutiny and so presumptively unconstitutional. At this stage, the most common interests invoked by jurisdictions are compliance with Section 2 or Section 5 of the federal VRA. *See, e.g.*, *Cooper*, 581 U.S. at 292. When one of these interests is proffered, a

court asks whether a jurisdiction had a "strong basis in evidence" for believing that the federal VRA required its action. *See, e.g.*, *ALBC*, 575 U.S. at 278. To decide a racial-gerrymandering case, then, a court must often master not just that body of law but also the equally complicated precedent interpreting the federal VRA. Little wonder the Court's last racial-gerrymandering decision filled a hundred pages of the United States Reports. *See Alexander*, 602 U.S. at 1-100.

Accordingly, it stretches matters past their breaking point to say that the Equal Protection Clause "expressly forbid[s]" race-conscious redistricting. *Merola*, 427 F. Supp. 3d at 292. Since the 1990s, that provision has been construed to prohibit individual districts that run afoul of the elaborate framework outlined above. That framework is the opposite of a clear command: a byzantine doctrine whose implications are often anything but obvious.

II The NYVRA Is Facially Constitutional.

Turning to the merits of Defendants' attack on the NYVRA,[2] it should fail just as all other challenges to the constitutionality of state VRAs and Section 2 of the federal VRA have ultimately fallen short. Like these laws, the NYVRA employs no

[2] This section addresses only the NYVRA's vote dilution provision and uses "NYVRA" as shorthand for it. The following section discusses the statute as a whole, which the trial court purported to invalidate.

racial classifications. It *refers* to race-related concepts but it never *classifies* by race. The statute is therefore subject to rational basis review, which it easily survives. Moreover, even if strict scrutiny did apply to the NYVRA, it would still be valid. Its two theories of vote dilution—one based on racially polarized voting, the other on circumstances of historical and ongoing racial discrimination—are narrowly tailored to furthering the compelling state interest in preventing and remedying racial discrimination in voting. As for the NYVRA's partial divergence from the *Gingles* framework for vote dilution claims under the federal VRA, it is constitutionally irrelevant. In particular, the absence of an element identical to the first *Gingles* prong does not give rise to a racial classification. Lastly, everyone agrees that some applications of the NYVRA are lawful—for example, where all elements of a federal VRA claim could be satisfied. For this reason, too, the law's facial nullification was improper.

i. The NYVRA Employs No Racial Classifications.

A. The Supreme Court Failed to Identify Any Racial Classifications.

The central constitutional issue in this case is whether the NYVRA classifies by race. Under the Equal Protection Clause, laws that employ racial classifications are subject to strict scrutiny. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 506 (2005). By contrast, laws that do not employ racial (or other suspect) classifications are not subject to that "degree of critical examination" and are instead reviewed

under the "relatively relaxed" standard known as "rational basis review." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). One might have expected the Supreme Court to analyze this issue carefully and comprehensively. Instead, the Court announced and justified its conclusion that the NYVRA does racially classify in just one short paragraph. NYSCEF-Doc-147 at 16. And most of this paragraph did not explain *how* or *why* the NYVRA racially classifies but rather stated and then repeated the Court's position that it does so. The NYVRA "classifies people according to their race, color and national origin," declared the Court. *Id.* "For Plaintiffs to suggest that the NYVRA is not a race-based (or national origin-based) statute is simply to deny the obvious" the Court reiterated. *Id.*

An initial problem with this discussion is that the Supreme Court failed to specify the definition of a racial classification. This definition is critical because only statutes that *classify* by race are subject to strict scrutiny. Statutes that merely *refer* to race or are race-*conscious* are not. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015) ("[M]ere awareness of race in attempting to solve [race-related] problems ... does not doom that endeavor at the outset."). Fortunately, there is no need to guess the meaning of a racial classification. The U.S. Supreme Court has defined it as a legal provision that (1) distributes burdens or benefits (2) to individuals (3) on the basis of individuals' race. *See, e.g.*, *Parents Involved*, 551 U.S. at 720 ("[W]hen the government

distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982) (a law "does not embody a racial classification" if "[i]t neither says nor implies that persons are to be treated differently on account of their race").

To be sure, the Supreme Court was not required to show its work. If it had *identified* a racial classification in the NYVRA, its omission of the *definition* of a racial classification would have been a minor lapse. *But the Court never named the NYVRA provision(s) it believed to be racial classifications*. The lone paragraph analyzing this issue did not cite, let alone quote, a single NYVRA clause. This will not do. New York laws are entitled to a "strong presumption of constitutionality." *LaValle*, 98 N.Y.2d at 161. Before being nullified, their invalidity must be demonstrated "beyond a reasonable doubt." *Id.* (internal quotation marks omitted). These basic principles oblige a court, at least, to point to the provision(s) it thinks warrant strict scrutiny. To subject a statute to the most rigorous review known to constitutional law, without first confirming that such intense oversight is called for, is to show insufficient respect to the coordinate branches of government.

The Supreme Court did claim that, under the NYVRA, "[a] person can only seek relief on the basis of their race, color or national origin." NYSCEF-Doc-147 at 16. But this assertion is wrong. The NYVRA provision that governs standing states

that "*[a]ny* aggrieved person"—of *any* race—may bring a vote dilution claim. Election Law §17-206(4) (emphasis added). There is no racial test here for who may seek relief. Nor does relief depend on anyone's race per se. Instead, a successful vote dilution suit hinges on proof of either racially polarized voting or the impairment of protected class members' ability to elect candidates of their choice, as well as satisfaction of the reasonable-alternative-policy requirement. As explained in the next section, these elements refer to, but do not classify by, race.

Now, it is true that plaintiffs of the same race generally sue under the NYVRA. (Though not always—and not here, for instance, where three plaintiffs are Black and three are Latino.) But this fact about some vote dilution litigation is attributable not to any racial classification but rather to the nature of the legal harm. Vote dilution, well, dilutes the electoral influence of members of one or more protected classes. It stands to reason that only these members typically sue because only their representation is diminished. Other members of the electorate are not "aggrieved" by the challenged electoral practice. *Id.*

Moreover, suits by plaintiffs of the same race are an utterly ordinary feature of antidiscrimination law. Take Section 2 of the federal VRA. Who usually alleges voter suppression or vote dilution under this provision? Members of the protected class(es) disparately impacted by these policies. *See, e.g.*, *Gingles*, 478 U.S. at 35 ("black citizens" challenged seven North Carolina districts). Suits by same-race

plaintiffs are also commonplace against employers accused of discriminatory hiring practices, *see, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971), and authorities charged with housing discrimination, *see, e.g.*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 16 (1988). Suits by same-race plaintiffs are even routine under the Equal Protection Clause, the very provision wielded by the Supreme Court to strike down the NYVRA. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 232 (1976). The Court's suggestion that laws classify by race if they are often enforced by same-race plaintiffs is thus untenable. That approach would imperil most antidiscrimination statutes as well as, paradoxically, the Equal Protection Clause itself.

The Supreme Court further remarked that the NYVRA's "remedies are ... created based upon those [racial] classifications." NYSCEF-Doc-147 at 16. They are not. The law lists various remedies that might be implemented in vote dilution cases, including "a district-based method of election," "an alternative method of election," and "new or revised districting or redistricting plans." Election Law §17-206(5)(a)(i)-(iii). None of these remedies even mentions race, much less classifies by it. These remedies are also identical to the ones imposed for decades under other state VRAs, the federal VRA, and the federal Constitution. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 765 (1973) (replacing multimember districts with single-member districts); *Singleton*, 2023 WL 6567895, at *16 (replacing one district plan

with another); *United States v. City of Eastpointe*, No. 4:17-CV-10079, 2019 WL 2647355, at *2 (E.D. Mich. June 26, 2019) (replacing an at-large electoral system with ranked-choice voting). Relief available for decades under other sources of law does not turn into a racial classification when authorized by the NYVRA.

Perhaps the Supreme Court meant that jurisdictions will classify by race in an effort to avoid or cure vote dilution. But this argument does not support strict scrutiny for the NYVRA either. Plainly, for *the statute* to be subject to such stringent review, *the statute* must racially classify. Strict scrutiny for the NYVRA does not follow from the alleged future racial classifications of political subdivisions. To illustrate, states sometimes misconstrue Section 2 of the federal VRA and craft districts that are unlawful racial gerrymanders. This results in the judicial invalidation of the illegal districts. But it does *not* cause Section 2 itself to classify by race, let alone to violate the federal Constitution. To the contrary, in *Allen*, the U.S. Supreme Court brusquely "reject[ed] Alabama's argument that § 2 ... is unconstitutional." 599 U.S. at 41. In so doing, the Court confirmed that Section 2 must only be "appropriate" to pass constitutional muster—not necessary to achieve

a compelling interest, as would be the case if strict scrutiny applied. *Id.* (internal quotation marks omitted).[3]

Additionally, jurisdictions do *not* need to classify by race to comply with the NYVRA. They merely have to analyze the elements of vote dilution and, if this analysis indicates that liability is likely, make changes to their electoral system to prevent or remedy the violation. The next section shows that none of these statutory elements is a racial classification. None distributes burdens or benefits to individuals, and none is satisfied by anyone's race as such. Lastly, as other courts have recognized, the possibility that some jurisdictions may act unconstitutionally in the future does not justify strict scrutiny for state VRAs in the present. Instead, the correct approach is for plaintiffs to bring as-applied challenges if and when jurisdictions break constitutional rules (as by unlawfully racially gerrymandering). *See, e.g.*, *Portugal*, 530 P.3d at 1006 ("Strict scrutiny could certainly be triggered in an *as-applied* challenge to districting maps that sort voters on the basis of race." (internal quotation marks omitted)); *Sanchez*, 51 Cal. Rptr. 3d at 844 ("[A]ny

[3] The Court plainly did not say that *Section 2* is subject to strict scrutiny in *Abbott v. Perez*, 585 U.S. 579 (2018), as Defendants wrongly claimed below. The Court actually said close to the opposite: that a *district* drawn for a predominantly racial reason "*satisfies* strict scrutiny" if it is reasonably "necessary in order to comply with the VRA," thanks to the Court's assumption that "complying with the VRA is a compelling state interest." *Id.* at 587 (emphasis added).

district-based remedy [a] court might impose ... would be subject to analysis under the [racial-gerrymandering] line of cases.").

B. No Elements of the NYVRA Classify by Race.

Below, Defendants also tried to find a racial classification in the NYVRA. But their search was futile because state VRAs, "like the [federal] []VRA ... [do] not allocate benefits or burdens on the basis of race or any other suspect classification." *Sanchez,* 51 Cal. Rptr. 3d at 837. Begin with the NYVRA's references to a "protected class," which "means a class of individuals who are members of a race, color, or language-minority group." Election Law §17-204(5). These are quintessential statutory *references* to race, which, again, are distinct from racial classifications. *See, e.g.*, *Inclusive Cmtys. Project*, 576 U.S. at 545. When a law simply mentions race, it does not thereby advantage or handicap anyone on the basis of race.

Significantly, other state VRAs, the federal VRA, and most civil rights statutes refer to race as well. The federal VRA, for instance, prohibits voting discrimination "on account of race," 52 U.S.C. §10301(a), and defines a "language minority group" as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," *id.* §10310(c)(3). Yet courts have uniformly held that these laws do not classify by race and so do not trigger strict scrutiny. In *Allen*, the U.S. Supreme Court used the distinctive language of rational basis review when

it confirmed the constitutionality of Section 2 of the federal VRA. *See* 599 U.S. at 41. The Washington Supreme Court similarly rejected the argument that the Washington VRA "makes 'racial classifications' by recognizing the existence of race, color, and language minority groups." *Portugal*, 530 P.3d at 1006. The court observed that "[n]o authority supports that position," which would mean that "every statute prohibiting racial discrimination ... would be subject to ... strict scrutiny." *Id.*; *see also Sanchez*, 51 Cal. Rptr. 3d at 838 (refuting the claim that the California VRA is "subject to strict scrutiny because of its reference to race").

Next, take the NYVRA's element of racially polarized voting between members of the protected class and other members of the electorate. *See* Election Law §17-206(2)(b)(i)(A). Racially polarized *voting* refers to the *electoral choices* of members of different racial and ethnic groups. The concept does not boil down to any voter's race per se. Put differently, racially polarized voting involves voters' *behavior*, not their racial identity. To be a racial classification, however, the element would have to be (but, in fact, is not) satisfied by voters' race alone.

Furthermore, requiring proof of racially polarized voting is not some innovation of the NYVRA. Rather, it was the *U.S. Supreme Court's* idea for a precondition for liability in vote dilution cases brought under Section 2 of the federal VRA. In *Gingles*, the Court made the political cohesiveness of the minority group the second prerequisite for a Section 2 violation and white bloc voting the third

prerequisite. *See* 478 U.S. at 51. Together, the second and third *Gingles* prongs create a requirement of racially polarized voting. *See id.* at 52. Consequently, if the NYVRA classifies by race because it asks for a showing of racially polarized voting, then so does Section 2. If the NYVRA is subject to strict scrutiny for this reason, then so is Section 2. To reiterate, though, that conclusion is untenable given *Allen*. *See* 599 U.S. at 41; *see also Portugal*, 530 P.3d at 1010 ("Recognizing the possibility of racially polarized voting is neither novel nor unique to the [Washington VRA]."); *Sanchez*, 51 Cal. Rptr. 3d at 826 (disagreeing that "the [California VRA] is unconstitutional because it uses 'race' to identify the polarized voting that causes vote dilution").

Now turn to the other kind of vote dilution claim authorized by the NYVRA, based on the impairment of protected class members' ability to elect candidates of their choice under the totality of the circumstances. *See* Election Law §17-206(2)(b)(i)(B). Most of the relevant circumstances identified by the statute *relate* to race in some way: for example, a jurisdiction's history of racial discrimination, racial disparities in various areas, and the use of racial appeals in campaigns. *See id.* §17-206(3). But none of these factors *just is* anyone's race. None is established by the mere fact that one or more individuals identify with one race or another. A plaintiff who presented only such evidence would get laughed out of court for failing to prove any of the pertinent factors.

Examination of the totality of the circumstances is not some oddity of the NYVRA either. To the contrary, Section 2 of the federal VRA explicitly makes liability contingent on consideration of the relevant factors. "A violation ... is established if, *based on the totality of circumstances*, it is shown that the political processes ... are not equally open to participation by [protected class] members." 52 U.S.C. §10301(b) (emphasis added). The key Senate report about the 1982 amendments to Section 2 also includes a compilation of relevant factors that mirrors the NYVRA's list. *See* S. Rep. No. 97-417, at 28-29 (1982). And these so-called "Senate factors" were not plucked out of thin air but rather were borrowed nearly verbatim from the circumstances that were evaluated by courts in pre-1982 *constitutional* vote dilution litigation. *See, e.g.*, *Zimmer*, 485 F.2d at 1305. Accordingly, if the NYVRA's catalog of race-related factors triggers strict scrutiny, then so does Section 2's parallel list, and so too does that list's constitutional predecessor. But that consequence for Section 2 is precluded by *Allen*—and that result for the Constitution, which cannot presumptively nullify itself, is nonsensical.

This leaves only the NYVRA's reasonable-alternative-policy requirement, which can be dealt with quickly since Defendants have not tarred it as a racial classification. *See* Election Law §17-206(2)(a). Again, this requirement entails *awareness* of race since the election of candidates preferred by protected class members under the status quo must be compared to these candidates' likely success

under one or more alternative policies. Being aware of race, though, is different from taking an action because of an individual's race, which the requirement in no way countenances.

And once more, the requirement is not unique to the NYVRA but rather shared with other state VRAs and Section 2 of the federal VRA. Under the California VRA, "a plaintiff must identify a reasonable alternative voting practice ... that will serve as the benchmark 'undiluted' voting practice." *Pico Neighborhood Ass'n.*, 534 P.3d at 65 (internal quotation marks omitted). Under Section 2, likewise, a plaintiff must "postulate a reasonable alternative voting practice," "against which the fact of dilution may be measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). Since these elements do not classify by race, the NYVRA's identical reasonable-alternative-policy requirement does not do so either.

Two last points on this topic: *First*, the NYVRA also does not racially classify because it distributes no burdens or benefits to *individuals*. Instead, the statute applies exclusively to *political subdivisions*, which are the entities that are barred from committing vote dilution. *See* Election Law §17-206(2)(a) ("No board of elections or political subdivision shall use any [dilutive] method of election."). This language imposes no requirements on any individuals. No individuals are compelled to do anything, nor may individuals be sued. The sole regulated units are political subdivisions. In the related context of partisan vote dilution, the U.S. Supreme Court

has held that individual voters have no cognizable interest in "the overall composition of the legislature." *Gill v. Whitford*, 585 U.S. 48, 68 (2018). Analogously, voters in their individual capacity are neither harmed nor helped by either the presence of racial vote dilution or its remediation.

Second, none of this analysis is affected by the Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023). In *SFFA*, the Court in no way altered its longstanding definition of a racial classification. In fact, the Court did not even *mention* this definition. *SFFA* involved a quintessential racial classification: an affirmative action policy that advantaged *individual minority applicants* to an elite university *because of their race*. *See id.* at 208 ("These cases involve whether a university may make admissions decisions that turn on an applicant's race."). Precisely because the affirmative action context is so far removed from this one, courts have consistently declined to extend *SFFA* to voting rights cases. *See, e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) ("Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy."); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) ("[A]ffirmative action cases ... are fundamentally unlike this [federal VRA] case.").

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

A. The Supreme Court Wrongly Refused to Consider the State Interest Furthered by the NYVRA

Even if strict scrutiny somehow did apply to the NYVRA, the statute would still be constitutional. To survive strict scrutiny, a law must further a compelling state interest, and the law must be narrowly tailored to serve that interest. *See, e.g.*, *SFFA*, 600 U.S. at 206-07. Here, the state interest advanced by the NYVRA—as well as by other state VRAs and the federal VRA—is preventing and remedying racial discrimination in voting. No one disputes that this is a vital goal. It is the same one that motivated the Fifteenth Amendment itself. The U.S. Supreme Court has also characterized "racial discrimination in voting" as an "insidious and pervasive evil" that may be addressed through "sterner and more elaborate measures." *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966).

Nevertheless, the Supreme Court refused to consider the NYVRA's objective because it could not locate it in the statutory text. "[T]he Court is unable to find within [the law's] text" its aim of avoiding and curing racial discrimination in voting. NYSCEF-Doc-147 at 17. "[T]he wording of the NYVRA is devoid of" an articulation of this state interest. *Id.* But the NYVRA's introductory section states that the statute is intended to stop "the denial or abridgement of the voting rights of members of a race, color, or language-minority group." Election Law §17-200.

Racial discrimination in voting is the archetypal conduct that denies or abridges protected class members' votes. This section adds that the law seeks to "[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York." *Id.* §17-200(2). This is another way of saying that the law's aspiration is the end of racial discrimination in voting. In fact, it is the *same* way that Section 2 of the federal VRA describes its operation. *See* 52 U.S.C. §10301(b) (Section 2 is violated when protected class members "have less opportunity ... to participate in the political process").

Even if the Supreme Court were right that the NYVRA's purpose is not apparent from its text, the Court was wrong to insist on a textual statement of the statute's goal. A court may neither instruct the Legislature how to write a law nor look askance at a law that deviates from the court's preferred drafting style. *See, e.g.*, *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 634 (1989) ("[T]he Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves."). New York courts routinely credit state interests that are not directly encoded into statutory language. Unlike the Supreme Court, they do not enforce their own views as to how state interests ought to be communicated. *See, e.g.*, *People v. Watts*, 42 N.Y.3d 60, 69 (2024) (recognizing a "compelling interest" justifying the Sex Offender Registration

Act not specified in the law itself); *People v. Foley*, 94 N.Y.2d 668, 682 (2000) (recognizing the "primary legislative purpose" of a penal law by consulting the governor's memorandum approving the law).

When the aperture is widened beyond the NYVRA itself, more evidence pours in that the statute hopes to curb—and the State has a problem with—racial discrimination in voting. The committee report on the law states that it "provide[s] strong protections for the franchise at time when voter suppression is on the rise[] [and] vote dilution remains prevalent." N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022). The report also acknowledges that "New York has an extensive history of discrimination against racial, ethnic, and language minority groups in voting." *Id.* A white paper confirms that "many discriminatory practices remain in place" in New York, including "at-large election systems, redistricting plans that dilute minority voting strength, polling location plans with too few and/or too inconvenient sites, and failures to provide adequate language assistance." NYCLU & LDF, John R. Lewis Voting Rights Act of New York 2 (2022), https://www.naacpldf.org/wp-content/uploads/NYVRA-White-Paper-NYCLU-LDF-March-2022.pdf. The white paper further explains that the NYVRA "address[es] these pervasive problems," "confront[s] evolving barriers to effective participation," and "root[s] out longstanding discriminatory practices more effectively." *Id.*

Additionally, several New York counties were covered by Section 5 of the federal VRA prior to *Shelby County v. Holder*, 570 U.S. 529 (2013). *See Jurisdictions Previously Covered by Section 5*, U.S. Dep't of Justice (May 17, 2023), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5. These jurisdictions were placed under federal oversight because of their low participation and use of discriminatory voting practices. *See* 52 U.S.C. §10303(b). And since Section 2 of the federal VRA took its current form, dozens of New York political subdivisions have been sued for voter suppression and vote dilution. *See Section 2 Cases Database*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/database/ (last accessed Nov. 25, 2024). Some of these suits have been among the highest-profile Section 2 victories in recent years. *See, e.g.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

The Supreme Court had one more reason for rebuffing the State's interest in preventing and remedying racial discrimination in voting.[4] It is that, under the

[4] The Supreme Court also asserted that "no compelling interest exists in allowing multiple protected classes to aggregate for purposes of proving vote dilution." NYSCEF-Doc-147 at 19. But coalition claims are allowed by the NYVRA—and, in most circuits, by the federal VRA—not because the aggregation of protected classes is *itself* a compelling interest but rather because coalitions of groups may experience vote dilution. Coalition claims are thus a means to the end of

NYVRA, liability for vote dilution can arise without a plaintiff "proving past discrimination [against] a protected class." NYSCEF-Doc-147 at 17. But statutes rarely make their ultimate objectives explicit elements that need to be satisfied before liability may be imposed. Statutes more commonly rely on elements that are reasonable proxies for, and easier to establish than, their ultimate ends. A court may not disregard the state interest underpinning a law simply because the interest does not have to be demonstrated anew in every suit.

To illustrate, neither Section 2 of the federal VRA nor any other state VRA requires a plaintiff to prove past discrimination to prevail on a vote dilution claim. *See, e.g.*, 52 U.S.C. §10301 (not even mentioning "discrimination"); Cal. Elec. Code §14028(d) ("Proof of an intent ... to discriminate against a protected class is *not* required." (emphasis added)). Yet no court has ever doubted that these voting rights laws aim to stop racial discrimination in voting. *See, e.g.*, *Shelby Cnty.*, 570 U.S. at 557 (noting the "nationwide ban on racial discrimination in voting found in § 2"). Moreover, there *was* a brief two-year window in which, because of the U.S. Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), Section 2 claims

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stopping racial discrimination in voting, not an end in and of themselves. *See, e.g.*, *NAACP Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 379 (S.D.N.Y. 2020) ("[D]iverse minority groups can be combined to meet VRA litigation requirements." (internal quotation marks omitted)).

required proof of intentional discrimination. But Congress "dispositively reject[ed]" this rule when it amended Section 2 in 1982. *Gingles*, 478 U.S. at 43. Congress "repudiated" the discriminatory intent requirement because it was "unnecessarily divisive," "place[d] an inordinately difficult burden of proof on plaintiffs," and "ask[ed] the wrong question." *Id.* at 44 (internal quotation marks omitted). The Supreme Court thus faulted the NYVRA for not including an element that has been absent from voting rights doctrine for more than forty years. But it was the Court that erred, not the statute, by turning back the clock.

B. The Supreme Court Wrongly Conducted Its Tailoring Analysis in the Abstract.

After concluding that the NYVRA does not serve a compelling state interest, the Supreme Court should have ended its strict scrutiny analysis. Instead, the Court forged on to the tailoring stage, at which point it examined the fit between the statute and ... nothing at all. Having declined to recognize the law's goal of avoiding and curing racial discrimination in voting, the Court had no end relative to which to evaluate the law's means. The Court therefore discussed the NYVRA's tailoring in the abstract, not with respect to its actual objective. Because the statute's "breadth of remedies" did not seem "narrow" to the Court "in any sense of that word," the Court held that the NYVRA is not narrowly tailored. NYSCEF-Doc-147 at 20.

This approach to tailoring is foreign to equal protection (and every other body of) law. To survive strict scrutiny, a law that classifies by race must be "narrowly

tailored—meaning necessary—*to achieve that interest*." *SFFA*, 600 U.S. at 207 (internal quotation marks omitted) (emphasis added); *see also, e.g.*, *People v. Barton*, 8 N.Y.3d 70, 77 (2006) ("[T]he requirement of narrow tailoring is satisfied so long as the ... regulation *promotes a substantial government interest*." (emphasis added)). That an interest advanced by a law must be identified before the law's tailoring can be assessed is evident from the nature of the inquiry. The inquiry focuses on the degree to which a law is "overinclusive and underinclusive *in relation to the state interests [it] purportedly serve[s]*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun, J., concurring in the judgment) (emphasis added). If those interests are left unsaid, a law's fit with them cannot be determined.

Had the Supreme Court acknowledged the NYVRA's aim of fighting racial discrimination in voting—in particular, vote dilution—the statute's narrow tailoring would have been plain. The "essence" of vote dilution is that an electoral practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [different racial and ethnic groups] to elect their preferred representatives." *Gingles*, 478 U.S. at 47. In turn, the "social and historical conditions" that enable vote dilution are racially polarized voting, *see id.* at 52-74, and/or past and present racial discrimination, *see id.* at 36-37, 44-45. Racially polarized voting is relevant because, when it is present, protected class members

have genuinely *preferred* candidates whose election is opposed—and typically thwarted—by other members of the electorate with different views. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). Racial discrimination matters because it is often the *reason* why protected class members and other members of the electorate diverge in their electoral preferences. *See*, *e.g.*, *Gingles*, 478 U.S. at 70.

Remember that the NYVRA authorizes two kinds of vote dilution claims: one based on racially polarized voting, the other on circumstances mostly involving historical and ongoing racial discrimination, both of which also require a showing of a reasonable alternative policy. The claim based on racially polarized voting corresponds to the "essence" of vote dilution because the "social and historical conditions" that comprise this essence include racially polarized voting. *Id.* at 47. Consider what a plaintiff who prevails on this type of claim has proven: A vast gulf separates the electoral preferences of protected class members from the views of other members of the electorate. And because of this stark racial divide, protected class members are currently underrepresented—yet could be better represented under a reasonable alternative policy. In this situation, vote dilution is exactly what protected class members experience. They "prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a ... majority that votes as a significant bloc for different candidates." *Id.* at 68.

Likewise, the claim based on the totality of the circumstances dovetails with the other social and historical condition that constitutes the essence of vote dilution, namely, past and present racial discrimination. A plaintiff who makes out this type of claim has established the following: a protected class was *previously* the victim of discrimination within and outside the political process; the class *continues* to suffer from such discrimination; and because of this deplorable record, the class is currently underrepresented yet could be better represented under a reasonable alternative policy. In this scenario, too, vote dilution is precisely what is occurring. The "effects of prior discrimination have combined with the [challenged] electoral structure to afford [protected class members] less opportunity than [other members of the electorate] ... to elect representatives of their choice." *Id.* at 70.

This type of claim is also linked to the core of vote dilution in another way. Again, racial discrimination often leads to racially polarized voting. *See, e.g.*, *id.* (noting that "discrimination [can] deter whites from voting for blacks"). Racially polarized voting is sometimes difficult to measure with standard empirical methods, for instance, when the number of precincts is small, there are more than two major racial or ethnic groups, or residential patterns are highly integrated. *See, e.g.*, D. James Greiner, *Ecological Inference in Voting Rights Disputes: Where Are We Now, and Where Do We Want to Be?*, 47 Jurimetrics 115 (2007). Under these conditions, racial discrimination is a reasonable proxy for racially polarized voting that cannot

be directly observed. Racial discrimination supports an inference of racially polarized voting—and as explained above, racially polarized voting in combination with underrepresentation capable of amelioration is the prototypical vote dilution pattern.

One more chain connects this type of claim to vote dilution. Under the Equal Protection Clause, courts decide *constitutional* vote dilution cases without reference to any of the *Gingles* prongs. Instead, in these (now rare) cases, courts consider "a panoply of factors, any number of which may contribute to the existence of dilution." *Zimmer*, 485 F.2d at 1305. These factors revolve around racial discrimination: "the maintenance of racial discrimination," "the existence of past discrimination," and so on. *Id.*; *see also, e.g.*, *White v. Regester*, 412 U.S. 755, 766-69 (1973) (surveying "the history of official racial discrimination," "the results and effects of invidious discrimination," and the like). The NYVRA's totality-of-circumstances claim thus mirrors the analysis that federal courts commonly conducted prior to the 1982 amendments to Section 2 of the federal VRA—and still perform today, albeit less often. *See, e.g.*, *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1343-46

(11th Cir. 2000). The claim must be narrowly tailored, then, given its convergence with the constitutional standard.[5]

iii. The NYVRA's Partial Divergence from the *Gingles* Framework Is Constitutionally Irrelevant.

The Supreme Court's last constitutional critique of the NYVRA was that the statute does not perfectly replicate the legal framework that applies to claims under Section 2 of the federal VRA. The Court ascribed constitutional significance to the *Gingles* prongs, in particular, deeming them "applicable to the issue of whether a state voting rights act is violative of the US Constitution." NYSCEF-Doc-147 at 23. Because the NYVRA does not "satisfy the clear standards set forth in *Gingles*," it "is in violation of federal law and therefore cannot stand." *Id.* at 25.

The Supreme Court misunderstood the nature and function of the *Gingles* prongs. They are *not* derived from, meant to operationalize, or otherwise related to the Constitution, as a perusal of *Gingles* and subsequent Section 2 cases confirms. Neither in the thirty-plus pages in which *Gingles* introduced the prongs, nor in any later case, did the U.S. Supreme Court state that the prongs are constitutional in stature. To the contrary, the prongs have two non-constitutional purposes. *First*, as

[5] If strict scrutiny applies, and if there is doubt about this claim's narrow tailoring, it could also be severed from the claim based on racially polarized voting pursuant to the NYVRA's severability provision. *See* Election Law §17-222.

a group, they are intended to make vote dilution cases less sprawling and more manageable for litigants and courts. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1010 (1994) (observing that "*Gingles* provided some structure to the statute's 'totality of circumstances' test"); Christopher S. Elmendorf, *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 589 (2016) ("The Supreme Court understands the *Gingles* test to ... keep[] vote dilution law *manageable*.").

Second, the first *Gingles* prong specifically is based on the Court's assumption about how vote dilution would typically be remedied. This prong requires a minority group to be "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. The prong thus ensures that, if a violation is found, relief is available in the form of a reasonably-configured majority-minority district. In the Court's words, liability should not arise "[u]nless minority voters possess the *potential* to elect representatives." *Id.* at 50 n.17. Moreover, "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect." *Id.*

This proper grasp of the *Gingles* prongs refutes the Supreme Court's objection to the NYVRA. Since the *Gingles* prongs are non-constitutional, no state law can run afoul of the federal Constitution merely because it fails to emulate them. But a subtler possibility remains: Could the NYVRA's partial divergence from the *Gingles*

framework undermine either of the earlier arguments about its constitutionality, namely, that it does not classify by race but nevertheless satisfies strict scrutiny?

The answer is no. To see why, it is helpful to nail down exactly how the NYVRA does—and does not—part ways with Section 2 of the federal VRA. *First*, the NYVRA does not explicitly include the first *Gingles* prong. However, the statute does require proof of a reasonable alternative policy that would improve the protected class's representation relative to the status quo. This requirement has the same point as the first *Gingles* prong: ensuring that any violation can viably be remedied.[6] *Second*, the NYVRA's vote dilution claim based on racially polarized voting incorporates the second and third *Gingles* prongs. Racially polarized voting is simply the difference between protected class members' support for candidates (the subject of the second prong) and other voters' support for them (the topic of the third). *See, e.g.*, *Gingles*, 478 U.S. at 52-74 (exclusively addressing "racially polarized voting" after introducing the second and third prongs). And *third*, the NYVRA's vote dilution claim based on the totality of the circumstances is essentially identical to Section 2's totality-of-circumstances stage. *Compare* Election Law §17-206(3), *with* S. Rep. No. 97-417, at 28-29 (1982).

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[6] The NYVRA also states that geographic compactness—the core of the first *Gingles* prong—*is* relevant to "determining an appropriate remedy." Election Law §17-206(2)(c)(viii).

These limited contrasts between the two laws in no way cause the NYVRA to racially classify. As discussed earlier, none of the elements the NYVRA does include *is* a racial classification. No element can *become* a racial classification either because the statute omits or amends certain other requirements that are present in federal voting rights doctrine. On its own terms, a legal provision either does or does not distribute burdens or benefits to individuals on the basis of their race. If it does not (like each NYVRA element), then it cannot start doing so due to similarities with, or differences from, some other law.

The contrasts between the NYVRA and the *Gingles* framework also make the former *better* tailored to preventing and remedying vote dilution. Take each difference in turn. As has long been recognized, because of the first *Gingles* prong, a protected class that happens to be geographically dispersed cannot succeed in a claim under Section 2 of the federal VRA. Yet such a class can certainly experience vote dilution, as when voting is racially polarized and the class is underrepresented. *See, e.g.*, Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173 (1989). The NYVRA (like all other state VRAs) compensates for this limitation of the *Gingles* framework by allowing liability to arise even when a protected class is geographically noncompact. The statute also avoids problematic remedies in this situation by encouraging the use of alternative methods of election. *See* Election Law

§17-206(2)(c)(viii). These methods, again, cannot be racial gerrymanders because they involve no district-drawing.

Next, vote dilution cannot be tackled under the *Gingles* framework when a plaintiff cannot establish enough of the factors at the totality-of-circumstances stage. The NYVRA (also like all other state VRAs) responds to this shortcoming by permitting a plaintiff to prevail without having to muster evidence about these myriad factors. It is enough for a plaintiff to prove racially polarized voting and remediable underrepresentation. Notably, *Gingles* itself supports this revision to its framework. Historical and ongoing discrimination is the crux of the totality-of-circumstances stage. Yet "[f]ocusing on" such discrimination, according to *Gingles*, "asks the wrong question." 478 U.S. at 73. "All that matters ... under a functional theory of vote dilution is voter behavior, not its explanations." *Id.*

Lastly, if a plaintiff cannot show the presence of racially polarized voting, the *Gingles* framework flatly precludes liability. But recall that racially polarized voting can sometimes be difficult to measure for technical reasons, and that, in this scenario, a protected class can still be underrepresented and the victim of past and present discrimination. The NYVRA properly leaves the door open under these unusual conditions, understanding that racially polarized voting is generally—but not necessarily—a hallmark of vote dilution. In this way, too, the statute "provides a more efficient and effective means of prosecuting cases in which [electoral

practices] dilute minority voting strength compared to federal law." NYCLU & LDF, *supra*, at 17.

iv. The NYVRA Cannot Be Facially Nullified Because It Undeniably Has Lawful Applications.

The Supreme Court's invalidation of the NYVRA on its face overlooked still another rule of judicial review. For a statute's "facial nullification" to be appropriate, "the law [must] suffer[] wholesale constitutional impairment" "in every conceivable application." *Cohen v. State*, 94 N.Y.2d 1, 8 (1999) (internal quotation marks omitted); *see also, e.g.*, *McGowan v. Burstein*, 71 N.Y.2d 729, 733 (1988) (to show that a law is "per se violative of the State Constitution," "plaintiffs must demonstrate that ... in every conceivable application [it] would be unconstitutional"). In another case involving the NYVRA, Defendants' own counsel conceded that the NYVRA has lawful applications. If the statute is enforced "in line with Section 2 of the VRA ... then there would be no constitutional problem." NYSCEF-Doc-187 at 19, *Coads v. Nassau Cnty.*, No. 611872/2023 (Sup. Ct. Nov. 11, 2024). This admission alone warrants the reversal of the Court's facial ruling.

Indeed, *this case* is one in which a successful Section 2 claim could have been brought. The first *Gingles* prong is satisfied because it is possible to draw at least one reasonably-configured majority-minority Town Board district. NYSCEF-Doc-92. The second and third *Gingles* prongs are satisfied by the uncontroverted evidence of highly racially polarized voting in the Town. NYSCEF-Doc-72 ¶¶60-65. And the

same evidence that establishes the circumstances listed by the NYVRA, *id.* ¶¶80-118, shows that Section 2's nearly identical totality-of-circumstances analysis supports liability as well. Consequently, there is no need to speculate about other fact patterns where the NYVRA might lead to the same result as Section 2—and thus have lawful applications according to the Town's own counsel. This very case constitutes one of these undeniably lawful applications.

III The Supreme Court Had No Authority to Consider, Let Alone Invalidate, NYVRA Provisions Not Relating to Vote Dilution.

Finally, and most aggressively, the Supreme Court purported to invalidate the *entire* NYVRA. *See* S.J. Order at 25 (ordering that "the NYVRA is hereby stricken in its entirety"). But this litigation involves only vote dilution claims under Election Law §17-206(2)(b)(i). It does not involve a vote dilution claim against "a district-based or alternative method of election." *Id.* §17-206(2)(b)(ii). Nor does it involve a challenge to "voter suppression." *Id.* §17-206(1). Nor does it involve an action for voter "intimidation, deception, or obstruction." *Id.* §17-212(1)(a). Nor does it involve the interpretation of non-NYVRA laws or regulations "related to the elective franchise." *Id.* §17-202. And nor does it involve the system of preclearance instituted by the NYVRA. *Id.* §17-210. Yet without even *citing* any of these other provisions, the Court arrogated the authority to nullify them all. The Court did so without any briefing on the rest of the statute, without any explanation of its supposed flaws, and

without any acknowledgement (let alone examination) of the NYVRA's robust severability provision. *Id.* §17-222.

This move requires reversal. "It is a fundamental principle of our jurisprudence that the power of a court ... is limited to[] determining the rights of persons which are actually controverted in a particular case pending before the tribunal." *Matter of Hearst Corp.*, 50 N.Y.2d at 713. The Supreme Court ignored this "fundamental principle" by passing judgment on countless aspects of the NYVRA not "actually controverted" in this litigation. *Id.* In a comparable situation, the Court of Appeals summarily reversed an Appellate Division decision that "prospectively declare[d] [certain] regulations invalid on additional ... grounds" unnecessary to the court's ruling. *T.D. v. N.Y. State Off. of Mental Health*, 91 N.Y.2d 860, 862 (1997). According to the Court of Appeals, the Appellate Division decision was "an inappropriate advisory opinion." *Id.* So too here. No matter how this Court evaluates the Supreme Court's analysis of Plaintiffs' vote dilution claims under Election Law §17-206(2)(b)(i), this Court should hold that the Supreme Court had no authority to reach any other NYVRA provisions.

Conclusion

We have seen this film before. In an early case under the California VRA, an outlier trial court held that the statute was "facially invalid under the equal protection clause[]." *Sanchez*, 51 Cal. Rptr. 3d at 825. An appellate court promptly corrected

the trial court's wrong turn. *See id.* And in the nearly two decades between that correction and the Supreme Court's decision here, no court at any level questioned the constitutionality of any state VRA. The Supreme Court had no sound basis for diverging from this consensus. Its ruling should be reversed, and this case should be remanded for further proceedings on Plaintiffs' vote dilution claims.

Dated: White Plains, New York
November 26, 2024

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PRINTING SPECIFICATIONS STATEMENT
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The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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Supreme Court State of New York
Appellate Division, Second Dept.

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

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

Statement Pursuant to CPLR 5531

Docket No.: 2024-09985

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Appellant.

----------X

1. The Index Number in the trial court was EF-002460-2024.

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, Orange County.

4. The summons and verified complaint were filed on March 26, 2024. Issue was joined thereafter by the filing of a verified answer on May 28, 2024.

5. This action is pursuant to Election Law.

6. The appeal is from the Decision and Order of the Supreme Court, Orange County (Hon. Maria S. Vazquez-Doles) dated November 7, 2024 and entered November 8, 2024.

7. The appeal is being perfected on the original record method.

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange located at 285 Main Street, Goshen, New York 10924 on the 7th day of November 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
Index No.: EF002460-2024
Motion date: 10/18/2024
Motion Seq. No.: 5

VAZQUEZ-DOLES, J.S.C.

The following papers were read on this motion by Defendants for summary judgement pursuant to CPLR §3212:

Notice of Motion/Memo of Law/Affirmations/Ex. A-J.....1-14
Opposition Affirmation/Memo of Law/Statement Material Facts/Ex. A-DD.....15-47
Amicus Brief of the ACLU et al.....48
Reply Memo of Law/Response to Material Facts/Affirmation/Ex. K-L.....49-53

I. SUMMARY OF THE DECISION

Defendants assert that no issue of fact exists as to whether the John Lewis Voting Rights Act of New York ("the NYVRA"), pled as the basis for the claims in the Complaint, violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. Where race or national origin is the basis for unequal treatment by the State, as here, the NYVRA must satisfy strict scrutiny, i.e. it must both serve a compelling state interest and be narrowly tailored. The NYVRA does not satisfy either part of that exacting standard.

Defendants have capacity to assert this challenge herein on the basis that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. Under the requisite strict scrutiny analysis, no compelling interest of the State in this instance justifies the use of extremely broad race and national origin-based legislation, which opens the door to an overhaul of the electoral system of Defendant Town of Newburgh ("Defendant Town") that could be imposed by the Court. Additionally, there is no compelling State interest in allowing multiple protected classes (here, Black and Spanish heritage) to aggregate as a single group for purposes of determining whether voter dilution exists in the Defendant Town.

Moreover the process for reaching a determination of voter dilution is not narrowly tailored and can rest on the slightest of impairments in Plaintiffs' ability to influence an election. The explicit and intentional omission from the NYVRA of a requirement of past discrimination against the putative protected class(es), and of the guardrails created by the US Supreme Court when determining the permissible scope of the bases for reform when using race in voting rights cases, cannot be reconciled with US Supreme Court precedent. This Court must adhere to that precedent on issues of potential federal constitutional violations.

For these many reasons, the NYVRA is violative of the Equal Protection Clause of the 14th Amendment to the US Constitution, which is supreme to any law of New York. Therefore, the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York. Defendants' motion for summary judgment is GRANTED and the Complaint is DISMISSED.

II. PROCEDURAL HISTORY

Plaintiffs sent a letter to Defendant Town and Defendant Town Board of Town of Newburgh ("Defendant Board") on January 26, 2024. The letter notified the Defendants of Plaintiffs' intention to file a lawsuit for violations of the NYVRA. Defendant Board passed a resolution concerning the letter from Plaintiffs on March 15, 2024 ("the Board Resolution") in which Defendant Town included a plan to investigate whether a violation of the Act is ongoing there. After the Board Resolution was enacted, less than 90 days passed before Plaintiffs filed the instant lawsuit.

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint asserts facts as to the composition of the population in Defendant Town, voting history and trends, community issues that have established a pattern of alleged racially motivated behavior by the Defendants, and other data related to the alleged disenfranchisement. The Complaint pleads two causes of action that allege illegal "vote dilution" in Defendant Town. The first cause of action asserts that racially polarized voting ("RPV") has caused vote dilution. The second cause of action asserts that under a totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice "or" to influence the outcome of elections is impaired[1], regardless of proof of RPV.

Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer. The sole predicate for the motion was that Plaintiffs allegedly were prohibited by the NYVRA from filing this

[1] Notably, Count Two is pled in the disjunctive, an apparent recitation of the statutory wording. Neither the Complaint nor the Opposition to the instant motion clarify whether Plaintiffs assert that, under the totality standard, their votes were diluted on both bases for impairment (election of chosen candidate *and* ability to influence election). For purposes of the instant summary judgment motion, viewing the facts in the light most favorable to the non-movant, the Court addresses the Complaint as having pled both.

lawsuit until the expiration of the 90 day "safe harbor" provision, NY Election Law 17-206(7). The Court denied the motion on May 17, 2024. Defendants filed an Answer on May 28, 2024.

The NYVRA requires that "actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference". NY Election Law 17-216. A Preliminary Conference Order was entered on May 10, 2024 that required Plaintiffs to disclose expert reports by June 28, 2024 and Defendants to do so by July 2, 2024.

The parties each disclosed two experts, whose reports and depositions are appended as exhibits to the instant motion. In sum, Plaintiff's experts assert the two protected classes of Black and Hispanic voters can – in the aggregate – be configured within four or five newly created single-member districts that will render likely the election of one or two chosen candidates. The experts assert that RPV exists in Defendant Town based on a statistical analysis of voting trends. They also assert that the ability of voters in the two protected classes to influence the elections and elect their candidate of choice has been impaired by the current at-large system.

Defendants' experts contest these findings. They assert that the statistical analysis has a significant margin of error due to its reliance on numerous vaguely defined variables, such as whether voters with particular surnames or who live on a particular residential block are actually Black or Hispanic. They contest whether RPV does exist and also whether the creation of districts would have an effect on the alleged impairment of the protected classes.

A briefing schedule for the instant motion was set in an Order docketed on September 24, 2024 (letter endorsed by the Court). The Court had set this trial to begin on October 31, 2024 but that date was adjourned sine die in the Decision and Order on Motion Seq. #7.[2]

III. FACTS UNDERLYING THE COMPLAINT

Plaintiffs are six residents of Defendant Town. Defendant Town is a political subdivision of the State of New York. Three of the Plaintiffs assert that they identify as Black and three other Plaintiffs assert that they identify as Hispanic. The Complaint asserts that as of 2020, Defendant Town was comprised of a population that was 15% "black", 25% "Hispanic" and 61% "white". On the instant motion, Plaintiff slightly changed their position to assert that as of 2022, 15.4% identified as "non-Hispanic Black" and 25.2% as "Hispanic". *Compare* Complaint at Par. 32 *with* Plaintiff Statement of Facts at Par. 39. Defendants do not contest that the 2022 data Plaintiff rely upon provides these percentages.

Defendant Town holds elections on a periodic basis for voters to choose members of Defendant Board. The election process provides that voters living anywhere in Defendant Town may vote for each of the open seats in a given election ("at-large voting"). Defendant Board has four elected positions, with four years terms, that are voted upon in staggered two years intervals. A fifth member, the Town Supervisor, is not elected.

[2] Motion Seq. #7 concerned whether the untimely disclosure of an addendum by one of Plaintiff's experts should cause the exclusion of that document and his related testimony at trial. Motion Seq. #7 was not directed to the consideration of the expert addendum on the instant Motion Seq. #5.

IV. ANALYSIS

A. Summary Judgment Standard

CPLR §3212(b) states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section §3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact" *Anyanwu v Johnson*, 276 A.D.2d 572 (2nd Dept. 2000). Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 A.D.2d 252 (2nd Dept. 1984). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. *Kutkiewicz v Horton*, 83 A.D.3d 904 (2nd Dept. 2011).

The facts at issue regarding RPV and diminished ability of the protected classes at issue to influence an election outcome are not material to the legal issue of whether the NYVRA violates the Equal Protection Clause. Those few facts that *are* material to a review of the NYVRA for constitutionality are not contested: Defendant Town is a political subdivision with at-large voting; Plaintiffs are members of two different protected classes; Plaintiffs have claimed RPV against them and/or impairment of their influence on election outcomes; and the Court is authorized to impose certain remedies in the NYVRA, including a mandate for new single-member districts, if Plaintiffs were to prevail at a trial.

Thus, viewing the facts most favorably for Plaintiffs, and assuming arguendo that the aforementioned factual disputes would be resolved in their favor at trial, remedies imposed

pursuant to the NYVRA could nonetheless require Defendants to violate the Equal Protection Clause. For that reason, the Court proceeds to review Defendants' challenge to the NYVRA.

B. Purpose of the NYVRA

The New York State Senate proposed Senate Bill 2021-S1046 in the 2021-2022 session. The bill was amended five times, passed by both the Senate and Assembly, and signed into law as version S1046E by the Governor in 2022 as NY Election Law 17-200 et seq.

The NYVRA states that its purposes are:

> 1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
> 2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

NY Election Law 17-200.

The legislative history of the NYVRA corroborates this intention of the NYVRA, as well as states the justification for the breadth of the legislation:

> PURPOSE:
>
> The purpose of the NYVRA is to encourage participation in the elective franchise by all eligible voters to the maximum extent, to ensure that eligible voters who are members of racial, ethnic, and language-minority groups shall have an equal opportunity to participate in the political processes of the State of New York, and especially to exercise the elective franchise; to improve the quality and availability of demographic and election data; and to protect eligible voters against intimidation and deceptive practices.
>
> JUSTIFICATION
>
> . . . But both the Washington and California state voting rights NYVRAs are limited to addressing vote dilution in at-large elections. The New York Voting rights NYVRA builds upon the demonstrated track record of success in California and Washington, as well as the historic success of the federal voting rights NYVRA by offering the most comprehensive state law protections for the right to vote in the United States. The law will

> address both a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

The Governor signed a memorandum on June 20, 2022 that states in no uncertain terms that the NYVRA is intended to extend beyond the FVRA and provide greater protections:

> As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in, and this legislation ensures voting rights will be protected in New York . . . . It also builds upon the federal Voting Rights act's vital preclearance scheme, which was gutted by the U.S Supreme Court in Shelby County v. Holder.

Governor's Bill Jacket (Ex. G to the Opposition).

C. Prohibitions and Remedies Created by the NYVRA

The NYVRA prohibits certain actions, or the effects of such actions, in the voting process within a "political subdivision". NY Election Law 17-206(1). "Political subdivision" is defined to include any town in New York. NY Election Law 17-204(4). Defendant Town is a "political subdivision" encompassed by the NYVRA.

The NYVRA makes it unlawful for Defendant Town to "use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" (hereafter collectively, "Unlawful Vote Dilution"). NY Election Law 17-206(2)(a). A "protected class" (singular) is defined as "members of a race, color or language-minority group". NY Election

Law 17-204 (5). The use of "race, color or language-minority[3]" as the statutory definition of "protected class", and thus the universe of people who can claim "vote dilution", encompasses literally every person in the State of New York - because every person is a member of some race or is of some color.

The NYVRA refers to 'protected class' repeatedly in the singular in Section 17-206(2) with respect to prohibited practices. However, the NYVRA later allows the aggregation of an unlimited number of protected classes, in two instances. First, aggregation is allowed where "there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision." NY Election Law 17-206(2)(c)(vi). Later in the same subsection 17-206, aggregation is allowed for a different reason, to wit, "in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate." NY Election Law 17-206(8). There is no explanatory wording in the NYVRA to address i) why protections extend to only a single class but are subsequently extended to multiple classes, and ii) if aggregation is authorized, whether both requirements (i.e., 206(2)(c)(vi) and 206(8)) must be satisfied.

The NYVRA provides that Unlawful Vote Dilution exists where a town: "(i) used[4] an at-large method of election and either: (A) voting patterns of members of the protected class within[5]

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[3] The definition of "language-minorities" is the same as set forth in federal law, to wit, "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage". 52 USC § 10310(c)(3). Three of the Plaintiffs have described themselves as "Hispanic."

[4] The legislation provides no explanation for why the voting system is assessed retrospectively but RPV and impairment of ability are reviewed in real time. Thus, it is unclear whether *past* RPV or *past* impairment of the protected class is a basis for relief.

[5] The legislation does not clarify why a polarization of members of the protected class *from each other* is a criteria for relief, versus polarization of that class from the rest of the electorate.

the political subdivision are racially polarized; or[6] (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; . . . ." NY Election Law 17-206(2)(b). "At-large" method of election includes "a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; . . . ." NY Election Law 17-204(1). There is no issue of fact herein that Defendant Town employs "at-large" voting.

"Racially polarized voting" means voting in which "there is a divergence in the candidate, political preferences[7], or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." NY Election Law 17-204(6). However, the descriptive wording of subsection 17-206(2)(b) ("racially polarized") does not employ that three word definition of RPV as a noun. Moreover, subsection 17-206(2)(b) refers to racial polarization *among* the protected class, not in comparison to the majority.

The NYVRA lists 11 factors that a court *may* consider when deciding whether Unlawful Vote Dilution has occurred. NY Election Law 17-206(3)(a)-(k). This list is not exclusive. Id. The NYVRA specifies nine ways in which a reviewing court must weigh and consider evidence of Unlawful Vote Dilution. NY Election Law 17-206(2)(c)(i)-(ix).

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[6] Notably, in each of the Senate sponsor memoranda that accompanied the earlier versions (Original and A-D) of the Senate Bill, the word "and" appeared between subsections (A) and (B). Had the final bill used "and", then the NYVRA would have required RPV for any violation. But the final bill (and perhaps some or all of the earlier bills, the text of which are not available) used "or", thereby making proof of RPV merely optional. As discussed infra, this significant change of removing the RPV requirement, in comparison to RPV being required by the FVRA (as well as the California and Washington legislation), is one of the reasons why the NYVRA does not satisfy the strict scrutiny standard.

[7] The legislation does not explain how "political preferences" can be a factor for comparison when it is listed only in respect to the protected class but not for the rest of the electorate.

A court that finds in favor of a Plaintiff has extremely broad authority to change in virtually every respect how elections are conducted in the affected political subdivision. A court "shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans; . . . .

NY Election Law 17-206(5).

D. Capacity of Defendants to Seek Summary Judgment

Plaintiffs oppose the motion initially on the basis that Defendants do not have capacity to challenge the NYVRA on the basis of its constitutionality, because Defendants are part of the very government that enacted the NYVRA. They also assert that the time for such a challenge comes only after the Court has adjudicated the case on the merits and imposed a remedy that Defendants must implement. Plaintiffs summarize the general rule but do not accurately capture the scope and application of the exceptions.

"[P]olitical power conferred by the Legislature confers no vested right as against the government itself." *City of New York v State of New York,* 86 NY2d 286 (1995). "The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions . . . counties are mere political subdivisions of the State, created by the State Legislature and possessing no more power save that deputed to them by that body." *Id.* The Court of Appeals has extended the doctrine of no capacity to sue by municipal corporate bodies

to a wide variety of challenges based as well upon claimed violations of the State Constitution, not just the federal Constitution. *Id.* However, this rule is not without exceptions.

Four distinct instances have been defined by the Court of Appeals for when a municipality may challenge the constitutionality of a law that it is required to enforce. Those exceptions are as follows:

> (1) an express statutory authorization to bring such a suit *(County of Albany v Hooker,* 204 NY, at 9, *supra);* (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys *(County of Rensselaer v Regan,* 173 AD2d 37, *affd* 80 NY2d 988; *Matter of Town of Moreau v County of Saratoga,* 142 AD2d 864); (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution *(Town of Black Brook v State of New York,* 41 NY2d 486); and (4) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" *(Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287 [citing *Board of Educ. v Allen,* 20 NY2d 109, *affd* 392 US 236]).

City of New York, 86 NY2d at 291-292.

Here, Defendants rely upon and fall squarely within the ambit of the fourth of these exceptions, namely that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. The Court of Appeals in *Matter of Jeter* held that certain parties lacked capacity because they did not assert that "***if*** they are obliged to comply with the State statute," said compliance would violate the constitution. 41 NY2d at 287 (emphasis added). The wording of the decision in the future tense ("if they are") confirms that an actual mandated violation is not a perquisite to a challenge. Here, Defendants assert that if they are required to comply with the NYVRA, through a mandate of this Court that

alters their electoral system, it will require them to violate the Equal Protection Clause. Under these circumstances, Defendants have capacity to assert their constitutional challenge of the NYVRA now, in the instant motion, which is ripe for review.

E. The Equal Protection Clause

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Constitution, Amend. XIV, Sec. 1. The last clause of Section 1 is commonly referred to as the "Equal Protection Clause." It is this provision of law that is the basis for the constitutional challenge of the Defendants.

The US Supreme Court summarized the monumental passage of this amendment in *Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, 600 US 181, 201-202 (2023):

> To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—the absolute equality of all citizens of the United States politically and civilly before their own laws . . . . The Constitution, they were determined, should not permit any distinctions of law based on race or color . . . because any "law which operates upon one man [should] operate *equally* upon all . . . . . As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold 'over every American citizen, without regard to color, the protecting shield of law."

Id. (citations omitted).

The New York Constitution includes a provision with similar wording: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person

shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." NY Constitution, Art. 1, Sec. 11. Defendants also rely upon that state authority for their challenge to the NYVRA.

The US Constitution provides that it and all federal law is the supreme law of the United States. US Constitution, Art. VI. While no state can pass and enforce legislation that limits the rights of citizens in contravention of federal law, there is no bar to a state passing a law that provides enhanced rights to its citizens that exceeds the protections of federal law. For that reason, the Court reviews the instant motion for its compliance with the potentially narrower protections afforded Defendants by the US Constitution. To the extent that the NYVRA unlawfully exceeds the limits of the Equal Protection Clause, *a fortiori* it will also exceed the potentially more generous protections afforded by the New York Constitution.

F. Strict Scrutiny Standard

The US Supreme Court issued its first majority decision requiring "strict scrutiny" in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *See Adarand Constructors v Pena*, 515 US 200 (1995) (recounting the history of the heightened standard of review). In *Croson*, it considered whether a city's determination that 30% of its contracting work should go to minority-owned businesses was constitutional. *Croson* held that "the single standard of review for racial classifications should be "strict scrutiny." *Id.*, at 493–494. That standard has not changed since 1989 with regard to the review of a state or federal law that classifies the rights of differing people on the basis of race or national origin.

Notably, the Supreme Court has repeatedly held that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Adarand, 515 US.* at 273. "Racial classifications of any sort must be subjected to 'strict scrutiny." *Id.* at 285. The Court in *Croson* affirmed its adherence to requiring strict scrutiny in *all* instances of race-based legislation, regardless of the demographics in the protected class or the majority group: "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification". *Croson* at 493-494.

Thirty-five years later, the Supreme Court reaffirmed its precedent of requiring that the Equal Protection Clause prohibits discrimination against all people, not just those classes who have experienced historic discrimination or who experienced such morally repugnant treatment to a degree greater than other people:

> Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U.S. at 369, 6 S.Ct. 1064. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290.

Students for Fair Admissions, 600 US at 206. *See Johnson v California,* 543 US 499, 505-506 (2005) ("We therefore apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race . . . .").

Here, the text of the NYVRA, on its face, classifies people according to their race, color and national origin. These are not mere passing references in the legislation. These classes of people are not simply mentioned as part of the justification for its passage, or as part of some broader plan for electoral reform by which these classes might derive some tangential benefit. Instead classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA. A person can only seek relief on the basis of their race, color or national origin and remedies are likewise created based upon those classifications. For Plaintiffs to suggest that the NYVRA is not a race-based (or national origin-based) statute is simply to deny the obvious.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent." *Affiliated Brookhaven Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022) (citations omitted). "[T]he clearest indicator of legislative intent is the statutory text". Id. "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

That being said, the inclusion of a race-based criteria does not, in and of itself, foreclose the possibility for enforcement of the NYVRA. Whether statutes are violative of the Equal Protection Clause can only be determined after the analysis required by US Supreme Court precedent. Thus, the strict scrutiny standard will be the basis upon which this Court will decide whether the NYVRA's prohibitions and remedies can satisfy the bar that the US Supreme Court has established for such state action.

G. Compelling Interest and Narrowly Tailored Legislation

i. Compelling Interest

The NYVRA must satisfy one of the very few identifiable bases for race-based government action. *See Students for Fair Admissions,* 600 US at 203 (e.g. education, housing covenants, buses, golf courses, remediating specific, identified instances of past discrimination that violated the Constitution or a statute). Yet, the Court is unable to find within its text any of those enumerated justifications. In voting rights cases, past discrimination against the protected class has been the justification for race-based statutes, such as the FVRA.

Yet, the wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class. Section 17-206, as discussed in detail supra, includes no such requirement. Voter dilution can be established simply by a showing that a protected class has an impaired ability to influence an election. Moreover, "protected class" is not defined by reference to historic discrimination. Instead, persons of any "race, color or language minority" have standing to seek redress. Thus, a minority (or even a majority) in a political subdivision comprised of persons who identify as White can seek electoral changes if they establish any impairment of their ability to affect an election, *absent any evidence of historic discrimination against people of that color* in that political subdivision.

The only wording related to the NYVRA with regard to past discrimination is in the Senate Sponsor Memorandum, which is not part of the NYVRA. Moreover, that wording does not even go as far as stating that the NYVRA was enacted to remedy historic discrimination, only mentioning discrimination. *See* Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

More importantly, the NYVRA lists discrimination among the factors that a Court *may, but need not necessarily,* consider when deciding if voter dilution has occurred. See NY Election law 17-206(3)(a) ("the history of discrimination in or affecting the political subdivision; . . . ."). A Court can grant relief pursuant to the NYVRA absent a history of *any* discrimination against the "protected class". This intent to exclude historic discrimination from the NYVRA requirements is also manifest in its omission of requiring RPV. Unlike the Washington and California voting rights acts that Plaintiffs rely upon so heavily to support their position, those acts do require RPV to prove vote dilution. Cal. Election Code 14028(a) ("A violation of Section 14027 is established if it is shown that racially polarized voting occurs . . ."); Wash. Elections Stat. Ann. 29A.92.030(1) (proof of a violation when it is shown that: "(a) Elections in the political subdivision exhibit polarized voting; ***and*** (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice . . . .") (emphasis added). As noted supra, fn. 6, the passage of the NYVRA used "or" to join RPV with other means of

proving vote dilution, resulting in RPV being merely optional in New York to prove a violation.

As a result, the NYVRA fails to satisfy the first part of the strict scrutiny standard. No compelling interest -as that term has been defined by the US Supreme Court's interpretation of the Equal Protection Clause – exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision. Here, while Plaintiffs' Opposition discusses alleged past discrimination against persons who are Black and of Spanish Heritage in Defendant Town, that is not a requirement for their cause of action. They can decline to offer such proof at trial. If they do offer such proof, there is no standard for this Court

to use in determining the sufficiency of that evidence because proof of discrimination is not required *to any degree* by the NYVRA. While the two groups herein might establish some impairment of their ability to influence an election, the US Supreme Court has held that such impairment – without a history of discrimination - is not sufficiently compelling to justify a state mandate based on race or national origin.

Additionally, no compelling interest exists in allowing multiple protected classes to aggregate for purposes of proving vote dilution. Aggregation is raised by the instant motion because the Complaint asserts that each group of Plaintiffs (Black and Spanish heritage) comprise less than a majority of the population of Defendant Town but cannot independently form a majority in a reasonably configured district. Therefore they seek to aggregate the two groups into a single group for purposes of proving vote dilution.

Even if such aggregation were permissible as a compelling interest, its boundaries must be defined. Here, the NYVRA states aggregation is allowed where "there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision." NY Election Law 17-206(2)(c)(vi). But in the same subsection 17-206, aggregation is allowed for a different reason, to wit, "in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate." NY Election Law 17-206(8).

ii. Narrowly Tailored

Even if the Court assumes, arguendo, that the NYVRA does serve a compelling interest, Plaintiffs must also prove that the prohibitions and remedies are narrowly tailored. "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter v*

Bollinger, 593 US 306, 26 (2003). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." Id. *See Parents Involved v Seattle School District No. 1*, 551 US 701, 704 (2007) ("Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives").

Here, the breadth of remedies that a Court can impose for the most minimal of impairments of a class of voters' ability to influence an election cannot be described as "narrow" in any sense of that word. The NYVRA sets no minimum bar on the extent of any such impairment of voter ability to influence an election and does not require RPV or impairment of the ability of a protected class to elect a candidate of choice.

Moreover, the review standard is lax to the point of explicitly allowing a court to find voter dilution exists without citing any basis. The NYVRA allows a finding of vote dilution based upon a "totality of circumstances", which lacks any defined criteria because the NYVRA lists 11 factors that *may* be considered. Thus, a court is free to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all. NY Election Law 17-206(3)("Nothing in this subdivision shall preclude any additional factors from being considered, ***nor shall any specified number of factors be required*** in establishing that such a violation has occurred.").

Plaintiffs are quick to compare the NYVRA to the FVRA when it suits their purposes. However, that is not entirely, but is largely a two way street. Attempts to extend the FVRA to the degree that Plaintiffs assert here have been soundly rejected. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Supreme Court held that Section 2 of the FVRA does not require the creation of

"influence districts," where a minority group cannot elect the candidate of its choice because of its sub-majority numbers but the group may still play an influential role in the electoral process. The Court held that the ability of members of a minority group to influence an election in a district was insufficient to state a claim for vote dilution. "The opportunity 'to elect representatives of their choice,' ***requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.***" *Id.*

H. Precedent for Judicial Review of Voting Rights Legislation

In the context of voting rights, the Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Abbott v Perez*, 585 US 579, 585 (2018), *citing Shaw v. Reno,* 509 U.S. 630, 641 (1993). "At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [Federal] Voting Rights Act of 1965 . . . pulls in the opposite direction: it often insists that districts be created precisely because of race." *Id.* "Since the Equal Protection Clause restricts consideration of race and the [F]VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to " 'competing hazards of liability.' " *Id.* at 587, citing *Bush v. Vera,* 517 U.S. 952, 977 (1996) (plurality opinion).

As a result of this tension between the Equal Protection Clause and the FVRA, a significant body of law developed over the past 60 years whereby the FVRA could be applied as intended by Congress, but not without limitation. Plaintiffs on this score turn away from the FVRA and urge this Court to disregard that precedent, holding that the NYVRA is constitutional, despite its explicit rejection of certain guardrails so firmly created over decades to prevent undue

infringement on the Equal Protection Clause. The Court declines this invitation to ignore binding US Supreme Court precedent and apply the NYVRA in a manner by which it would become supreme over the guarantees provided by the US Constitution.

Thornburg v. Gingles, 478 U.S. 30 (1986) created the framework for analyzing vote dilution claims under the FVRA. *Gingles* specified three preconditions that a minority group must prove to succeed on a vote dilution claim: the minority group is i) sufficiently large and geographically compact to constitute a majority in a [reasonably configured] single-member district; ii) politically cohesive, and iii) able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.* If these three preconditions are established, the minority group must then show that, "based on the totality of circumstances," the electoral process is not "equally open" to its members. This final step of the analysis entails considering several factors, often called 'the Senate factors' because they originated from the Senate Judiciary Committee Report accompanying the 1982 Amendments. *Id.* at 36-37.

That process has been followed in an unbroken line of Supreme Court decisions over four decades, regardless of the composition of that Court and the philosophies of its members. In some unusual instances, principles of law ring so true, and are established over time with repeated confirmation, that the doctrine of stare decisis overcomes the inclination of any member or faction of a court to disturb decades of precedent. The *Gingles* preconditions have been one of those rare examples.

The NYVRA mandates that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim. NY Election Law 17-206(c) "For the

purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: . . . (viii) evidence concerning whether members of a protected class are geographically compact or concentrated ***shall not be considered***, but may be a factor in determining an appropriate remedy . . . ." Plaintiffs urge this Court to cast aside 40 years of jurisprudence and decline to apply *Gingles* to the analysis of the NYVRA, with no legal authority.

The Court is mindful that *Gingles* determines claims under the FVRA and this case presents a claim under the NYVRA. However, the analysis of *Gingles* is one by which the Supreme Court created a balance of the aforementioned tension between the Equal Protection Clause and voting rights legislation. Assuming arguendo that New York has authority equal to Congress to pass voting rights legislation that is race-based, a principle that is itself controversial, the NYVRA still must satisfy judicial precedent that permits a rare state-sanctioned infringement on the rights of persons not in the protected class. The Court is not aware of, and no party has provided upon its request, any case from the Supreme Court or any other federal court that determined that the first precondition of *Gingles* is not applicable to the issue of whether a state voting rights act is violative of the US Constitution.

The NYVRA's elimination of the first *Gingles* factor effectively creates a right to proportional representation. Where one class cannot establish that it can elect a candidate of choice - even if new districts are created -- then the aggregation of many such classes into one will result in a de jure mandate of representation in proportion to these innumerable classes, each of which has no minimum percentage of voting population. When the FVRA was amended, the Senate included wording to explicitly *reject* such a requirement. 52 USC 10301(b) ("nothing in

this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

In *Bartlett v State Board of Elections*, 556 US 1, 15 (2009), the Supreme Court rejected Plaintiff's argument herein, declining to hold that the FVRA "grants special protection to a minority group's right to form political coalitions." *Bartlett* rejected the argument that 'opportunity' under the FVRA includes the opportunity to form a majority with other voters—whether those other voters are other racial minorities, whites, or both. *Id.* When a minority group cannot constitute a majority in a single-member district without combining with members of another minority group, the FVRA does not provide protection because there neither has been a wrong nor can there be a remedy. *Growe v Emison*, 507 U.S. 25, 41 (1993); *see Allen v. Milligan*, 599 U.S. 1, 28 (2023) ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2 [of the FVRA].").

A similar argument was recently raised and rejected in a federal appellate case, *Pettway v Galveston County*, 11 F4th 596 (5th Cir 2024) (en banc). In *Pettway*, the protected class asked for new "crossover districts" in which they could elect the candidate of their choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. The court rejected the proposal because when "a minority group constitutes less than a majority of the citizen voting-age population in a reasonably configured district, it has no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." Id. at 610.

Coalition claims pose the same practical problems as crossover claims in determining the existence of the *Gingles* preconditions, especially whether the distinct minority groups are

politically cohesive. *Pettway*, 11 F4th at 610-611. Coalition claims create questions of "judicially unmanageable complexity". *Id.* "[C]ontemporary demographics suggest there is no stopping point if minority coalitions may be formed out of any minority racial or language groups. Id. The factual complexity of coalition claims only increases as the number of minority groups within the coalition increases. Id.

Based on this history of cases rejecting the coalition claim that Plaintiffs herein plead as their basis for sweeping electoral reform in Defendant Town, this Court holds that such claims do not satisfy the clear standards set forth in *Gingles* and its progeny. For that additional reason, the NYVRA is in violation of federal law and therefore cannot stand.

Conclusion

For all the foregoing reasons, it is hereby

ORDERED that Defendants' Motion Seq. #5 for summary judgment is **GRANTED** and it is further

ORDERED that the Complaint is **DISMISSED**, and it is further

ORDERED that the NYVRA is hereby **STRICKEN** in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 7, 2024
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

25

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

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

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

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

Synopsis

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

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

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

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

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

[4] one congressional district did not violate VRA;

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

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

Affirmed in part, reversed in part, and remanded.

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

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

West Headnotes (30)

[1] Constitutional Law Electoral districts and gerrymandering

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

15 Cases that cite this headnote

[2] Constitutional Law Electoral districts and gerrymandering

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

3 Cases that cite this headnote

[3] Election Law Majority-minority districts

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

6 Cases that cite this headnote

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

Election Law Apportionment and Reapportionment

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

18 Cases that cite this headnote

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

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

7 Cases that cite this headnote

[6] **Federal Courts** Injunction

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

34 Cases that cite this headnote

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

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

9 Cases that cite this headnote

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

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

36 Cases that cite this headnote

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

Federal Courts Three-judge courts

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

3 Cases that cite this headnote

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

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

1 Case that cites this headnote

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

Injunction Redistricting and reapportionment

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

4 Cases that cite this headnote

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

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

1 Case that cites this headnote

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

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

36 Cases that cite this headnote

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

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

44 Cases that cite this headnote

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

States Power and Duty to Apportion

States Judicial Review and Enforcement

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

14 Cases that cite this headnote

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

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

34 Cases that cite this headnote

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

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

55 Cases that cite this headnote

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

Election Law Presumptions and burden of proof

Election Law Weight and sufficiency

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

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

33 Cases that cite this headnote

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

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

11 Cases that cite this headnote

[20] **Federal Courts** Findings

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

6 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

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

4 Cases that cite this headnote

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

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

1 Case that cites this headnote

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

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

8 Cases that cite this headnote

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

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

1 Case that cites this headnote

[25] **Election Law** Vote Dilution

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

19 Cases that cite this headnote

[26] **Election Law** Vote Dilution

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

9 Cases that cite this headnote

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

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

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

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

3 Cases that cite this headnote

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

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

4 Cases that cite this headnote

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

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

5 Cases that cite this headnote

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

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

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

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

Held :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Opinion

Justice ALITO delivered the opinion of the Court.

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

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

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

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

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

I

A

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***594** II

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

A

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

III

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

A

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

1

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

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

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

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

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

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

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

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

2

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

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

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

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

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

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

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

***620** B

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

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

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

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

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

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

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

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

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

* * *

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

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

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

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

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

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

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

I

A

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

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

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

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

B

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

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

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

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

***629** C

1

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

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

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

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

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

2

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

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

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

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

3

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

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

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

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

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

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

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

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

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

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

D

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

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

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

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

II

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

A

Before delving into the content of the August 15 and 24 orders, a quick recap of the rather convoluted history of these cases is useful. In 2011, the Texas Legislature redrew its electoral districts. Various plaintiff groups challenged the 2011 maps under § 2 of the Voting Rights Act and the Fourteenth Amendment, and those lawsuits were consolidated before the three-judge District Court below pursuant to 28 U.S.C. § 2284(a). Because Texas then was subject to preclearance under § 5 of the Voting Rights Act, the 2011 ***640** maps did not take effect immediately, and Texas filed a declaratory action in the District Court for the District of Columbia to obtain preclearance.

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

***647** C

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

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

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

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

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

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

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

D

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

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

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

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

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

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

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

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

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

III

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

A

1

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

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

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

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

2

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

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

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

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

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

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

**2357 *660 B

1

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

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

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

2

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

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

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

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

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

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

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

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

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

IV

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

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

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Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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135 S.Ct. 1257
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Appellants
v.
ALABAMA et al.
Alabama Democratic Conference, et al., Appellants
v.
Alabama et al.

Nos. 13–895, 13–1138
|
Argued Nov. 12, 2014.
|
Decided March 25, 2015.[1]

Synopsis

Background: Black political caucus, political party, office holders, and county commissioners of Alabama brought separate actions against state of Alabama and various state officials, challenging redistricting plans for Alabama's Senate and House of Representatives. Actions were consolidated. After bench trial, a three-judge panel of the United States District Court for the Middle District of Alabama, Pryor, Circuit Judge, 989 F.Supp.2d 1227, dismissed in part and granted judgment to defendants. Probable jurisdiction was noted.

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

[1] racial gerrymandering claims apply district-by-district;

[2] district court should have allowed one plaintiff to present evidence of its associational standing;

[3] equal population goal was not a factor to be weighed, for equal protection challenge to redistricting; and

[4] Section 5 of the Voting Rights Act (VRA) does not require a covered jurisdiction to maintain a particular numerical minority percentage when redistricting.

Vacated and remanded.

Justice Scalia filed a dissenting opinion, in which Chief Justice Roberts and Justices Thomas and Alito joined.

Justice Thomas filed a dissenting opinion.

West Headnotes (10)

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

States Compactness; contiguity; gerrymandering in general

A racial gerrymandering claim against a State, asserting an equal protection violation in drawing boundaries for electoral districts, applies to the boundaries of individual districts, i.e., district-by-district, and does not apply to a State considered as an undifferentiated whole. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

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

The nature of the harms that underlie a racial gerrymandering claim, asserting an equal protection violation in drawing boundaries for electoral districts, are personal, and they include being personally subjected to a racial classification, as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group; such harms directly threaten a voter who lives in the district attacked. U.S.C.A. Const.Amend. 14.

14 Cases that cite this headnote

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

Election Law Gerrymandering of equipopulous districts

Voters asserting a racial gerrymandering claim, alleging an equal protection violation in a State's drawing of boundaries for electoral districts, can present statewide evidence in order to prove racial gerrymandering in a particular district. U.S.C.A. Const.Amend. 14.

34 Cases that cite this headnote

[4] **Federal Courts** Review of federal district courts

Challengers to Alabama's state legislative redistricting of majority-minority districts did not waive, on review of three-judge district court ruling, a district-by-district analysis of their equal protection claim alleging racial gerrymandering, though challengers could have presented their district-specific claims more clearly, they relied heavily on statewide evidence to prove that race predominated in drawing of individual district lines, and district court's opinion suggested that challengers had led district court to consider racial gerrymandering of the State as whole; challengers brought, and their argument rested significantly upon, district-specific claims, and statewide evidence presented by challengers was relevant to proving racial gerrymandering in particular districts. U.S.C.A. Const.Amend. 14.

71 Cases that cite this headnote

[5] **Federal Courts** Review of federal district courts

Challenger to Alabama's state legislative redistricting of majority-minority districts did not waive its district-specific claims, on challenger's appeal to Supreme Court from three-judge district court's rejection of racial gerrymandering claim asserting an equal protection violation in drawing boundaries for electoral districts, which rejection had applied the racial gerrymandering claim to the State considered as an undifferentiated whole; at oral argument before the Supreme Court, challenger, when asked specifically about its position, stated it was relying on statewide evidence to prove its district-specific challenges, and challenger clarified that by referring to "statewide," challenger meant a common policy that applied to every district in the State. U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

[6] **States** Persons entitled to sue, standing, and parties

While three-judge district court had independent obligation to confirm its jurisdiction even in absence of challenge by State to association's standing to assert racial gerrymandering claim alleging equal protection violation redistricting of majority-minority districts, elementary principles of procedural fairness required district court to give association an opportunity to provide evidence that it had a member residing in each majority-minority district, rather than sua sponte holding that association lacked standing, where evidence presented by association, regarding residency of its members, supported common sense inference that association had members in all of State's majority-minority districts, and such inference was strong enough to lead association reasonably to believe that, in absence of State challenge or court request for more detailed information, it need not provide additional information such as a specific membership list. U.S.C.A. Const.Amend. 14.

24 Cases that cite this headnote

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

For a racial gerrymandering claim relating to redistricting, an equal population goal for districts is not one factor among others to be weighed against the use of race, to determine, under strict scrutiny for an equal protection violation, whether race was the predominant motivating factor in creating any challenged districts; rather, an equal population goal is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to

how equal population objectives will be met. U.S.C.A. Const.Amend. 14.

29 Cases that cite this headnote

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

A plaintiff pursuing a racial gerrymandering claim, alleging an equal protection violation in drawing electoral districts, must show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. U.S.C.A. Const.Amend. 14.

50 Cases that cite this headnote

[9] **Election Law** In general; covered jurisdictions

Section 5 of the Voting Rights Act (VRA), imposing preclearance requirements for covered States and certain other jurisdictions and forbidding retrogression when redistricting, does not require a covered jurisdiction to maintain a particular numerical minority percentage when redistricting, and instead requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. Voting Rights Act of 1965, § 12(b, d), 52 U.S.C.A. § 10304(b, d).

8 Cases that cite this headnote

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

A court's analysis of the narrow tailoring requirement, on strict scrutiny for an equal protection violation in drawing electoral districts, insists only that the legislature have a strong basis in evidence in support of the race-based choice that it has made, and this standard does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

****1259** *Syllabus*[*]

***254** In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. In doing so, while Alabama sought to achieve numerous traditional districting objectives—*e.g.,* compactness, not splitting counties or precincts, minimizing change, and protecting incumbents—it placed yet greater importance on two goals: (1) minimizing a district's deviation from precisely equal population, by keeping any deviation less than 1% of the theoretical ideal; and (2) seeking to avoid retrogression with respect to racial minorities' "ability to elect their preferred candidates of choice" under § 5 of the Voting Rights Act of 1965, 52 U.S.C. § 10304(b), by maintaining roughly the same black population percentage in existing majority-minority districts.

Appellants—Alabama Legislative Black Caucus (Caucus), Alabama Democratic Conference (Conference), and others—claim that Alabama's new district boundaries create a "racial gerrymander" in violation of the Fourteenth Amendment's Equal Protection Clause. After a bench trial, the three-judge District Court ruled (2 to 1) for the State. It recognized that electoral districting violates the Equal Protection Clause when race is the "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller v. Johnson,* 515 U.S. 900, 913, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762, and the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw v. Hunt,* 517 U.S. 899, 902, 116 S.Ct. 1894, 135 L.Ed.2d 207 (*Shaw II).*

In ruling against appellants, it made four critical determinations: (1) that both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," and that the Conference had also argued that the State had racially gerrymandered Senate Districts 7, 11, 22, and 26; (2) that the Conference lacked standing to make its racial gerrymandering claims; (3) that, in any event, appellants' claims must fail because race "was not the predominant motivating factor" in making the redistricting decisions; and (4) that, even were it wrong about standing and predominance, these claims must fail because any predominant use of race was ***255** "narrowly tailored" to ****1260** serve a "compelling state interest" in avoiding retrogression under § 5.

Held:

1. The District Court's analysis of the racial gerrymandering claim as referring to the State "as a whole," rather than district-by-district, was legally erroneous. Pp. 1264 – 1268.

(a) This Court has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts,* see, *e.g., Shaw v. Reno,* 509 U.S. 630, 649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (*Shaw I*), and has described the plaintiff's evidentiary burden similarly, see *Miller, supra,* at 916, 115 S.Ct. 2475. The Court's district-specific language makes sense in light of the personal nature of the harms that underlie a racial gerrymandering claim, see *Bush v. Vera,* 517 U.S. 952, 957, 116 S.Ct. 1941, 135 L.Ed.2d 248; *Shaw I, supra,* at 648, 113 S.Ct. 2816. Pp. 1264 – 1265.

(b) The District Court found the fact that racial criteria had not predominated in the drawing of some Alabama districts sufficient to defeat a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. But a showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts. Thus, the District Court's undifferentiated statewide analysis is insufficient, and the District Court must on remand consider racial gerrymandering with respect to the individual districts challenged by appellants. Pp. 1265 – 1266.

(c) The Caucus and the Conference did not waive the right to further consideration of a district-by-district analysis. The record indicates that plaintiffs' evidence and arguments embody the claim that individual majority-minority districts were racially gerrymandered, and those are the districts that the District Court must reconsider. Although plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines, neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole." Pp. 1266 – 1268.

2. The District Court also erred in deciding, *sua sponte,* that the Conference lacked standing. It believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside." But the Conference's post-trial brief and the testimony of a Conference representative support an inference that the organization has members in all of the majority-minority districts, which is sufficient to meet the Conference's burden of establishing standing. At ***256** the very least, the Conference reasonably believed that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. While the District Court had an independent obligation to confirm its jurisdiction, in these circumstances elementary principles of procedural fairness required the District Court, rather than acting *sua sponte,* to give the Conference an opportunity to provide evidence of member residence. On remand, the District Court should permit the Conference to file its membership list and the State to respond, as appropriate. Pp. 1268 – 1270.

3. The District Court also did not properly calculate "predominance" in its alternative holding that "[r]ace was not the predominant motivating factor" in the creation ****1261** of any of the challenged districts. It reached its conclusion in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. An equal population goal, however, is not one of the "traditional" factors to be weighed against the use of race to determine whether race "predominates," see *Miller, supra,* at 916, 115 S.Ct. 2475. Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met. Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26. Pp. 1270 – 1272.

4. The District Court's final alternative holding—that "the [challenged] Districts would satisfy strict scrutiny"—rests upon a misperception of the law. Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. Pp. 1272 – 1274.

(a) The statute's language, 52 U.S.C. §§ 10304(b), (d), and Department of Justice Guidelines make clear that § 5 is satisfied if minority voters retain the ability to elect their preferred candidates. The history of § 5 further supports this view, as Congress adopted the language in § 5 to

reject this Court's decision in *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428, and to accept the views of Justice Souter's dissent—that, in a § 5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice, and that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances, ***257** *id.,* at 493, 498, 505, 509, 123 S.Ct. 2498. Here, both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. Pp. 1272 – 1274.

(b) In saying this, this Court does not insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands. A court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29. Here, however, the District Court and the legislature both asked the wrong question with respect to narrow tailoring. They asked how to maintain the present minority percentages in majority-minority districts, instead of asking the extent to which they must preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice. Because asking the wrong question may well have led to the wrong answer, the Court cannot accept the District Court's conclusion. Pp. 1273 – 1274.

989 F.Supp.2d 1227, vacated and remanded.

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

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Opinion

Justice BREYER delivered the opinion of the Court.

***258** The Alabama Legislative Black Caucus and the Alabama Democratic Conference appeal a three-judge Federal District Court decision rejecting their challenges to the lawfulness of Alabama's 2012 redistricting of its State House of Representatives and State Senate. The appeals focus upon the appellants' claims that new district boundaries create "racial gerrymanders" in violation of the Fourteenth Amendment's Equal Protection Clause. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 907–908, 116 S.Ct. 1894, 135 L.Ed.2d

207 (1996) (*Shaw II*) (Fourteenth Amendment forbids use of race as " 'predominant' " district boundary-drawing " 'factor' " unless boundaries are "narrowly tailored" to achieve a " 'compelling state interest' " (citations omitted)). We find that the District Court applied incorrect legal standards in evaluating the claims. We consequently vacate its decision ****1263** and remand the cases for further proceedings.

***259** I

The Alabama Constitution requires the legislature to reapportion its State House and Senate electoral districts following each decennial census. Ala. Const., Art. IX, §§ 199–200. In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. 2012 Ala. Acts no. 602 (House plan); *id.,* at no. 603 (Senate plan) (Acts). In doing so, Alabama sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. But it placed yet greater importance on achieving two other goals. See Alabama Legislature Reapportionment Committee Guidelines in No. 12–cv–691, Doc. 30–4, pp. 3–5 (Committee Guidelines).

First, it sought to minimize the extent to which a district might deviate from the theoretical ideal of precisely equal population. In particular, it set as a goal creating a set of districts in which no district would deviate from the theoretical, precisely equal ideal by more than 1%—*i.e.,* a more rigorous deviation standard than our precedents have found necessary under the Constitution. See *Brown v. Thomson,* 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (5% deviation from ideal generally permissible). No one here doubts the desirability of a State's efforts generally to come close to a one-person, one-vote ideal.

Second, it sought to ensure compliance with federal law, and, in particular, the Voting Rights Act of 1965. 79 Stat. 439, as amended, 52 U.S.C. § 10301 *et seq*. At the time of the redistricting Alabama was a covered jurisdiction under that Act. Accordingly § 5 of the Act required Alabama to demonstrate that an electoral change, such as redistricting, would not bring about retrogression in respect to racial minorities' "ability ... to elect their preferred candidates of choice." 52 U.S.C. § 10304(b). Specifically, Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage ***260** in existing majority-minority districts. See Appendix B, *infra*.

Compliance with these two goals posed particular difficulties with respect to many of the State's 35 majority-minority districts (8 in the Senate, 27 in the House). That is because many of these districts were (compared with the average district) underpopulated. In order for Senate District 26, for example, to meet the State's no–more–than–1% population-deviation objective, the State would have to add about 16,000 individuals to the district. And, prior to redistricting, 72.75% of District 26's population was black. Accordingly, Alabama's plan added 15,785 new individuals, and only 36 of those newly added individuals were white.

This suit, as it appears before us, focuses in large part upon Alabama's efforts to achieve these two goals. The Caucus and the Conference basically claim that the State, in adding so many new minority voters to majority-minority districts (and to others), went too far. They allege the State created a constitutionally forbidden "racial gerrymander"—a gerrymander that (*e.g.,* when the State adds more minority voters than needed for a minority group to elect a candidate of its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help.

After a bench trial, the Federal District Court held in favor of the State, *i.e.,* against the Caucus and the Conference, with respect to their racial gerrymandering ****1264** claims as well as with respect to several other legal claims that the Caucus and the Conference had made. With respect to racial gerrymandering, the District Court recognized that electoral districting violates the Equal Protection Clause when (1) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller v. Johnson,* 515 U.S. 900, 913, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), and (2) the use of race is not "narrowly tailored to serve a compelling state interest," ***261** *Shaw II,* 517 U.S., at 902, 116 S.Ct. 1894; see also *Shaw v. Reno,* 509 U.S. 630, 649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*shaw i*) (CONSTITUTION FORBIDS "SEPARAT[ION of] voters into different districts on the basis of race" when the separation "lacks sufficient justification"); *Bush v. Vera,* 517 U.S. 952, 958–959, 976, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (principal opinion of O'Connor, J.) (same). But, after trial the District Court held (2 to 1) that the Caucus and the Conference had failed to prove their racial gerrymandering claims. The Caucus along with the Conference (and several

other plaintiffs) appealed. We noted probable jurisdiction with respect to the racial gerrymandering claims. 572 U.S. ——, 134 S.Ct. 2697, 189 L.Ed.2d 739 (2014).

We shall focus upon four critical District Court determinations underlying its ultimate "no violation" conclusion. They concern:

1. *The Geographical Nature of the Racial Gerrymandering Claims*. The District Court characterized the appellants' claims as falling into two categories. In the District Court's view, both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," 989 F.Supp.2d 1227, 1287 (M.D.Ala.2013) (emphasis added), and one of the appellants (the Conference) had also argued that the State had racially gerrymandered four specific electoral districts, Senate Districts 7, 11, 22, and 26, *id*., at 1288.

2. *Standing.* The District Court held that the Caucus had standing to argue its racial gerrymandering claim with respect to the State "as a whole." But the Conference lacked standing to make any of its racial gerrymandering claims—the claim requiring consideration of the State "as a whole," and the claims requiring consideration of four individual Senate districts. *Id*., at 1292.

3. *Racial Predominance.* The District Court held that, in any event, the appellants' claims must fail because race "was not the predominant motivating factor" either (a) "for the Acts as a whole" or (b) with respect to "Senate Districts 7, 11, 22, or 26." *Id*., at 1293.

***262** 4. *Narrow Tailoring/Compelling State Interest.* The District Court also held that, even were it wrong about standing and predominance, the appellants' racial gerrymandering claims must fail. That is because any predominant use of race in the drawing of electoral boundaries was "narrowly tailored" to serve a "compelling state interest," *id*., at 1306–1307, namely the interest in avoiding retrogression with respect to racial minorities' "ability to elect their preferred candidates of choice." § 10304(b).

In our view, each of these determinations reflects an error about relevant law. And each error likely affected the District Court's conclusions—to the point where we must vacate the lower court's judgment and remand the cases to allow appellants to reargue their racial gerrymandering claims. In light of our opinion, all parties ****1265** remain free to introduce such further evidence as the District Court shall reasonably find appropriate.

II

We begin by considering the geographical nature of the racial gerrymandering claims. The District Court repeatedly referred to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole*. See, *e.g.,* 989 F.Supp.2d, at 1293 ("Race was not the predominant motivating factor for the Acts as a whole"); *id*., at 1287 (construing plaintiffs' challenge as arguing that the "Acts as a whole constitute racial gerrymanders"); *id*., at 1292 (describing the plaintiffs' challenge as a "claim of racial gerrymandering to the Acts as a whole"); cf. *supra,* at 1264 – 1265 (noting four exceptions).

[1] A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated "whole." We have consistently described a claim of ***263** racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*. See, *e.g., Shaw I,* 509 U.S., at 649, 113 S.Ct. 2816 (violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Vera,* 517 U.S., at 965, 116 S.Ct. 1941 (principal opinion) ("[Courts] must scrutinize *each challenged district* ..." (emphasis added)). We have described the plaintiff's evidentiary burden similarly. See*Miller, supra,* at 916, 115 S.Ct. 2475 (plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without *a particular district*" (emphasis added)).

[2] Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally ... subjected to [a] racial classification," *Vera, supra,* at 957, 116 S.Ct. 1941 (principal opinion), as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw I, supra,* at 648, 113 S.Ct. 2816. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *United States v. Hays,*

515 U.S. 737, 744–745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995).

[3] Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district. See *Miller, supra,* at 916, 115 S.Ct. 2475. And voters might make the claim that *every* individual district in a State suffers from racial gerrymandering. But this latter claim is not the claim that the District Court, when using the phrase "as a whole," considered here. Rather, the concept as used here suggests the existence of a legal unicorn, an animal that exists only in the legal imagination.

This is not a technical, linguistic point. Nor does it criticize what might seem, in effect, a slip of the pen. Rather, here the District Court's terminology mattered. That is because ***264** the District Court found that racial criteria had not predominated in the drawing of some Alabama districts. And it found that fact (the fact that race did not predominate in the drawing of some, or many districts) sufficient to defeat what it saw as the basic claim before it, namely a claim of racial gerrymandering with respect to the State *as an undifferentiated* ****1266** *whole*. See, *e.g.,* 989 F.Supp.2d, at 1294 (rejecting plaintiffs' challenge because "[the legislature] followed no bright-line rule" with respect to every majority-minority district); *id*., at 1298–1299, 1301 (citing examples of majority-minority districts in which black population percentages were reduced and examples of majority-white districts in which precincts were split).

A showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts, however, would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama's majority-minority districts primarily at issue here. See *id*., at 1329 (Thompson, J., dissenting) ("[T]he drafters['] fail [ure] to achieve their sought-after percentage in one district does not detract one iota from the fact that they did achieve it in another"). Thus, the District Court's undifferentiated statewide analysis is insufficient. And we must remand for consideration of racial gerrymandering with respect to the individual districts subject to the appellants' racial gerrymandering challenges.

[4] The State and principal dissent argue that (but for four specifically mentioned districts) there were in effect no such districts. The Caucus and the Conference, the State and principal dissent say, did not seek a district-by-district analysis. And, the State and principal dissent conclude that the Caucus and the Conference have consequently waived the right to any further consideration. Brief for Appellees 14, 31; *post,* at 1276 – 1280 (opinion of SCALIA, J.).

***265** We do not agree. We concede that the District Court's opinion suggests that it was the Caucus and the Conference that led the Court to consider racial gerrymandering of the State "as a whole." 989 F.Supp.2d, at 1287. At least the District Court interpreted their filings to allege only that kind of claim. *Ibid*. But our review of the record indicates that the plaintiffs did not claim only that the legislature had racially gerrymandered the State "as" an undifferentiated "whole." Rather, their evidence and their arguments embody the claim that individual majority-minority districts were racially gerrymandered. And those are the districts that we believe the District Court must reconsider.

There are 35 majority-minority districts, 27 in the House and 8 in the Senate. The District Court's opinion itself refers to evidence that the legislature's redistricting committee, in order to satisfy what it believed the Voting Rights Act required, deliberately chose additional black voters to move into underpopulated majority-minority districts, *i.e.,* a specific set of individual districts. See, *e.g.,* 989 F.Supp.2d, at 1274 (referring to Senator Dial's testimony that the Committee "could have used," but did not use, "white population within Jefferson County to repopulate the majority-black districts" because "doing so would have resulted in the retrogression of the majority-black districts and potentially created a problem for [Justice Department] preclearance"); *id*., at 1276 (stating that Representative Jim McClendon, also committee cochair, "testified consistently with Senator Dial"); *id*., at 1277 (noting that the committee's expert, Randolph Hinaman, testified that "he needed to add population" to majority-black districts "without significantly lowering the percentage of the population in each district that was majority-black").

The Caucus and the Conference presented much evidence at trial to show that the legislature had deliberately moved black voters into these majority-minority districts—again, a specific set of districts—in ****1267** order to prevent the percentage of minority voters in each district from declining. See, *e.g.,* Committee Guidelines 3–5; 1 ***266** Tr. 28–29, 36–37, 55, 63, 67–68, 77, 81, 96, 115, 124, 136, 138 (testimony of Senator Dial); Deposition of Gerald Dial in No. 12–cv–691 (May 21, 2013), Doc. 123–5, pp. 17, 39–41, 62, 100 (Dial Deposition); 3 Tr. 222 (testimony of Representative McClendon); *id*., at 118–119, 145–146, 164,

182–183, 186–187 (testimony of Hinaman); Deposition of Randolph Hinaman in No. 12–cv–691 (June 25, 2013), Doc. 134–4, pp. 23–24, 101 (Hinaman Deposition).

In their post-trial Proposed Findings of Fact and Conclusions of Law, the plaintiffs stated that the evidence showed a racial gerrymander with respect to the majority of the majority-minority districts; they referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence. *E.g.,* Alabama Legislative Black Caucus Plaintiffs' Notice of Filing Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 194, pp. 9–10, 13–14, 30–35, 40 (Caucus Post–Trial Brief); Newton Plaintiffs' Notice of Filing Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195, pp. 33–35, 56–61, 64–67, 69–74, 82–85, 108, 121–122 (Conference Post–Trial Brief); see also Appendix A, *infra* (organizing these citations by district).

We recognize that the plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines. See generally Caucus Post–Trial Brief 1, 3–7, 48–50; Conference Post–Trial Brief 2, 44–45, 105–106. And they also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well. See, *e.g.,* 1 Tr. 36–37, 48, 55, 70–71, 93, 111, 124 (testimony of Dial); 3 Tr. 142, 162 (testimony of Hinaman); see generally Caucus Post–Trial Brief 8–16. Such evidence is perfectly relevant. We have said that the plaintiff's burden in a racial gerrymandering case is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was ***267** the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. Cf. *Easley v. Cromartie,* 532 U.S. 234, 258, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (explaining the plaintiff's burden in cases, unlike these, in which the State argues that politics, not race, was its predominant motive). That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole."

We, like the principal dissent, recognize that the plaintiffs could have presented their district-specific claims more clearly, *post,* at 1277 – 1278, 1279 – 1280 (opinion of SCALIA, J.), but the dissent properly concedes that its objection would weaken had the Conference "developed such a claim in the course of discovery and trial." *Post,* at 1277. And that is just what happened.

In the past few pages and in Appendix A, we set forth the many record references that establish this fact. The Caucus helps to explain the complaint omissions when it tells us that the plaintiffs unearthed the ****1268** factual basis for their racial gerrymandering claims when they deposed the committee's redistricting expert. See Brief for Appellants in No. 13–895, pp. 12–13. The State neither disputes this procedural history nor objects that plaintiffs' pleadings failed to conform with the proof. Indeed, throughout, the plaintiffs litigated these claims not as if they were wholly separate entities but as if they were a team. See, *e.g.,* Caucus Post–Trial Brief 1 ("[We] support the additional claims made by the [Conference] plaintiffs"); but cf. *post,* at 1275 – 1280 (SCALIA, ***268** J., dissenting) (treating separately Conference claims from Caucus claims). Thus we, like the dissenting judge below (who also lived with these cases through trial), conclude that the record as a whole shows that the plaintiffs brought, and their argument rested significantly upon, district-specific claims. See 989 F.Supp.2d, at 1313 (Thompson, J., dissenting) (construing plaintiffs as also challenging "each majority-Black House and Senate District").

[5] The principal dissent adds that the Conference waived its district-specific claims on appeal. Cf. *post,* at 1278. But that is not so. When asked specifically about its position at oral argument, the Conference stated that it was relying on statewide evidence to prove its district-specific challenges. Tr. of Oral Arg. 15–16. Its counsel said that "the exact same policy was applied in every black-majority district," *id.,* at 15, and "[b]y statewide, we simply mean a common policy applied to every district in the State," *id.,* at 16. We accept the Conference's clarification, which is consistent with how it presented these claims below.

We consequently conclude that the District Court's analysis of racial gerrymandering of the State "as a whole" was legally erroneous. We find that the appellants did not waive their right to consideration of their claims as applied to particular districts. Accordingly, we remand the cases. See *Pullman–*

Standard v. Swint, 456 U.S. 273, 291, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (remand is required when the District Court "failed to make a finding because of an erroneous view of the law"); *Rapanos v. United States,* 547 U.S. 715, 757, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (same).

III

[6] We next consider the District Court's holding with respect to standing. The District Court, *sua sponte,* held that the Conference lacked standing—either to bring racial gerrymandering claims with respect to the four individual districts that the court specifically considered (*i.e.,* Senate Districts 7, 11, 22, and 26) or to bring a racial gerrymandering ***269** claim with respect to the "State as a whole." 989 F.Supp.2d, at 1292.

The District Court recognized that ordinarily

> "[a]n association has standing to bring suit on behalf of its members *when its members would have standing to sue in their own right,* the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individuals members' participation in the lawsuit." *Id*., at 1291 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); emphasis added).

It also recognized that a "member" of an association "would have standing to sue" in his or her "own right" when that member "resides in the district that he alleges was the product of a racial gerrymander." 989 F.Supp.2d, at 1291 (citing *Hays,* 515 U.S., at 744–745, 115 S.Ct. 2431). But, the District Court nonetheless denied standing ****1269** because it believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside," and the Conference had "not proved that it has members who have standing to pursue any district-specific claims of racial gerrymandering." 989 F.Supp.2d, at 1292.

The District Court conceded that Dr. Joe Reed, a representative of the Conference, testified that the Conference "has members in almost every county in Alabama." *Ibid*. But, the District Court went on to say that "the counties in Alabama are split into many districts." *Ibid*. And the "Conference offered no testimony or evidence that it has members in all of the districts in Alabama or in any of the [four] specific districts that it challenged." *Ibid*.

The record, however, lacks adequate support for the District Court's conclusion. Dr. Reed's testimony supports, and nothing in that record undermines, the Conference's own statement, in its post-trial brief, that it is a "statewide political ***270** caucus founded in 1960." Conference Post–Trial Brief 3. It has the "purpose" of "endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people." *Id.,* at 3–4. These two statements (the second of which the principal dissent ignores), taken together with Dr. Reed's testimony, support an inference that the organization has members in all of the State's majority-minority districts, other things being equal, which is sufficient to meet the Conference's burden of establishing standing. That is to say, it seems highly likely that a "statewide" organization with members in "almost every county," the purpose of which is to help "blacks and other minorities and poor people," will have members in each majority-minority district. But cf. *post,* at 1275 – 1277 (SCALIA, J., dissenting).

At the very least, the common sense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. We have found nothing in the record, nor has the State referred us to anything in the record, that suggests the contrary. Cf. App. 204–205, 208 (State arguing lack of standing, not because of inadequate member residency but because an association "lives" nowhere and that the Conference should join individual members). The most the State argued was that "[n]one of the *individual* [p]laintiffs [who brought the case with the Conference] claims to live in" Senate District 11, *id.,* at 205 (emphasis added), but the Conference would likely not have understood that argument as a request that *it* provide a membership list. In fact, the Conference might have understood the argument as an indication that the State did *not* contest its membership in every district.

To be sure, the District Court had an independent obligation to confirm its jurisdiction, even in the absence of a state challenge. See *post,* at 1276 – 1277 (SCALIA, J., dissenting). But, ***271** in these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte,* give the Conference an opportunity to provide evidence of member residence. Cf. *Warth v. Seldin,* 422 U.S. 490, 501–502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (explaining that a court may "allow or [r]equire" a plaintiff to

supplement the record to show standing and that " [i]f, *after this opportunity,* the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed" (emphasis added)). Moreover, we have no reason to believe that the Conference ****1270** would have been unable to provide a list of members, at least with respect to the majority-minority districts, had it been asked. It has filed just such a list in this Court. See Affidavit of Joe L. Reed Pursuant to this Court's Rule 32.3 (Lodging of Conference affidavit listing members residing in each majority-minority district in the State); see also *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 718, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (accepting a lodged affidavit in similar circumstances). Thus, the District Court on remand should reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate.

IV

The District Court held in the alternative that the claims of racial gerrymandering must fail because "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. 989 F.Supp.2d, at 1293. In our view, however, the District Court did not properly calculate "predominance." In particular, it judged race to lack "predominance" in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. See, *e.g., id*., at 1305 (the "need to bring the neighboring districts into compliance with the requirement of one person, one vote *served as the primary motivating factor* for the changes to [Senate] District ***272** 22" (emphasis added)); *id*., at 1297 (the "constitutional requirement of one person, one vote trumped every other districting principle"); *id*., at 1296 (the "record establishes that the drafters of the new districts, above all, had to correct [for] severe malapportionment ..."); *id*., at 1306 (the "inclusion of additional precincts [in Senate District 26] is a reasonable response to the underpopulation of the District").

[7] In our view, however, an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met.

[8] To understand this conclusion, recall what "predominance" is about: A plaintiff pursuing a racial gerrymandering claim must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. To do so, the "plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* ... to racial considerations." *Ibid*. (emphasis added).

Now consider the nature of those offsetting "traditional race-neutral districting principles." We have listed several, including "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," *ibid*., incumbency protection, and political affiliation, *Vera,* 517 U.S., at 964, 968, 116 S.Ct. 1941 (principal opinion).

But we have not listed equal population objectives. And there is a reason for that omission. The reason that equal population objectives do not appear on this list of "traditional" criteria is that equal population objectives play a different role in a State's redistricting process. That role is not a minor one. Indeed, in light of the Constitution's demands, that role may often prove "predominant" in the ordinary ***273** sense of that word. But, as the United ****1271** States points out, "predominance" in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature "placed" race "above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." Brief for United States as *Amicus Curiae* 19 (some emphasis added). In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the "predominance" question concerns *which*voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, "traditional" factors when doing so.

Consequently, we agree with the United States that the requirement that districts have approximately equal populations is a background rule against which redistricting takes place. *Id*., at 12. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, "traditional" factors in the drawing of district boundaries.

Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, once the legislature's "equal population" objectives are put to the side —*i.e.,* seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.

The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. See ***274** *supra,* at 1278 – 1279 (compiling extensive record testimony in support of this point). There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26's boundaries. See 3 Tr. 175–180 (testimony of Hinaman); Appendix C, *infra* (change of district's shape from rectangular to irregular). Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white —a remarkable feat given the local demographics. See, *e.g.,* 2 Tr. 127–128 (testimony of Senator Quinton Ross); 3 Tr. 179 (testimony of Hinaman). Transgressing their own redistricting guidelines, Committee Guidelines 3–4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. See Exh. V in Support of Newton Plaintiffs' Opposition to Summary Judgment in No. 12–cv–691, Doc. 140–1, pp. 91–95. And the District Court conceded that race "was a factor in the drawing of District 26," and that the legislature "preserved" "the percentage of the population that was black." 989 F.Supp.2d, at 1306.

We recognize that the District Court also found, with respect to District 26, that "preservi[ng] the core of the existing [d]istrict," following "county lines," and following "highway lines" played an important boundary-drawing role. *Ibid*. But the first of these (core preservation) is not directly relevant to the origin of the *new* district inhabitants; the second (county lines) seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines; and the third (highways) was not mentioned in the legislative ****1272** redistricting guidelines. Cf. Committee Guidelines 3–5.

All this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration. ***275** Thus, on remand, the District Court should reconsider its "no predominance" conclusions with respect to Senate District 26 and others to which our analysis is applicable.

Finally, we note that our discussion in this section is limited to correcting the District Court's misapplication of the "predominance" test for strict scrutiny discussed in *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. It does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny. See *Vera,* 517 U.S., at 996, 116 S.Ct. 1941 (KENNEDY, J., concurring).

V

The District Court, in a yet further alternative holding, found that "[e]ven if the [State] subordinated traditional districting principles to racial considerations," the racial gerrymandering claims failed because, in any event, "the Districts would satisfy strict scrutiny." 989 F.Supp.2d, at 1306. In the District Court's view, the "Acts are narrowly tailored to comply with Section 5" of the Voting Rights Act. *Id*., at 1311. That provision "required the Legislature to maintain, where feasible, the existing number of majority-black districts and *not substantially reduce the relative percentages of black voters in those districts*." *Ibid*. (emphasis added). And, insofar as the State's redistricting embodied racial considerations, it did so in order to meet this § 5 requirement.

[9] In our view, however, this alternative holding rests upon a misperception of the law. Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what the language of the statute says. It prohibits a covered jurisdiction from adopting any change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred ***276** candidates of choice." 52 U.S.C. § 10304(b); see also § 10304(d) (the "purpose of subsection (b) ... is to protect the

ability of such citizens to elect their preferred candidates of choice").

That is also just what Department of Justice Guidelines say. The Guidelines state specifically that the Department's preclearance determinations are not based

> "on any predetermined or fixed demographic percentages.... Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.... [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Consistent with this view, the United States tells us that "Section 5" does not "requir[e] the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans." Brief for United States as *Amicus Curiae* 22. Rather, it "prohibits only those diminutions of a minority group's proportionate strength that strip the group within a district ****1273** of its existing ability to elect its candidates of choice." *Id.*, at 22–23. We agree. Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, § 5 is satisfied if minority voters retain the ability to elect their preferred candidates.

The history of § 5 further supports this view. In adopting the statutory language to which we referred above, Congress rejected this Court's decision in *Georgia v. Ashcroft,* 539 U.S. 461, 480, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) (holding that it is not necessarily retrogressive for a State to replace safe majority-minority districts with crossover or influence districts), and it adopted the views of the dissent. ***277** H.R.Rep. No. 109–478, pp. 68–69, and n. 183 (2006). While the thrust of Justice Souter's dissent was that, in a § 5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice—language that Congress adopted in revising § 5—his dissent also made clear that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances. *Georgia v. Ashcroft, supra,* at 493, 498, 505, 509, 123 S.Ct. 2498. And while the revised language of § 5 may raise some interpretive questions—*e.g.,* its application to coalition, crossover, and influence districts—it is clear that Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive. See Persily, The Promises and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 218 (2007). Indeed, Alabama's mechanical interpretation of § 5 can raise serious constitutional concerns. See *Miller, supra,* at 926, 115 S.Ct. 2475.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. See Appendix B, *infra*. And the difference between that view and the more purpose-oriented view reflected in the statute's language can matter. Imagine a majority-minority district with a 70% black population. Assume also that voting in that district, like that in the State itself, is racially polarized. And assume that the district has long elected to office black voters' preferred candidate. Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate. And, for that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at 70% is "narrowly tailored" to achieve a "compelling state interest," namely the interest in preventing § 5 retrogression. ***278** The circumstances of this hypothetical example, we add, are close to those characterizing Senate District 26, as set forth in the District Court's opinion and throughout the record. See, *e.g.,* 1 Tr. 131–132 (testimony of Dial); 3 Tr. 180 (testimony of Hinaman).

[10] In saying this, we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands. The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a ****1274** trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few. See *Vera,* 517 U.S., at 977, 116 S.Ct. 1941 (principal opinion). Thus, we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support

of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29 (citing *Ricci v. DeStefano,* 557 U.S. 557, 585, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009)). This standard, as the United States points out, "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." Brief for United States as *Amicus Curiae* 29. And legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid*. (emphasis added).

***279** Here the District Court enunciated a narrow tailoring standard close to the one we have just mentioned. It said that a plan is "narrowly tailored ... when the race-based action taken was *reasonably necessary*" to achieve a compelling interest. 989 F.Supp.2d, at 1307 (emphasis added). And it held that preventing retrogression is a compelling interest. *Id*., at 1306–1307. While we do not here decide whether, given *Shelby County v. Holder,* 570 U.S. ——, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), continued compliance with § 5 remains a compelling interest, we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court's "compelling interest/narrow tailoring" conclusion.

* * *

For these reasons, the judgment of the District Court is vacated. We note that appellants have also raised additional questions in their jurisdictional statements, relating to their one-person, one-vote claims (Caucus) and vote dilution claims (Conference), which were also rejected by the District Court. We do not pass upon these claims. The District Court remains free to reconsider the claims should it find reconsideration appropriate. And the parties are free to raise them, including as modified by the District Court, on any further appeal.

The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

***282** Today, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections. If the Court's destination seems fantastical, just wait until you see the journey.

****1275** Two groups of plaintiffs, the Alabama Democratic Conference and the Alabama Legislative Black Caucus, brought separate challenges to the way in which Alabama drew its state legislative districts following the 2010 census. These cases were consolidated before a three-judge District Court. Even after a full trial, the District Court lamented that "[t]he filings and arguments made by the plaintiffs on these claims were mystifying at best." 989 F.Supp.2d 1227, 1287 (M.D.Ala.2013). Nevertheless, the District Court understood both groups of plaintiffs to argue, as relevant here, only that "the Acts as a whole constitute racial gerrymanders." *Id.,* at 1287. It also understood the Democratic Conference to argue that "Senate Districts 7, 11, 22, and 26 constitute racial gerrymanders," *id.,* at 1288, but held that the Democratic Conference lacked standing to bring "*any* district-specific claims of racial gerrymandering," *id.,* at 1292 (emphasis added). It then found for Alabama on the merits.

The Court rightly concludes that our racial gerrymandering jurisprudence does not allow for statewide claims. *Ante,* at 1264 – 1268. However, rather than holding appellants to the misguided legal theory they presented to the District Court, it allows them to take a mulligan, remanding the case with orders that the District Court consider whether some (all?) of Alabama's 35 majority-minority districts result from impermissible racial gerrymandering. In doing this, the Court disregards the detailed findings and thoroughly reasoned conclusions of the District Court—in particular its determination, reached after watching the development of ***283** the case from complaint to trial, that no appellant proved (or even pleaded) district-specific claims with respect to the majority-minority districts. Worse still, the Court ignores the Democratic Conference's express waiver of these claims before this Court. It does this on the basis of a

few stray comments, cherry-picked from district-court filings that are more Rorschach brief than Brandeis brief, in which the vague outline of what could be district-specific racial-gerrymandering claims begins to take shape only with the careful, post-hoc nudging of appellate counsel.

Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law. It is therefore understandable, if not excusable, that the Court balks at denying merits review simply because appellants pursued a flawed litigation strategy. But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent.

I. The Alabama Democratic Conference

The District Court concluded that the Democratic Conference lacked standing to bring district-specific claims. It did so on the basis of the Conference's failure to present any evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them. 989 F.Supp.2d, at 1292.

A voter has standing to bring a racial-gerrymandering claim only if he votes in a gerrymandered district, or if specific evidence demonstrates that he has suffered the special harms that attend racial gerrymandering. *United States v. Hays,* 515 U.S. 737, 744–745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). However, the Democratic ****1276** Conference only claimed to have "chapters and members ***284** in *almost* all counties in the state." Newton Plaintiffs' Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 3–4 (Democratic Conference Post–Trial Brief) (emphasis added). Yet the Court concludes that this fact, combined with the Conference's self-description as a " 'statewide political caucus' " that endorses candidates for political office, "supports an inference that the organization has members in all of the State's majority-minority districts, other things being equal." *Ante,* at 1269. The Court provides no support for this theory of jurisdiction by illogical inference, perhaps because this Court has rejected other attempts to peddle more-likely-than-not standing. See *Summers v. Earth Island Institute,* 555 U.S. 488, 497, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (rejecting a test for organizational standing that asks "whether, accepting [an] organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury").

The inference to be drawn from the Conference's statements cuts in precisely the opposite direction. What is at issue here is not just counties but voting districts within counties. If the Conference has members in *almost* every county, then there must be counties in which it does not have members; and we have no basis for concluding (or inferring) that those counties do not contain all of the majority-minority voting districts. Moreover, even in those counties in which the Conference does have members, we have no basis for concluding (or inferring) that those members vote in majority-minority districts. The Conference had plenty of opportunities, including at trial, to demonstrate that this was the case, and failed to do so. This failure lies with the Democratic Conference, and the consequences should be borne by it, not by the people of Alabama, who must now shoulder the expense of further litigation and the uncertainty that attends a resuscitated constitutional challenge to their legislative districts.

***285** Incredibly, the Court thinks that "elementary principles of procedural fairness" *require* giving the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial. *Ante,* at 1269 – 1270. It observes that the Conference had no reason to believe it should provide such information because "the State did *not* contest its membership in every district," and the opinion cites an affidavit lodged *with this Court* providing a list of the Conference's members in each majority-minority district in Alabama. *Ibid*. I cannot imagine why the absence of a state challenge would matter. Whether or not there was such a challenge, it was the Conference's responsibility, as "[t]he party invoking federal jurisdiction," to establish standing. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). That responsibility was enforceable, challenge or no, by the court: "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.' " *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230–231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (citations omitted). And because standing is not a "mere pleading requiremen[t] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence

required at the successive stages of the litigation." *Defenders of Wildlife, supra,* at 561, 112 S.Ct. 2130.

The Court points to ****1277** *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 718, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007), as support for its decision to sandbag Alabama with the Democratic Conference's out-of-time (indeed, out-of-court) lodging in this Court. The circumstances in that case, however, are far afield. The organization of parents in that case had established organizational standing in the lower court by showing that it had members with children who would be subject to the school district's "integration tiebreaker," which was applied at ninth grade. Brief for Respondents, ***286** O.T. 2006, No. 05–908, p. 16. By the time the case reached this Court, however, the youngest of these children had entered high school, and so would no longer be subject to the challenged policy. *Ibid.* Accordingly, we accepted a lodging that provided names of additional, younger children in order to show that the organization had not *lost* standing as a result of the long delay that often accompanies federal litigation. Here, by contrast, the Democratic Conference's lodging in the Supreme Court is its first attempt to show that it has members in the majority-minority districts. This is too little, too late.

But that is just the start. Even if the Democratic Conference *had standing to bring* district-specific racial-gerrymandering claims, there remains the question whether it *did* bring them. Its complaint alleged three counts: (1) Violation of § 2 of the Voting Rights Act, (2) Racial gerrymandering in violation of the Equal Protection Clause, and (3) § 1983 violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Complaint in No. 2:12–cv–1081, Doc. 1, pp. 17–18. The racial gerrymandering count alleged that "Alabama Acts 2012–602 and 2012–603 were drawn for the purpose and effect of minimizing the opportunity of minority voters to participate effectively in the political process," and that this "racial gerrymandering by Alabama Acts 2012–602 and 2012–603 violates the rights of Plaintiffs." *Id.,* at 17. It made no reference to specific districts that were racially gerrymandered; indeed, the only particular jurisdictions mentioned *anywhere* in the complaint were Senate District 11, Senate District 22, Madison County Senate Districts, House District 73, and Jefferson and Montgomery County House Districts. None of the Senate Districts is majority-minority. Nor is House District 73. Jefferson County does, admittedly, contain 8 of the 27 majority-minority House Districts in Alabama, and Montgomery County contains another 4, making a total of 12. But they also contain 14 majority-white House Districts ***287** between them. In light of this, it is difficult to understand the Court's statement that appellants' "evidence and ... arguments embody the claim that individual majority-minority districts were racially gerrymandered." *Ante,* at 1266.

That observation would, of course, make sense if the Democratic Conference had developed such a claim in the course of discovery and trial. But in its post-trial Proposed Findings of Fact and Conclusions of Law, the Conference hewed to its original charge of statewide racial gerrymandering—or, rather, it did so as much as it reasonably could without actually proposing that the Court find *any* racial gerrymandering, statewide or otherwise. Instead, the Conference chose only to pursue claims that Alabama violated § 2 of the Voting Rights Act under two theories. See Democratic Conference Post–Trial Brief 91–103 (alleging a violation of the results prong of Voting Rights Act § 2) and 103–124 (alleging a violation of the purpose prong of Voting Rights Act § 2).

To be sure, the Conference employed language and presented factual claims at various points in its 126–page post-trial brief that are evocative of a claim of racial gerrymandering. But in clinging to these ****1278** stray comments to support its conclusion that the Conference made district-specific racial-gerrymandering claims, *ante,* at 1266 – 1267, the Court ignores the context in which these comments appear—the context of a clear Voting Rights Act § 2 claim. Voting Rights Act claims and racial-gerrymandering claims share some of the same elements. See *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 514, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (SCALIA, J., concurring in judgment in part and dissenting in part). Thus, allegations made in the course of arguing a § 2 claim will often be indistinguishable from allegations that would be made in support of a racial-gerrymandering claim. The appearance of such allegations in one of the Conference's briefs might support reversal if this case came to us on appeal from ***288** the District Court's grant of a motion to dismiss. See *Johnson v. City of Shelby,* 574 U.S. ——, ——, 135 S.Ct. 346, 346, 190 L.Ed.2d 309 (2014) (*per curiam*) (noting that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"). But here the District Court held a full trial before concluding that the Conference failed to make or prove any district-specific racial-gerrymandering claims with respect to the majority-minority districts. In this posture, and on this record, I cannot agree with the Court that the

Conference's district-specific evidence, clearly made in the course of arguing a § 2 theory, should be read to give rise to district-specific claims of racial gerrymandering with respect to Alabama's majority-minority districts.

The Court attempts to shift responsibility for the Democratic Conference's ill-fated statewide theory from the Conference to the District Court, implying that it was the "legally erroneous" analysis of the District Court, *ante,* at 1268, rather than the arguments made by the Conference, that conjured this "legal unicorn," *ante,* at 1265 – 1266, so that the Conference did not forfeit the claims that the Court now attributes to it, *ante,* at 1268. I suspect this will come as a great surprise to the Conference. Whatever may have been presented to the District Court, the Conference unequivocally stated in its opening brief: "Appellants challenge Alabama's race-based statewide redistricting policy, *not* the design of any one particular election district." Brief for Appellants in No. 13–1138, p. 2 (emphasis added). It drove the point home in its reply brief: "[I]f the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state's *policy,* not to the design of each particular district one-by-one." Reply Brief in No. 11–1138, p. 7. How could anything be clearer? As the Court observes, the Conference attempted to walk back this unqualified description of its case at oral argument. *Ante,* at 1267 – 1268. Its assertion that what it *really* meant to challenge ***289** was the policy as applied to every district (*not* every majority-minority district, mind you) is not "clarification," *ante,* at 1268, but an entirely new argument—indeed, the same argument it expressly disclaimed in its briefing. "We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief." *Republic of Argentina v. NML Capital, Ltd.,* 573 U.S. ——, ——, n. 2, 134 S.Ct. 2250, 2255, n. 2, 189 L.Ed.2d 234 (2014); we certainly should not do so when the issue is first presented at oral argument.

II. The Alabama Legislative Black Caucus

The Court does not bother to disentangle the independent claims brought by the Black Caucus from those of the Democratic Conference, but it strongly implies that both parties asserted racial-gerrymandering ****1279** claims with respect to Alabama's 35 majority-minority districts. As we have described, the Democratic Conference brought no such claims; and the Black Caucus's filings provide even weaker support for the Court's conclusion.

The Black Caucus complaint contained three counts: (1) Violation of One Person, One Vote, see *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); (2) Dilution and Isolation of Black Voting Strength in violation of § 2 of the Voting Rights Act; and (3) Partisan Gerrymandering. Complaint in No. 2:12–cv–691, Doc. 1, pp. 15–22. The failure to raise *any* racial-gerrymandering claim was not a mere oversight or the consequence of inartful pleading. Indeed, in its amended complaint the Black Caucus specifically cited this Court's leading racial-gerrymandering case for the proposition that "traditional or neutral districting principles may not be subordinated in a dominant fashion by *either racial or partisan interests* absent a compelling state interest for doing so." Amended Complaint in No. 2:12–cv–691, Doc. 60, p. 23 (citing *Shaw v. Reno,* 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); emphasis added). This quote appears in the first paragraph under the "Partisan Gerrymandering" heading, and claims of subordination ***290** to *racial* interests are notably absent from the Black Caucus complaint.

Racial gerrymandering was not completely ignored, however. In a brief introductory paragraph to the amended complaint, before addressing jurisdiction and venue, the Black Caucus alleged that "Acts 2012–602 and 2012–603 are racial gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution with both the purpose and effect of minimizing black voting strength and isolating from influence in the Alabama Legislature legislators chosen by African Americans." Amended Complaint, at 3. This was the first and last mention of racial gerrymandering, and like the Democratic Conference's complaint, it focused exclusively on the districting maps as a whole rather than individual districts. Moreover, even this allegation appears primarily concerned with the use of racially motivated districting as a means of violating one person, one vote (by splitting counties), and § 2 of the Voting Rights Act (by minimizing and isolating black voters and legislators).

To the extent the Black Caucus cited particular districts in the body of its complaint, it did so only with respect to its enumerated one-person, one-vote, Voting Rights Act, and partisan-gerrymandering counts. See, *e.g., id.,* at 13–14 (alleging that the "deviation restriction and disregard of the 'whole county' requirements ... facilitated the Republican majority's efforts to gerrymander the district boundaries in Acts 2012–602 and 2012–603 for partisan purposes.

By packing the majority-black House and Senate districts, the plans remove reliable Democratic voters from adjacent majority-white districts ..."); *id.,* at 36 ("The partisan purpose of [one] gerrymander was to remove predominately black Madison County precincts to SD 1, avoiding a potential crossover district"); *id.,* at 44–45 (asserting that "splitting Jefferson County among 11 House and Senate districts" and "increasing the size of its local legislative delegation and the ***291** number of other counties whose residents elect members" of the delegation "dilut[es] the votes of Jefferson County residents" by diminishing their ability to control county-level legislation in the state legislature). And even these claims were made with a statewide scope in mind. *Id.,* at 55 ("Viewed in their entirety, the plans in Acts 2012–602 and 2012–603 have the purpose and effect of minimizing the opportunities ****1280** for black and white voters who support the Democratic Party to elect candidates of their choice").

Here again, discovery and trial failed to produce any clear claims with respect to the majority-minority districts. In a curious inversion of the Democratic Conference's practice of pleading racial gerrymandering and then effectively abandoning the claims, the Black Caucus, which failed to plead racial gerrymandering, did clearly advance the theory after the trial. See Alabama Legislative Black Caucus Plaintiffs' Post–Trial Proposed Findings of Fact and Conclusions of Law in No. 2:12–cv–691, Doc. 194, pp. 48–51 (Black Caucus Post–Trial Brief). The Black Caucus asserted racial-gerrymandering claims in its post-trial brief, but they all had a clear statewide scope. It charged that Alabama "started their line drawing with the majority-black districts" so as to maximize the size of their black majorities, which "impacted the drawing of majority-white districts in nearly every part of the state." *Id.,* at 48–49. "[R]ace was the predominant factor in drafting both plans," *id.,* at 49, which "drove nearly every districting decision," "dilut [ing] the influence of black voters in the majority-white districts," *id.,* at 50.

The Black Caucus did present district-specific evidence in the course of developing its other legal theories. Although this included evidence that Alabama manipulated the racial composition of certain majority-minority districts, it also included evidence that Alabama manipulated racial distributions with respect to the districting maps as a whole, *id.,* at 6 ("Maintaining the same high black percentages had a ***292** predominant impact on the entire plan"), and with respect to majority-white districts, *id.,* at 10–11 ("Asked why [majority-white] SD 11 was drawn in a semi-donut-shape that splits St. Clair, Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts"), and 43–44 ("Sen. Irons' quick, 'primative' [*sic*] analysis of the new [majority-white] SD 1 convinced her that it was designed to 'shed' the minority population of Sen. Sanford's [majority-white] SD 7 to SD 1" in order to "crack a minority influence district"). The Black Caucus was attacking the legislative districts from every angle. Nothing gives rise to an inference that it ever homed in on majority-minority districts—or, for that matter, any particular set of districts. Indeed, the fair reading of the Black Caucus's filings is that it was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.

III. Conclusion

Frankly, I do not know what to make of appellants' arguments. They are pleaded with such opacity that, squinting hard enough, one can find them to contain just about anything. This, the Court believes, justifies demanding that the District Court go back and squint harder, so that it may divine some new means of construing the filings. This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past. See, *e.g.,* Amended Complaint and Motion for Preliminary and Permanent Injunction in ***293** *Cromartie v. Hunt,* No. 4:96–cv–104 (EDNC), Doc. 21, p. 9 ("Under the ****1281** March 1997 redistricting plan, the Twelfth District and First District have boundaries which were drawn pursuant to a predominantly racial motivation," which were "the fruit of [earlier] racially gerrymandered plans"). Even the complaint in *Shaw,* which established a cause of action for racial gerrymandering, displayed greater lucidity than appellants', alleging that defendants "creat[ed] two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota" "totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest." Complaint and Motion for Preliminary and Permanent Injunction and for

Temporary Restraining Order in *Shaw v. Barr,* No. 5:92–cv–202 (EDNC), Doc. 1, pp. 11–12.

The Court seems to acknowledge that appellants never focused their racial-gerrymandering claims on Alabama's majority-minority districts. While remanding to consider whether the majority-minority districts were racially gerrymandered, it admits that plaintiffs "basically claim that the State, in adding so many new minority voters to majority-minority districts (*and to others*), went too far." *Ante,* at 1263 (emphasis added). It further concedes that appellants "relied heavily upon statewide evidence," and that they "also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well." *Ante,* at 1267.

The only reason I see for the Court's selection of the majority-minority districts as the relevant set of districts for the District Court to consider on remand is that this was the set chosen by appellants after losing on the claim they actually presented in the District Court. By playing along with appellants' choose-your-own-adventure style of litigation, willingly turning back the page every time a strategic decision leads to a dead-end, the Court discourages careful litigation and punishes defendants who are denied both notice and ***294** repose. The consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case.

Accordingly, I dissent.

Justice THOMAS, dissenting.

"[F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder v. Hall,* 512 U.S. 874, 907, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). These consolidated cases are yet another installment in the "disastrous misadventure" of this Court's voting rights jurisprudence. *Id.,* at 893, 114 S.Ct. 2581. We have somehow arrived at a place where the parties agree that Alabama's legislative districts should be fine-tuned to achieve some "optimal" result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the "best" racial quota.

I join Justice SCALIA's dissent. I write only to point out that, as this case painfully illustrates, our jurisprudence in this area continues to be infected with error.

I

The Alabama Legislature faced a difficult situation in its 2010 redistricting efforts. It began with racially segregated district maps that were inherited from previous decades. The maps produced by the 2001 redistricting contained 27 majority-black House districts and 8 majority-black Senate districts—both at the time they ****1282** were drawn, App. to Juris. Statement 47–48, and at the time of the 2010 Census, App. 103–108. Many of these majority-black districts were over 70% black when they were drawn in 2001, and even more were over 60% black. App. to Juris. Statement 47–48. Even after the 2010 Census, the population remained above 60% black in the majority of districts. App. 103–108.

***295** Under the 2006 amendments to § 5 of the Voting Rights Act of 1965, Alabama was also under a federal command to avoid drawing new districts that would "have the effect of diminishing the ability" of black voters "to elect their preferred candidates of choice." 52 U.S.C. § 10304(b). To comply with § 5, the legislature adopted a policy of maintaining the same percentage of black voters within each of those districts as existed in the 2001 plans. See*ante,* at 1270 – 1271. This, the districting committee thought, would preserve the ability of black voters to elect the same number of preferred candidates. App. to Juris. Statement 174–175. The Department of Justice (DOJ) apparently agreed. Acting under its authority to administer § 5 of the Voting Rights Act, the DOJ precleared Alabama's plans.[1] *Id.,* at 9.

Appellants—including the Alabama Legislative Black Caucus and the Alabama Democratic Conference—saw matters differently. They sued Alabama, and on appeal they argue that the State's redistricting plans are racially gerrymandered because many districts are highly packed with black voters. According to appellants, black voters would have more voting power if they were spread over more districts rather than concentrated in the same number of districts as in previous decades. The DOJ has entered the fray in support of appellants, arguing that the State's redistricting maps fail strict scrutiny because the State focused too heavily on a single racial characteristic—the number of black voters in majority-minority districts—which potentially resulted in impermissible packing of black voters.

***296** Like the DOJ, today's majority sides with appellants, faulting Alabama for choosing the wrong percentage of blacks in the State's majority-black districts, or at least for arriving at that percentage using the wrong reasoning. In doing so, the Court—along with appellants and the DOJ—exacerbates a problem many years in the making. It seems fitting, then, to trace that history here. The practice of creating highly packed—"safe"—majority-minority districts is the product of our erroneous jurisprudence, which created a system that forces States to segregate voters into districts based on the color of their skin. Alabama's current legislative districts have their genesis in the "max-black" policy that the DOJ itself applied to § 5 throughout the 1990's and early 2000's. The 2006 amendments to § 5 then effectively locked in place Alabama's max-black districts that were established during the 1990's and 2000's. These three problems—a jurisprudence requiring segregated districts, the distortion created by the DOJ's max-black policy, and the ossifying effects of the 2006 amendments—are the ****1283** primary culprits in this case, not Alabama's redistricting policy. Nor does this Court have clean hands.

II

This Court created the current system of race-based redistricting by adopting expansive readings of § 2 and § 5 of the Voting Rights Act. Both § 2 and § 5 prohibit States from implementing voting laws that "den[y] or abridg[e] the right to vote on account of race or color." §§ 10304(a), 10301(a). But both provisions extend to only certain types of voting laws: any "voting qualification or prerequisite to voting, or standard, practice, or procedure." *Ibid.* As I have previously explained, the terms " 'standard, practice, or procedure' ... refer only to practices that affect minority citizens' access to the ballot," such as literacy tests. *Holder,* 512 U.S. at 914, 114 S.Ct. 2581 (opinion concurring in judgment). They do not apply to "[d]istricting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted." *Ibid.* Yet this Court has adopted ***297** far-reaching interpretations of both provisions, holding that they encompass legislative redistricting and other actions that might "dilute" the strength of minority votes. See generally *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (§ 2 "vote dilution" challenge to legislative districting plan); see also *Allen v. State Bd. of Elections,* 393 U.S. 544, 583–587, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (Harlan, J., concurring in part and dissenting in part).

The Court's interpretation of § 2 and § 5 have resulted in challenge after challenge to the drawing of voting districts. See, *e.g., Bartlett v. Strickland,* 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009); *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006); *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003); *Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (*Bossier II*); *Hunt v. Cromartie,* 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999); *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (*Bossier I*); *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); *Holder, supra* ; *Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Growe v. Emison,* 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*); *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993).

The consequences have been as predictable and as they are unfortunate. In pursuing "undiluted" or maximized minority voting power, "we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." *Holder, supra,* at 892, 114 S.Ct. 2581 (THOMAS, J., concurring in judgment). Section 5, the provision at issue here, has been applied to require States that redistrict to maintain the number of pre-existing majority-minority districts, in which minority voters make up a large enough portion of the population to be able to elect their candidate of choice. See, *e.g., Miller, supra,* at 923–927, 115 S.Ct. 2475 (rejecting the DOJ's policy of requiring States to increase the number of majority-black districts because maintaining the same number of majority-black districts would not violate § 5).

****1284** ***298** In order to maintain these "racially 'safe burroughs,' " States or courts must perpetually "divid[e] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands." *Holder, supra,* at 905, 114 S.Ct. 2581 (opinion of THOMAS, J.) (internal quotation marks omitted). The assumptions underlying this practice of creating and maintaining "safe minority districts"—"that members of [a] racial group must

think alike and that their interests are so distinct that they must be provided a separate body of representatives"—remain "repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.,* at 905–906, 114 S.Ct. 2581. And, as predicted, the States' compliance efforts have "embroil[ed] the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created." *Id.,* at 905, 114 S.Ct. 2581. It is this fateful system that has produced these cases.

III

A

In tandem with our flawed jurisprudence, the DOJ has played a significant role in creating Alabama's current redistricting problem. It did so by enforcing § 5 in a manner that required States, including Alabama, to create supermajority-black voting districts or face denial of pre-clearance.

The details of this so-called "max-black" policy were highlighted in federal court during Georgia's 1991 congressional redistricting. See *Johnson v. Miller,* 864 F.Supp. 1354, 1360–1361 (S.D.Ga.1994). On behalf of the Black Caucus of the Georgia General Assembly, the American Civil Liberties Union (ACLU) submitted a redistricting proposal to the Georgia Legislature that became known as the "max-black plan." *Id.,* at 1360. The ACLU's map created two new "black" districts and "further maximized black voting strength by pushing the percentage of black voters within its majority-black districts as high as possible." *Id.,* at 1361 (internal quotation marks omitted).

***299** The DOJ denied several of Georgia's proposals on the ground that they did not include enough majority-black districts. *Id.,* at 1366. The plan it finally approved was substantially similar to the ACLU's max-black proposal, *id.,* at 1364–1366, creating three majority-black districts, with total black populations of 56.63%, 62.27%, and 64.07%, *id.,* at 1366, and n. 12.[2]

Georgia was not the only State subject to the DOJ's maximization policy. North Carolina, for example, submitted a congressional redistricting plan after the 1990 Census, but the DOJ rejected it because it did not create a new majority-minority district, and thus "appear[ed] to minimize minority voting strength." *Shaw v. Barr,* 808 F.Supp. 461, 463–464 (E.D.N.C.1992) (quoting Letter from John R. Dunne, Assistant Attorney General of N. C., Civil Rights Div., to Tiare B. Smiley, Special Deputy Attorney General of N.C. 4 (Dec. 18, 1991)). The DOJ likewise pressured Louisiana to create a new majority-black district when the State sought approval of its congressional redistricting plan following the 1990 Census. See *Hays v. Louisiana,* 839 F.Supp. 1188, 1190 (W.D.La.1993), vacated on other grounds by ****1285** *Louisiana v. Hays,* 512 U.S. 1230, 114 S.Ct. 2731, 129 L.Ed.2d 853 (1994).

Although we eventually rejected the DOJ's max-black policy, see *Miller, supra,* at 924–927, 115 S.Ct. 2475, much damage to the States' congressional and legislative district maps had already been done. In those States that had enacted districting plans in accordance with the DOJ's max-black policy, the prohibition on retrogression under § 5 meant that the legislatures were effectively required to maintain those max-black plans during any subsequent redistricting. That is what happened in Alabama.

***300** B

Alabama's 2010 redistricting plans were modeled after max-black-inspired plans that the State put in place in the 1990's under the DOJ's max-black policy. See generally *Kelley v. Bennett,* 96 F.Supp.2d 1301 (M.D.Ala.2000), vacated on other grounds by *Sinkfield v. Kelley,* 531 U.S. 28, 121 S.Ct. 446, 148 L.Ed.2d 329 (2000) (*per curiam*).

Following the 1990 Census, the Alabama Legislature began redrawing its state legislative districts. After several proposals failed in the legislature, a group of plaintiffs sued, and the State entered into a consent decree agreeing to use the "Reed–Buskey" plan. 96 F.Supp.2d, at 1309. The primary designer of this plan was Dr. Joe Reed, the current chairman of appellant Alabama Democratic Conference. According to Dr. Reed, the previous plan from the 1980's was not "fair" because it did not achieve the number of "black-preferred" representatives that was proportionate to the percentage of blacks in the population. *Id.,* at 1310. And because of the DOJ's max-black policy, "it was widely assumed that a state could (and, according to DOJ, had to) draw district lines with the primary intent of maximizing election of black officials." *Id.,* at 1310, n. 14. "Dr. Reed thus set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts." *Id.,* at 1310. Illustrating this strategy,

Alabama's letter to the DOJ seeking preclearance of the Reed–Buskey plan "emphasize[d] the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature," *ibid.,* n. 14 and boasted that the plan had created four new majority-black districts and two additional majority-black Senate districts. *Ibid.*

Dr. Reed populated these districts with a percentage of black residents that achieved an optimal middle ground—a "happy medium"—between too many and too few. *Id.,* at 1311. Twenty-three of the twenty-seven majority-black House districts were between 60% and 70% black under ***301** Reed's plan, *id.,* at 1311, and Senate District 26—one of the districts at issue today—was pushed from 65% to 70% black. *Id.,* at 1315.[3] A District Court struck down several districts created in the Reed–Buskey plan as unconstitutionally based on race. *Id.,* at 1324. This Court reversed, however, holding that the plaintiffs lacked standing because they did not ****1286** live in the gerrymandered districts. *Sinkfield, supra,* at 30–31, 121 S.Ct. 446.

The Reed–Buskey plan thus went into effect and provided the template for the State's next redistricting efforts in 2001. See *Montiel v. Davis,* 215 F.Supp.2d 1279, 1282 (S.D.Ala.2002). The 2001 maps maintained the same number of majority-black districts as the Reed–Buskey plan had created: 27 House districts and 8 Senate districts. *Ibid*. And "to maintain the same relative percentages of black voters in those districts," the legislature "redrew the districts by shifting more black voters into the majority-black districts." App. to Juris. Statement 4. The State's letters requesting preclearance of the 2001 plans boasted that the maps maintained the same number of majority-black districts and the same (or higher) percentages of black voters within those districts, other than "slight reductions" that were "necessary to satisfy other legitimate, nondiscriminatory redistricting considerations." Letter from William H. Pryor, Alabama Attorney General, to Voting Section Chief, Civil Rights Division, Department of Justice 6–7 (Aug. 14, 2001) (Senate districts); Letter from William H. Pryor, Alabama Attorney General, to Voting ***302** Section Chief, Civil Rights Division, Department of Justice 7, 9 (Sept. 4, 2001) (House districts).

Section 5 tied the State to those districts: Under this Court's § 5 precedents, States are prohibited from enacting a redistricting plan that "would lead to a retrogression in the position of racial minorities." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). In other words, the State could not retrogress from the previous plan if it wished to comply with § 5.

IV

Alabama's quandary as it attempted to redraw its legislative districts after 2010 was exacerbated by the 2006 amendments to § 5. Those amendments created an inflexible definition of "retrogression" that Alabama understandably took as requiring it to maintain the same percentages of minority voters in majority-minority districts. The amendments thus provide the last piece of the puzzle that explains why the State sought to maintain the same percentages of blacks in each majority-black district.

Congress passed the 2006 amendments in response to our attempt to define "retrogression" in *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428. Prior to that decision, practically any reapportionment change could "be deemed 'retrogressive' under our vote dilution jurisprudence by a court inclined to find it so." *Bossier I,* 520 U.S., at 490–491, 117 S.Ct. 1491 (THOMAS, J., concurring). "[A] court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts)." *Id.,* at 491, 117 S.Ct. 1491. Our § 5 jurisprudence thus "inevitably force[d] the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments courts are ill equipped to make." *Id.,* at 492, 117 S.Ct. 1491.

We tried to pull the courts and the DOJ away from making these sorts of judgments in *Georgia v. Ashcroft, supra*. Insofar as § 5 applies to the drawing of voting districts, we ***303** held that a District Court had wrongly rejected Georgia's reapportionment plan, and we adopted a retrogression standard that gave States flexibility in determining the percentage of black voters in each district. *Id.,* at 479–481, 123 S.Ct. 2498. As we explained, "a State may choose to create a certain number of 'safe' districts, in which it is highly ****1287** likely that minority voters will be able to elect the candidate of their choice." *Id.,* at 480, 123 S.Ct. 2498. Alternatively, "a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Ibid.* We noted that "spreading out minority voters over a greater number of districts creates more districts in which minority voters may

have the opportunity to elect a candidate of their choice," even if success is not guaranteed, and even if it diminished the chance of electing a representative in some districts. *Id.,* at 481, 123 S.Ct. 2498. Thus, States would be permitted to make judgments about how best to prevent retrogression in a minority group's voting power, including assessing the range of appropriate minority population percentages within each district. *Id.,* at 480–481, 123 S.Ct. 2498.

In response, Congress amended § 5 and effectively overruled *Georgia v. Ashcroft*. See 120 Stat. 577. The 2006 amendments added subsection (b), which provides:

> "Any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color ... to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of ... this section." 52 U.S.C. § 10304(b). See § 5, 120 Stat. 577.

Thus, any change that has the effect of "diminishing the ability" of a minority group to "elect their preferred candidate of choice" is retrogressive.

***304** Some were rightly worried that the 2006 amendments would impose too much inflexibility on the States as they sought to comply with § 5. Richard Pildes, who argued on behalf of the Alabama Democratic Conference in these cases, testified in congressional hearings on the 2006 amendments. He explained that*Georgia v. Ashcroft* "recognizes room ... for some modest flexibility in Section 5," and warned that if "Congress overturns *Georgia v. Ashcroft,* it will make even this limited amount of flexibility illegal." Hearing on the Continuing Need for Section 5 Pre–Clearance before the Senate Committee on the Judiciary, 109th Congress, 2d Sess., pp. 11–12 (2006). Pildes also observed that the proposed standard of "no 'diminished ability to elect' ... has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters' interests." *Id.,* at 12. Although this testimony says nothing about how § 5 ought to be interpreted, it tells us that the Alabama Democratic Conference's own attorney believes that the State was subject to a "rigi[d]" and "mechanical" standard in determining the number of black voters that must be maintained in a majority-black district.

All of this history explains Alabama's circumstances when it attempted to redistrict after the 2010 Census. The legislature began with the max-black district maps that it inherited from the days of Reed–Buskey. Using these inherited maps, combined with population data from the 2010 Census, many of the State's majority-black House and Senate districts were between 60% and 70% black, and some were over 70%. App. to Juris. Statement 103–108. And the State was prohibited from drawing new districts that would "have the effect of diminishing the ability" of blacks "to elect their preferred candidates of choice." § 10304(b). The legislature ****1288** thus adopted a policy of maintaining the same number of majority-black districts and roughly the same percentage of blacks within each of those districts. See *ante,* at 1270 – 1271.

***305** The majority faults the State for taking this approach. I do not pretend that Alabama is blameless when it comes to its sordid history of racial politics. But, today the State is not the one that is culpable. Its redistricting effort was indeed tainted, but it was tainted by our voting rights jurisprudence and the uses to which the Voting Rights Act has been put. Long ago, the DOJ and special-interest groups like the ACLU hijacked the Act, and they have been using it ever since to achieve their vision of maximized black electoral strength, often at the expense of the voters they purport to help. States covered by § 5 have been whipsawed, first required to create " safe" majority-black districts, then told not to "diminis[h]" the ability to elect, and now told they have been too rigid in preventing any "diminishing" of the ability to elect. *Ante,* at 1271 – 1272.

Worse, the majority's solution to the appellants' gerrymandering claims requires States to analyze race even *more* exhaustively, not less, by accounting for black voter registration and turnout statistics. *Ante,* at 1271 – 1272. The majority's command to analyze black voting patterns en route to adopting the "correct" racial quota does nothing to ease the conflict between our color-blind Constitution and the "consciously segregated districting system" the Court has required in the name of equality. *Holder,* 512 U.S., at 907, 114 S.Ct. 2581. Although I dissent today on procedural grounds, I also continue to disagree with the Court's misguided and damaging jurisprudence.

Appendix A

V

Majority-minority District	Instances in Plaintiffs' Post-Trial Briefs Arguing that Traditional Race-Neutral Districting Principles Were Subordinated to Race
HOUSE	
HD 52, 54–60	Caucus Post-Trial Brief 30; Conference Post-Trial Brief 56–57, 60, 82–83, 121–122
HD 53	Caucus Post-Trial Brief 33–35; Conference Post-Trial Brief 59–61
HD 68	Conference Post-Trial Brief 70, 84–85
HD 69	Conference Post-Trial Brief 66–67, 85
HD 70	Conference Post-Trial Brief 85
HD 71	Conference Post-Trial Brief 83–85
HD 72	Caucus Post-Trial Brief 40; Conference Post-Trial Brief 83–85
HD 76–78	Conference Post-Trial Brief 65–66
SENATE*	
SD 18–20	Conference Post-Trial Brief 56–59
SD 23–24	Caucus Post-Trial Brief 9–10, 40; Conference Post-Trial Brief 69–74
SD 33	Caucus Post-Trial Brief 13–14

* Senate District 26 excluded from this list

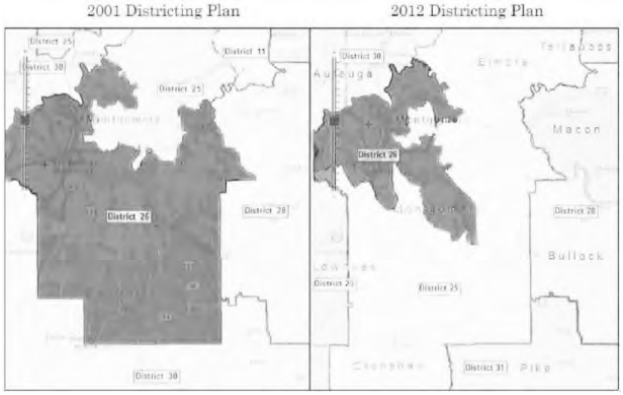
**1289 Appendix B

State's Use of Incorrect Retrogression Standard

The following citations reflect instances in either the District Court opinion or in the record showing that the State believed that § 5 forbids, not just *substantial* reductions, but *any* reduction in the percentage of black inhabitants of a majority-minority district.

District Court Findings	989 F. Supp. 2d, at 1307; *id.*, at 1273; *id.*, at 1247	
Evidence in the Record	Senator Gerald Dial	1 Tr. 28–29, 36–37, 55, 81, 96, 136, 138
		Dial Deposition 17, 39–41, 81, 100
	Representative Jim McClendon	3 Tr. 222
	Randolph Hinaman	3 Tr. 118–119, 145–146, 149–150, 164, 182–183, 187
		Hinaman Deposition 23–24, 101; but see *id.*, at 24–25, 101

**1290 Appendix C



All Citations

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Footnotes

1 Together with No. 13–1138, *Alabama Democratic Conference et al.* v. Alabama *et al.*, also on appeal from the same court.

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

1 As I have previously explained, § 5 of the Voting Rights Act is unconstitutional. See *Shelby County v. Holder*, 570 U.S. ——, ——, 133 S.Ct. 2612, 2631, 186 L.Ed.2d 651 (2013) (THOMAS, J., concurring). And § 5 no longer applies to Alabama after the Court's decision in *Shelby County*. See *id.*, at 2631 (majority opinion). Because the appellants' claims are not properly before us, however, I express no opinion on whether compliance with § 5 was a compelling governmental

purpose at the time of Alabama's 2012 redistricting, nor do I suggest that Alabama would necessarily prevail if appellants had properly raised district-specific claims.

2 The District Court found it "unclear whether DOJ's maximization policy was driven more by [the ACLU's] advocacy or DOJ's own misguided reading of the Voting Rights Act," and it concluded that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." *Johnson v. Miller,* 864 F.Supp. 1354, 1368 (S.D.Ga.1994).

3 In this litigation, Dr. Reed and the Alabama Democratic Conference argue that the percentage of black residents needed to maintain the ability to elect a black-preferred candidate is lower than it was in the 2000's because black participation has increased over the last decade. Brief for Appellants in No. 13–1138, pp. 39–40. Although appellants disclaim any argument that the State must achieve an optimal percentage of black voters in majority-black districts, *id.,* at 35, it is clear that that is what they seek: a plan that maximizes voting strength by maintaining "safe" majority-minority districts while also spreading black voters into other districts where they can influence elections. *Id.,* at 17–18.

144 S.Ct. 1221
Supreme Court of the United States.

Thomas C. ALEXANDER, in his official Capacity as President of the South Carolina Senate, et al., Appellants
v.
The SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.

No. 22-807
|
Argued October 11, 2023
|
Decided May 23, 2024

Synopsis

Background: Voter and civil rights organization brought action against state officials, challenging on equal protection grounds the validity of South Carolina's congressional redistricting plan. A three-judge panel of the United States District Court for the District of South Carolina, 649 F.Supp.3d 177, granted judgment and permanent injunctive relief to plaintiffs as to one congressional district and granted judgment to defendants as to two congressional districts. Defendants filed direct appeal, and the Supreme Court noted its probable jurisdiction. The three-judge District Court, 2024 WL 1327340, granted in part and denied in part defendants' motion to stay the injunction.

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

[1] finding of racial predominance, based on direct evidence that state legislature drew the challenged congressional district with racial target, was clearly erroneous;

[2] finding of racial predominance, based on circumstantial evidence that mapmaker and others viewed racial data, was clearly erroneous;

[3] finding of racial predominance, based on expert reports, was clearly erroneous; and

[4] finding of racial predominance, without adverse inference against plaintiffs based on their failure to provide an alternative map, was clearly erroneous.

Reversed in part and remanded in part.

Chief Justice Roberts and Justices Gorsuch, Kavanaugh, and Barrett joined, and Justice Thomas joined in part.

Justice Thomas filed an opinion concurring in part.

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

West Headnotes (45)

[1] **Constitutional Law** Justiciability
Constitutional Law Electoral districts and gerrymandering
United States Equality of representation and discrimination; Voting Rights Act

Claims that a state legislature's map for congressional districts is an unconstitutional partisan gerrymander are not justiciable in federal court, and so as far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in redistricting, while in contrast, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subject to strict scrutiny for an equal protection violation and may be held unconstitutional as a racial gerrymander. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

A party challenging a state legislature's map for congressional districts, as being a racial gerrymander in violation of equal protection, must disentangle race and politics if it wishes to

prove that the legislature was motivated by race as opposed to partisanship, because as far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in congressional redistricting. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

United States Power and duty to apportion

Congressional redistricting constitutes a traditional domain of state legislative authority, but the Fourteenth Amendment's Equal Protection Clause introduces one constraint by prohibiting a State from engaging in a racial gerrymander unless it can satisfy strict scrutiny, so federal courts, given the complex interplay of forces that enter a legislature's redistricting calculus, must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race, and such caution is necessary because federal-court review of redistricting legislation represents a serious intrusion on the most vital of local functions. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

1 Case that cites this headnote

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

When a challenger asserts that a state legislature's map for congressional districts is a racial gerrymander in violation of equal protection, the challenger, to untangle impermissible race considerations from permissible considerations, must to show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

When a challenger asserts that a state legislature's map for congressional districts is a racial gerrymander in violation of equal protection, the challenger, to untangle impermissible race considerations from permissible considerations by showing that race was the predominant factor, must prove that the State subordinated race-neutral districting criteria such as compactness, contiguity, and core preservation, to racial considerations, and that is because it may otherwise be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

Racial considerations predominate, so that a state legislature's map for congressional districts is subject to strict scrutiny for racial gerrymandering in violation of equal protection, when race was the criterion that, in the State's view, could not be compromised in the drawing of district lines. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

A challenger can establish the predominance of racial considerations, so that a state legislature's map for congressional districts is subject to strict scrutiny for racial gerrymandering in violation of equal protection, by showing that the legislature used race as a proxy for political interests. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

United States Judicial review and enforcement

A showing of the predominance of racial considerations, so that a state legislature's map for congressional districts is subject to strict scrutiny for racial gerrymandering in violation

of equal protection, can be made through some combination of direct and circumstantial evidence. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

1 Case that cites this headnote

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

United States Judicial review and enforcement

Direct evidence of the predominance of racial considerations, so that a state legislature's map for congressional districts is subject to strict scrutiny for racial gerrymandering in violation of equal protection, may come in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines, and such concessions are not uncommon because States often admit to considering race for the purpose of satisfying Supreme Court precedent interpreting the VRA. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301 et seq.

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

United States Judicial review and enforcement

Even in the absence of direct evidence of predominance of racial considerations for a state legislature's map for congressional districts, which is challenged as a racial gerrymander in violation of equal protection, it is possible that in rare instances racial predominance can be shown through circumstantial evidence that a district's shape is so bizarre on its face that it discloses a racial design absent any alternative explanation. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

United States Judicial review and enforcement

Showing the predominance of race, so that a state legislature's map for congressional districts is subject to strict scrutiny for racial gerrymandering in violation of equal protection, solely on basis of circumstantial evidence is especially difficult when the State raises a partisan-gerrymandering defense, and that is because partisan gerrymanders and racial gerrymanders are capable of yielding similar oddities in a district's boundaries when there is a high correlation between race and partisan preference. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

2 Cases that cite this headnote

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

A state legislature may engage in political gerrymandering for its map for congressional districting, without violating equal protection as a racial gerrymander, even if it so happens that the most loyal voters for a political party happen to be Black and even if the State is conscious of that fact. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

United States Judicial review and enforcement

A State's partisan-gerrymandering defense, when the state legislature's map for congressional districts is challenged as a racial gerrymander in violation of equal protection, raises special problems for challengers who rely on circumstantial evidence of the predominance of race, and to prevail, the challengers must disentangle race from politics by proving that the former drove a district's lines, and that means, among other things, ruling out the competing explanation that political considerations dominated the legislature's redistricting efforts, because if either politics or race could explain a district's contours, the

plaintiff has not cleared its bar. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

3 Cases that cite this headnote

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

United States Judicial review and enforcement

Without an alternative map showing that a rational legislature sincerely driven by its professed partisan goals would have drawn a different map with greater racial balance, it is difficult for plaintiffs who challenge, based on circumstantial evidence, a state legislature's map for congressional districts as a racial gerrymander in violation of equal protection to defeat the starting presumption by federal courts that the legislature acted in good faith. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

1 Case that cites this headnote

[15] **Constitutional Law** Equal protection

Presumption of legislative good faith, when a state legislature's map for congressional districts is challenged as a racial gerrymander in violation of equal protection, directs federal district courts to draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions, and this approach ensures that when racial gerrymandering is found, race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

2 Cases that cite this headnote

[16] **Constitutional Law** Equal protection

Federal courts' presumption of legislative good faith when a state legislature's map for congressional districts is challenged as a racial gerrymander in violation of equal protection reflects the Federal Judiciary's due respect for the judgment of state legislators, who are bound by an oath to follow the Constitution. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[17] **Constitutional Law** Equal protection

Federal courts' presumption of legislative good faith when a state legislature's map for congressional districts is challenged as a racial gerrymander in violation of equal protection is justified because when a federal court finds that race drove a legislature's districting decisions, it is declaring that the legislature engaged in offensive and demeaning conduct that bears an uncomfortable resemblance to political apartheid, and federal courts should not be quick to hurl such accusations at the political branches. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

1 Case that cites this headnote

[18] **Constitutional Law** Equal protection

Federal courts' presumption of legislative good faith when a state legislature's map for congressional districts is challenged as a racial gerrymander in violation of equal protection reflects that federal courts must be wary of plaintiffs who seek to transform federal courts into weapons of political warfare that will deliver victories that eluded them in the political arena. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[19] **Constitutional Law** Equal protection

Constitutional Law Electoral districts and gerrymandering

If a plaintiff, who challenges a state legislature's map for congressional districts as a racial gerrymander in violation of equal protection, can demonstrate that race drove the mapping of district lines, then the burden shifts to the State to prove that the map can overcome the daunting requirements of strict scrutiny. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

Under strict scrutiny for an equal protection violation, when a state legislature's map for congressional districts is challenged as a racial gerrymander in violation of equal protection, courts begin by asking whether the State's decision to sort voters on the basis of race furthers a compelling governmental interest, and they then determine whether the State's use of race is narrowly tailored—i.e., necessary—to achieve that interest. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

The strict scrutiny standard for an equal protection violation, when a state legislature's map for congressional districts is challenged as a racial gerrymander, is extraordinarily onerous because the Fourteenth Amendment was designed to eradicate race-based state action. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

Challengers to state legislature's map for congressional districts, who alleged that the plan constituted racial gerrymandering in violation of equal protection, bore the burden of showing that the legislature subordinated traditional race-neutral districting principles to racial considerations. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[23] **Federal Courts** Review of federal district courts

Supreme Court would review for clear error three-judge District Court's factual findings, on State's direct appeal from District Court's judgment that a congressional district drawn by state legislature constituted a racial gerrymander in violation of equal protection, and under clear-error standard of review, Supreme Court could not set aside those findings unless, after examining the entire record, it was left with the definite and firm conviction that a mistake had been committed. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

6 Cases that cite this headnote

[24] **Federal Courts** Scope and Extent of Review

If a trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard of review for factual findings.

1 Case that cites this headnote

[25] **Federal Courts** Review of federal district courts

Supreme Court would exercise special care in reviewing the relevant findings of fact by three-judge District Court, on State's direct appeal from District Court's judgment that a congressional district drawn by state legislature constituted a racial gerrymander in violation of equal protection; there was special danger that a misunderstanding of what the law required might infect what was labeled a finding of fact because standard of proof that District Court was required to apply, i.e., racial-predominance test, had very substantial legal component that took account of Supreme Court's prior relevant decisions, and application of test called for particular care because State contended that driving force in its critical districting decisions (namely, partisanship) was factor closely correlated with race. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

For successful challenge to a State's congressional redistricting plan as being a racial gerrymander in violation of equal protection, it is not enough for a challenger to show that race was a mere factor in the State's redistricting calculus;

rather, the challenger must show that race played a predominant role in shaping a district's lines. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[27] **Stipulations** Matters which may be subject of stipulation

Parties can stipulate to issues of fact, but they cannot by stipulation amend the law.

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

Predominance of race in shaping challenged congressional district's lines, rather than a showing that race was a mere factor, was the applicable constitutional standard, on claim of state legislature's racial gerrymandering in violation of equal protection, though State denied relying at all on racial data; State could stipulate to issues of fact but it could not stipulate to amending the law, and it would be uniquely perverse to deprive State of a more generous constitutional standard simply because it made the laudable effort to disregard race altogether in redistricting process. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[29] **Constitutional Law** Equal protection

Constitutional Law Electoral districts and gerrymandering

United States Judicial review and enforcement

Finding of racial predominance, based on direct evidence that state legislature drew the challenged congressional district with a racial target, namely, the maintenance of a 17% Black voting age population (BVAP), was clearly erroneous and therefore did not overcome federal courts' presumption of legislative good faith, in action alleging racial gerrymandering in violation of equal protection; no direct evidence supported the finding, and direct evidence in the record was contrary, i.e., non-partisan career legislative employee who drew enacted map testified that he used only political data, and his colleagues likewise steadfastly denied using race in drawing enacted map. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[30] **Constitutional Law** Equal protection

Constitutional Law Electoral districts and gerrymandering

United States Judicial review and enforcement

Finding of racial predominance, based on circumstantial evidence that, despite all of the changes during drawing of redistricting map's lines for challenged congressional district, Black voting age population (BVAP) stayed around 17%, was clearly erroneous and therefore did not overcome federal courts' presumption of state legislative good faith, in action alleging racial gerrymandering in violation of equal protection; State considered variety of maps, including those submitted by challengers, maps with Democratic-leaning district had BVAP percentages that generally ranged between 21% to 24%, District Court itself concluded that 17% BVAP produced a Republican tilt, 20% BVAP produced toss-up district, and 21% to 24% BVAP produced Democratic tilt, and no map in record would have satisfied legislature's political aim of creating stronger Republican political tilt in district while having BVAP above 17%. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[31] **Constitutional Law** Equal protection

Constitutional Law Electoral districts and gerrymandering

United States Judicial review and enforcement

Finding of racial predominance, based on circumstantial evidence that state legislature's congressional redistricting plan moved more voters out of challenged district than necessary to comply with one-person, one-vote rule, and that a few counties were split even though avoiding such splits was traditional redistricting objective, was clearly erroneous and therefore did not overcome federal courts' presumption of legislative good faith, in action alleging racial

gerrymandering in violation of equal protection; these facts were easily explained by legislature's avowed partisan objective of creating stronger Republican political tilt in district. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[32] **Constitutional Law** Equal protection
Constitutional Law Electoral districts and gerrymandering
United States Judicial review and enforcement

Finding of racial predominance, based on circumstantial evidence that state legislature's congressional redistricting plan moved many predominantly Black precincts in a county to a district with strong Democratic tilt, was clearly erroneous and therefore did not overcome federal courts' presumption of legislative good faith, in action alleging racial gerrymandering in violation of equal protection; race and partisan preferences were tightly correlated, so the evidence did little to show that race, not politics, drove the legislature's choice. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[33] **Constitutional Law** Equal protection
Constitutional Law Electoral districts and gerrymandering
United States Judicial review and enforcement

Finding of racial predominance, based on circumstantial evidence that several state legislative staffers, including non-partisan career legislative employee who drew legislature's congressional redistricting map, viewed racial data at some point during redistricting process, was clearly erroneous and therefore did not overcome federal courts' presumption of legislative good faith, in action alleging racial gerrymandering in violation of equal protection; legislature would be expected to almost always be aware of racial demographics, and employee testified without contradiction that he considered relevant racial data only after he had drawn map and that he generated the data solely for lawful purpose of checking that maps he produced complied Supreme Court's VRA precedent. U.S. Const. art. 1, § 4, cl. 1; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301 et seq.

[34] **Constitutional Law** Equal protection
Constitutional Law Electoral districts and gerrymandering
United States Judicial review and enforcement

Finding of racial predominance for challenged congressional district in state legislature's redistricting map, based on expert reports, was clearly erroneous and therefore did not overcome federal courts' presumption of state legislative good faith, in action alleging racial gerrymandering in violation of equal protection; reports ignored certain traditional districting criteria such as geographical constraints and the legislature's partisan interests, and reports did not replicate the myriad considerations that legislature had to balance as part of its redistricting efforts. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

1 Case that cites this headnote

[35] **Constitutional Law** Equal protection
Constitutional Law Electoral districts and gerrymandering
United States Judicial review and enforcement

Finding of racial predominance for challenged congressional district in state legislature's redistricting map, based on report from expert who developed a computer algorithm that generated 20,000 maps of State's congressional districts that complied with one-person, one-vote rule, was clearly erroneous and therefore did not overcome federal courts' presumption of legislative good faith, in action alleging racial gerrymandering in violation of equal protection; expert made no effort to disentangle race from politics, and expert failed to consider core district retention, i.e., proportion of district that remained when State transitioned from one districting plan to another. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[36] **Constitutional Law** Equal protection

Constitutional Law Electoral districts and gerrymandering

United States Judicial review and enforcement

Finding of racial predominance for challenged congressional district in state legislature's redistricting map, based on report from expert who used models employing county envelope approach, was clearly erroneous and therefore did not overcome federal courts' presumption of legislative good faith, in action alleging racial gerrymandering in violation of equal protection; expert failed to account for two key mapmaking factors, i.e., contiguity and compactness, and expert measured precincts' partisan tilt by looking at total votes rather than net votes cast for Democratic candidate in most recent presidential election, which method failed to account for fact that voter turnout could vary significantly from precinct to precinct. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

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

A state-wide analysis cannot show that an electoral district, which is challenged as racial gerrymandering in violation of equal protection, was drawn based on race. U.S. Const. Amend. 14.

[38] **Federal Courts** Review of federal district courts

Clear-error review, on direct appeal to Supreme Court from a three-judge District Court's finding that state legislature's congressional districting is racial gerrymandering in violation of equal protection, does not cause the challenger's demanding burden of proving racial predominance to vanish on appeal because a challenger's hardest job allegedly should be done once the challenger has prevailed before a three-judge District Court. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[39] **Federal Courts** Scope and Extent of Review

In determining whether a finding of fact is clearly erroneous, an appellate court must ask whether the factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof.

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

Evidence Withheld or Falsified Evidence

United States Judicial review and enforcement

Finding of racial predominance, without drawing adverse inference against challengers to congressional district in state legislature's redistricting plan based on challengers' failure to provide alternative map that showed how legislature could have achieved its legitimate political objectives for district while producing significantly greater racial balance, was clearly erroneous, in action alleging racial gerrymandering in violation of equal protection; race and partisanship were closely intertwined, and alternative map could have performed critical task of distinguishing between racial and political motivations. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[41] **Evidence** Withheld or Falsified Evidence

Failure of a challenger, who alleges that congressional redistricting is a racial gerrymander in violation of equal protection, to submit an alternative map, which can be designed with ease, should be interpreted as an implicit concession that the challenger cannot draw a map that undermines the legislature's defense that the districting lines were based on a permissible, rather than a prohibited, ground. U.S. Const. Amend. 14; U.S. Const. art. 1, § 4, cl. 1.

[42] **Federal Courts** Review of federal district courts

Clear-error review is not a perfunctory task, though a District Court's findings of fact are generally correct; conscientious District Courts sometimes err, and appellants are entitled to meaningful appellate review.

1 Case that cites this headnote

[43] **Evidence** Withheld or Falsified Evidence

A factfinder may draw an adverse inference when a party fails to produce highly probative evidence that it could readily obtain if in fact such evidence exists.

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

A racial-gerrymandering claim, asserting an equal protection violation, asks whether race predominated in the drawing of an electoral district regardless of the motivations for the use of race, and racial classification itself is the relevant harm in that context. U.S. Const. Amend. 14.

1 Case that cites this headnote

[45] **Election Law** Vote Dilution

United States Judicial review and enforcement

A vote-dilution claim under the VRA is analytically distinct from a racial-gerrymandering claim alleging an equal protection violation, so a plaintiff pressing a vote-dilution claim cannot prevail simply by showing that race played a predominant role in the electoral districting process; rather, the plaintiff must show that the State enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, i.e., the State's districting plan has the purpose and effect of diluting the minority vote. U.S. Const. Amend. 14; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

****1229** *Syllabus*[*]

***1** The Constitution entrusts state legislatures with the primary responsibility for drawing congressional districts, and legislative redistricting is an inescapably political enterprise. Claims that a map is unconstitutional because it was drawn to achieve a partisan end are not justiciable in federal court. By contrast, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subjected to strict scrutiny and may be held unconstitutional. These doctrinal lines collide when race and partisan preference are highly correlated. This Court has endorsed two related propositions when navigating this tension. First, a party challenging a map's constitutionality must disentangle race and politics to show that race was the legislature's "predominant" motivating factor. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762. Second, the Court starts with a presumption that the legislature acted in good faith. To disentangle race from other permissible considerations, plaintiffs may employ some combination of direct and circumstantial evidence. *Cooper v. Harris*, 581 U.S. 285, 291, 137 S.Ct. 1455, 197 L.Ed.2d 837. Where race and politics are highly correlated, a map that has been gerrymandered to achieve a partisan end can look very similar to a racially gerrymandered map. Thus, in *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430, the Court held that the plaintiffs ***2** failed to meet the high bar for a racial-gerrymandering claim when they failed to produce an alternative map showing that a rational legislature sincerely driven by its professed partisan goals would have drawn a different map with greater racial balance. *Id.*, at 258, 121 S.Ct. 1452. Without an alternative map, the Court also found it difficult for plaintiffs to defeat the starting presumption that the legislature acted in good faith.

Following the 2020 Census, South Carolina was tasked with redrawing its congressional district maps because of population shifts in two of its seven districts—Districts 1 and 6. The State Senate subcommittee responsible for drawing the new map issued a statement explaining that the process would be guided by traditional districting principles along with the goal of creating a stronger Republican tilt in District 1. To draw the new maps, the Senate turned to Will Roberts, a nonpartisan staffer with experience in drawing reapportionment plans. Roberts' plan (the Enacted

Plan) achieved the legislature's political goal by increasing District 1's projected Republican vote share by 1.36% to 54.39%. The plan also raised the black voting-age population (BVAP) from 16.56% to 16.72%. The legislature adopted the plan, and the Governor signed it into law.

The National Association for the Advancement of Colored People and District 1 voter Taiwan Scott (Challengers), challenged the plan, alleging that it resulted in racial gerrymanders in certain districts and in the dilution of the electoral power of the State's black voters. The three-judge District Court held that the State drew District 1 with a 17% BVAP target in mind in violation of the Equal Protection Clause and that this putative use of race to draw District 1 unlawfully diluted the black vote.

Held:

1. The District Court's finding that race predominated in the design of District I in the Enacted Plan was clearly erroneous. Pp. 1239 - 1252.

(a) Because the State's principal legal argument—that the District Court did not properly disentangle race from politics —is an attack on the factual basis of the District Court's findings, this case can be disposed on clear-error grounds. The District Court clearly erred because the Challengers did not satisfy the demanding burden of showing that the "legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The Challengers provided no direct evidence of a racial gerrymander, and their circumstantial evidence is very weak. Instead the Challengers relied on deeply flawed expert reports. And the Challengers did not offer a single alternative map to show that the legislature's partisan goal could be achieved while raising the BVAP in District 1. Pp. 1239 - 1240.

***3** (b) The District Court's factual findings in this case are reviewed for clear error. Because the racial predominance test has a very substantial legal component that must take account of the Court's prior relevant decisions, special care must be exercised in reviewing the relevant findings of fact. Pp. 1240 -1241.

(c) The District Court's heavy reliance on four pieces of evidence was seriously misguided in light of the appropriate legal standard and repeated instructions that a court in a case such as this must rule out the possibility that politics drove the districting process. None of the facts on which the District Court relied to infer a racial motive is sufficient to support an inference that can overcome the presumption of legislative good faith. First, the District Court concluded that the legislature deliberately sought to maintain a particular BVAP because the maps that produced the sought-after partisan goal all had roughly the same BVAP. But the mere fact that District 1's BVAP remained around 17%, despite all the changes made during the redistricting process, proves very little. The tight correlation between the legislature's partisan aim and District 1's BVAP is substantiated by the District Court's own findings. The Challengers could not point to a single map in the record that would satisfy the legislature's political aim with a BVAP above 17%. The District Court disregarded the presumption of legislative good faith by drawing an inference that the State acted in bad faith based on the racial consequences of a political gerrymander in a jurisdiction in which race and partisan preference are very closely related. Second, the District Court inferred a racial motive from the fact that the Enacted Plan moved more voters out of District 1 than were needed to comply with the one person, one vote rule, and that the Enacted Plan split a few counties. But the high priority that the legislature gave to its partisan aim can explain these decisions. Third, the District Court clearly erred when it concluded that the legislature's real aim was racial based on the movement of certain predominantly black Charleston precincts from District 1 to District 6. Again, the legislature's partisan goal can easily explain this decision. Fourth, the District Court placed excessive weight on the fact that several legislative staffers admitted to viewing racial data at some point during the redistricting process. The District Court cited no evidence that could not also support the inference that politics drove the mapmaking process and provided no explanation why a mapmaker who wanted to produce a version of District 1 that would be safely Republican would use data about voters' race rather than their political preferences. Pp. 1240 - 1244.

(d) The four expert reports relied upon by the Challengers are flawed because they ignored traditional districting criteria such as geographical constraints and the legislature's partisan interests. ***4** *Allen v. Milligan*, 599 U.S. 1, 34, 143 S.Ct. 1487, 216 L.Ed.2d 60. The report of Dr. Kosuke Imai made no effort to disentangle race from politics. It also failed to consider "core district retention," a term referring to "the proportion of districts that remain when a State transitions from one districting plan to another." *Id.*, at 21, 143 S.Ct. 1487. The report of Dr. Jordan Ragusa did attempt to disentangle race from politics, but its analysis has two

serious defects. First, each of his three models failed to control for contiguity or compactness. Second, he used an inferior method of measuring a precinct's partisan leanings by counting absolute votes rather than a party's relative share of the vote. The report of Dr. Baodong Liu purported to show that race rather than politics explains District 1's design, but Dr. Liu's methodology was plainly flawed. Like Dr. Ragusa, Dr. Liu failed to account for contiguity and compactness. And while this defect alone is sufficient to preclude reliance, Dr. Liu also used inferior data to measure a district's partisan tilt —*i.e.,* data from the 2018 off-cycle gubernatorial primaries. Finally, the report of Dr. Moon Duchin, like that of Dr. Imai, did not account for partisanship or core retention and was based on an assessment of the map as a whole rather than District 1 in particular. Thus, her report has no probative force with respect to the Challengers' racial-gerrymandering claim regarding District 1's boundaries. Pp. 1243 - 1249.

(e) The District Court also critically erred by failing to draw an adverse inference against the Challengers for not providing an adequate alternate map. By showing that a rational legislature, driven only by its professed mapmaking criteria, could have produced a different map with "greater racial balance," *Cromartie*, 532 U.S. at 258, 121 S.Ct. 1452, an alternative map can perform the critical task of distinguishing between racial and political motivations when race and partisanship are closely entwined. Moreover, an alternative map is easy to produce. The District Court mistakenly held that an alternative map is relevant only for the purpose of showing that a remedy is plausible. A plaintiff's failure to submit an alternative map should be interpreted by courts as an implicit concession that the plaintiff cannot draw a map that undermines the legislature's defense. Pp. 1249 -1250.

2. Because the same findings of fact and reasoning that guided the court's racial-gerrymandering analysis also guided the analysis of the Challengers' independent vote-dilution claim, that conclusion also cannot stand. The District Court also erred in conflating the two claims. A plaintiff pressing a vote-dilution claim cannot prevail simply by showing that race played a predominant role in the districting process, but rather must show that the State "enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities." *Miller*, 515 U.S. at 911, 115 S.Ct. 2475. In other words, the plaintiff must show that the State's districting plan "has the purpose ***5** and effect" of diluting the minority vote. *Shaw v. Reno*, 509 U.S. 630, 649, 113 S.Ct. 2816, 125 L.Ed.2d 511. In light of these two errors in the District Court's analysis, a remand is appropriate. Pp. 1251 - 1252.

Reversed in part and remanded in part.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GORSUCH, KAVANAUGH, and BARRETT, JJ., joined, and in which THOMAS, J., joined as to all but Part III–C. THOMAS, J., filed an opinion concurring in part. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR and JACKSON, JJ., joined.

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Justice ALITO delivered the opinion of the Court.

**1233 *6 I

[1] The Constitution entrusts state legislatures with the primary responsibility for drawing congressional districts, and redistricting is an inescapably political enterprise. Legislators are almost always aware of the political ramifications of the maps they adopt, and claims that a map is unconstitutional because it was drawn to achieve a partisan end are not justiciable in federal court. Thus, as far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in redistricting. By contrast, if a legislature gives race a predominant role in redistricting decisions, the resulting map is subjected to strict scrutiny and may be held unconstitutional.

[2] These doctrinal lines collide when race and partisan preference are highly correlated. We have navigated this tension by endorsing two related propositions. First, a party challenging a map's constitutionality must disentangle race and politics if it wishes to prove that the legislature was motivated by race as opposed to partisanship. Second, in assessing a legislature's work, we start with a presumption that the legislature acted in good faith.

*7 In this case, which features a challenge to South Carolina's redistricting efforts in the wake of the 2020 census, the three-judge District Court paid only lip service to these propositions. That misguided approach infected the District Court's findings of fact, which were clearly erroneous under the appropriate legal standard. We therefore reverse the trial court in part and remand for further proceedings.

II

A

[3] [4] Redistricting constitutes a traditional domain of state legislative authority. See *Moore v. Harper*, 600 U.S. 1, 143 S.Ct. 2065, 216 L.Ed.2d 729 (2023); see also U. S. Const., Art. I, § 4, cl. 1. The Fourteenth Amendment introduces one constraint by prohibiting a State from engaging in a racial gerrymander unless it can satisfy strict scrutiny. But given "the complex interplay of forces that enter a legislature's **1234 redistricting calculus," we have repeatedly emphasized that federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 915–916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Such caution is necessary because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Id.*, at 915, 115 S.Ct. 2475. To untangle race from other permissible considerations, we require the plaintiff to show that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.*, at 916, 115 S.Ct. 2475.

[5] [6] [7] To make that showing, a plaintiff must prove that the State "subordinated" race-neutral districting criteria such as compactness, contiguity, and core preservation to "racial considerations." *Ibid.* Racial considerations predominate when "[r]ace was the criterion that, in the State's view, could not be compromised" in the drawing of district lines.[1] *8 *Shaw v. Hunt*, 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). We have recognized that, "[a]s a practical matter," challengers will often need to show that the State's chosen map conflicts with traditional redistricting criteria. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 190, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017). That is because it may otherwise "be difficult for challengers to find other evidence sufficient to show that race was the overriding factor causing neutral considerations to be cast aside." *Ibid.*

[8] [9] This showing can be made through some combination of direct and circumstantial evidence. See *Cooper v. Harris*, 581 U.S. 285, 291, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017). Direct evidence often comes in the form of a relevant state actor's express acknowledgment that race played a role in the drawing of district lines. Such concessions are not uncommon because States often admit to considering race for the purpose of satisfying our precedent interpreting the Voting Rights Act of 1965. See, *e.g.*, *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 259–260, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). Direct evidence can also be smoked out over the course of litigation. In *Cooper*, for instance, we offered the hypothetical example of a plaintiff finding "scores of leaked e-mails from state officials

instructing their mapmaker to pack as many black voters as possible into a district." 581 U.S. at 318, 137 S.Ct. 1455. In such instances, if the State cannot satisfy strict scrutiny, direct evidence of this sort amounts to a confession of error.

[10] Proving racial predominance with circumstantial evidence alone is much more difficult. Although we have never invalidated an electoral map in a case in which the plaintiff failed to adduce any direct evidence, we have, at least in theory, kept the door open for those rare instances in which a district's shape is "so bizarre on its face that it discloses a racial design" absent any alternative explanation. ***9** *Miller*, 515 U.S. at 914, 115 S.Ct. 2475; see also *Shaw v. Reno*, 509 U.S. 630, 643–645, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

****1235** **[11]** **[12]** **[13]** A circumstantial-evidence-only case is especially difficult when the State raises a partisan-gerrymandering defense. That is because partisan and racial gerrymanders "are capable of yielding similar oddities in a district's boundaries" when there is a high correlation between race and partisan preference. *Cooper*, 581 U.S. at 308, 137 S.Ct. 1455. And that is the situation in this case, as the 2020 Presidential election illustrated. Exit polls found that at least 90% of black voters voted for the Democratic candidate in South Carolina and throughout the Nation.[2] When partisanship and race correlate, it naturally follows that a map that has been gerrymandered to achieve a partisan end can look very similar to a racially gerrymandered map. For that reason, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*); see also *Rucho v. Common Cause*, 588 U.S. 684, 721, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019) (concluding that federal judges lack the license to evaluate partisan-gerrymandering claims). We have noted that a State's partisan-gerrymandering defense therefore raises "special challenges" for plaintiffs. *Cooper*, 581 U.S. at 308, 137 S.Ct. 1455. To prevail, a plaintiff must "disentangle race from politics" by proving "that the former *drove* a district's lines." *Ibid.* (emphasis added). That means, among other things, ruling out the competing explanation that political considerations dominated ***10** the legislature's redistricting efforts. If either politics or race could explain a district's contours, the plaintiff has not cleared its bar.

Our decision in *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*), illustrates the difficulties that plaintiffs must overcome in this context. There, the plaintiffs' case hinged on circumstantial evidence of a racial gerrymander such as expert testimony and discrepancies between the relevant district lines and traditional districting criteria. *Id.*, at 240–241, 121 S.Ct. 1452; see also *Cooper*, 581 U.S. at 321, 137 S.Ct. 1455 (describing the direct evidence in *Cromartie II* as "extremely weak"). After the State asserted a partisan-gerrymandering defense, we faulted the plaintiffs for failing to show "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Cromartie II*, 532 U.S. at 258, 121 S.Ct. 1452. In other words, the plaintiffs failed to meet the high bar for a racial-gerrymandering claim by failing to produce, among other things, an alternative map showing that a rational legislature sincerely driven by its professed partisan goals would have drawn a different map with greater racial balance. Since our decision in *Cromartie II*, any plaintiff with a strong case has had every incentive to produce such an alternative map.

[14] **[15]** Without an alternative map, it is difficult for plaintiffs to defeat our starting presumption that the legislature acted in good faith. This presumption of legislative good faith directs district courts to ****1236** draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions. See, *e.g.*, *Abbott v. Perez*, 585 U.S. 579, 610–612, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018). This approach ensures that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913, 115 S.Ct. 2475; see also *Cromartie I*, 526 U.S. at 546, 119 S.Ct. 1545 (noting that strict scrutiny is warranted when a map is "unexplainable on grounds other than race" (internal quotation marks omitted)).

***11** **[16]** **[17]** **[18]** Three additional reasons justify this presumption. First, this presumption reflects the Federal Judiciary's due respect for the judgment of state legislators, who are similarly bound by an oath to follow the Constitution. Second, when a federal court finds that race drove a legislature's districting decisions, it is declaring that the legislature engaged in "offensive and demeaning" conduct, *Miller*, 515 U.S. at 912, 115 S.Ct. 2475, that "bears an uncomfortable resemblance to political apartheid," *Shaw I*, 509 U.S. at 647, 113 S.Ct. 2816. We should not be quick to

hurl such accusations at the political branches. Third, we must be wary of plaintiffs who seek to transform federal courts into "weapons of political warfare" that will deliver victories that eluded them "in the political arena." *Cooper*, 581 U.S. at 335, 137 S.Ct. 1455 (ALITO, J., concurring in judgment in part and dissenting in part). The presumption of good faith furthers each of these constitutional interests. It also explains why we have held that the plaintiff 's evidentiary burden in these cases is especially stringent. See *Cromartie II*, 532 U.S. at 241, 121 S.Ct. 1452.

[19] **[20]** **[21]** If a plaintiff can demonstrate that race drove the mapping of district lines, then the burden shifts to the State to prove that the map can overcome the daunting requirements of strict scrutiny. Under this standard, we begin by asking whether the State's decision to sort voters on the basis of race furthers a compelling governmental interest. *Cooper*, 581 U.S. at 292, 137 S.Ct. 1455. We then determine whether the State's use of race is "narrowly tailored"—*i.e.*, "necessary"—to achieve that interest. This standard is extraordinarily onerous because the Fourteenth Amendment was designed to eradicate race-based state action. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 206, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023).

B

South Carolina has seven congressional districts, and this case concerns two of them, Districts 1 and 6. District 1 covers the State's southeast region, while District 6 covers its southwest and central regions. South Carolina's prior map, ***12** which was enacted in 2011, split several counties between Districts 1 and 6, including Beaufort, Berkeley, Charleston, Colleton, and Dorchester Counties. See Figure 1, *infra*, at 1238 - 1239. The Department of Justice precleared the 2011 map, and a three-judge District Court upheld it against racial-gerrymandering and intentional vote-dilution claims after finding that the legislature "demonstrate[d] that [it] adhered to traditional race-neutral principles." *Backus v. South Carolina*, 857 F.Supp.2d 553, 560 (DSC), summarily aff'd, 568 U.S. 801, 133 S.Ct. 156, 184 L.Ed.2d 1 (2012). The relevant part of that map is shown in Figure 1, *infra*, at 1238 - 1239.

Over the next decade, the 2011 map consistently yielded a 6-to-1 Republican-Democratic delegation—with one exception. In 2018, the Democratic candidate, with 50.7% of the votes, narrowly won ****1237** District 1, which had previously elected Republican candidates.[3] But in 2020, when the Republican Presidential candidate handily won the State, the Republican congressional candidate retook District 1 by a slender margin, winning 50.6% of the votes.[4]

South Carolina had to redraw its map after the 2020 census because two of the State's seven districts saw major population shifts. District 1 was overpopulated by 87,689 residents while District 6 was underpopulated by 84,741 residents. South Carolina therefore had to add voters to District 6 while subtracting voters from District 1 in order to comply with the principle of one person, one vote. The remaining districts also had to be modified in order to bring the whole map into compliance with that requirement.

In September 2021, the Senate subcommittee tasked with drawing the new map issued guidance explaining that traditional ***13** districting principles, such as respect for contiguity and incumbent protection, would guide the mapmaking process along with the strict equal-population requirement. At the same time, the Republican-controlled legislature also made it clear that it would aim to create a stronger Republican tilt in District 1. Senate Majority Leader Shane Massey, for instance, testified at trial that partisanship was "one of the most important factors" in the process and that the Republican Party was "not going to pass a plan that sacrificed [District 1]." J. S. A. 265a. As he put it, the legislature's adoption of any map that improved the Democrats' chance of reclaiming District 1 would constitute "political malpractice." *Id.,* at 276a. Contemporaneous evidence confirms that leaders in the legislature sought to "create a stronger Republican tilt" in District 1 while "honoring" other race-neutral, traditional districting criteria. 649 F.Supp.3d 177, 187 (DSC 2023); J. S. A. 333a–334a.

To draw its maps, the Senate turned to Will Roberts, a nonpartisan staffer with 20 years of experience in state government. Roberts had "worked with the three-judge panel in *Backus*" and had routinely prepared "reapportionment plans for counties, cities[,] and school boards across the state." 649 F.Supp.3d at 188. During the trial of this case, one of the judges praised Roberts' expertise and honesty on the record.[5] Under the Senate's open-door policy, Roberts drew maps upon request for Republican and Democratic Senators alike. In making these maps, Roberts relied on political data from the 2020 Presidential election along with traditional districting criteria and input from various lawmakers, including Representative Jim Clyburn, whose

***14** recommendations would have preserved the strong Democratic tilt in his district (District 6) and included a version of District 1 with a black voting-age population (BVAP) of 15.48%. J. S. A. 127a.

The eventual map (Enacted Plan), see Figure 2, *infra*, at 1239 - 1240, differed from the 2011 map in three important respects that reflected the legislature's ****1238** priorities. First, the Enacted Plan unified Beaufort and Berkeley Counties within District 1. This move enhanced the Republican advantage in District 1 because the moved-in portions of those counties leaned Republican. Second, to further increase the Republican lead in District 1, Roberts also put more of Dorchester County in District 1. These changes exacerbated the population imbalance between District 1 and District 6. Third, to cure this problem, Roberts moved a series of precincts in Charleston from District 1 to District 6. In keeping with the legislature's partisan objectives, the precincts moved out of District 1 had a 58.8% Democratic vote share.

By design, the legislature divided Charleston between Districts 1 and 6. This split was seen as in Charleston's best interests because it meant that the county would have two Representatives in the House—one Democrat, Representative Clyburn, who has represented District 6 since 1993 and has held important House leadership positions, and one Republican representing District 1. Republican Senator Chip Campsen, who spearheaded the mapmaking process, testified that Charleston benefits from bipartisan congressional representation on "bread-and-butter things" like port maintenance and "influence with the incumbent administration." *Id.,* at 338a. As he explained, "I am tickled to death that Jim Clyburn represents Charleston County," *id*., at 371a, because "Clyburn has more influence with the Biden Administration perhaps than anyone in the nation," *id*., at 338a. To achieve all these objectives, Roberts ***15** moved roughly 193,000 residents between the districts with a net migration of 87,690 people into District 6. *Id*., at 439a, 443a.

The Enacted Map achieved the legislature's political goal by increasing District 1's projected Republican vote share by 1.36% to 54.39%. The version of District 1 in the Enacted Plan also had a slightly higher BVAP, rising from 16.56% to 16.72%. The legislature voted to adopt the Enacted Plan, and the Governor signed it into law in January 2022.

While the Enacted Map was still in the making, the plaintiff-appellees in this case—the National Association for the Advancement of Colored People (NAACP) and Taiwan Scott, a voter in District 1 (collectively, the Challengers)—sued to contest the 2011 map on the ground that, in light of the 2020 census, it violated the one person, one vote requirement. After South Carolina passed the Enacted Plan, the Challengers amended their complaint to attack that map instead. The Challengers alleged that Districts 1, 2, and 5 were racially gerrymandered and that these districts diluted the electoral power of the State's black voters. A three-judge District Court rejected these claims with respect to Districts 2 and 5. But the court held that South Carolina drew District 1 with a 17% BVAP "target" in mind and that this violated the Equal Protection Clause. For similar reasons, the court also found that the State's putative use of race to draw District 1 unlawfully diluted the black vote. The court permanently enjoined South Carolina from conducting elections in District 1 until it approved a new map. The State appealed to this Court, and we noted probable jurisdiction. 598 U. S. ——, 143 S.Ct. 2456, 216 L.Ed.2d 430 (2023).

****1239**

***16**

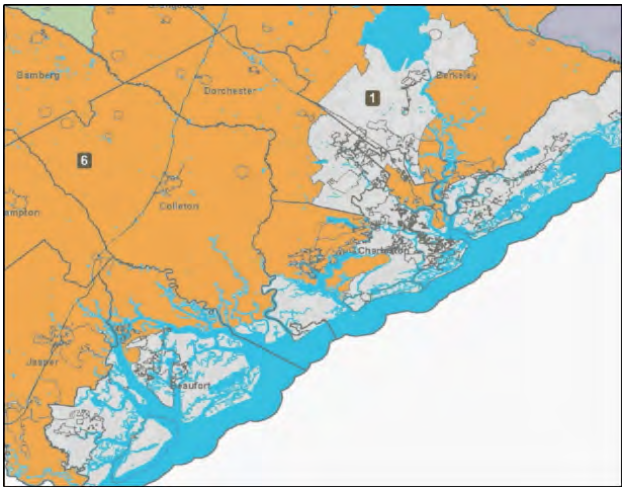


Figure 1. 2011 Map—Districts 1 and 6 (Exh. 1 to State's Motion for Summary Judgment in *South Carolina State Conference of the NAACP v. McMaster*, No. 3:21–cv–3302 (D SC, Aug. 19, 2022), ECF Doc. 323–1, p. 2)

***17**

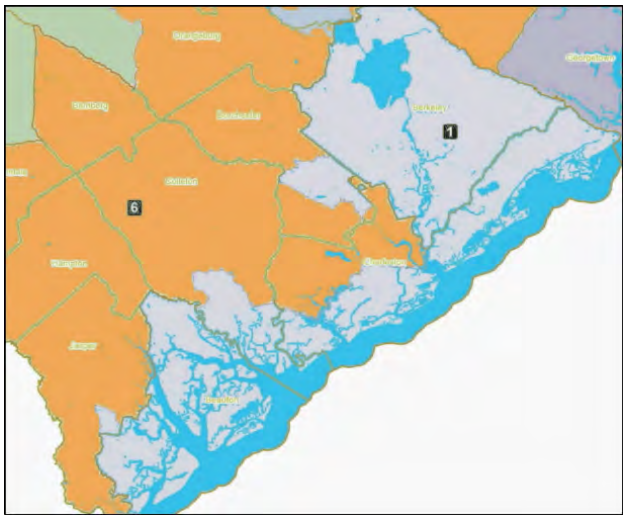


Figure 2. Enacted Plan—Districts 1 and 6 (South Carolina House of Representatives, S. 865 Passed—As Signed by the ****1240** Governor, https://redistricting.schouse.gov/docs/plans/cpg/conpassed%20map.pdf)

III

The State contends that the District Court committed both legal error and clear factual error in concluding that race played a predominant role in the legislature's design of District 1. The State's principal legal argument is that the District Court did not properly disentangle race from politics. Because this argument, at bottom, attacks the factual basis of the District Court's findings, we dispose of this case on clear-error grounds.

[22] Under our case law, the Challengers bore the burden of showing that the "legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. In this case, the District Court clearly erred because the Challengers did not meet this "demanding" ***18** standard. *Id.*, at 928, 115 S.Ct. 2475 (O'CONNOR, J., concurring). They provided no direct evidence of a racial gerrymander, and their circumstantial evidence is very weak. Instead, the Challengers relied on deeply flawed expert reports. And while these experts produced tens of thousands of maps with differently configured districts, they did not offer a single map that achieved the legislature's partisan goal while including a higher BVAP in District 1. Faced with this record, we must reverse the District Court on the racial-gerrymandering claim.

We divide our analysis into four parts. First, we set out the appropriate legal standard for reviewing a district court's factual findings in racial-gerrymandering cases. Second, we explain why the District Court's factual findings are clearly flawed with respect to the Challengers' circumstantial evidence. Third, we examine the four expert reports that the Challengers presented below. And finally, we explain that the District Court erred by not drawing an adverse inference from the Challengers' failure to submit an alternative map that would have allowed the State to achieve its districting goals while maintaining a higher BVAP in District 1.

A

[23] We review the District Court's factual findings for clear error. That means we may not set those findings aside unless, after examining the entire record, we are "left with the definite and firm conviction that a mistake has been committed." *Cooper*, 581 U.S. at 309, 137 S.Ct. 1455 (internal quotation marks omitted). This is a demanding test, but it is not a rubber stamp.

[24] **[25]** **[26]** **[27]** **[28]** Moreover, in a case like this, there is a special danger that a misunderstanding of what the law requires may infect what is labeled a finding of fact. "[I]f [a] trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." ***19** *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, n. 15, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982); see also *Abbott*, 585 U.S. at 607, 138 S.Ct. 2305. Here, the standard of proof that the three-judge court was required to apply, *i.e.*, the racial-predominance test, has a very substantial legal component that must take account of our prior relevant decisions.[6] ****1241** And the application of this test calls for particular care when the defense contends that the driving force in its critical districting decisions (namely, partisanship) was a factor that is closely correlated with race. Thus, in a case like this, we must exercise special care in reviewing the relevant findings of fact.

B

[29] The District Court found that South Carolina drew District 1 with a racial "target," namely, the maintenance of a 17% BVAP, and it concluded that this deliberate use of race rendered District 1's lines unlawful. See *Bethune-Hill*, 580 U.S. at 183–185, 137 S.Ct. 788. But the Challengers did not offer any direct evidence to support that conclusion,

and indeed, the direct evidence that is in the record is to the contrary. Roberts, the non-partisan career employee who drew the Enacted Map, testified that he used only political data, and his colleagues likewise steadfastly denied using race in drawing the Enacted Map. None of the facts on which the District Court relied to infer a racial motive is sufficient to support ***20** an inference that can overcome the presumption of legislative good faith.

[30] *First*, the District Court inferred a racial motive from the fact that District 1's BVAP stayed around 17% "[d]espite all of th[e] changes" that South Carolina made during the redistricting process. 649 F.Supp.3d at 191. But where race and partisan preferences are very closely tied, as they are here, the mere fact that District 1's BVAP stayed more or less constant proves very little. If 100% of black voters voted for Democratic candidates, it is obvious that any map with the partisan breakdown that the legislature sought in District 1—something in the range of 54% Republican to 46% Democratic—would inevitably involve the removal of a disproportionate number of black voters. And since roughly 90% of black voters cast their ballots for Democratic candidates, the same phenomenon is very likely.

The District Court's own findings substantiate the tight correlation between the legislature's partisan aim and District 1's BVAP. During the redistricting process, the State considered a variety of maps, including those submitted by the Challengers. Maps with a Democratic-leaning District 1 had BVAP percentages that generally ranged between 21% to 24%. See App. 83; J. S. A. Supp. 142a. The District Court itself concluded that a 17% BVAP "produced a Republican tilt," a 20% BVAP "produced a 'toss up district,' " and a 21% to 24% BVAP "produced a Democratic tilt." 649 F.Supp.3d at 188. And the Challengers cannot point to even one map in the record that would have satisfied the legislature's political aim and had a BVAP above 17%. Thus, there is strong evidence that the district's BVAP of 17% was simply a side effect of the legislature's partisan goal. And certainly nothing rules out that possibility. In light of the presumption of legislative good faith, that possibility is dispositive.

The District Court's reasoning, however, is flatly inconsistent with that presumption. And what the court did—inferring ***21** bad faith based on the racial effects of a ****1242** political gerrymander in a jurisdiction in which race and partisan preference are very closely correlated—would, if accepted, provide a convenient way for future litigants and lower courts to sidestep our holding in *Rucho* that partisan-gerrymandering claims are not justiciable in federal court. Under the District Court's reasoning, a litigant could repackage a partisan-gerrymandering claim as a racial-gerrymandering claim by exploiting the tight link between race and political preference. Instead of claiming that a State impermissibly set a target Republican-Democratic breakdown, a plaintiff could simply reverse-engineer the partisan data into racial data and argue that the State impermissibly set a particular BVAP target. Our decisions cannot be evaded with such ease. For that reason, the District Court clearly erred in finding that the legislature deliberately sought to maintain a particular BVAP just because the maps that produced the sought-after partisan goal all had roughly the same BVAP.

[31] *Second*, the District Court inferred a racial motive from certain changes that the State made in redrawing District 1, namely, the Enacted Plan moved more voters out of District 1 (approximately 140,000) than were needed to comply with the one person, one vote rule (about 88,000), and the Enacted Plan split Charleston and a few other counties even though the avoidance of such splits is a traditional redistricting objective. But here, again, the State's avowed partisan objective easily explains these facts. The State claims it sought to ensure that District 1 had a reliable Republican majority, and simply removing 88,000 voters without regard to their party preferences would not have satisfied that objective. Similarly, the high priority that the legislature gave to its partisan goal provides an entirely reasonable explanation for the subordination of other objectives such as the avoidance of county splits. See *Cooper*, 581 U.S. at 308, 137 S.Ct. 1455 ("[P]olitical and racial [gerrymanders] ***22** are capable of yielding similar oddities in a district's boundaries").

[32] *Third*, the District Court found it telling that many predominantly black Charleston precincts were moved out of District 1 and into District 6. But because of the tight correlation between race and partisan preferences, this fact does little to show that race, not politics, drove the legislature's choice. The Charleston County precincts that were removed are 58.8% Democratic. Thus, the legislature's stated partisan goal can easily explain this decision, and the District Court therefore erred in crediting the less charitable conclusion that the legislature's real aim was racial.

[33] *Fourth*, the District Court placed too much weight on the fact that several legislative staffers, including Roberts, viewed racial data at some point during the redistricting process. This acknowledgment means little on its own

because we expect that "[r]edistricting legislatures will ... almost always be aware of racial demographics." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Here, Roberts testified without contradiction that he considered the relevant racial data only *after* he had drawn the Enacted Map and that he generated that data solely for a lawful purpose, namely, to check that the maps he produced complied with our Voting Rights Act precedent. J. S. A. 92a, 205a, 379a.

The District Court discredited this testimony, but it cited no evidence that could not also support the inference that politics drove the mapmaking process. And the court provided no explanation why a mapmaker who wanted to produce a version of District 1 that would be safely Republican would use data about voters' race rather than their political preferences. Why would ****1243** Roberts have used racial data—with the associated legal risks—as a proxy for partisan data when he had access to refined, sub-precinct-level political data that accounted for voter turnout and electoral ***23** preferences? The District Court provided no answer to this obvious question.[7]

The Challengers look to plug this gap by arguing that Roberts must have used racial data because the political data he claimed to have used was blatantly unsatisfactory. For support, they cite the testimony of Dale Oldham, a political consultant who did not participate in drawing the Enacted Plan. Oldham testified that he believed the standard data South Carolina used for measuring partisanship is unreliable because it does not accurately reflect the partisan preferences of absentee voters. Oldham opined that a new type of composite data that first became available in 2020 does a better job in that regard. J. S. A. Supp. 417a–418a, 420a.

This criticism is entitled to little weight. One consultant's opinion about the quality of South Carolina's political data obviously does not settle the question whether the State's political data was inferior. And in any event, the relevant question is not whether the State used the best available data but whether it is reasonable to infer that the mapmakers' political data was so obviously flawed that they must have surreptitiously used racial data. Oldham's testimony falls far short of establishing that the State cannot plausibly have believed that its own political data was sufficient. Nothing in our case law requires the State to adopt novel methodologies in analyzing election data. Indeed, the State plausibly argues that its data was more than good enough for its purposes because it showed partisan preferences at ***24** the sub-precinct level and also accounted for variations in voter turnout. Reply Brief 9, 11; J. S. A. 93a.

In sum, the District Court's heavy reliance on these four pieces of evidence was seriously misguided in light of the appropriate legal standard and our repeated instructions that a court in a case such as this must rule out the possibility that politics drove the districting process.

C

[34] Once these weak inferences are set aside, all that the Challengers have left are four expert reports. But these reports are flawed because they "ignored certain traditional districting criteria" such as geographical constraints and the legislature's partisan interests. *Allen v. Milligan*, 599 U.S. 1, 34, 143 S.Ct. 1487, 216 L.Ed.2d 60 (2023). Because these reports do not replicate the "myriad considerations" that a legislature must balance as part of its redistricting efforts, they cannot sustain a finding that race played a predominant role in the drawing of District 1's lines. *Id.*, at 35, 143 S.Ct. 1487. We will discuss each of the Challengers' four experts in turn.

[35] *Dr. Kosuke Imai*. The report of the Challengers' first expert, Dr. Kosuke Imai, provides no support for the decision below because Dr. Imai made no effort to disentangle race from politics. Dr. Imai developed a computer algorithm that generated 20,000 maps of the State's congressional districts that complied with the one ****1244** person, one vote rule. This algorithm did not take race into account, and it sought to respect traditional redistricting objectives such as contiguity and compactness. The Challengers assert that these maps prove that race drove the State's redistricting process because the average District 1 in these simulations contained a higher BVAP than the District 1 in the Enacted Plan.

The Challengers' inference is flawed because Dr. Imai's models failed to consider partisanship. See J. S. A. Supp. 30a (acknowledging that "no race or *partisan* information was used" (emphasis added)). That is a fatal omission in this ***25** case. As noted, race and politics strongly correlate in South Carolina, and Dr. Imai's algorithm produced maps without requiring that District 1 comply with the legislature's asserted aim of ensuring that District 1 remain a relatively safe Republican seat. The effect of Dr. Imai's omission can be seen by looking at the Democratic vote share (measured by the results in the 2020 Presidential election) in the versions of District 1 that his simulations produced. President Biden's

vote share in the average District 1 in Dr. Imai's maps was significantly higher than his vote share in the version of District 1 in the Enacted Plan. Rebuttal Report of Sean Trende in *South Carolina State Conference of the NAACP* v. *McMaster*, No. 3:21–cv–3302 (D SC, Aug. 19, 2022), ECF Doc. 323–33, pp. 5–6. Indeed, Dr. Sean Trende, the State's expert, showed that District 1 would have voted for the Democratic nominee in 2020 in 91% of Dr. Imai's simulations. *Ibid.* Because Dr. Imai's model fails to track the considerations that governed the legislature's redistricting decision, it is irrelevant that the racial makeup of District 1 in his maps differs from that in the version of the district in the Enacted Plan.

It is also noteworthy that Dr. Imai could have easily controlled for partisan preferences just as he controlled for other redistricting factors such as compactness and county splits. He could have generated maps conditioned on District 1's vote share matching or exceeding the Benchmark Plan's Republican tilt. But he did not take that obvious step.

he Challengers seek to excuse their failures to disentangle race and politics by arguing that South Carolina raised a partisan-gerrymandering defense for the first time during the trial, but this argument rests on the implausible premise that the Challengers were unaware of the legislature's partisan concerns during the mapmaking process. The fact of the matter is that politics pervaded the highly visible mapmaking process from start to finish. The Republican and ***26** Democratic caucuses submitted competing maps, and the Enacted Plan passed the legislature by a margin of 26 to 15 in the Senate and 72 to 33 in the House, with only Democrats voting in opposition. The public hearings and legislative debates are of a piece. For example, Senator Margie Bright Matthews, a black Democrat, said in a floor debate with Senator Campsen that " 'we're not going to get into the racial gerrymandering thing because you and I both know in Charleston it matters not about your race. It is just that you went by how those folks voted.' " App. 296. For evidence, she recognized that the Enacted Plan also moved into District 6 predominantly white parts of Charleston that skewed Democratic, such as West Ashley. She added, " 'Senator [Campsen], ... I really appreciate you agreeing with me that our opposition ... is not about racial [gerrymandering].' " *Ibid*. Instead, she said, it was about " 'packing' " the Democratic-voting area of Charleston into District 6 " 'to make [District 1] more electable.' " *Ibid.* Former Congressman Cunningham, the Democrat ****1245** who represented District 1 from 2018 to 2020, also criticized the Enacted Plan's District 1 lines as " 'mak[ing] no sense unless, of course, the *sole* purpose ... is to make it harder for a Republican to lose.' " *Id.,* at 295. He added that "the folks in Washington, D.C.," did not want a repeat of the 2018 election or even the 2020 election where he lost against the Republican nominee by "a single point in one of the closest elections in the entire country." *Ibid.* Under these circumstances, it is safe to say that the Challengers were on notice hat the State would raise a partisan-gerrymandering defense at trial.

Dr. Imai's conspicuous failure to control for party preference is alone sufficient to discredit any reliance on his report, but his report exhibited another serious flaw: it failed to consider "core district retention," a term that "refers to the proportion of districts that remain when a State transitions from one districting plan to another." *Allen*, 599 U.S. at 21, 143 S.Ct. 1487. ***27** The Enacted Plan retains 83% of District 1's core, but the average map produced by Dr. Imai's model scored 69% on the core-district-retention metric—three standard deviations lower. ECF Doc. 323–33, at 5.

Dr. Imai's failure to consider core retention betrays a blinkered view of the redistricting process. Lawmakers do not typically start with a blank slate; rather, they usually begin with the existing map and make alterations to fit various districting goals. Core retention recognizes this reality. Dr. Imai could have controlled for this metric by restricting the core retention in his simulations to at least 83%. His failure to do so here means we cannot rule out core retention as another plausible explanation for the difference between the Enacted Plan and the average Imai simulation.

[36] *Dr. Jordan Ragusa*. As evidence that race predominated in District 1's design, the District Court also credited a report by Dr. Jordan Ragusa, another expert for the Challengers. Unlike Dr. Imai, Dr. Ragusa attempted to disentangle race from politics, but as we will explain, his analysis has at least two serious defects. First, he failed to account for two key mapmaking factors: contiguity and compactness. Second, he used an inferior method of measuring a precinct's partisan leanings.

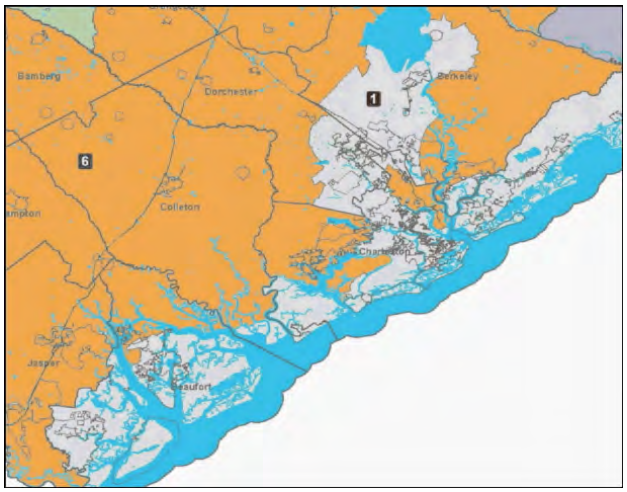
We begin with the matter of contiguity and compactness. Dr. Ragusa used three separate models, but none of them controlled for these critical districting factors. Two of his models employed the so-called county envelope approach. Using this approach, he first identified the five counties that have at least one precinct that fell within District 1 in the

Benchmark Plan. These counties in their entirety constituted the "county envelope."

Dr. Ragusa employed a method that we will discuss below to control for the partisan preferences of voters in these precincts, and he also controlled for precinct size. He then asked whether a precinct of a given size with a given partisan ***28** breakdown was more or less likely to be included in District 1 depending on its racial demographics, and he reported that districts with a high percentage of black voters were more likely to be excluded.

His remaining model looked only at the precincts that were in District 1 in the Benchmark Plan, and controlling in the same way for size and partisan leaning, he reported that a precinct was more likely to be moved out if it had a high percentage of black voters.

All three of these models exhibit the same flaw. Because they did not control for contiguity or compactness, they all assume that a precinct could be moved into or out of District 1 regardless of its distance ****1246** from the line between that district and District 6. That is highly unrealistic. A simple example illustrates this point in relation to the county envelope approach, as can be seen with a quick look at Figure 1, which we again reproduce below.



***29** Under Dr. Ragusa's methodology, *any precinct* in Colleton County could have been moved into District 1, but many precincts in that county are nowhere near District 1's outer boundaries. For example, precincts near the county's northern border with Bamberg County could not have been moved into District 1 without egregiously flouting the State's important interests in contiguity or compactness. And the same problem arises with respect to the question whether a precinct in District 1 in the Benchmark Plan could have been moved into District 6. Precincts in District 1 that are not close to the district line could not have been moved without making District 6 less contiguous or compact.[8]

We have already rejected a plaintiff 's expert report for failing to account for this feature of mapmaking. In *Cromartie II*, we faulted the plaintiff 's expert for failing to consider whether the excluded precincts "were located near enough to [the district's] boundaries or each other for the legislature as a practical matter to have ****1247** drawn [the district's] boundaries to have included them, without sacrificing other important political goals." 532 U.S. at 247, 121 S.Ct. 1452. The District ***30** Court clearly erred in crediting Dr. Ragusa's models because his approach made that same mistake.

Dr. Ragusa's report also carries less weight because of how he measured a precinct's partisan leanings. Using the results of the 2020 Presidential election, Dr. Ragusa measured partisan tilt by looking at the *total votes* cast for President Biden, not the *net votes* for President Biden. This method fails to account for the fact that voter turnout may vary significantly from precinct to precinct, and therefore a precinct in which a candidate gets a large number of votes may also be a precinct in which the candidate fails to win a majority. To illustrate this point, consider this simplified example:

	Precinct 1	Precinct 2
Total Voting Age Population	1,250	1,250
Biden Vote	400	500
Trump Vote	250	600
Net Biden Votes	150	-100

Biden Vote %	62%	45%
Black Voting Age Population	250	0
Moved from District 1 to District 6	Yes	No

Dr. Ragusa's model considers only the total number of Biden votes in its partisanship analysis. J. S. A. 502a. But legislators aiming to make District 1 a relatively safe Republican seat would be foolish to exclude Precinct 2 merely because it has more Democratic votes than Precinct 1. Instead, they would look at the net Democratic votes and would thus remove Precinct 1, not Precinct 2. Although the use of total votes may be a statistically permissible measure of partisan lean, it is undoubtedly preferable for an expert report ***31** to rely on net votes when measuring a district's partisan lean.

The Challengers seek to defend Dr. Ragusa's report by suggesting that he followed the same methodology as Professor Stephen Ansolabehere, whose report we blessed in *Cooper*, 581 U.S. at 315, 137 S.Ct. 1455, but that is wrong. There are important differences between Dr. Ragusa's methodology and Professor Ansolabehere's,[9] and in all events, Professor Ansolabehere's report played a minor role in *Cooper*, where the plaintiffs could also point to direct evidence. Here, by contrast, ****1248** once the District Court's other circumstantial findings are set aside, the Challengers must rest their entire case on these expert reports. Dr. Ragusa's report, on its own, cannot prove that District 1's lines are "unexplainable on grounds other than race." *Shaw I*, 509 U.S. at 644, 113 S.Ct. 2816 (internal quotation marks omitted).

Dr. Baodong Liu. Dr. Baodong Liu, another of the Challengers' experts, submitted a report that purported to show that race rather than politics explains District 1's design. Although the District Court did not cite Dr. Liu's report, the Challengers contend that it bolsters the District Court's findings. Tr. of Oral Arg. 86–87. But Dr. Liu's methodology was plainly flawed.

First, his methodology, like Dr. Ragusa's, failed to account for contiguity and compactness. Dr. Liu examined all voters living within the county envelope for District 1 of the ***32** Enacted Plan to see which voters were more likely to have been excluded. His analysis suggested that black Democrats were more likely to have been excluded than white Democrats.

This methodology was highly unrealistic because it treated each voter as an independent unit that South Carolina could include or exclude from District 1. No mapmaker who respects contiguity and compactness could take such an approach. For example, a mapmaker could not assign a black Republican to one district while moving a black Democrat who lives in the same apartment building to another district. To accurately reflect the districting process, an analysis would have to pay attention to whether a voter's neighbors were moved too.

This defect alone is sufficient to preclude reliance on Dr. Liu's report, but that report exhibited another flaw: it used inferior data to measure a district's partisan tilt. While the State used voting data from the 2020 *Presidential election*, Dr. Liu relied on data from the 2018 *gubernatorial primaries*. Data from that gubernatorial primary is less informative because far fewer voters turn out for off-cycle gubernatorial primary elections. The numbers prove the point. In the 2018 elections, a total of about 610,000 votes were cast across both primaries; in the 2020 Presidential election, by contrast, a total of 2.5 million votes were cast.[10] Because Dr. Liu examined only a small, highly non-random sample of the regular voting electorate, we cannot say that the same results would hold true if he had applied his methodology to the State's 2020 data.

***33** *Dr. Moon Duchin*. Dr. Moon Duchin, the final expert put forward by the Challengers, provided a report assessing whether the Enacted Plan "cracks" black voters among multiple districts in a way that produced "discernible vote dilution." J. S. A. Supp. 127a. After finding that the Enacted Plan diluted the black vote, Dr. Duchin concluded that it is "not plausible" that the dilution was a mere "side effect of partisan concerns." *Id*., at 175a.

[37] Neither the District Court nor the Challengers cite Dr. Duchin's report to support the racial-predominance finding, and that is for a good reason. Like Dr. Imai's report, various parts of Dr. Duchin's report did not account for partisanship ****1249** or core retention. App. 102–103. Moreover, Dr. Duchin's conclusion was based on an assessment of the map as a whole rather than District 1 in particular. A state-wide analysis cannot show that District 1 was drawn based on race.

See *Bethune-Hill*, 580 U.S. at 191, 137 S.Ct. 788 ("[T]he basic unit of analysis for racial gerrymandering claims ... is the district"); *Alabama Legislative Black Caucus*, 575 U.S. at 262–263, 135 S.Ct. 1257 (a racial-gerrymandering claim "does not apply to a State considered as an undifferentiated 'whole' "). Given these serious problems, it is no wonder that the challengers cite Dr. Duchin's report only in support of their racial vote-dilution claim. It has no probative force with respect to their racial-gerrymandering claim regarding District 1's boundaries.

[38] **[39]** To sum up our analysis so far, no direct evidence supports the District Court's finding that race predominated in the design of District 1 in the Enacted Plan. The circumstantial evidence falls far short of showing that race, not partisan preferences, drove the districting process, and none of the expert reports offered by the Challengers provides any significant support for their position.[11]

***34** D

[40] In addition to all this, the District Court also critically erred by failing to draw an adverse inference against the Challengers for not providing a substitute map that shows how the State "could have achieved its legitimate political objectives" in District 1 while producing "significantly greater racial balance." *Cromartie II*, 532 U.S. at 258, 121 S.Ct. 1452. We have repeatedly observed that an alternative map of this sort can go a long way toward helping plaintiffs disentangle race and politics. In *Cooper*, we expressed "no doubt that an alternative districting plan ... can serve as key evidence in a race-versus-politics dispute." 581 U.S. at 317, 137 S.Ct. 1455. By showing that a rational legislature, driven only by its professed mapmaking criteria, could have produced a different map with "greater racial balance," *Cromartie II*, 532 U.S. at 258, 121 S.Ct. 1452, an alternative map can perform the critical task of distinguishing between racial and political motivations when race and partisanship are closely entwined. For that reason, we have said that when all plaintiffs can muster is "meager direct evidence of a racial gerrymander" "only [an alternative] ***35** ma[p] of that kind" can "carry the day." *Cooper*, 581 U.S. at 322, 137 S.Ct. 1455.

****1250** Nor is an alternative map difficult to produce. Any expert armed with a computer "can easily churn out redistricting maps that control for any number of specified criteria, including prior voting patterns and political party registration." *Id.*, at 337, 137 S.Ct. 1455 (opinion of ALITO, J.). The Challengers enlisted *four* experts who could have made these maps at little marginal cost. Dr. Imai's simulations generated 20,000 different maps—but none that actually controlled for politics. The evidentiary force of an alternative map, coupled with its easy availability, means that trial courts should draw an adverse inference from a plaintiff 's failure to submit one. The adverse inference may be dispositive in many, if not most, cases where the plaintiff lacks direct evidence or some extraordinarily powerful circumstantial evidence such as the "strangely irregular twenty-eight-sided" district lines in *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), which betrayed the State's aim of segregating voters on the basis of race with "mathematical" precision, *ibid.*

[41] The District Court, however, misunderstood our case law when it held that an alternative map is relevant only for the purpose of showing that a remedy is plausible. 649 F.Supp.3d at 198–199. Because "a constitutionally compliant plan for [District 1] can be designed without undue difficulty," the District Court concluded that it was "not necessary for Plaintiffs to present an acceptable alternative map to prevail on their claims." *Id.*, at 199. That is wrong. A plaintiff 's failure to submit an alternative map—precisely because it can be designed with ease—should be interpreted by district courts as an implicit concession that the plaintiff cannot draw a map that undermines the legislature's defense that the districting lines were "based on a permissible, rather than a prohibited, ground." *Cooper*, 581 U.S. at 317, 137 S.Ct. 1455. The District Court's conclusions are clearly erroneous because it did not follow this basic logic.

***36** E

Despite its length, the dissent boils down to six main points. None is valid.

[42] *First*, the dissent suggests that clear-error review is a perfunctory task, see *post*, at 1272 - 1273, but that is not so. While district court findings of fact are generally correct, conscientious district courts sometimes err, and appellants are entitled to meaningful appellate review. Does the dissent really think that all district court findings on the question of racial discrimination are virtually immune from reversal?

Second, the dissent attacks the proposition that in redistricting cases the "good faith of [the] state legislature must be presumed." *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. But,

as the citation to Justice Kennedy's opinion for the Court in *Miller* reveals, that presumption is an established feature of our case law.

[43] *Third*, the dissent claims that our decision is inconsistent with *Cooper*, but the dissent's argument is based on an imaginary version of that opinion. Nothing in *Cooper* is inconsistent with the venerable rule that a factfinder may draw an adverse inference when a party fails to produce highly probative evidence that it could readily obtain if in fact such evidence exists. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939); see also 2 J. Wigmore, Evidence in Trials at Common Law § 291, pp. 227–229 (Chadbourn rev. 1979). "[T]his rule can be traced as far back as 1722" and "has been utilized in scores of modern cases." ****1251** *International Union, United Auto, Aerospace and Agricultural Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (CADC 1972). The dissent is correct that this inference "pack[s] a wallop" in such cases, *post*, at 1272 - 1273, but that is only because an adequate alternative map is remarkably easy to produce—as demonstrated by the fact that the Challengers introduced tens of thousands of other maps into the record. Under such circumstances, if a sophisticated plaintiff bringing a racial-gerrymandering claim cannot provide ***37** an alternative map, that is most likely because such a map cannot be created. It would be clear error for the factfinder to overlook this shortcoming.

Fourth, the dissent argues that the Challengers were blindsided when the State argued at trial that its map was drawn to achieve a political goal. *Post*, at 1274 - 1275. But there is ample evidence that the State's aim was well known before trial. See *supra*, at 1244 - 1245. And neither the Challengers nor the dissent can explain why the Challengers' experts, who created thousands of maps that took into account all sorts of variables, supposedly never even tried to create a District 1 that had a higher BVAP while achieving the legislature's political goals. Nor can they explain why, if such a map can be created, the Challengers' experts did not produce one during the trial.

Fifth, the dissent makes much of the fact that Roberts had taken racial demographics into account in drawing maps in the past and was aware of the racial makeup of the various districts he created in this case. But there is nothing nefarious about his awareness of the State's racial demographics. Roberts has spent nearly 20 years drawing maps for various state and local initiatives, and it is therefore entirely unsurprising that he exhibited a wealth of knowledge about who lives in which part of the State. Cf. *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (state redistricting officials "will ... almost always be aware of racial demographics" during the districting process). The dissent seeks to undercut Roberts's credibility by labeling him "a veteran consumer of racial data." *Post*, at 1277. We think it is unfair for the dissent to question his credibility simply because he, like every other expert who has ever worked on a Voting Rights Act case, has had to "consum[e] ... racial data" to comply with our precedents.

Finally, the dissent thinks that the State must have used racial data because that data, in its view, is more accurate than political data in predicting future votes. Refusing to use the racial data, according to the dissent, would have required ***38** the "self-restraint of a monk." *Post*, at 1279. This jaded view is inconsistent with our case law's longstanding instruction that the "good faith of [the] state legislature must be presumed" in redistricting cases. *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. And in any event, there is little reason to think that it requires much restraint for a mapmaker with a political aim to use data that bears directly on what he is trying to achieve, namely, political data. That is especially so where, as here, the political data, unlike the racial data that the dissent prefers, took into account voter turnout. See *supra*, at 1242 - 1244, and n. 7.

In sum, there is no substance to the dissent's attacks.

IV

The Challengers also raised an independent vote-dilution claim. The District Court held that this claim was governed by the "same findings of fact and reasoning" that guided its racial-gerrymandering analysis, and it thus entered judgment for the Challengers on that ground as well. 649 F.Supp.3d at 198. But in light of our conclusion that those findings were clearly erroneous, that conclusion cannot stand. ****1252** Moreover, the District Court's analysis did not take into account the differences between vote-dilution and racial-gerrymandering claims.

[44] **[45]** A racial-gerrymandering claim asks whether race predominated in the drawing of a district "regardless of the motivations" for the use of race. *Shaw I*, 509 U.S. at 645, 113 S.Ct. 2816. The racial classification itself is the relevant harm in that context. A vote-dilution claim is "analytically

distinct" from a racial-gerrymandering claim and follows a "different analysis." *Id.*, at 650, 652, 113 S.Ct. 2816. A plaintiff pressing a vote-dilution claim cannot prevail simply by showing that race played a predominant role in the districting process. Rather, such a plaintiff must show that the State "enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities." ***39** *Miller*, 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). In other words, the plaintiff must show that the State's districting plan "has the purpose *and* effect" of diluting the minority vote. *Shaw I*, 509 U.S. at 649, 113 S.Ct. 2816 (emphasis added).

In light of these two errors in the District Court's analysis of the Challengers' vote-dilution claim, a remand is appropriate.

* * *

We reverse the judgment of the District Court in part and remand the case in part for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring in part.
I join all but Part III–C of the Court's opinion. The Court correctly concludes that the judgment below must be reversed under our precedents. Although I find the analysis in Part III–C persuasive, clear-error review is not an invitation for the Court to "sift through volumes of facts" and "argue *its* interpretation of those facts." *Easley v. Cromartie*, 532 U.S. 234, 262, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (THOMAS, J., dissenting). The Court's searching review of the expert reports exceeds the proper scope of clear-error review. But, that analysis is not necessary to resolve the case. In Part III–B, the Court explains that the District Court failed to evaluate evidence reflecting the correlation between race and politics with the necessary presumption of legislative good faith. *Ante,* at 1240 - 1243. And, in Part III–D, it explains that the District Court failed to properly account for the plaintiffs' failure to produce an alternative map. *Ante,* at 1248 - 1249. Both of those mistakes are reversible legal errors.

I write separately to address whether our voting-rights precedents are faithful to the Constitution. This case is unique because it presents solely constitutional questions. The plaintiffs do not rely on the Voting Rights Act of 1965 for any of their claims. Nor do the South Carolina officials ***40** invoke the Voting Rights Act as part of their defense. There can be no more propitious occasion to consider the constitutional underpinnings of our voting-rights jurisprudence.

The plaintiffs press two distinct constitutional claims. First, they bring a "racial gerrymandering" claim, alleging that South Carolina drew its new Congressional District 1 to sort black voters based on their race. To prevail on that claim under our precedents, the plaintiffs must show that race was the "predominant factor" in the legislature's approach to drawing the district. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Second, they bring a "vote dilution" claim, alleging that South Carolina drew ****1253** District 1 to intentionally reduce the voting strength of the district's black residents. To prevail on that claim under our precedents, the plaintiffs must show that District 1's design reduces "minority voters' ability, as a group, 'to elect the candidate of their choice.' " *Shaw v. Reno*, 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)).

In my view, the Court has no power to decide these types of claims. Drawing political districts is a task for politicians, not federal judges. There are no judicially manageable standards for resolving claims about districting, and, regardless, the Constitution commits those issues exclusively to the political branches.

The Court's insistence on adjudicating these claims has led it to develop doctrines that indulge in race-based reasoning inimical to the Constitution. As we reiterated last Term, " '[o]ur Constitution is color-blind.' " *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 230, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting)). A colorblind Constitution does not require that racial considerations "predominate" before subjecting them to scrutiny. Nor does it tolerate groupwide judgments about the preferences and beliefs ***41** of racial minorities. It behooves us to abandon our misguided efforts and leave districting to politicians.

I

Determining the proper shape of a district is a political question not suited to resolution by federal courts. The questions presented by districting claims are "

'nonjusticiable,' or 'political questions.' " *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). We have explained that a question is nonjusticiable when there is " 'a lack of judicially discoverable and manageable standards for resolving' " the issue or " 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.' " *Id.*, at 277–278, 124 S.Ct. 1769 (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

In *Rucho v. Common Cause*, 588 U.S. 684, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019), we applied those principles to conclude that ***42** partisan gerrymandering claims are nonjusticiable. Partisan gerrymandering claims allege that a political map unduly favors one political party over another. We explained that partisan gerrymandering claims therefore present questions about how to "apportion political power as a matter of fairness," despite the fact that "[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.*, at 705, 707, 139 S.Ct. 2484. We bolstered our conclusion by reference to "the Framers' decision to entrust districting to political entities" in the Elections Clause, Art. I, § 4, cl. 1. *Id.*, at 697, 701, 139 S.Ct. 2484. Because courts "have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority," we held that partisan gerrymandering claims are nonjusticiable. *Id.,* at 721, 139 S.Ct. 2484.

The same logic demonstrates that racial gerrymandering and vote dilution claims are also nonjusticiable. As with partisan gerrymandering claims, the racial gerrymandering and vote dilution claims in this case lack "judicially discoverable and manageable standards" for their resolution. ****1254** *Vieth*, 541 U.S. at 277–278, 124 S.Ct. 1769 (internal quotation marks omitted). And, they ask us to address an issue—congressional districting—that is textually committed to a coordinate political department, Congress. *Id.*, at 277, 124 S.Ct. 1769. As a result, racial gerrymandering and vote dilution claims brought under the Fourteenth and Fifteenth Amendments are nonjusticiable.

A

Racial gerrymandering and vote dilution claims lack " 'judicially discoverable and manageable standards' " for their resolution. *Id.*, at 277–278, 124 S.Ct. 1769 (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. 691). Both types of claims turn on questions that cannot be answered through the kind of reasoning that constitutes an exercise of the "judicial Power." Art. III, § 1, cl. 1. I address in turn the reasons why each claim is unmanageable.

1

Racial gerrymandering claims ask courts to reverse-engineer the purposes behind a complex and often arbitrary legislative process. The standard developed under our precedents "require[s] the plaintiff to show that race was the 'predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' " *Ante,* at 1234 (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475). In other words, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles ... to racial considerations." *Id.*, at 916, 115 S.Ct. 2475. The Court's focus on legislative purpose is unavoidable because "the constitutional violation in racial gerrymandering cases stems from the racial purpose of state action," not the resulting map. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 189, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017) (internal quotation marks omitted).

***43** Divining legislative purpose is a dubious undertaking in the best of circumstances, but the task is all but impossible in gerrymandering cases. "Electoral districting is a most difficult subject for legislatures," a pure "exercise [of] the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. We have therefore cautioned courts to "be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Id.*, at 915–916, 115 S.Ct. 2475.

In cases without smoking-gun evidence, the only practical way to prove that a State considered race when drawing districts is to "show that the State's chosen map conflicts with traditional redistricting criteria."[1] *Ante,* at 1234. The Court's racial gerrymandering precedents use the term " 'traditional districting principles' " to refer to the "competing interests" and "complex ... forces" involved in drawing districts. *Miller*, 515 U.S. at 915–916, 919, 115 S.Ct. 2475 (quoting *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816). Judging a map's consistency or conflict with traditional districting principles requires a court to ascertain what kinds of maps should result from the application of those principles.

Determining how a legislature would have drawn district lines in a vacuum is a fool's errand. Indeed, as we have defined them, "traditional districting principles" are simply anything relevant to drawing districts other than race. They include "principles such as compactness, contiguity, and respect for political subdivisions." **1255 *Id.*, at 647, 113 S.Ct. 2816. They also include "keeping communities of interest together, and protecting incumbents," *Rucho*, 588 U.S. at 706–707, 139 S.Ct. 2484, as well as "minimizing change," *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 259, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015). Today, the Court identifies "the legislature's partisan interests" as a traditional criterion. *44 *Ante,* at 1243. Even considerations such as a district's "consistently urban character," "common media sources," and inclusion of "major transportation lines ... implicate traditional districting principles." *Bush v. Vera*, 517 U.S. 952, 966, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). We have readily acknowledged that "[t]raditional redistricting principles ... are numerous and malleable," and that "some ... are surprisingly ethereal and admit of degrees." *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788 (alteration and internal quotation marks omitted).

To evaluate whether a map aligns with traditional districting principles, a court must "rank the relative importance of those ... criteria." *Rucho*, 588 U.S. at 708, 139 S.Ct. 2484. Without such a ranking, it is impossible to say what kinds of maps the principles should yield. But, that analysis ensnarls courts in a political thicket. Traditional districting principles often conflict with one another, and there is no principled way for judges to resolve those conflicts. Consider the question whether the principles of contiguity and compactness can justify a map that retains a relatively small part of the old district's core. See *ante,* at 1243 - 1244, 1244 -1245. Or, consider whether the principle of keeping communities of interest together can justify uniting one community at the cost of splitting another between several districts, or healing partially an existing split at the cost of introducing a new one. See *Allen v. Milligan*, 599 U.S. 1, 57, 61, 143 S.Ct. 1487, 216 L.Ed.2d 60 (2023) (THOMAS, J., dissenting). These questions do not ask for legal answers, only political compromises. Judicial resolution of racial gerrymandering claims thus requires precisely the kind of "inconsistent, illogical, and ad hoc" decisionmaking that we have said is beyond the judicial power. *Vieth*, 541 U.S. at 278, 124 S.Ct. 1769.

Evaluating compliance with traditional districting principles is further complicated by the fact that many decisions are equally consistent with both a good-faith application of those principles and with common gerrymandering techniques. *45 A legislature seeking to gerrymander a district will often proceed by "packing" or "cracking" groups of minority voters. "Packing" means concentrating minority voters in a single district to reduce their influence in surrounding districts. "Cracking" means splitting a group of minority voters between multiple districts to avoid strong minority influence in any one district. But, in areas where "political groups ... tend to cluster (as is the case with Democratic voters in cities)," apparent packing or cracking can simply reflect "adherence to compactness and respect for political subdivision lines" or "the traditional criterion of incumbency protection." *Id.*, at 290, 298, 124 S.Ct. 1769. This case exemplifies the problem—the majority observes that Dr. Moon Duchin's report failed to "account for" the traditional districting principles of "partisanship or core retention" in "assessing whether the Enacted Plan 'cracks' black voters among multiple districts." *Ante,* at 1248. The difference between illegitimate packing and the legitimate pursuit of compactness is too often in the eye of the beholder.

Perhaps the most serious obstacle to evaluating whether a map is consistent with traditional districting principles is the fact that race and politics are, at present, highly correlated in American society. Racial **1256 gerrymandering is constitutionally suspect, but "a jurisdiction may engage in constitutional political gerrymandering." *Rucho*, 588 U.S. at 701, 139 S.Ct. 2484 (internal quotation marks omitted). So, even if a court is able to navigate all the complications I have identified so far, it must still contend with the reality that "political and racial reasons are capable of yielding similar oddities in a district's boundaries." *Cooper v. Harris*, 581 U.S. 285, 308, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017). To that end, "when the State asserts partisanship as a defense," plaintiffs must meet the "formidable task" of "disentangl[ing] race from politics and prov[ing] that the former drove a district's lines." *Ibid.* Courts are not well equipped to evaluate whether plaintiffs succeed in disentangling race and politics.

*46 As the Court observes, roughly 90% of black voters in South Carolina supported the Democratic candidate in the last Presidential election. *Ante,* at 1234 - 1235, and n. 2. When nearly all black voters support Democrats, an effort to strategically sort Democratic voters can be indistinguishable from an effort to strategically sort black voters. In this case, all Democratic-leaning maps presented during the districting

process featured a black share of the voting-age population of 21% or higher, and all Republican-leaning maps featured a black voter share of 17% or lower. *Ante,* at 1241. The dispute in this case therefore focuses on whether that correlation reflected a racial purpose, or merely reflected the result of a political purpose.

The majority's reasoning highlights the difficulties inherent in disentangling race and politics. Its explanation of why the expert evidence was insufficient does not rest on the application of legal principles, but on the likely errors it finds in the experts' statistical models after a "foray into the minutiae of the record." *Cromartie*, 532 U.S. at 262, 121 S.Ct. 1452 (opinion of THOMAS, J.). The majority discounts four separate expert reports based on methodological concerns. One report is insufficient because it fails to model partisanship. *Ante,* at 1243 - 1245. Another "carries less weight" because it measures partisanship through the wrong statistical method. *Ante*, at 1246 - 1247. And, another cannot be relied upon because it measures partisanship with the wrong election data. *Ante*, at 1247 - 1248. The dissent accuses the Court of "play[ing] armchair statistician." *Post*, at 1284 (opinion of KAGAN, J.). But, the dissent's defense of the expert reports includes an exercise in armchair cartography. The dissent justifies the experts' assumption that the legislature could move any precinct in District 1 to District 6 by explaining that District 1 is thin, coastal, and shares a long border with District 6. *Post*, at 1282 - 1284. It supports its hunch with two zoomed-out maps that include no information about precinct size or location. *Post,* at 1286 - 1287, Appendix. This type of back-and-forth is the ***47** inevitable result of our voting-rights doctrine. One worries that the Court will soon begin drawing its own sample maps and performing in-house regression analyses.

A system in which only specialized experts can discern the existence of a constitutional injury is intolerable, and strongly suggests that the racial gerrymandering injury is not amenable to judicial resolution. We should resist the temptation to reduce the Fourteenth Amendment to a battle of expert witnesses. Our gerrymandering misadventures demonstrate that these claims lack judicially manageable standards.

2

As I have long maintained, vote dilution claims are also "not readily subjected to any judicially manageable standards." ****1257** *Holder v. Hall*, 512 U.S. 874, 901–902, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). To prove vote dilution as a constitutional claim, our precedents require plaintiffs to show that the design of a district reduces "minority voters' ability, as a group, to elect the candidate of their choice." *Shaw*, 509 U.S. at 641, 113 S.Ct. 2816 (internal quotation marks omitted). The same consideration is used for vote dilution claims brought under § 2 of the Voting Rights Act. See *Allen*, 599 U.S. at 13, 143 S.Ct. 1487 (explaining that § 2 "borrow[s] language from a Fourteenth Amendment [vote dilution] case").

To assess whether a legislature has diluted a minority's vote, "the critical question ... is: 'Diluted relative to what benchmark?' " *Id.*, at 50, 143 S.Ct. 1487 (opinion of THOMAS, J.) (quoting *Gonzalez v. Aurora*, 535 F.3d 594, 598 (CA7 2008) (Easterbrook, C. J.)). Despite repeated efforts in our Voting Rights Act cases, the Court has "never succeeded" in formulating "an objective and workable method of identifying the undiluted benchmark." 599 U.S. at 69, 143 S.Ct. 1487 (opinion of THOMAS, J.). The Court's failure is not surprising because the task is futile. The Constitution does not offer "a theory for defining effective participation in representative government." *Holder*, 512 U.S. at 897, 114 S.Ct. 2581 (opinion of THOMAS, J.).

***48** Choosing among theories of effective representation depends on particular voters' objectives and preferred political strategies, not principles of constitutional law. Are a minority's votes "more 'effective' when they provide *influence* over a greater number of seats, or *control* over a lesser number of seats"? *Id.*, at 899, 114 S.Ct. 2581. Are minority voters " 'represented' only when they choose a delegate who will mirror their views in the legislative halls," or does the "practical influence" of a small group of potential swing voters also amount to effective representation? *Id.*, at 900, 114 S.Ct. 2581. Only minority voters themselves can answer these questions. No "theory of the 'effective' vote" is "inherent in the concept of representative democracy itself." *Id.*, at 899, 114 S.Ct. 2581. So, when our precedents ask a court to determine if a minority's vote is diluted, they are "actually ask[ing]" the court " 'to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy.' " *Id.*, at 897, 114 S.Ct. 2581 (quoting *Baker*, 369 U.S. at 300, 82 S.Ct. 691 (Frankfurter, J., dissenting)). The Constitution expresses no view on such issues, and they are not amenable to judicial resolution.

In practice, this Court has endorsed a theory of representation that distributes legislative seats in direct proportion to

racial demographics. "[T]he 'lack of any better alternative' identified in our case law" and the "intuitive appeal" of "direct proportionality" make a racial proportionality standard irresistible. *Allen*, 599 U.S. at 72, 143 S.Ct. 1487 (opinion of THOMAS, J.) (quoting *Holder*, 512 U.S. at 937, 114 S.Ct. 2581 (opinion of THOMAS, J.)). As a result, there is a "near-perfect correlation between [courts'] proportionality findings and [vote dilution] liability results." 599 U.S. at 72, 143 S.Ct. 1487 (citing E. Katz, M. Aisenbrey, A. Baldwin, E. Cheuse, & A. Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 730–732 (2006)). A proportionality approach is easy to apply, but it is "*radically inconsistent* with the [Reconstruction] Amendments' command that government treat citizens ***49** as individuals and their 'goal of a political system in which race no longer matters.' " 599 U.S. at 82, 143 S.Ct. 1487 (quoting *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816).

****1258** I continue to believe that "[t]he matters the Court has set out to resolve in vote dilution cases are ... not questions of law," and that "they are not readily subjected to any judicially manageable standards." *Holder*, 512 U.S. at 901–902, 114 S.Ct. 2581 (opinion of THOMAS, J.). The Court's determination to nonetheless adjudicate these cases has yielded an unconstitutional practice of distributing of political power based on race.

B

Racial gerrymandering and vote dilution claims—at a minimum, those challenging congressional districts—are nonjusticiable for an additional reason: The Elections Clause makes a "textually demonstrable constitutional commitment" of the power to oversee congressional districting to "a coordinate political department," Congress. *Vieth*, 541 U.S. at 277, 124 S.Ct. 1769 (internal quotation marks omitted). And, no other constitutional provision overcomes that commitment to Congress. The Constitution contemplates no role for the federal courts in the districting process.

1

Although States have the initial duty to draw district lines, the Elections Clause commits exclusive supervisory authority over the States' drawing of congressional districts to Congress—not federal courts. It provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1. The first part of the Clause "imposes a duty upon" state legislatures to "prescribe the details necessary to hold congressional elections." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 862, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (THOMAS, J., dissenting). The second part "grants power ***50** exclusively to Congress" to police the state legislatures' performance of their duty. *Id*., at 864, 115 S.Ct. 1842. Critically, the Clause leaves the Judiciary out of the districting process entirely.

The Clause's assignment of roles is comprehensive. For example, a state legislature's responsibility over congressional elections " 'transcends any limitations sought to be imposed by the people of a State' " through other state actors; the state *legislature* is the exclusive state authority. *Moore v. Harper*, 600 U.S. 1, 58, 143 S.Ct. 2065, 216 L.Ed.2d 729 (2023) (THOMAS, J., dissenting) (quoting *Leser v. Garnett*, 258 U.S. 130, 137, 42 S.Ct. 217, 66 L.Ed. 505 (1922)). In a similar vein, the Clause makes Congress the exclusive federal authority over States' efforts to draw congressional districts, to the exclusion of courts.

The historical record compels this interpretation of the Elections Clause's text. Gerrymandering and vote dilution are not new phenomena. The founding generation was familiar with political districting problems from the American colonial experience. See *Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (collecting examples). But, the Framers nowhere suggested the federal courts as a potential solution to those problems. Instead, they relied on congressional oversight. The Framers' considered choice of a nonjudicial remedy is highly relevant context to the interpretation of the Elections Clause. See *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 26–27, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022).

Because the Elections Clause attracted considerable criticism during the ratification debates, ample contemporaneous discussion sheds light on the original understanding ****1259** of the Clause. As a delegate to the Virginia ratifying convention observed, Congress's power to regulate the time, place, and manner of elections drew objections that "echoed from one end of the continent to the other." 3 Debates on the Constitution 9 (J. Elliot ed. 1836) (Elliot's Debates). Opponents of ratification attacked the Clause as a radical expansion of national power and a grave danger to liberty.

Patrick Henry argued: "What can be more defective than the clause ***51** concerning the elections? The control given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage." *Id*., at 60.

Defenses of the Elections Clause demonstrate that it was designed at least in part as a way to address abusive districting. To be sure, proponents of ratification primarily justified the Clause as a "constitutional remedy for th[e] evil" presented by the possibility that "the states [might] *neglect to appoint representatives*" to the new Federal Government. 2 *id.,* at 326 (statement of John Jay). But, other defenses of the Elections Clause resonate with modern concerns about gerrymandering and vote dilution.

Some proponents of ratification championed the Clause as necessary "for securing to the people their equal rights of election." *Id.*, at 26. A delegate to the Massachusetts ratifying convention cautioned that "a state legislature ... in times of popular commotion, and when faction and party spirit run high, ... might make an unequal and partial division of the states into districts for the election of representatives." *Id*., at 27. In such a situation, he explained, "the people can have no remedy" except for that created by the Elections Clause: the "controlling power" by which Congress may "preserve and restore to the people their equal and sacred rights of election." *Ibid*. And, James Madison raised similar arguments at the Constitutional Convention. See 2 Records of the Federal Convention of 1787, pp. 240–241 (M. Farrand ed. 1911).

It was Congress, not the courts, that the Founders contemplated would provide recourse against state intrusions on voting rights through the districting process. Even when listing *all* entities that could *possibly* regulate congressional elections, the founding generation did not consider the federal courts. To support his assertion that "the discretionary power over elections ought to exist somewhere," Alexander Hamilton posited that "there were *only* three ways in which this power could have been reasonably organized; that ***52** it must either have been lodged wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 326 (E. Scott ed. 1898) (emphasis added). A delegate made the same observation at the Massachusetts ratifying convention: "The power ... to regulate the elections of our federal representatives must be lodged somewhere. I know of but two bodies wherein it can be lodged—*the legislatures of the several states, and the general Congress*." 2 Elliot's Debates 24.

The Elections Clause's text and history therefore point to the same conclusion: The Clause commits supervisory authority over congressional districting to Congress alone. "At no point" during the drafting or ratification of the Constitution "was there a suggestion that the federal courts had a role to play" in resolving "electoral districting problems." *Rucho*, 588 U.S. at 699, 139 S.Ct. 2484. Even when the debate touched on how political districting could affect the voting rights of individuals, it was understood that any remedy related to ****1260** districting would come from Congress, not federal courts.[2]

2

None of the Constitution's other provisions undercuts or countermands the Elections Clause's clear mandate for Congress to supervise the States' districting efforts. The Court ***53** has viewed the Fourteenth and Fifteenth Amendments as the source of its authority to entertain challenges to districts. But, the Reconstruction Amendments are perfectly consistent with Congress's exclusive authority to oversee congressional districting.

Our decisions primarily identify the Equal Protection Clause as the textual basis for judicial resolution of districting claims. See *Shaw*, 509 U.S. at 642, 113 S.Ct. 2816; *Davis v. Bandemer*, 478 U.S. 109, 151, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring in judgment) (asserting that, in contrast to political gerrymandering, "the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination ... render[s] racial gerrymandering claims justiciable"). That conclusion does not comport with the text of the Equal Protection Clause or the structure of the Reconstruction Amendments.

The text of the Equal Protection Clause makes it an unlikely source for claims about political districting. The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. The Clause's "focus on 'protection' " suggests that it imposes only " 'a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system,' " not a "prohibit[ion on] discriminatory legislative classifications." *United States v. Vaello Madero*, 596 U.S. 159, 178–179, n. 4, 142 S.Ct. 1539, 212 L.Ed.2d 496 (2022) (THOMAS, J.,

concurring) (quoting C. Green, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History, 19 Geo. Mason U. Civ. Rights L. J. 1, 3 (2008)). So understood, the Equal Protection Clause has no obvious bearing on districting.[3]

**1261 *54 Reading the Equal Protection Clause—or anything else in § 1 of the Fourteenth Amendment—to invite judicial involvement in disputes over voting rights also ignores the fact that another part of the Fourteenth Amendment deals directly with those rights. Section 2 provides that "when the right to vote ... is denied" to a State's voting-age male citizens "or in any way abridged," the State's apportionment of congressional representatives "shall be reduced in the proportion" of the denial of the franchise. Congress alone can provide that remedy through its power to apportion representatives among the States. See Art. I, § 2, cl. 3. Federal courts are therefore unable to enforce § 2. See *Saunders v. Wilkins*, 152 F.2d 235 (CA4), cert. denied, 328 U.S. 870, 66 S.Ct. 1362, 90 L.Ed. 1640 (1945). The express provision of a nonjudicial remedy for voting-rights violations in § 2 counsels against reading § 1 to allow judicial remedies implicitly in those same voting-rights disputes. Cf. *Reynolds v. Sims*, 377 U.S. 533, 594, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (Harlan, J., dissenting).

Reading the Equal Protection Clause to support claims for racial gerrymandering or vote dilution also makes the existence of the Fifteenth Amendment unexplainable. If § 1 of the Fourteenth Amendment allows for such fulsome protection of the franchise by federal courts, it is hard to see why *55 "Congress and the States still found it necessary to adopt the Fifteenth Amendment—which protects '[t]he right of citizens of the United States to vote'—two years after the Fourteenth Amendment's passage." *McDonald*, 561 U.S. at 852, 130 S.Ct. 3020 (opinion of THOMAS, J.).

Nor can the Fifteenth Amendment justify racial gerrymandering or vote dilution claims in its own right. The Fifteenth Amendment is the primary constitutional protection for the voting rights of racial minorities. But, the Fifteenth Amendment "address[es] only matters relating to access to the ballot." *Holder*, 512 U.S. at 930, 114 S.Ct. 2581 (opinion of THOMAS, J.). "[I]ts protections [are] satisfied as long as members of racial minorities [can] ' "register and vote without hindrance." ' " *Id.*, at 921, 114 S.Ct. 2581 (quoting *Mobile v. Bolden*, 446 U.S. 55, 65, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion)). The Court's decision in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)—a Fifteenth Amendment case often cited as a touchstone of our racial gerrymandering jurisprudence—is consistent with this understanding. *Gomillion* involved only a claim "that the boundaries of a city had been drawn to prevent blacks from voting in municipal elections altogether," not a claim about the way minority voters were distributed between two districts. *Holder*, 512 U.S. at 920, n. 20, 114 S.Ct. 2581 (opinion of THOMAS, J.).

At this juncture, I see no directive in the Reconstruction Amendments for courts to police the lines between political districts. Instead, the Elections Clause assigns the responsibility for supervising the States' drawing of congressional districts solely to Congress.

* * *

Racial gerrymandering and vote dilution claims lack judicially manageable standards for their resolution. And, they conflict **1262 with the Constitution's textual commitment of congressional districting issues to the state legislatures and Congress. They therefore present nonjusticiable political *56 questions. The Court should extricate itself from this business and return political districting to the political branches, where it belongs.

II

When an institution strays from its competencies, one does not expect good results. This Court's efforts in the districting field are no exception. The underlying nonjusticiability of racial gerrymandering and vote dilution claims leads us to distort our doctrines in numerous ways. The standard that the Court uses to resolve racial gerrymandering claims betrays the colorblind promise of the Fourteenth Amendment by endorsing the notion that some racial classifications are benign. The standard that the Court uses to resolve vote dilution claims invariably falls back on racial stereotypes. And, the remedy commonly ordered in redistricting cases—a judicially imposed map—ignores the normal limits on federal equity power. Taken together, the Court's misconceived doctrines leave the States in an unenviable position.

A

The racial predominance standard for racial gerrymandering claims is plainly inconsistent with the fact that " '[o]ur

Constitution is color-blind.' " *Harvard College*, 600 U.S. at 230, 143 S.Ct. 2141 (quoting *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (opinion of Harlan, J.)). Ordinarily, *any* governmental consideration of race—even as a second-order consideration—triggers strict scrutiny. For example, using race merely as a "tip" or a "plus" factor in college admissions does not excuse a university from satisfying strict scrutiny. 600 U.S. at 195–196, 213, 143 S.Ct. 2141 (internal quotation marks omitted).

Our voting-rights precedents diverge from this rule by subjecting an alleged racial gerrymander to strict scrutiny only if "race was the '*predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district.' " *Ante,* at 1234 (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475) (emphasis added). A "predominance" ***57** requirement conflicts with the classification-based harm that racial gerrymandering claims purport to address. The constitutional injury underlying a racial gerrymandering claim is the legislature's mere use of a racial classification in drawing its map. See *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788. That injury exists whether race is a legislature's first or last consideration in drawing districts. "Racial classifications *of any sort* pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816 (emphasis added). "They reinforce the belief ... that individuals should be judged by the color of their skin" and "balkanize us into competing racial factions." *Ibid.* All racial classifications are inherently suspect, whether predominant or not.

The Court developed the racial predominance standard with concerns about the justiciability of gerrymandering claims in mind. The Court initially formulated the predominance standard while observing that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," and stressing the need to allow States "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. And, after describing the predominance standard, the Court cautioned that federal courts must consider the problem of racial gerrymandering in light of "the intrusive ****1263** potential of judicial intervention into the legislative realm." *Id.*, at 916, 115 S.Ct. 2475. These concerns about intruding on the political process should have been a clear sign to retreat. Instead, the Court forged ahead to adopt a constitutionally suspect compromise.

The racial predominance standard does not even purport to be consistent with the colorblind Constitution. The *Miller* Court simply borrowed that standard from the District Court's flawed opinion below. The Court endorsed the District Court's decision "to require strict scrutiny whenever race is the 'overriding, predominant force' in the redistricting process." *Id.*, at 909, 917, 115 S.Ct. 2475 (quoting ***58** *Johnson v. Miller*, 864 F.Supp. 1354, 1372 (SD Ga. 1994)). But, the District Court's opinion could not have been a stronger rejection of our colorblind Constitution. It acknowledged that the racial predominance standard allowed legislatures to "intentionally consider race in redistricting—and even alter the occasional line in keeping with that consideration—without incurring constitutional review." *Id.*, at 1373. But, the District Court reasoned, "[b]oth the Supreme Court and Congress have already admitted that the Constitution is not genuinely 'color-blind.' " *Id.*, at 1374. This provenance underscores the inconsistency of the racial predominance standard with our colorblind Constitution.

Any use of race in drawing political districts—no matter how minor—must be justified by a compelling interest. The Court's insistence on hearing nonjusticiable districting claims leads it to disregard that principle in favor of a distorted standard that legitimizes racial classifications. If the Court is truly concerned about intruding on the political process, it should acknowledge that districting is a political question and vacate the field.

B

The Court's standard for vote dilution claims is similarly flawed, because it requires judges to engage in racial stereotyping. As I have explained, the Constitution does not define a baseline of effective representation by which to evaluate the dilution of a vote. *Supra*, at 1256 - 1258. The Court has purported to fill that gap by looking to "minority voters' ability, as a group, 'to elect the candidate of their choice.' " *Shaw*, 509 U.S. at 641, 113 S.Ct. 2816 (quoting *Allen*, 393 U.S. at 569, 89 S.Ct. 817). Simply put, the lack of a manageable vote dilution standard has led the Court to fall back on generalized expectations about members of minority groups.

"Our constitutional history does not tolerate [the] choice" to treat as "the touchstone of an individual's identity ... the color of their skin." *Harvard College*, 600 U.S. at 231, 143 S.Ct. 2141. It ***59** therefore does not permit courts to make judgments about what candidate "minority voters as a group" would choose. That assessment requires a court to assume that

"members of racial and ethnic groups must all think alike on important matters of public policy." *Holder*, 512 U.S. at 903, 114 S.Ct. 2581 (opinion of THOMAS, J.). And, it requires a court to construct a caricature of the racial group to determine —in the abstract—the attributes that define "the candidate of its choice." The Constitution does not indulge the belief that members of racial minorities "always (or even consistently) express some characteristic minority viewpoint on any issue." *Harvard College*, 600 U.S. at 219, 143 S.Ct. 2141 (internal quotation marks omitted).

The racial stereotyping encouraged by our vote dilution precedents is pronounced here. To establish vote dilution, the plaintiffs point to the District Court's observation that recent elections in the district " 'were close, with less than one percent **1264 separating the candidates,' so increasing the district's Black population to 20% 'would produce a "toss up" district' " instead of a Republican one. Brief for Appellees 64. But, that reasoning simply equates the ability of black South Carolinians to elect the candidate of their choice with their ability to elect a Democrat—an exercise in racial stereotyping. The mere fact that "members of a racial group tend to prefer the same candidates" is not license to treat that correlation as an absolute truth. *Holder*, 512 U.S. at 904, 114 S.Ct. 2581 (opinion of THOMAS, J.). Plaintiffs make no effort to explore whether the affinity of the district's black population toward the Democratic Party "might be the product of similar socioeconomic interests rather than some other factor related to race." *Ibid.* They instead proceed on the "working assumption that racial groups can be conceived of largely as political interest groups." *Id.*, at 905, 114 S.Ct. 2581. The Constitution forbids such an assumption.

The plaintiffs' stereotyping does not stop there. They contend that their vote dilution claim also finds support in an expert report evaluating the ability of black South Carolinians *60 to elect the candidate of their choice. That expert based her conclusion on the results of "elections with Black candidates on the ballot." Brief for Appellees 64. The plaintiffs' argument therefore assumes that the "candidate of choice" for black voters is simply a black candidate. But, the stereotyping is worse than that. In 2016, South Carolina reelected Republican Tim Scott to the United States Senate; Scott is the first black senator from the South since Reconstruction. The plaintiffs and their expert nonetheless decided that this race was *not* "considered probative for Black electoral opportunity." Supp. App. to Juris. Statement 174a. Plaintiffs' argument therefore combines two stereotypes by assuming that black South Carolinians can be properly represented only by a black *Democrat*.

Such stereotyping is, of course, not limited to this case or black voters. For example, a District Court recently concluded that Hispanic voters in a majority-Hispanic district lacked an opportunity to elect the candidate of their choice, even though the district elected a Hispanic Republican. *Soto Palmer v. Hobbs*, 686 F.Supp.3d 1213, 1224-26, 1230-31, 1234-35 (WD Wash. 2023). The court later purported to correct the lack of Hispanic opportunity by imposing a remedial map that made the district "substantially more Democratic," but slightly less Hispanic. *Soto Palmer*, 2024 WL 1138939, *2, *5 (Mar. 15, 2024). In short, the court concluded that securing the rights of Hispanic voters required replacing some of those voters with non-Hispanic Democrats. That dismissive attitude toward non-Democratic members of minority groups exemplifies the tendency of the Court's race-obsessed jurisprudence to "balkanize us into competing racial factions." *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816. The Court should correct course now before it inflicts further damage.

The vote dilution analysis in this case inevitably reduces black Charlestonians to partisan pawns and racial tokens. The analysis is demeaning to the courts asked to perform it, *61 to say nothing of the black voters that it stereotypes. "The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Holder*, 512 U.S. at 905–906, 114 S.Ct. 2581 (opinion of THOMAS, J.).

C

The Court's insistence on adjudicating racial gerrymandering and vote dilution claims has also tempted it to ignore constitutional **1265 limits on its remedial powers. Ultimately, the only remedy for the constitutional injuries caused by an illegally drawn map is a new map. But, federal courts lack "the power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). And, there is no "indication that the Framers had ever heard of courts" playing any role in resolving electoral districting problems. *Rucho*, 588 U.S. at 699, 139 S.Ct. 2484. The power to redraw a States' electoral districts therefore exceeds "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of

the original Judiciary Act." *Grupo Mexicano*, 527 U.S. at 318, 119 S.Ct. 1961 (internal quotation marks omitted).

The Court once recognized its limited equitable powers in this area. We previously acknowledged that "[o]f course no court can affirmatively re-map [a State's] districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid." *Colegrove v. Green*, 328 U.S. 549, 553, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) (opinion of Frankfurter, J.); see also *Baker*, 369 U.S. at 328, 82 S.Ct. 691 (Frankfurter, J., dissenting) ("Surely a Federal District Court could not itself remap the State").

The view of equity required to justify a judicial map-drawing power emerged only in the 1950s. The Court's "impatience with the pace of desegregation" caused by resistance to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), ***62** "led us to approve ... extraordinary remedial measures," *Missouri v. Jenkins*, 515 U.S. 70, 125, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). In the follow-on case to *Brown*, the Court considered "the manner in which relief [was] to be accorded" for vindication of "the fundamental principle that racial discrimination in public education is unconstitutional." *Brown v. Board of Education*, 349 U.S. 294, 298, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*). In doing so, the Court took a boundless view of equitable remedies, describing equity as being "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.*, at 300, 75 S.Ct. 753 (footnote omitted). That understanding may have justified temporary measures to "overcome the widespread resistance to the dictates of the Constitution" prevalent at that time, but, as a general matter, "[s]uch extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers' design." *Jenkins*, 515 U.S. at 125–126, 115 S.Ct. 2038 (opinion of THOMAS, J.). Federal courts have the power to grant only the equitable relief "traditionally accorded by courts of equity," not the flexible power to invent whatever new remedies may seem useful at the time. *Grupo Mexicano*, 527 U.S. at 319, 119 S.Ct. 1961.

Redistricting remedies rest on the same questionable understanding of equitable power. No court has explained where the power to draw a replacement map comes from, but all now assume it may be exercised as a matter of course. The most consideration this Court has given to the question, if it can be called consideration, was in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. In that case, the Court foreswore any attempt to "consider ... the difficult question of the proper remedial devices which federal courts should utilize in state legislative reapportionment cases," but nonetheless upheld, as an act of "proper judicial restraint," the District Court "ordering its own temporary ****1266** reapportionment plan." *Id.*, at 585–586, 84 S.Ct. 1362. The Court's only support for that conclusion was the naked statement in Justice Douglas's *Baker* concurrence that " 'any ***63** relief accorded can be fashioned in the light of well-known principles of equity.' " *Reynolds*, 377 U.S. at 585, 84 S.Ct. 1362 (quoting 369 U.S. at 250, 82 S.Ct. 691). Douglas's statement is an obvious fallback to the "practical flexibility" extolled as a "traditional attribut[e] of equity power" in *Brown II,* 349 U.S. at 300, 75 S.Ct. 753. The explanation is wholly inadequate; the Court has never attempted to ground the map-drawing power in "the jurisdiction in equity exercised by the High Court of Chancery in England" in 1789. *Grupo Mexicano*, 527 U.S. at 318, 119 S.Ct. 1961 (internal quotation marks omitted).

The lack of a historically grounded map-drawing remedy is an enormous problem for districting claims, because no historically supportable remedy can correct an improperly drawn district. The most promising option is "[t]he negative injunction remedy against state officials countenanced in *Ex parte Young*," a "standard tool of equity that federal courts have authority to entertain under their traditional equitable jurisdiction." *Whole Woman's Health* v. *Jackson*, 595 U. S. 30, 53, 142 S.Ct. 522, 211 L.Ed.2d 316 (2021) (THOMAS, J., concurring in part and dissenting in part) (citation and internal quotation marks omitted); see also *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The Court has "long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015).

But, a negative-injunction remedy does not actually redress racial gerrymandering or vote dilution, for two reasons. First, it is not apparent that an *Ex parte Young* injunction can prevent a state election official from conducting an election under an unconstitutional map, or force him to draw a new map. Such an injunction "permits a party to assert in equity a defense that would otherwise have been available in the State's enforcement proceedings at law," and it "extends no further than permitting private parties in some circumstances to prevent state officials from bringing an action to enforce a

state law that is contrary to federal ***64** law." *Whole Woman's Health*, 595 U. S., at 53, 142 S.Ct. 522 (opinion of THOMAS, J.) (alteration and internal quotation marks omitted). It is thus not clear that such an injunction could stop an election. Second, even if it is possible to enjoin state officials from conducting an election, it is questionable whether that remedy is ever "equitable." Our system of government depends on regular elections; putting elections indefinitely on hold may do more harm than good. Cf. *Baker*, 369 U.S. at 327, 82 S.Ct. 691 (opinion of Frankfurter, J.) ("An injunction restraining a general election unless the legislature reapportions would paralyze the critical centers of a State's political system and threaten political dislocation whose consequences are not foreseeable"). Ultimately, to remedy racial gerrymandering or vote dilution, someone must draw a new map. I can find no explanation why that "someone" can be a federal court.

D

The Court's attempts to adjudicate the impossible have put the States in an untenable position. We have hesitated to subject States to the " ' "competing hazards of liability" ' " that arise from the fact that the Constitution "restricts consideration of race and the [Voting Rights Act] demands consideration of race." ****1267** *Abbott v. Perez*, 585 U.S. 579, 587, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (quoting *Vera*, 517 U.S. at 977, 116 S.Ct. 1941 (plurality opinion)). But, the lack of manageable standards for districting claims and the unfortunate trajectory of the Court's Voting Rights Act precedents combine to make it impossible for States to navigate these hazards.

Last Term, the Court held that the Voting Rights Act required Alabama to draw a map that would give black Alabamians a majority in two of the State's seven congressional districts. Because black Alabamians make up less than two-sevenths of the State's population, such a map could result only from an obsessive focus on race in the map-drawing process. See *Allen*, 599 U.S. at 56, 143 S.Ct. 1487 (opinion of THOMAS, J.). For example, one of the plaintiffs' experts used a race-neutral ***65** algorithm to generate 2 million random maps; not a single map yielded two majority-black districts. *Id.*, at 58–59, 143 S.Ct. 1487. In this case, however, South Carolina faced a real risk of constitutional liability based on allegations that it considered race *too* heavily in drawing a district that was 17% black instead of 20%.

In fact, the Court recently granted emergency relief after a State failed to thread the impossible needle created by our voting-rights precedents. Voters in Louisiana challenged the State's 2022 congressional map, arguing that "Louisiana was required under the Voting Rights Act to create a second black-majority district." *Robinson v. Ardoin*, 86 F.4th 574, 585 (CA5 2023). The Fifth Circuit concluded that the plaintiffs were likely to succeed on their Voting Rights Act claim. Louisiana argued that, under the Voting Rights Act, "the possibility of drawing a majority-minority district does not require the drawing of the district," but the court pointed to our decision in *Allen* to reject that contention. 86 F.4th at 599. Louisiana then held a special legislative session and adopted a new map that "established a second majority-Black congressional district to resolve the [Voting Rights Act] litigation." *Callais v. Landry*, —— F. Supp. 3d ——, ——, 2024 WL 1903930, *1 (WD La., Apr. 30, 2024). The result? A different group of voters brought constitutional gerrymandering and vote-dilution claims against the State. *Id.*, at ——–——, 2024 WL 1903930, at *6–*7. That suit was also successful. A District Court found that race predominated in Louisiana's process of adding the second majority-minority district, and enjoined the use of the new map. *Id.*, at ——, ——, 2024 WL 1903930, at *17, *24. After the State argued that the proximity of the District Court's order to important election deadlines would cause "election chaos," Emergency Application in No. 23A1002, p. 19, we stayed the order, Order in No. 23A1002, 601 U. S. —— (2024) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (*per curiam*)).

As these cases make clear, this Court's jurisprudence puts States in a lose-lose situation. Taken together, our precedents ***66** stand for the rule that States must consider race *just enough* in drawing districts. And, what "just enough" means depends on a federal court's answers to judicially unanswerable questions about the proper way to apply the State's traditional districting principles, or about the groupwide preferences of racial minorities in the State. There is no density of minority voters that this Court's jurisprudence cannot turn into a constitutional controversy. We have extracted years of litigation from every districting cycle, with little to show for it. The Court's involvement in congressional districting is unjustified and counterproductive.

* * *

"When, under our direction, federal courts are engaged in methodologically ****1268** carving the country into racially designated electoral districts, it is imperative that we stop

to consider whether the course we have charted for the Nation is the one" required by the Constitution. *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). The Constitution provides courts no power to draw districts, let alone any standards by which they can attempt to do so. And, it does not authorize courts to engage in the race-based reasoning that has come to dominate our voting-rights precedents. It is well past time for the Court to return these political issues where they belong—the political branches.

Justice KAGAN, with whom Justice SOTOMAYOR and Justice JACKSON join, dissenting.

This voting case, as the Court acknowledges, turns on a quintessential factual dispute: Did South Carolina rely on racial data to reconfigure the State's Congressional District 1? The parties here agree that the South Carolina Legislature wanted to make District 1 more Republican. They further agree that in pursuit of that aim, the legislature moved nearly 200,000 people into or out of the district. What the parties disagree about is how the people expelled from the ***67** district were chosen. The State contends that its mapmakers looked exclusively at data from the last election and targeted people who had voted Democratic. If that is true, the State's actions (however unsavory and undemocratic) are immune from federal constitutional challenge. The Challengers, though, offer a different account. They say that the mapmakers, not content with what the election data revealed, also reviewed and heavily relied on racial data—thus exploiting the well-known correlation between race and voting behavior. And if that is true, the Challengers have a good constitutional claim, because the Equal Protection Clause forbids basing election districts mainly on race in order to achieve partisan aims. See *Cooper v. Harris*, 581 U.S. 285, 291, and n. 1, 308, n. 7, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Miller v. Johnson*, 515 U.S. 900, 914, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). So the key question again: In drawing District 1, did the mapmakers consider voting data alone, or did they also closely attend and respond to which residents were Black and which were White?

A three-judge District Court undertook to resolve that factual dispute. And the court, over nearly a year, did everything one could ask to carry out its charge. After overseeing broad discovery, the court held a 9-day trial, featuring some two dozen witnesses and hundreds of exhibits. It evaluated evidence about South Carolina geography and politics. It heard first-hand testimony about the redistricting process. And it considered the views of statistical experts on how the State's new district lines could—and could not—have come about. In the end, the court had to decide between two starkly different stories, backed by opposing bodies of evidence. One side you know from having read the majority opinion: The state officials repeatedly denied using race in choosing the people kicked out of District 1, insisting that they based their decisions on political data alone. The other side you have not yet heard, except in the sketchiest of terms. It is that the State's mapmakers were experienced and skilled in the use of racial data to draw electoral ***68** maps; that they configured their mapmaking software to show how any change made to the district would affect its racial composition; that the racial make-up they landed on was precisely what they needed, to the decimal point, to achieve their partisan goals; and that their politics-only story could not account, as a statistical matter, for their large-scale exclusion of African-American citizens. Faced with that proof, all three judges agreed: ****1269** The Challengers' version of events was the more credible. The court, to put the matter bluntly, did not believe the state officials. It thought they had gerrymandered District 1 by race.

In reviewing those conclusions, the majority goes seriously wrong. Factfinding about electoral districting, as about other matters, is reversible "only for clear error." *Cooper*, 581 U.S. at 293, 137 S.Ct. 1455. This Court must give a district court's view of events "significant deference," which means we must uphold it so long as it is "plausible." *Ibid.* Under that standard, South Carolina should now have to redraw District 1. As I'll detail, the Challengers introduced more than enough evidence of racial gerrymandering to support the District Court's judgment. The majority's attempt to explain its contrary result fails at every turn. The majority picks and chooses evidence to its liking; ignores or minimizes less convenient proof; disdains the panel's judgments about witness credibility; and makes a series of mistakes about expert opinions. The majority declares that it knows better than the District Court what happened in a South Carolina map-drawing room to produce District 1. But the proof is in the pudding: On page after page, the majority's opinion betrays its distance from, and lack of familiarity with, the events and evidence central to this case.

Yet there is worse: The majority cannot begin to justify its ruling on the facts without in two ways reworking the law—each to impede racial-gerrymandering cases generally. First, the majority, though ostensibly using the clear-error standard, effectively inverts it whenever a trial court rules ***69** against a redistricting State. In the majority's version, all

the deference that should go to the court's factual findings for the plaintiffs instead goes to the losing defendant, because it is presumed to act in good faith. See *ante*, at 1235 - 1236. So the wrong side gets the benefit of the doubt: Any "possibility" that favors the State is treated as "dispositive." *Ante*, at 1241. Second, the majority invents a new rule of evidence to burden plaintiffs in racial-gerrymandering cases. As of today, courts must draw an adverse inference against those plaintiffs when they do not submit a so-called alternative map—no matter how much proof of a constitutional violation they otherwise present. See *ante*, at 1249 - 1250. Such micro-management of a plaintiff 's case is elsewhere unheard of in constitutional litigation. But as with its upside-down application of clear-error review, the majority is intent on changing the usual rules when it comes to addressing racial-gerrymandering claims.

To be fair, we have seen all this once before—except that it was in a dissent. Just seven years ago, this Court decided another racial-gerrymandering case, strikingly similar to this one. In *Cooper* v. *Harris*, the Court rejected the State's request for an alternative-map requirement; the dissent vehemently objected. See 581 U.S. at 318, 137 S.Ct. 1455; *id.*, at 334–337, 137 S.Ct. 1455 (ALITO, J., dissenting). The Court applied normal clear-error review, deferring to all plausible trial court findings. See *id.*, at 293, 137 S.Ct. 1455. The dissent, invoking a presumption of good faith, instead deferred to all plausible arguments of the losing State defendant. See *id.*, at 357, 137 S.Ct. 1455 (ALITO, J., dissenting). Today, for all practical purposes, the *Cooper* dissent becomes the law.

Perhaps most dispiriting is what lies behind the Court's new approach—its special rules to specially disadvantage suits to remedy race-based redistricting. The *Cooper* dissent thought plaintiffs would use racial-gerrymandering actions as "weapons of political warfare." *Id.*, at 335, 137 S.Ct. 1455 (ALITO, J., dissenting). And it lamented ****1270** that courts finding gerrymanders ***70** were "accus[ing]" States of "offensive and demeaning conduct." *Id.*, at 334, 137 S.Ct. 1455 (internal quotation marks omitted). So the problem was more with challenging racial gerrymanders than with putting them into place. Today, that view becomes central to the majority opinion. See *ante*, at 1236. The suspicion, and indeed derision, of suits brought to stop racial gerrymanders are self-evident; the intent to insulate States from those suits no less so. But consider what this altered perspective misses. That a State may in fact have engaged in such "offensive and demeaning" conduct. That it may have sorted citizens by their race with respect to the most fundamental of all their political rights. That it may have done so for no reason other than to achieve partisan gain. And here, that a three-judge court unanimously found all this to have occurred.

The proper response to this case is not to throw up novel roadblocks enabling South Carolina to continue dividing citizens along racial lines. It is to respect the plausible—no, the more than plausible—findings of the District Court that the State engaged in race-based districting. And to tell the State that it must redraw District 1, this time without targeting African-American citizens.

I

Begin with the law, and more particularly the usual standard of review. This Court all the time recites the words: "only for clear error." *Cooper*, 581 U.S. at 293, 309, 137 S.Ct. 1455. And those words always mean (or anyway, always meant) the same thing. Under the clear-error standard, a lower court's factual findings "warrant[ ] significant deference." *Id.*, at 293, 137 S.Ct. 1455. We do not rubber stamp those findings, but we affirm them so long as they are "plausible" in light of the full record. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). And that is so even if, left to our own devices, we "would have decided the [matter] differently." *Id.*, at 573, 105 S.Ct. 1504. We can reverse only when "left with the definite and firm conviction ***71** that a mistake has been committed." *Ibid.* And nowhere is that high bar higher than when witness credibility is at issue. A trial court's judgment about whether a witness is telling the truth is entitled to "singular deference." *Cooper*, 581 U.S. at 309, 137 S.Ct. 1455.

The reasons for thus deferring to trial court factfinding are equally well-settled. Trial courts are the judiciary's factfinding specialists. They live with a case for months or years, supervising discovery, ruling on the admission of expert opinions, and watching how the evidence unfolds. They preside over the trial and see the live witnesses (24 in this case) up close. They can observe "the variations in demeanor and tone" that "bear so heavily" on credibility judgments. *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504. They know the ins and outs of often massive records. (This case boasts, for example, a 2,122-page trial transcript, a 1,694-page compilation of key deposition testimony, and (as one judge remarked) too many exhibits to fit in the courtroom. No. 3:21–cv–3302 (D SC), ECF Doc. 503, p. 23.) Chances are, then, that a trial court will do better factfinding than an appellate court parachuting in at the last moment. The clear-

error standard is a recognition of comparative competence. And it is a forced dose of humility—a virtue which sometimes doesn't come naturally to appellate courts. Apply that last point to this Court in particular. The clear-error standard tells us that when we disagree with a trial court's view of the facts, we are the ones likely to be wrong. So we should make triple sure that we are correcting, not creating, an error before we reverse.

**1271 *Cooper* illustrates how the ordinary clear-error standard works in districting litigation. The question there, as here, was whether a state legislature chose voters for a congressional district based on their race, or instead based on their past political choices. The three-judge District Court found that race accounted for the new district lines. On review, we decided the evidence "adequately support[ed]" that conclusion. *72 581 U.S. at 309, 137 S.Ct. 1455. As that phrasing suggests, we nowhere claimed the court was actually right. To the contrary, we observed that in this "thoroughly two-sided case," both views of the evidence were "plausible" and "permissible," and we declined to choose between them. *Id.*, at 299, 307, n. 6, 137 S.Ct. 1455; see *id.*, at 316–317, 137 S.Ct. 1455 ("Maybe we would have evaluated the testimony differently had we presided over the trial; or then again, maybe we would not have"). Our decision followed from the deference we thought owed to the District Court. Under clear-error review, we noted, "we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it." *Id.*, at 316, 137 S.Ct. 1455. Because the District Court's view was "plausible in light of the full record," it "must govern"—even if another were "equally or more so." *Id.*, at 293, 137 S.Ct. 1455 (internal quotation marks omitted).

Today's decision could not be more different. To be sure, the majority recites the clear-error standard. See *ante*, at 1240. But from then on, the majority ignores it—no, worse, does the opposite of what the standard commands. It is not just that the majority refuses to defer to the District Court's findings in favor of the Challengers. It is that the majority defers to the assertions of the State defendants—the side that lost below. Invoking a "presumption of legislative good faith," the majority insists that "when confronted with evidence that could plausibly support multiple conclusions," a court must "draw the inference that cuts" in the State's favor. *Ante*, at 1236. So over and over the majority puts its thumb on the scale *against* the District Court. Each time it takes up a piece of evidence, the majority declares that there is a "possibility" of seeing it the State's way. *Ante*, at 1241, 1243 - 1244. And that possibility is "dispositive"; because of it, the State's version of the facts must control. *Ante*, at 1241 - 1242; see also, *e.g.*, *ante*, at 1235 - 1236, 1242, 1245 (similarly awarding points to the State because its claims were "plausible," even if the Challengers' were more so). In effect, the majority's demand for deference to the State overrides clear-error review's *73 call for deference to the trial court. If the District Court wants deference, it had better just rule for the State.

That approach conflicts with this Court's precedent. Indeed, it has only ever appeared in the *Cooper* ... dissent. There too, Justice ALITO argued for reversing the trial court's view of evidence because it was not "the only plausible interpretation." 581 U.S. at 357, 137 S.Ct. 1455. There too, he called for accepting the State's contrary view because the evidence could "as easily be understood" that way. *Ibid.*; see *id.*, at 345, 350, 352, 358–359, 137 S.Ct. 1455. The *Cooper* Court noticed—and disapproved. The dissent, it said, "repeatedly flips the appropriate standard of review," to give the State rather than the trial court deference. Id., at 309 137 S.Ct. 1455. But that move reflected "an elemental error": There is no "super-charged, pro-State presumption on appeal, trumping clear error review." *Ibid.* Of course clear-error review takes into account the standard of proof in the trial court. See *ante*, at 1249, n. 11. But that standard is not transformed because of the good-faith presumption. In our precedents, that presumption tells a court not to assume a districting plan is flawed or to limit the State's opportunities to defend it. **1272 See *Abbott v. Perez*, 585 U.S. 579, 603, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (the presumption requires a plan's challengers to bear the burden of proof); *Hunt v. Cromartie*, 526 U.S. 541, 553, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (the presumption may suggest sending a case to trial, rather than rejecting a plan on summary judgment). And the presumption reminds a court that it is a serious matter to find a State in breach of the Constitution. See *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. But that is all. Nothing in our decisions suggests that a trial court must resolve every plausibly disputed factual issue for the State (as if we could hardly imagine officials violating the law). And still less do our decisions suggest that the trial court's factual findings are deprived of deference on appeal. To the contrary, as *Cooper* stated, clear-error review of those findings proceeds just as usual, unaffected by the presumption. See 581 U.S. at 309, n. 8, 137 S.Ct. 1455; see *74 also *Miller*, 515 U.S. at 915, 115 S.Ct. 2475 (good faith is presumed "*until* a claimant makes a showing" of "race-based decisionmaking" (emphasis added)).

The majority's deeper reasons for specially indulging the State also clash with this Court's decisions. In the majority's view, claims of racial gerrymanders are often "weapons of political warfare," using courts for illegitimate ends. *Ante*, at 1236. And when courts vindicate those claims, they "accus[e]" States of "offensive and demeaning conduct," bearing "an uncomfortable resemblance to political apartheid," *ibid.*—an apparently intolerable insult even when justified. Those sentiments, again, come straight out of the *dissent* in *Cooper*. See 581 U.S. at 334–335, 137 S.Ct. 1455. The *Court* there took a different view, more reflective of our precedents. See id., at 319 137 S.Ct. 1455. Time and again, this Court has noted the important role suits like this one play in stopping the unlawful race-based division of citizens into electoral districts. See, *e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017). For sorting of that kind does occur—sometimes (as here) to serve partisan goals, occasionally just to suppress the political influence of minority voters. See *Cooper*, 581 U.S. at 319, n. 15, 137 S.Ct. 1455. And when it does, the Court has held, it requires a judicial response. See, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). If calling out a racial gerrymander "accus[es]" a State of a grave wrong, then so be it. This Court is not supposed to be so fearful of telling discriminators, including States, to stop discriminating. In other recent decisions, the Court has prided itself on halting race-based decision-making wherever it arises—even though serving far more commendable goals than partisan advantage. See, *e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 213–214, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023). It is not the ordinary thing to agonize so much about giving "offens[e]" to a discriminating State. *Ante*, at 1236.

***75** And it is not the right thing either. In adopting its novel credit-the-losing-State approach, the majority thwarts efforts to undo a pernicious kind of race-based discrimination. See *Shaw*, 509 U.S. at 643, 113 S.Ct. 2816 (recognizing racial gerrymanders as "odious"). True enough, as the majority highlights, that the judicial system fails when a State is wrongly found to have gerrymandered a district. But the system fails as badly or worse when a State that has gerrymandered a district gets away with it. This Court has prohibited race-based gerrymanders for a reason: They divide citizens on racial lines to engineer the results of elections (without the justification of protecting minority voters' ****1273** rights). And litigation to remedy that harm is already none too easy. Because of the complex political context, this Court has required challengers of electoral maps to show that race was not just a single but the "predominant" factor in moving voters between districts. *Bethune-Hill*, 580 U.S. at 187, 137 S.Ct. 788. That is, and is meant to be, a demanding burden. But once plaintiffs have met it to a three-judge district court's satisfaction, their hardest job should be done. They should not have to face an upside-down form of clear-error review, in which this Court reverses if it decides there is a "possibility" of seeing the evidence the State's way. *Ante*, at 1241. The principal effect of that novel rule will be to defeat valid voting-discrimination claims.

And the majority is not yet done putting uncommon burdens on gerrymandered plaintiffs. From now on, those plaintiffs will also be subject to an "adverse inference" unless they present a specific form of evidence—an "alternative map" that would "achieve[the State's] legitimate political objectives" while "producing significantly greater racial balance." *Ante*, at 1249 - 1250 (internal quotation marks omitted). And that inference gives every sign of packing a wallop. The majority labels it "dispositive in many, if not most, cases," except when the plaintiff presents (1) direct evidence ***76** of a gerrymander (say, an email admitting to the targeting of Black voters) or (2) "some extraordinarily powerful circumstantial evidence such as the strangely irregular twenty-eight-sided district lines" in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). *Ante*, at 1250 (internal quotation marks omitted). Think about that last category, as the majority frames it. The majority must go back 65 years, to the most grotesque racial gerrymander in the U. S. Reports, to find a case based on circumstantial evidence that could have survived its adverse inference. How better to make the point: The majority's new evidentiary rule is meant to scuttle gerrymandering cases.

Odd that the majority fails to mention a seemingly pertinent fact: *Cooper* expressly rejected a similar demand that a plaintiff alleging a gerrymander submit an alternative map. In that case, North Carolina argued that "[w]hen race and politics are competing explanations of a district's lines," the challenger must introduce "an alternative map that achieves the legislature's political objectives while improving racial balance." 581 U.S. at 317, 137 S.Ct. 1455 (alterations omitted). The *Cooper* dissent agreed. See *id.*, at 332–337, 137 S.Ct. 1455. The *Cooper* Court did not. See *id.*, at 317–322, 137 S.Ct. 1455. The Court freely acknowledged that such a map could be good evidence of a racial gerrymander. See *id.*, at 317, 137 S.Ct. 1455. So too, it recognized "as a practical matter" that a plaintiff with an otherwise weak

case would not prevail without a map. *Id.*, at 319, 137 S.Ct. 1455.[1] ***77** But we could not have been more adamant in rebuffing the State's proposed ****1274** requirement. "[I]n no area of our equal protection law," we reasoned, "have we forced plaintiffs to submit one particular form of proof." *Ibid.* And we were not about to start. A "plaintiff 's task" in a gerrymander case, we stated, "is simply to persuade the trial court—without any special evidentiary prerequisite"—that race was the predominant factor in redistricting voters. *Id.*, at 318, 137 S.Ct. 1455. Like all other submissions in a gerrymandering case—the "testimony of government officials," proof about the data available to mapmakers, and "expert analysis"—"[a]n alternative map is merely an evidentiary tool." *Id.*, at 318–319, 137 S.Ct. 1455. So "neither [a map's] presence nor its absence can itself resolve a racial gerrymandering claim." *Id.*, at 319, 137 S.Ct. 1455.

The majority cannot evade *Cooper*'s force by casting today's holding as an "adverse inference" rule rather than a simple requirement. First, there is precious little difference between the two. Given the apparent strength of the majority's adverse inference, few litigants will feel free to proceed without commissioning alternative maps. The majority's inference is effectively a requirement, whether or not it goes by that label. And anyway, *Cooper*'s reasoning easily encompasses —which is to say forbids—the majority's new inference rule. The point in *Cooper* was to treat maps equivalently to—rather than "elevate" them above—other forms of evidence. *Id.*, at 318, 137 S.Ct. 1455. So if the plaintiff 's non-map evidence supports a claim, the Court stated, the absence of a map "does not matter." *Ibid.* The *Cooper* dissent well understood the point. No less than three times, the dissent quoted the Court's "does not matter" line, arguing vociferously that a map's absence should matter, if not in all cases, at least in all but "exceptional ones." *Id.*, at 336, 137 S.Ct. 1455; see ***78** *id.*, at 329, 359, 137 S.Ct. 1455. The dissent lost that battle, but now succeeds in overturning the essence of *Cooper*'s map ruling.

The majority-née-dissent's reasons for elevating maps above other evidence have not improved since *Cooper* held to the contrary. The majority states that maps can serve as a good way to undermine a State's "it was all politics" defense. See *ante*, at 1249 - 1250. No argument there: The *Cooper* Court also said as much. 581 U.S. at 317, 137 S.Ct. 1455. But it went on to say that maps "are hardly the *only* means" of attacking such a defense—as this case well shows. *Id.*, at 318, 137 S.Ct. 1455; see *infra*, at 1275 - 1286. The majority also insists that plaintiffs can "easily churn out" alternative maps at "little marginal cost." *Ante*, at 1250 (quoting, of course, the *Cooper* dissent). Maybe or maybe not; either way, the *Cooper* Court said, the matter is irrelevant: We have no "warrant to demand" that plaintiffs jump through "evidentiary hoops" of our creation, "whether the exercise would cost a hundred dollars or a million, a week's more time or a year's," if they can otherwise prove that race predominated in drawing district lines. 581 U.S. at 319, n. 15, 137 S.Ct. 1455.[2] Finally, the majority suggests that all plaintiffs with serious gerrymandering ****1275** cases should have known to produce an alternative map. See *ante*, at 1235 - 1236. But that assertion requires airbrushing *Cooper* out of our caselaw. What plaintiffs should have known after *Cooper* was that they could but need not submit an alternative map. The majority today punishes the Challengers for thinking that this Court would be good to its word.

***79** In any event, the Challengers had an understandable reason for not offering the kind of map the majority demands. The point of such a map, as the majority explains, is to help figure out whether race or politics accounts for districting lines. See *ante*, at 1249 - 1250. That function becomes important—so a map makes sense—only if a State in fact defends its plan as arising from political considerations. At trial, South Carolina indeed adopted that defense. But it was not clear beforehand, when the plaintiffs were developing their evidence for trial, that the State would do so. The plain fact is, politicians don't like admitting to partisan gerrymanders: They often deny them as aggressively as they draw them. That is because "[e]xcessive partisanship in districting" is–and is thought by voters to be—"incompatible with democratic principles." *Rucho v. Common Cause*, 588 U.S. 684, 718, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019). So it is scarcely surprising that, during legislative debate, the districting plan's sponsor responded to charges of a partisan gerrymander by asserting "that's really not the case." J. S. A. Supp. 286a.[3] Or that during pretrial proceedings key State witnesses continued to deny partisan motives. Luke Rankin, the Republican chair of the Senate Judiciary Committee, testified in discovery that it was *not* "a goal of [his] to make" District 1 "more reliably republican." *Id.*, at 425a. Likewise, a Republican member of the House Redistricting Committee testified that he "never considered partisan gain as a goal" of redistricting, and "never" heard "anyone else" admit that goal either. *Id.*, at 409a–410a. And the Senate Redistricting Subcommittee's counsel swore ***80** that there was "no effort" to make District 1 "more Republican leaning." *Id.*, at 392a. So the Challengers, prior to trial, were not on notice of a partisanship defense. The State, to be sure,

changed tack in the end: A strong case made by plaintiffs can powerfully concentrate a defendant's mind. But by that time, the Challengers' mapmaker (Dr. Kosuke Imai) had completed his work, and the trial had begun.

Even before looking at the trial evidence, the majority thus places the Challengers in a deep hole. Although this Court recently disclaimed any need for an alternative map, the majority today draws an adverse inference from such a map's absence. And contrary to settled practice, the majority decrees that, even on clear-error review of a ruling for the Challengers, the State will emerge victorious if its version of events is so much as *possible*. Combine those two facets of the majority's approach, and the trial evidence fades into insignificance. A legal twist here and a legal bend there ensure that the majority need show no respect for the three-judge District Court's well-considered factual findings.

II

Normal clear-error review would lead to a different outcome. The District Court ****1276** faced a factual question: Did the State rely significantly on racial data in drawing its new District 1? Based on the mountains of evidence presented, the court decided that the State had done so. That finding was reasonable, and deserves to be affirmed.

As the majority explains, this case concerns changes that South Carolina made in its most recent redistricting to Congressional District 1. See *ante*, at 1236 - 1240. Under the pre-existing map, District 1 was a thin strip of land stretching along the Atlantic Coast. See Appendix, *infra*, at 1286 - 1287, Figure 1 (2011 Congressional Map). It was bordered to the northwest by District 6, the State's only majority-Black district. See *ibid.*; J. S. A. 429a. After the 2020 census, South ***81** Carolina had to redraw both those districts to comply with the Constitution's one-person, one-vote requirement. District 1 was overpopulated by about 88,000 people, and District 6 was underpopulated by about 85,000. The State chose, though, not to make a one-way transfer of residents from the overpopulated to the underpopulated district. To unite two counties, the State first moved around 53,000 residents from (the underpopulated) District 6 into (the overpopulated) District 1. That shift, of course, exacerbated the problem: The State now needed to transfer some 140,000 residents in the opposite direction. It did so mainly by moving a large chunk of Charleston County from District 1 to District 6.

And here is the rub—the thing that created this case. The part of the county that the legislature moved out of District 1 was disproportionately Black, and by a lot. The mapmakers targeted several heavily Black neighborhoods in North Charleston, while leaving many heavily White neighborhoods alone. See *id.*, at 261a–262a. And no matter how you slice the numbers, the effects were stark. More than 60% of Black Charleston County residents previously in District 1 were relocated to District 6. 649 F.Supp.3d 177, 189 (DSC 2023). Of the 11 precincts with the largest Black populations, 10 were gone. *Ibid.* Overall, the proportion of African Americans in the excised part of the county (23.8%) was more than twice as high as in the remaining part (10.3%). See *id.*, at 190; Supp. App. 153a. The upshot was that 79% of Charleston County's Black population now found itself in District 6, whereas only 53% had been there before. See 649 F.Supp.3d at 190, and n. 9. As the State's main mapmaker —and star witness—acknowledged, the new lines created a "tremendous [racial] disparity" in comparison to the old districting plan. J. S. A. 262a; 649 F.Supp.3d at 189.

The question at trial was how that disparity had come about. By that time, the State had adopted its politics-only defense. It argued, as the majority says, that the point of ***82** redrawing District 1 was to "enhance[ ] the Republican advantage" there —*i.e.*, to make sure a Democratic candidate could not win. *Ante*, at 1237 -1238. But that claim, even if true, would not be enough for the State to prevail. As this Court has held, a State cannot divide voters by race to achieve political ends. See *Miller*, 515 U.S. at 914, 115 S.Ct. 2475. "[T]he sorting of voters on the grounds of their race" is a constitutional problem "even if race is meant to function as a proxy" for political affiliation. *Cooper*, 581 U.S. at 309, n. 7, 137 S.Ct. 1455; see *id.*, at 291, and n. 1, 137 S.Ct. 1455. So the critical issue was not whether the State's ultimate aim was political or racial (though the majority often phrases it that way, see, *e.g.*, *ante*, at 1233, 1235 - 1236, 1242). Instead, the issue was whether the State had advanced its partisan objective primarily by racial means. The Challengers maintained that it had. They said the State's mapmakers had consciously removed Black citizens from District 1 on the (justified) assumption ****1277** that doing so would turn the district redder. The State, by contrast, denied in any way using race to draw District 1's lines. According to its account, the disproportionate removal of African Americans from District 1 was just an accidental byproduct of political sorting—more specifically, of ejecting precincts that had strongly supported then-candidate Biden in

the 2020 election.[4] Faced with those competing stories, the District Court had to decide which to credit.

The court's decision to credit the Challengers, as I'll next show, was not clear error—indeed, far from it. There was ***83** of course evidence pointing in each direction; like *Cooper*, this was a "two-sided case." 581 U.S. at 307, n. 6, 137 S.Ct. 1455. But the Challengers made a weighty showing that the mapmakers relied substantially on racial data in moving voters around. The mapmakers had the incentive to do so, given the limits of the political information in their possession. They had the ability to do so—both access to data and experience using it. And direct testimony showed that the mapmakers had in fact continually examined racial data during the line-drawing process. The map yielded by that process hit on the dot the Black voting percentage that state officials knew they needed to achieve their partisan goal. And when statistics experts reviewed the map, they found that the State's politics-only story could not explain the redistricting's extreme racial disparity. In dismissing that strong case, the majority cherry-picks evidence, ignores credibility findings, misunderstands expert views, and substitutes its own statistical theories. Its opinion gives not a whit of respect to the District Court's factual findings, thus defying the demands of clear-error review.

A

Start with the State's chief mapmaker. William Roberts, as the majority notes, was a "nonpartisan staffer with 20 years of experience" drawing maps for Republicans and Democrats alike. *Ante*, at 1237. He was good at what he did—expert, "helpful," and "precise." J. S. A. 74a, 254a. And also this—he was a veteran consumer of racial data. On cross-examination, Roberts testified as follows:

> Q: I think I heard the number of 75 to a hundred localities you've worked in over the past 20 years?
>
> A: Yes....
>
> Q: Before this redistricting cycle, you always looked at race data in the 75 to a hundred districts you worked in, correct?
>
> A: Yes....
>
> ***84** Q: Indeed, ... you provided guidance to localities that they should be looking at BVAP [Black Voting-Age Population] in drawing lines, correct?
>
> A: That's correct.

Id., at 204a–205a. The point of looking at BVAP, according to the mapmaker's testimony, was not to suppress the Black vote. Rather, Roberts stated that he did so to achieve a panoply of lawful districting goals—like assessing Voting Rights Act ****1278** compliance and "help[ing] the general public understand the race of voters getting moved in and out." *Id.*, at 206a; see *id.*, at 205a. Whatever the particular purpose, he consulted racial data constantly. Now as you know from the majority, Roberts denied doing so in the redistricting at issue here. See *ante*, at 1240 - 1241. But when asked "so in your 20 years of redistricting, this was the only time [that] you didn't look at race?," Roberts answered "That's correct." J. S. A. 207a.

True to his persistent practice (if not to his this-case-only denial), Roberts configured maproom computers to show how every line-drawing decision would affect the new District 1's racial make-up. In other words, as a mapmaker moved a district line this way or that, he could immediately see the resulting change in the district's BVAP. Displaying racial data in that way was not an unavoidable feature of the mapmaking software. As one staffer explained: "[Y]ou could configure" the computer setup "in a multitude of ways." ECF Doc. 462–9, at 114. You could make it so that new BVAP numbers appeared on your screen "while you manipulated geography"—but "there [was] no requirement that you ha[d] to set it up that way." *Ibid.* The mapmakers had to choose to display racial data. And here is the key thing: They did. A Senate staffer who often sat with Roberts in the maproom explained that not only "political data" but also "demographic data"—specifically, "race" and "voting age population by race"—was "visible" on computer screens "[a] ***85** lot of the time." ECF Doc. 462–4, at 40. And on cross-examination, Roberts admitted that to be true:

> Q: So BVAP was visible on the screen while you were drawing maps?
>
> A: Yeah. It was in the statistics window at the bottom of the screen.
>
> Q: So, you could see BVAP as you were making changes in real time as you were drawing lines?

A: We could see the statistics update after a change was made.

Q: So, if you moved a district line, you could see if the BVAP went up or down, right?

A: You could see on the statistics what the overall district BVAP would be.

J. S. A. 207a; see J. S. A. Supp. 402a (another staffer acknowledging: "Was I aware of, while I was drawing, what the racial makeup of what I was drawing was? Yes").

So Roberts's testimony presented a puzzle. As the majority highlights, Roberts consistently denied relying on racial data. See, *e.g.*, *ante*, at 1240 - 1241, 1242. But racial data, according to both him and others, was easily accessible—in fact, was usually visible—on his computer while the line-drawing was going on. And he never explained why it was there. Why configure a computer to tell you, at every stage of the mapmaking process, how the slightest change in a district line would affect Black voting-age population if you weren't tracking and manipulating Black voting-age population? Roberts had no answer.

But there was an obvious reason for attending so closely to racial data, as even the majority acknowledges: One surefire way of making a South Carolina district more Republican is to make it less Black. See *ante*, at 1241. The difference between a "Republican tilt" and a "Democratic tilt" in District 1, notes the majority, is the difference between a 17% BVAP and a 21% BVAP. *Ibid.* That is because in recent ***86** statewide elections, more than 90% of Black South Carolina voters—and usually more than 95%—have supported the Democratic candidate. See J. S. A. Supp. 82a. In South Carolina, to remove a Black voter from a congressional district is pretty ****1279** nearly to remove a future Democratic vote. That is no secret. So it is small wonder that racial data was conspicuously displayed on Roberts's computer. And then small wonder that the District Court found Roberts to have used that data to draw district lines. See 649 F.Supp.3d at 191. More doubt would properly have attached to the *opposite* finding—that Roberts put this hugely relevant data on his screen only to ignore it as he worked to make District 1 more Republican. That would have taken the self-restraint of a monk.

Especially so because using only the political data at hand would not have done the job as well. "Why," the majority asks, "would Roberts have used racial data" when he had access to sub-precinct-level voting data from the 2020 election? *Ante*, at 1242 - 1243; see *ante*, at 1251 - 1252. The question is apparently meant to be rhetorical; but the trial record provides a ready answer—and one more than sufficient on clear-error review. One of the Challengers' experts testified that "[t]he 2020 election data" was "not a good" measure of partisan tilt—neither so "accurate" nor so "reliable." App. 135. And racial data, another expert suggested, served the mapmakers' goal better. See *id.*, at 112. The single-sentence explanation is this: In South Carolina, a Black voter is more likely to vote for a Democrat in the next election than is someone who voted for a Democrat in the last election. That is because White voting preferences in the State are not as "stable" as Black voting preferences. *Ibid.* A White voter "might vote for a Democrat in one election" only to vote "for a Republican in another." *Ibid.* So to remove a past Democratic voter (as contrasted with a Black voter) is not necessarily to remove a future Democratic ***87** vote.[5] And the gap only widens for past *presidential* voters, like those who participated in the 2020 election. In presidential elections, one expert explained, more people than usual switch party lines to "vote for the candidate"—a trend that then-President Trump's candidacy may have further amplified. *Id.*, at 135; see J. S. A. 382a. Given all that, the South Carolina mapmakers' racial data was peculiarly predictive: The single best thing Roberts and his staff could do to increase the future Republican vote in District 1 was to exclude a Black voter. That fact would not have meant they looked at racial data alone; they also had the 2020 election data on their computers. But the racial data offered a potent tool for ensuring that District 1 would vote for a Republican in coming elections.[6]

And strong evidence showed, as the District Court found, that the mapmakers wielded this tool—that they used their racial data to meet the BVAP level needed to achieve their partisan goal. Recall the large turnover of voters in District 1. See *supra*, at 1275 - 1276. Some 53,000 people were moved into, and 140,000 people were ****1280** moved out of, the district (which wound up with 730,000 total). Yet the district's racial balance did not budge. The district began with a 16.6% ***88** BVAP. See J. S. A. 430a. That number went up with the 53,000-person addition, because almost 40% of the new residents were Black. See *id.*, at 439a. So what did the mapmakers do? As noted earlier, they removed from District 1 over 60% of Black Charleston County residents, by excising a part of the county more than twice as Black (23.8%) as the part they kept in (10.3%). See 649 F.Supp.3d at 189–190; Supp. App. 153a; *supra*, at 1276. That brought the

district's BVAP right back down to 16.7%—again below the 17% required to create the desired Republican tilt. See J. S. A. 452a; 649 F.Supp.3d at 188. In the majority's description, what happened was of no particular note—just that the District's BVAP "stayed more or less constant." *Ante*, at 1241. But consider: With approximately a quarter of District 1's population moving in or out, the district's BVAP shifted by ... one-tenth of one percentage point. The District Court observed that uncanny stability, knowing that racial data was at the mapmakers' fingertips. See 649 F.Supp.3d at 191. And the court, as addressed shortly, had heard statistical experts deny that the racially disparate districting could have come about through political sorting. See *infra*, at 1281 - 1286. So it was no large step—and hardly clear error—for the court to conclude that the mapmakers had gerrymandered Charleston County to achieve "a target of 17%" BVAP. 649 F.Supp.3d at 193.

As against all that, what does the majority offer? Only a series of self-serving denials. The sum and substance of the State's case came from the testimony of Roberts and State Senator George Campsen, who was the redistricting plan's sponsor. Yes, the new map, Roberts conceded, had a "tremendous" racial skew. J. S. A. 262a. But Roberts and Campsen maintained that they had never sorted by race—never used their (constantly accessible) racial data to draw district lines. Both insisted that they had looked only to voting results from the 2020 election to ensure their partisan goal. The majority buys it—hook, line, and sinker. Indeed, ***89** the majority relies on nothing else. It treats Roberts's and Campsen's account as a "fact of the matter," rather than a vigorously contested assertion. *Cooper*, 581 U.S. at 307, n. 6, 137 S.Ct. 1455; see, *e.g.*, *ante*, at1237 - 1238. The majority trusts the two State witnesses, and believes what they said.

The problem is that the three judges who sat on the District Court did not. And they are the ones entitled to make credibility judgments. See *supra*, at 1270; *Cooper*, 581 U.S. at 309, 137 S.Ct. 1455 ("[W]e give singular deference to a trial court's judgments about the credibility of witnesses"). That is for an obvious reason: They were there. They could assess every aspect of a witness's testimony, including demeanor, tone of voice, and facial expression. They could see when the witness was at ease and when he stumbled. And after taking account of all those cues, the three judges all reached the same conclusion about Roberts and Campsen. They thought that those two witnesses were not telling the truth.

The panel was especially disbelieving of Roberts, if almost in spite of itself. The court (contra the majority) well understood what the presumption of good faith required. The judges were predisposed, as the majority has to acknowledge, to think that this "good man," who had for so long been a fixture on the South Carolina political scene, would play it straight. *Ante*, at 1237 - 1238, and n. 5 (citing J. S. A. 23a, 74a–75a, 254a, 263a, 421a). But in the end, the court felt compelled to find that Roberts's old habit of relying on race died ****1281** hard. To the panel, the mapmaker's tale did not hang together. He said he did not consider race in drawing lines; but he could recite "off the top of his head" the racial breakdown of particular precincts in District 1. 649 F.Supp.3d at 191. Those "highly accurate" estimates, the court noted, reflected Roberts's obvious knowledge of "the racial demographics of the state down to the individual precinct level." *Ibid.*, n. 12. And Roberts never did—never could—explain why he put so much racial data on his computer screen if not to look at it as he drew district lines. Especially given the surrounding ***90** evidence, the court found, Roberts's "claim that he did not consider race" in excluding voters from District 1 "rings hollow." *Id.*, at 191 (internal quotation marks omitted). On normal clear-error review, that credibility judgment would control.

And so too for Campsen, who obfuscated at every turn. At trial, Campsen reversed his own deposition testimony about whether state senators knew the racial makeup of their districts. (First they knew, then he couldn't possibly speak for them.) See J. S. A. 377a–378a. He answered as simple a question as whether "race and party are correlated in South Carolina" this way:

> "Yes—well, yes and no. I guess that's fluid. It is fluid, but yes.... Well, it's not in every instance, but generally African Americans tend to vote higher, you know, more—you can look at the polls—when you look at the numbers after the fact—I didn't look at them drawing the map—but you see that in the numbers." *Id.*, at 381a.

And he contradicted common knowledge—as well as the State's own defense—when he point-blank denied that sorting people based on their voting behavior could result in racial disparities. See *id.*, at 383a ("Q: You would agree with me that if you ... focus on partisan numbers, there's a risk that you might disproportionately impact Black voters in drawing lines, right? A: No, I'm not going to agree with that"). Would you buy what this man was selling? As the contradictions, non-answers, and evasions mounted, the District Court quite reasonably decided that it could not.

Put all this together, and the Challengers offered—even before getting to their statistical studies—a more than plausible case of racial gerrymandering. They showed that the exclusion of voters from District 1 was racially disproportionate—not by a little but by a lot. They showed that the State's star mapmaker had always—always—before ***91** considered race in drawing district lines. They showed why he would want to do so here, to create a reliable Republican tilt. They showed that the mapmaker configured his computer to exhibit in real time how every adjustment of a district line affected the district's racial make-up. And they showed that after moving nearly 200,000 residents this way and that, the mapmaker managed to land on the exact BVAP figure he knew would ensure his political goal. Now it is true that the State, when confronted with this evidence, did not confess error, as the majority comes close to demanding. Its officials, as you might expect, adamantly disputed the charge of racial discrimination. But they could not keep their story straight or make it believable to three judges. The more the officials talked, the more the court became convinced that, to create a red District 1, they had divided citizens by race. And that, again, was even before the statisticians took center stage.

B

Once the statisticians did so, the Challengers' case was clinched—at the least, from a clear-error perspective. Consider how much the controverted issue lent itself to statistical evidence. That issue began ****1282** with a simple fact: The part of Charleston County that the mapmakers excised from District 1 was (vastly) disproportionately Black. The dispute was about what caused that disparity. Statistical evidence showing that it could have arisen from political sorting would significantly benefit the State's defense. Conversely, statistical evidence showing that the racial disparity could not have arisen in that way would significantly benefit the Challengers' case. So you might think that the trial would feature a war of statistical experts, each presenting their own multivariate regressions. But you would be wrong. The Challengers did their part, but the State failed to respond in kind. Rather than submit its own statistical studies, the State devoted all its efforts to trying to pick apart the Challengers'. It thus anticipated today's majority, ***92** which (given the unbalanced record) can do nothing more than search for holes, however minute, in the Challengers' expert evidence. But two separate studies emerge unscathed, and with significant probative force—fully sufficient on clear-error review to justify the District Court's conclusion. Each analysis was designed to answer the critical question: whether Charleston County was split as it was based on its residents' race. And each found that it was. Even controlling for political preference, Black voters were more likely than White voters to be removed from District 1.[7]

Dr. Jordan Ragusa's regression found that race, separate and apart from partisanship, was "an important factor in the design of the 1st district." J. S. A. 509a; see 649 F.Supp.3d at 192. Ragusa looked at the size, racial demographics, and partisan composition of each precinct in the old District 1. (His measure of partisanship was the vote count for then-candidate Biden in the 2020 election, which mirrored the political data the State's mapmakers possessed.) By controlling for all three of those variables, Ragusa explained, he could "statistically disentangle the effect of each factor." J. S. A. 505a. And when he did so, Ragusa determined that "the decision to move a [precinct] out of [District 1] was highly correlated to the number of African American voters" in the precinct. 649 F.Supp.3d at 192; see J. S. A. 508a–509a, 514a. If, for example, a precinct had 100 to 500 Black voters, "the chance of [its] being moved out" of District 1 was "no greater than 20%." 649 F.Supp.3d at 192. But ***93** as the number climbed, so did the likelihood: When a district had 1,500 Black voters, the probability of exclusion reached 60%. See *ibid.* And on top of that analysis, Ragusa directly compared the effects of partisanship and race on the exclusion decision. He found that the mapmakers removed 41% of precincts with more than 1,000 Biden voters, but 62% of precincts with more than 1,000 Black voters. See J. S. A. Supp. 14a. That comparison showed that "the racial composition of a precinct was a stronger predictor of whether it was removed" from District 1 "than its partisan composition." *Ibid.*; see 649 F.Supp.3d at 192.

A second expert, Dr. Baodong Liu, reinforced Ragusa's conclusions about the significance of race, using a complementary methodology and data set. Liu evaluated the different likelihoods that White Democrats ****1283** and Black Democrats would wind up outside or inside District 1. Based on demographic data and vote tabulations from the 2018 Democratic primary, Liu first found that Black Democrats were moved out of District 1 disproportionately to White Democrats. Whereas 26% of Black Democrats in the district were excluded, only 19% of White Democrats were; so the rate at which Black Democrats were excluded was more than one-third higher. See J. S. A. Supp. 94a. And then Liu sliced his data another way, which confirmed his results. Replicating a methodology that this Court approved

in *Cooper*, see 581 U.S. at 315, 137 S.Ct. 1455, Liu looked at Democratic voters in all the counties that at least partly overlapped with District 1. Which of those voters, Liu asked, actually wound up in District 1 and which did not? Once again, the answer showed a significant racial disproportion. Whereas 69% of White Democrats in the region were placed in the new District 1, only 51% of Black Democrats were put there. J. S. A. Supp. 100a.

The majority's primary objection to Ragusa's and Liu's studies —that they did not "control for contiguity or compactness," *ante*, at 1245, 1247 - 1248—is woefully misplaced. The gripe is ***94** that the experts assumed "unrealistic[ally]" that any precinct, no matter where located, could be moved. *Ante*, at 1245 - 1246. If the experts had thought about geography, the majority suggests, they might have found that Black Democrats were disproportionately relocated because they lived in precincts closer to a district boundary. The argument is reprised from *Cooper*—but (what a surprise) only from the dissent. See 581 U.S. at 358, 137 S.Ct. 1455. And the reason the objection got nowhere in *Cooper* applies once again. The relevant district in *Cooper* was super-thin, so that the lion's share of precincts within it were close enough to a boundary line to be easily moved. See *id.*, at 326, 137 S.Ct. 1455. And so too here. Recall that the only issue under review is whether the State improperly moved Black voters from District 1 to District 6—because that is the only gerrymander the District Court found. Now turn to the map of South Carolina's old districts in this opinion's Appendix. District 1 was a narrow strip on the Atlantic coast; District 6 ran along its whole length. Nearly everyone within District 1 lived close to the border line; so nearly everyone could have been sent to District 6, consistent with contiguity and compactness. That is true even of people who lived on the beach. Under the State's districting guidelines, "[c]ontiguity by water is sufficient," so the mapmakers could—and in fact did—split the new District 1's land area by pulling District 6 all the way to the water. J. S. A. 541a; see Appendix, *infra*, at 1286 - 1287, Figure 2 (Inset to 2022 Congressional Map). The upshot is that precinct location did not meaningfully constrain the State's choice of which voters to move from District 1 to District 6. And so the Challengers' experts were not required to pretend that it did.[8]

***95** That is why the majority, to support its contiguity theory, must use a "simple example" ****1284** of zero relevance to this case. *Ante*, at 1246. Says the majority: District 6 "precincts near [Colleton C]ounty's northern border with Bamberg County could not have been moved into District 1 without egregiously flouting the State's important interests in contiguity or compactness." *Ante*, at 1247. That is true: As the map shows, District 6 is fat, and the precincts the majority mentions are far away from the District 1-District 6 line. See Appendix, *infra*, at 1286 - 1287, Figure 1. But of course this case has nothing to do with those outermost District 6 precincts, or even with the closer-in District 6 precincts that could have been moved *into* District 1. The sole issue here, again, is whether the State disproportionately selected heavily African-American precincts to move *out of* District 1. When it gets around to that issue, the majority says: "[T]he same problem" as in its example "arises with respect to the question whether a precinct in District 1 ... could have been moved into District 6." *Ante*, at 1246. But that is not true, for self-evident reasons. As just described—and shown on the map—the old District 1 was thin, and the great bulk of its precincts were close to the District 1-District 6 line. See Appendix, *infra*, at 1286 - 1287, Figure 1. So they could have been moved "without egregiously flouting"—actually, without flouting at all—"the State's important interests in contiguity or compactness." *Ante*, at 1247. The majority's inapt comparison is revelatory in one sense only: It shows why appellate courts are supposed to use a clear-error standard—to make sure we are fixing, not introducing, mistakes.

***96** The majority's other main criticism, aimed solely at Ragusa, is original to this Court: It was never raised or considered below (or, as far as I know, in other voting suits). The objection relates to the way Ragusa measured each precinct's partisan tilt. He asked how many 2020 Biden voters lived in a precinct relative to its voting-age population. So, for example, a 1,250-person precinct with 700 Biden voters would count as much more Democratic than the same-sized precinct with 350 Biden voters. The majority says that measure may be "statistically permissible"—but still is not good enough. *Ante*, at 1247. In the majority's view, Ragusa should have "account[ed] for" potential variance in precinct turnout by looking to the Biden net vote instead of the Biden total vote. *Ante*, at 1246 - 1247. Now I'll admit: I'm not a statistician. I can see what the majority is saying, but my inclination would be to seek out other opinions—including from Ragusa himself—about the net-vote approach, and whether it would matter. The problem is I can't do that here. The theory is the majority's brainchild, absent from the District Court's proceedings. The State never asked Ragusa about it, before or during trial. The State's own expert did not bring it up. The State did not raise it in briefing below. And most important: Nothing in the trial record suggests that adopting the net-vote measure would have made a real difference. The majority, to show you why it might,

offers what it calls a "simplified" example. *Ante*, at 1247. For simplified read "fictional"—meaning, not reflective of any actual precinct's vote. And for simplified, also read "unrepresentative"? To take just one example: Maybe there are some, but I doubt there are many, precincts in which 1,100 of 1,250 voting-age people make it to the polls. See *ante*, at 1247. A number of things about precinct composition and turnout would need to be true for the net-vote/total-vote distinction to make a significant difference to Ragusa's analysis—and we know none of them. Sure, it's fun to play ***97** armchair statistician. But it's irresponsible to reverse a trial court's decision—on clear-error review—based on such hypothesizing.

****1285** A couple of final attacks fare no better. The majority faults Liu for testing partisan tilt in District 1 with data from the 2018 gubernatorial primaries, rather than the 2020 presidential election. The majority confidently declares that because an off-year primary has a lower turnout, the "[d]ata from [it] is less informative." *Ante*, at 1248. Liu's explanation is deemed unworthy of mention. It was that the higher turnout of a presidential election, along with its greater focus on individual candidates, makes it a poorer measure of a district's year-in, year-out partisan tilt. See App. 135. The State's own expert did not contest that view, so the majority's skepticism again finds no support in the trial record. And even if 2020 data is better than 2018 data—it might be—what is better than either is both. That is what the Challengers had: Ragusa's study based on 2020 data and Liu's based on 2018 data, each showing a racial gerrymander.

Much the same thing is true as to a more obscure methodological issue the majority raises (again, needless to say, *sua sponte*): whether statistical analysis should "operate[ ] at the voter level" or the precinct level. *Ante*, at 1247, n. 9. Here, the majority cannot get its attack-line consistent. First the majority claims that Ragusa's testimony was worse than the expert's in *Cooper* because Ragusa's relied on "precinct-level analysis" rather than looking at individual voters. *Ibid*. But within a page the majority asserts that Liu's study was "highly unrealistic" because he "treated each voter as an independent unit" rather than considering "neighbors" together. *Ante*, at 1247 - 1249. So an expert challenging a gerrymander can't win either way. But put that aside; the key thing, once more, is that the Challengers had not one but two types of analysis working in their favor. ***98** However a statistician looked at the data—whether voter-level or precinct-level—he reached the same conclusion: that the State's mapmakers targeted Black voters.

And the State offered little by way of rebuttal. It, too, had an expert witness. And that witness, Sean Trende, took a couple of shots at Ragusa's methods. See ECF Doc. 510, at 46–52. But he did not offer the most relevant kind of evidence—a counter-analysis showing that partisanship subsumed race in the design of District 1. Trende had access to all the same data Ragusa did. He even had access to Ragusa's computer code, so that he would not have needed to start from scratch. See *id.*, at 58. He could just have rerun the code after fixing whatever variables he thought wrong. What should one make of Trende's failure to do so? If I were adopting the majority's methods, I would draw an "adverse inference" from the decision not to submit such "easily churn[ed] out" evidence. *Ante*, at 1250. Surely it must count as an "implicit concession" by the State that the statistical analysis, even with the desired fixes, would keep showing evidence of a racial gerrymander? *Ante*, at 1250. But I don't need to create a novel adverse inference to make the critical point. It was hardly clear error for the District Court to credit the Challengers' statistical evidence about race's predominant role when the State presented no similar evidence to support its partisanship theory. The majority's contrary view—that the State's nothing necessarily beat the Challengers' something—is one more tell that it has left the proper review standard way behind.

III

In every way, the majority today stacks the deck against the Challengers. They must lose, the majority says, because the State had a "possible" story to tell about not considering race—even if the opposite story was the more credible. *Ante*, at 1241 - 1242. And they must lose again, the ****1286** majority says, because they failed to offer a particular form of proof—which ***99** they did not know would be relevant and which this Court recently told plaintiffs was not required. It does not matter that the Challengers offered extensive evidence, including expert statistical analyses, that the State's districting plan was the product of racial sorting. It does not matter that the State, by way of response, offered little more than strained and awkward denials. It does not matter that three judges—entitled to respect for their factual findings—thought that those denials were not believable, and did not put a dent in the plaintiffs' proof. When racial classifications in voting are at issue, the majority says, every doubt must be resolved in favor of the State, lest (heaven forfend) it be "accus[ed]" of "offensive and demeaning" conduct. *Ante*, at 1236.

What a message to send to state legislators and mapmakers about racial gerrymandering. For reasons I've addressed, those actors will often have an incentive to use race as a proxy to achieve partisan ends. See *supra*, at 1244 - 1245. And occasionally they might want to straight-up suppress the electoral influence of minority voters. See *Cooper*, 581 U.S. at 319, n. 15, 137 S.Ct. 1455. Go right ahead, this Court says to States today. Go ahead, though you have no recognized justification for using race, such as to comply with statutes ensuring equal voting rights. Go ahead, though you are (at best) using race as a short-cut to bring about partisan gains—to elect more Republicans in one case, more Democrats in another. It will be easy enough to cover your tracks in the end: Just raise a "possibility" of non-race-based decision-making, and it will be "dispositive." *Ante*, at 1241. And so this "odious" practice of sorting citizens, built on racial generalizations and exploiting racial divisions, will continue. *Shaw*, 509 U.S. at 643, 113 S.Ct. 2816. In the electoral sphere especially, where "ugly patterns of pervasive racial discrimination" have so long governed, we should demand better—of ourselves, of our political representatives, and most of all of this Court. *Id.*, at 639, 113 S.Ct. 2816. Respectfully, I dissent.

***100**

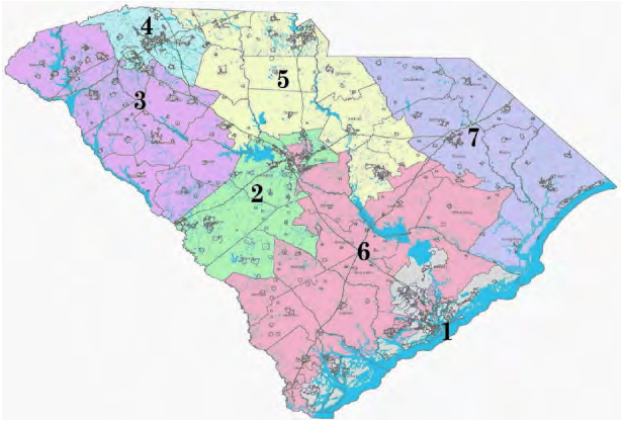


Figure 1. 2011 Congressional Map (adapted from ECF Doc. 323–1, p. 2)

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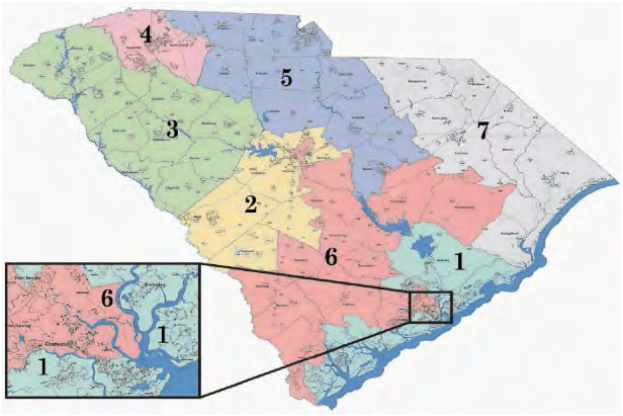

Figure 2. 2022 Congressional Map (adapted from J. S. A. Supp. 306a)

All Citations

602 U.S. 1, 144 S.Ct. 1221, 218 L.Ed.2d 512, 23 Cal. Daily Op. Serv. 3855, 2024 Daily Journal D.A.R. 4385, 30 Fla. L. Weekly Fed. S 165

Footnotes

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

1 A plaintiff can also establish racial predominance by showing that the legislature used "race as a proxy" for "political interest[s]." *Miller*, 515 U.S. at 914, 115 S.Ct. 2475; see also *Cooper v. Harris*, 581 U.S. 285, 291, n. 1, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (noting that strict scrutiny is warranted when "a legislature elevated race to the predominant criterion in order to advance other goals, including political ones").

2 See, *e.g.*, Pew Research Center, Behind Biden's 2020 Victory (June 30, 2021), https://www.pewresearch.org/politics/2021/06/30/behind-bidens-2020-victory/; NBC News, South Carolina Presidential Election Results 2020 (Nov. 3,

2020), https://www.nbcnews.com/politics/2020-elections/south-carolina-president-results/; N. Y. Times, South Carolina Exit Polls: How Different Groups Voted (Nov. 3, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/exit-polls-south-carolina.html.

3 N. Y. Times, South Carolina Election Results: First House District (Jan. 28, 2019), https://www.nytimes.com/elections/results/south-carolina-house-district-1.

4 N. Y. Times, South Carolina Election Results: First Congressional District (Nov. 3, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-south-carolina-house-district-1.html.

5 During the proceedings, one of the judges described Roberts as "a very precise guy" and a "good man." J. S. A. 74a, 421a. That judge also remarked that he "always liked asking [Roberts] questions," that "the legislature's blessed to have Mr. Roberts," and that if Roberts says a report is not accurate, "that's good enough for [him]." *Id*., at 74a–75a, 254a, 263a.

6 The dissent is correct to note that it is not enough for a plaintiff to show that race was a mere factor in the State's redistricting calculus. Rather, the plaintiff must show that race played a " 'predominant' " role in shaping a district's lines. *Post,* at 1277, n. 4 (opinion of KAGAN, J.) (quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475). But the dissent then retreats from this standard because the State denied relying at all on racial data. *Post*, at 1277, n. 4. That is a puzzling argument. Parties can stipulate to issues of fact, but they cannot by stipulation amend the law. See, *e.g., United States Natl. Bank of Ore. v. Independent Ins. Agents of America*, 508 U.S. 439, 447, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). And it would be uniquely perverse to deprive the State of a more generous constitutional standard simply because it made the laudable effort to disregard race altogether in the redistricting process.

7 The dissent argues that racial data is superior because black Democrats are more loyal to the party than white Democrats. *Post*, at 1279 - 1280. But whether or not this is true (and the dissent relies solely on the say-so of one witness), studies show that non-white voters turn out at a much lower rate than white voters. See Brennan Center for Justice, K. Morris & C. Grange, Large Racial Turnout Gap Persisted in 2020 Election (Aug. 6, 2021), https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election.

8 The dissent excuses Dr. Ragusa's failure to control for contiguity on the ground that a vast majority of the precincts in old District 1 could have been moved into District 6 without violating contiguity. *Post*, at 1283 - 1284. However, a quick look at the precincts in the counties that fall within District 1 shows that this is plainly untrue. (Links to some of the relevant precinct maps are provided below.) Many precincts would have had to jump over quite a few others in order to join District 6. In addition, the dissent ignores the other objectives that the new map sought to achieve, namely, the unification of Beaufort and Berkeley Counties and the division of Charleston between Districts 1 and 6 so that the city would predictably have one Democratic House Member and one Republican House Member.

For the voting precincts in Beaufort County, see https://rfa.sc.gov/sites/default/files/2024-01/Beaufort%20Precincts%202024.pdf. For Berkeley County, see https://rfa.sc.gov/sites/default/files/2022-04/Berkeley%20Precincts.pdf.

9 Two differences in particular stand out. First, while Dr. Ragusa looked only at Democratic voters to control for partisanship, Professor Ansolabehere looked at both Democratic *and* Republican voters. 1 App. in *Cooper* v. *Harris*, O. T. 2016, No. 15–1262, pp. 334–337. Only after calculating the percentage of black voters moved in each partisan group did Professor Ansolabehere conclude that "race, and not party, had a disproportionate effect on the configuration of " the congressional districts. *Id.*, at 337. Second, Professor Ansolabehere's analysis operated at the voter level. *Id.*, at 313–314. That enabled him to compare the demographics of the moved voters to the general population in a way that Dr. Ragusa's precinct-level analysis cannot.

10 See N. Y. Times, South Carolina Governor Primary Election Results (Nov. 3, 2020), https://www.nytimes.com/elections/results/south-carolina-governor-primary-election; N. Y. Times, South Carolina Presidential Election Results (Nov. 3, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-south-carolina-president.html; see also App. 135 (testimony of Baodong Liu) (noting that Presidential election years "usually ha[ve] a very high level of voter turnout").

11 The dissent, by contrast, would make it virtually impossible to show clear error in a case like this. The dissent agrees that a plaintiff raising a racial-gerrymandering claim bears a "demanding burden." *Post*, at 1272 - 1273 (opinion of KAGAN, J.).

But according to the dissent's view, clear-error review means that this burden vanishes on appeal because a plaintiff 's "hardest job should be done" once it prevails before a three-judge district court. *Ibid.* That misses the point. In assessing whether a finding is clearly erroneous, it is important to keep in mind the standard of proof that the district court was required to apply. It is hornbook law, after all, that we must ask on appeal whether the "factfinder in the first instance made a mistake in concluding that a fact had been proven *under the applicable standard of proof*." *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622–623, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (emphasis added); see also H. Edwards & L. Elliott, Federal Standards of Review 26 (3d ed. 2018) ("[I]n applying the clearly erroneous standard, a reviewing court must take account of the standard of proof informing the trial court's factual finding"). Once our task is framed properly, we can easily conclude for the reasons that follow that the District Court clearly erred when it found that the Challengers carried their "demanding burden."

1 As the Court observes, the most common direct evidence that a State considered race in drawing a districting plan is the State's admission that it considered race in order to comply with our Voting Rights Act precedents. *Ante,* at 1234.

2 Congress has, at times, wielded its power under the Elections Clause to impose compactness and contiguity requirements for congressional districts. See, *e.g.*, Apportionment Act of 1842, ch. 47, 5 Stat. 491; Apportionment Act of 1911, ch. 5, 37 Stat. 13. More recently, in the Uniform Congressional District Act of 1967, Congress required the States to use single-member congressional districts instead of at-large elections. See Pub. L. 90–196, 81 Stat. 581, 2 U.S.C. § 2c. And, Congress created a system for addressing a State's failure to properly redistrict following a decennial census. See § 2a(c). Some Elections Clause legislation may give rise to justiciable controversies regarding the application of federal statutes. Cf. *Wood v. Broom*, 287 U.S. 1, 8, 53 S.Ct. 1, 77 L.Ed. 131 (1932). But, constitutional districting claims are not justiciable in and of themselves.

3 Other Clauses in § 1 of the Fourteenth Amendment fare no better. The Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It "grants 'United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status.' " *Ramos v. Louisiana*, 590 U. S. 83, 138, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (THOMAS, J., concurring in judgment) (quoting *McDonald v. Chicago*, 561 U.S. 742, 808, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment)). And, the Citizenship Clause provides that "[a]ll persons born or naturalized in the United States ... are citizens of the United States and of the State wherein they reside." It likely "guarantees citizens equal treatment ... with respect to civil rights." *Vaello Madero*, 596 U.S. at 179, 142 S.Ct. 1539 (opinion of THOMAS, J.). It is questionable whether the terms "privileges and immunities" and "civil rights" were understood by the generation that ratified the Fourteenth Amendment "to extend to political rights, such as voting." J. Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1417 (1992).

The Due Process Clause, of course, is a nonstarter as a source for substantive rights. See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 330–336, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) (THOMAS, J., concurring).

1 The example *Cooper* gave was *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). The plaintiffs' direct evidence there, *Cooper* noted, was "meager" and "weak." 581 U.S. at 321–322, 137 S.Ct. 1455. *Cromartie* described it as saying "little or nothing" about the role race had played in drawing district lines. 532 U.S. at 253, 121 S.Ct. 1452. And the additional, circumstantial evidence did not fill the gap, because it too "offer[ed] little insight" into the basis of the legislature's mapmaking. *Id.*, at 248, 121 S.Ct. 1452. In that evidentiary vacuum, *Cooper* explained, an alternative map was needed to "carry the day." 581 U.S. at 322, 137 S.Ct. 1455. Not because, as today's majority decides, there is something special about that form of evidence. Just because in *Cromartie* there was basically nothing else. As I'll soon show, that is far from true in this case. See *infra*, at 1275 - 1286.

2 And that view is in no way an outlier. Note that the majority must go back almost a century to find a decision in which this Court drew an adverse inference against a civil litigant for failure to offer a certain form of evidence. See *ante*, at 1250 - 1251 (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939)). And even that decision merely applied an inference in a particular case; it did not create a rule to cover a whole category of suits, as the majority does today. Nor did that old decision relate to a constitutional claim. As far as I know, today's decision is the first to impose a rule defeating claims of that type merely because plaintiffs chose not to offer one form of evidence, and instead relied on others.

3 The majority does not help its cause by noting that two *Democratic* members of the legislature described the districting plan as a partisan gerrymander. See *ante*, at 1244 - 1245. Even as a districting plan's proponents deny partisan gerrymandering, a plan's opponents often allege it. (And both for the same reason—because voters don't like excessive partisan manipulation of district lines.) That Democrats were attacking the plan as a partisan gerrymander hardly shows that Republicans were likely to defend it in that way.

4 A notable feature of this case is that the State chose to litigate it in categorical terms, claiming that the new district lines were based only on political data and not at all on racial data. The State did not need to go that far. In a gerrymandering case, a defendant can prevail by arguing that although race played some role in redistricting, it was not the "predominant factor." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The State's eschewal of that more moderate assertion turned the factual issue about what its mapmakers did into a binary choice. I therefore mainly address it in those terms, though the Challengers' evidence was powerful enough to support a finding of gerrymandering even had the State put predominance at issue.

5 The same variability occurs the other way around. In other words, a White voter might vote for a Republican in one election only to vote for a Democrat in another. So to retain a past Republican voter in a district is not necessarily to retain a future Republican vote.

6 In arguing to the contrary—that the political data was superior to, and would have removed any incentive to use, racial data—the majority emphasizes that only the political data "accounted for voter turnout." *Ante*, at 1242, and n. 7, 1251. But as one of the Challengers' experts explained, that fact is a double-edged sword, because turnout in presidential elections is highly unrepresentative of turnout in off-year ones. See App. 135. And still more important, the mapmakers did not have to make a choice between using political data alone and racial data alone. They could get whatever turnout (or other) information the political data provided even as they used the racial data as an especially reliable and accurate measure of individual voting behavior.

7 Two other studies on which the majority expends much effort, see *ante*, at 1243 - 1245, 1248 - 1249, had only a tenuous connection to the race-versus-politics question. Dr. Moon Duchin's analysis was offered primarily to support the Challengers' independent vote-dilution claim. And Dr. Kosuke Imai's report was designed to address a different defense the State could have raised—that traditional districting principles accounted for District 1's lines. Those two studies are therefore irrelevant. They do not help the Challengers on the disputed issue. But neither does the majority score any points for saying as much.

8 None of that is to say, as the majority seems to think I say, that all or nearly all District 1 precincts touch the District 1-District 6 line. See *ante*, at 1246, n. 8. Some of the district's precincts are indeed several precincts away from the border. But that fact in no way revives the majority's objection to the expert reports. Because of District 1's thinness, almost all of its 300 precincts could (contra the majority) "[ ]realistic[ally]" have been moved, either alone or with a few others, to District 6. *Ante*, at 1245 - 1246. (And so what if with a few others?: The State generally moved precincts around in clumps.) In other words, the State's preference for contiguity and compactness left almost all precincts on the table as candidates for removal. The choice of *which* of those precincts to move must therefore have been explained by other variables, as the Challengers' experts concluded.

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

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

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

Synopsis

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

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

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

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

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

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

Affirmed.

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

Justice Kavanaugh filed an opinion concurring in part.

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

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

West Headnotes (25)

[1] Constitutional Law Fifteenth Amendment

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

1 Case that cites this headnote

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

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

5 Cases that cite this headnote

[3] **Election Law** Vote Dilution

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

19 Cases that cite this headnote

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

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

16 Cases that cite this headnote

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

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

6 Cases that cite this headnote

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

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

14 Cases that cite this headnote

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

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

1 Case that cites this headnote

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

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

10 Cases that cite this headnote

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

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

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

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

1 Case that cites this headnote

[11] **Injunction** Redistricting and reapportionment

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

11 Cases that cite this headnote

[12] **Election Law** Vote Dilution

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

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

2 Cases that cite this headnote

[13] **Injunction** Redistricting and reapportionment

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

5 Cases that cite this headnote

[14] **Injunction** Redistricting and reapportionment

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

5 Cases that cite this headnote

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

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

6 Cases that cite this headnote

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

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

1 Case that cites this headnote

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

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

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

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

[19] **Election Law** Vote Dilution

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

1 Case that cites this headnote

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

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

[21] **Election Law** Vote Dilution

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

2 Cases that cite this headnote

[22] **Election Law** Vote Dilution

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

1 Case that cites this headnote

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

Election Law Vote Dilution

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

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

[24] **Constitutional Law** Fifteenth Amendment

Election Law Apportionment and Reapportionment

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

2 Cases that cite this headnote

[25] **Constitutional Law** Fifteenth Amendment

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

1 Case that cites this headnote

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Opinion

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

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

I

A

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

C

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

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

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

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

II

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

A

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

As we explain below, we find Alabama's new approach to § 2 compelling neither in theory nor in practice. We accordingly decline to recast our § 2 case law as Alabama requests.

A

1

Section 2 prohibits States from imposing any "standard, practice, or procedure ... in a manner which results in a ***25** denial or abridgement of the right of any citizen ... to vote on account of race or color." 52 U.S.C. § 10301(a). What that means, § 2 goes on to explain, is that the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 10301(b).

[15] **[16]** **[17]** **[18]** We have understood the language of § 2 against the background of the hard-fought compromise that Congress struck. To that end, we have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent. See, *e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 403–404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). And we have explained that "[i]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Gingles*, 478 U.S. at 71, n. 34, 106 S.Ct. 2752 (plurality opinion) (some alterations omitted). Individuals thus lack an equal opportunity to participate in the political process when a State's electoral structure operates in a manner that "minimize[s] or cancel[s] out the[ir] voting strength." *Id.*, at 47, 106 S.Ct. 2752. That occurs where an individual is disabled from "enter[ing] into the political process in a reliable and meaningful manner" "in the light of past and present reality, political and otherwise." *White*, 412 U.S. at 767, 770, 93 S.Ct. 2332. A district is not equally open, in other words, when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter.

The State's reading of § 2, by contrast, runs headlong into our precedent. Alabama asserts that a State's map does not "abridge[ ]" a person's right to vote "on account of race" if the map resembles a sufficient number of race-neutral alternatives. See Brief for Alabama 54–56. But our cases have consistently focused, for purposes of litigation, on the specific ***26** illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect on account of race. The remainder of the *Gingles* test helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State, past and present.

[19] A State's liability under § 2, moreover, must be determined "based on the totality of circumstances." 52 U.S.C. § 10301(b). Yet Alabama suggests there is only one "circumstance[ ]" that matters—how the State's map stacks up relative to the benchmark. That single-minded view of § 2 cannot be squared with the VRA's ****1508** demand that courts employ a more refined approach. And we decline to adopt an interpretation of § 2 that would "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence" for nearly forty years. *Bartlett*, 556 U.S. at 16, 129 S.Ct. 1231 (plurality opinion); see also *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1250 (faulting lower court for "improperly reduc[ing] *Gingles*' totality-of-circumstances analysis to a single factor"); *De Grandy*, 512 U.S. at 1018, 114 S.Ct. 2647 ("An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' ").[3]

2

Alabama also argues that the race-neutral benchmark is required because our existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to the last sentence of § 2(b). But properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as our decisions have frequently demonstrated.

***27** In *Shaw* v. *Reno*, for example, we considered the permissibility of a second majority-minority district in North Carolina, which at the time had 12 seats in the U. S. House of Representatives and a 20% black voting age population. 509 U.S. 630, 633–634, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). The second majority-minority district North Carolina drew was "160 miles long and, for much of its length, no wider than the [interstate] corridor." *Id.*, at 635, 113 S.Ct. 2816. The district wound "in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobble[d] in enough enclaves of black neighborhoods." *Id.*, at 635–636, 113 S.Ct. 2816. Indeed, the district was drawn so imaginatively that one state legislator remarked: "[I]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Id.*, at 636, 113 S.Ct. 2816.

Though North Carolina believed the additional district was required by § 2, we rejected that conclusion, finding instead that those challenging the map stated a claim of impermissible racial gerrymandering under the Equal Protection Clause. *Id.*, at 655, 658, 113 S.Ct. 2816. In so holding, we relied on the fact that the proposed district was not reasonably compact. *Id.*, at 647, 113 S.Ct. 2816. North Carolina had "concentrated a *dispersed* minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Ibid.* (emphasis added). And "[a] reapportionment plan that includes in one district individuals who belong to the same race, *but who are otherwise separated by geographical and political boundaries*," we said, raised serious constitutional concerns. *Ibid.* (emphasis added).

The same theme emerged in our 1995 decision *Miller* v. *Johnson*, where we upheld a district court's finding that one of Georgia's ten congressional districts was the product of an impermissible racial gerrymander. 515 U.S. 900, 906, 910–911, 115 S.Ct. 2475, 132 L.Ed.2d 762. At the time, Georgia's black voting age population was 27%, but there was only one majority-minority district. *Id.*, at 906, 115 S.Ct. 2475. To comply with the VRA, Georgia thought it necessary ***28** to create two more ****1509** majority-minority districts—achieving proportionality. *Id.*, at 920–921, 115 S.Ct. 2475. But like North Carolina in *Shaw*, Georgia could not create the districts without flouting traditional criteria. One district "centered around four discrete, widely spaced urban centers that ha[d] absolutely nothing to do with each other, and stretch[ed] the district hundreds of miles across rural counties and narrow swamp corridors." 515 U.S. at 908, 115 S.Ct. 2475. "Geographically," we said of the map, "it is a monstrosity." *Id.*, at 909, 115 S.Ct. 2475.

In *Bush* v. *Vera*, a plurality of the Court again explained how traditional districting criteria limited any tendency of the VRA to compel proportionality. The case concerned Texas's creation of three additional majority-minority districts. 517 U.S. at 957, 116 S.Ct. 1941. Though the districts brought the State closer to proportional representation, we nevertheless held that they constituted racial gerrymanders in violation of the Fourteenth Amendment. That was because the districts had "no integrity in terms of traditional, neutral redistricting criteria." *Id.*, at 960, 116 S.Ct. 1941. One of the majority-black districts consisted "of narrow and bizarrely shaped tentacles." *Id.*, at 965, 116 S.Ct. 1941. The proposed majority-Hispanic district resembled "a sacred Mayan bird" with "[s]pindly legs reach[ing] south" and a "plumed head ris[ing] northward." *Id.*, at 974, 116 S.Ct. 1941.

The point of all this is a simple one. Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2. The numbers bear the point out well. At the congressional level, the fraction of districts in which black-preferred candidates are likely to win "is currently below the Black share of the eligible voter population in every state but three." Brief for Professors Jowei Chen et al. as *Amici Curiae* 3 (Chen Brief). Only one State in the country, meanwhile, "has attained a proportional share" of districts in which Hispanic-preferred candidates are likely to prevail. *Id.*, at 3–4. That is because as residential segregation decreases—as it has "sharply" done since the ***29** 1970s—satisfying traditional districting criteria such as the compactness requirement "becomes more difficult." T. Crum, Reconstructing Racially Polarized Voting, 70 Duke L. J. 261, 279, and n. 105 (2020).

Indeed, as *amici* supporting the appellees emphasize, § 2 litigation in recent years has rarely been successful for just that reason. See Chen Brief 3–4. Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. *Id.*, at 7. And "the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston." *Id.*, at 7–8. By contrast, "[n]umerous lower courts" have upheld districting maps "where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district" or satisfy the compactness requirement. *Id.*, at 15–16 (collecting cases). The same has been true of recent litigation in this Court. See *Abbott*, 585 U. S., at —— – ——, 138 S.Ct., at 2331 (finding a Texas district did not violate § 2 because "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino ... districts that exist under the current plan").[4]

****1510** **[20]** **[21]** Reapportionment, we have repeatedly observed, "is primarily the duty and responsibility of the State[s]," not the federal courts. *Id.*, at ——, 138 S.Ct., at 2324. Properly applied, the *Gingles* factors help ensure that remains the case. As respondents ***30** themselves emphasize, § 2 "never require[s] adoption of districts that violate traditional redistricting principles." Brief for Respondents in No. 21–1087, p. 3. Its exacting requirements, instead, limit judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process ... den[ies] minority voters equal opportunity to participate." Senate Report 33–34.

B

Although we are content to reject Alabama's invitation to change existing law on the ground that the State misunderstands § 2 and our decisions implementing it, we also address how the race-neutral benchmark would operate in practice. Alabama's approach fares poorly on that score, which further counsels against our adopting it.

1

The first change to existing law that Alabama would require is prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being "based" on race. Brief for Alabama 56. Although Alabama is not entirely clear whether, under its view, plaintiffs' illustrative plans must not take race into account at all or whether they must just not "prioritize" race, *ibid.*, we see no reason to impose such a new rule.

When it comes to considering race in the context of districting, we have made clear that there is a difference "between being aware of racial considerations and being motivated by them." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475; see also *North Carolina* v. *Covington*, 585 U. S. ——, ——, 138 S.Ct. 2548, 2553, 201 L.Ed.2d 993 (2018) (*per curiam*). The former is permissible; the latter is usually not. That is because "[r]edistricting legislatures will ... almost always be aware of racial demographics," *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, but such "race consciousness does not lead inevitably to impermissible race discrimination," *Shaw*, 509 U.S. at 646, 113 S.Ct. 2816. Section 2 itself "demands consideration of race." ***31** *Abbott*, 581 U. S., at ——, 138 S.Ct., at 2315. The question whether additional majority-*minority* districts can be drawn, after all, involves a "quintessentially race-conscious calculus." *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647.

At the same time, however, race may not be "the predominant factor in drawing district lines unless [there is] a compelling reason." *Cooper*, 581 U.S. at 291, 137 S.Ct. 1455. Race predominates in the drawing of district lines, our cases explain, when "race-neutral considerations [come] into play only after the race-based decision had been made." *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 189, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017) (internal quotation marks omitted). That may occur where "race for its own sake is the

overriding reason for choosing one map over others." *Id.*, at 190, 137 S.Ct. 788.

While the line between racial predominance and racial consciousness can be difficult **1511 to discern, see *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, it was not breached here. The *Caster* plaintiffs relied on illustrative maps produced by expert Bill Cooper. See 2 App. 591–592. Cooper testified that while it was necessary for him to *consider* race, he also took several other factors into account, such as compactness, contiguity, and population equality. *Ibid.* Cooper testified that he gave all these factors "equal weighting." *Id.*, at 594. And when asked squarely whether race predominated in his development of the illustrative plans, Cooper responded: "No. It was a consideration. This is a Section 2 lawsuit, after all. But it did not predominate or dominate." *Id.*, at 595.

The District Court agreed. It found "Cooper's testimony highly credible" and commended Cooper for "work[ing] hard to give 'equal weight[ ]' to all traditional redistricting criteria." 582 F.Supp.3d at 1005–1006; see also *id.*, at 978–979. The court also explained that Alabama's evidence of racial predominance in Cooper's maps was exceedingly thin. Alabama's expert, Thomas Bryan, "testified that he never reviewed the exhibits to Mr. Cooper's report" and "that he never reviewed" one of the illustrative plans that Cooper *32 submitted. *Id.*, at 1006. Bryan further testified that he could offer no "conclusions or opinions as to the apparent basis of any individual line drawing decisions in Cooper's illustrative plans." 2 App. 740. By his own admission, Bryan's analysis of any race predominance in Cooper's maps "was pretty light." *Id.*, at 739. The District Court did not err in finding that race did not predominate in Cooper's maps in light of the evidence before it.[5]

The dissent contends that race nevertheless predominated in both Cooper's and Duchin's maps because they were designed to hit " 'express racial target[s]' "—namely, two "50%-plus majority-black districts." *Post*, at 1527 (opinion of THOMAS, J.) (quoting *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788). This argument fails in multiple ways. First, the dissent's reliance on *Bethune-Hill* is mistaken. In that case, this Court was unwilling to conclude that a State's maps were produced in a racially predominant manner. Instead, we remanded for the lower court to conduct the predominance analysis itself, explaining that "the use of an express racial target" was just one factor among others that the court would have to consider as part of "[a] holistic analysis." *Id.*, at 192, 137 S.Ct. 788. Justice *33 THOMAS dissented in relevant part, contending that because "the legislature sought to achieve a [black voting-age population] of at least 55%," race necessarily predominated in its decisionmaking. *Id.*, at 198, 137 S.Ct. 788 (opinion concurring in part and dissenting in part). But the Court did not join in that view, and Justice THOMAS again dissents along the same lines today.

**1512 The second flaw in the dissent's proposed approach is its inescapable consequence: *Gingles* must be overruled. According to the dissent, racial predominance plagues *every single illustrative map ever adduced* at the first step of *Gingles*. For all those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the enterprise. The upshot of the approach the dissent urges is not to change how *Gingles* is applied, but to reject its framework outright.

The contention that mapmakers must be entirely "blind" to race has no footing in our § 2 case law. The line that we have long drawn is between consciousness and predominance. Plaintiffs adduced at least one illustrative map that comported with our precedents. They were required to do no more to satisfy the first step of *Gingles*.

2

The next condition Alabama would graft onto § 2 is a requirement that plaintiffs demonstrate, at the totality of circumstances stage, that the State's enacted plan contains fewer majority-minority districts than the race-neutral benchmark. Brief for Alabama 43. If it does not, then § 2 should drop out of the picture. *Id.*, at 44.

Alabama argues that is what should have happened here. It notes that one of plaintiffs' experts, Dr. Duchin, used an algorithm to create "2 million districting plans for Alabama ... without taking race into account in any way in the generation process." 2 App. 710. Of these two million "race-blind" *34 plans, none contained two majority-black districts while many plans did not contain any. *Ibid.* Alabama also points to a "race-neutral" computer simulation conducted by another one of plaintiffs' experts, Dr. Kosuke Imai, which produced 30,000 potential maps. Brief for Alabama 55. As with Dr. Duchin's maps, none of the maps that Dr. Imai created contained two majority-black districts. See 2 App. 571–572. Alabama thus contends that because HB1 sufficiently "resembles" the "race-neutral" maps created by Dr. Duchin

and Dr. Imai—all of the maps lack two majority-black districts—HB1 does not violate § 2. Brief for Alabama 54.

Alabama's reliance on the maps created by Dr. Duchin and Dr. Imai is misplaced. For one, neither Duchin's nor Imai's maps accurately represented the districting process in Alabama. Dr. Duchin's maps were based on old census data—from 2010 instead of 2020—and ignored certain traditional districting criteria, such as keeping together communities of interest, political subdivisions, or municipalities.[6] And Dr. Imai's 30,000 maps failed to incorporate Alabama's own districting guidelines, including keeping together communities of interest and preserving municipal boundaries. See Supp. App. 58–59.[7]

***35** ****1513** But even if the maps created by Dr. Duchin and Dr. Imai were adequate comparators, we could not adopt the map-comparison test that Alabama proposes. The test is flawed in its fundamentals. Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality. See *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Yet "[q]uantifying, measuring, prioritizing, and reconciling these criteria" requires map drawers to "make difficult, contestable choices." Brief for Computational Redistricting Experts as *Amici Curiae* 8 (Redistricting Brief). And "[i]t is easy to imagine how different criteria could move the median map toward different ... distributions," meaning that "the same map could be [lawful] or not depending solely on what the mapmakers said they set out to do." *Rucho* v. *Common Cause*, 588 U. S. ——, ——–——, 139 S.Ct. 2484, 2505, 204 L.Ed.2d 931 (2019). For example, "the scientific literature contains dozens of competing metrics" on the issue of compactness. Redistricting Brief 8. Which one of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide?

[22] Alabama does not say; it offers no rule or standard for determining which of these choices are better than others. Nothing in § 2 provides an answer either. In 1982, the computerized mapmaking software that Alabama contends plaintiffs ***36** must use to demonstrate an (unspecified) level of deviation did not even exist. See, *e.g.*, J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 881–882 (2021) (Chen & Stephanopoulos). And neither the text of § 2 nor the fraught debate that produced it suggests that "equal access" to the fundamental right of voting turns on computer simulations that are technically complicated, expensive to produce, and available to "[o]nly a small cadre of university researchers [that] have the resources and expertise to run" them. Brief for United States as *Amicus Curiae* 28 (citing Chen & Stephanopoulos 882–884).[8]

One final point bears mentioning. Throughout these cases, Alabama has repeatedly emphasized that HB1 cannot have violated § 2 because none of plaintiffs' two million odd maps contained more than one majority-minority district. See, *e.g.*, Brief for Alabama 1, 23, 30, 31, 54–56, 70, 79. The point is that two million is a very big number and that sheer volume matters. But as elsewhere, Alabama misconceives ****1514** the math project that it expects courts to oversee. A brief submitted by three computational redistricting experts explains that the number of possible districting maps in Alabama is at least in the "trillion trillions." Redistricting Brief 6, n. 7. Another publication reports that the number of potential maps may be orders of magnitude higher: "the universe of all possible connected, population-balanced districting plans that satisfy the state's requirements," it explains, "is likely in the range of googols." Duchin & Spencer 768. Two million maps, in other words, is not many maps at all. And Alabama's insistent reliance on that number, ***37** however powerful it may sound in the abstract, is thus close to irrelevant in practice. What would the next million maps show? The next billion? The first trillion of the trillion trillions? Answerless questions all. See, *e.g.*, Redistricting Brief 2 ("[I]t is computationally intractable, and thus effectively impossible, to generate a complete enumeration of all potential districting plans. [Even] algorithms that attempt to create a manageable sample of that astronomically large universe do not consistently identify an average or median map."); Duchin & Spencer 768 ("[A] comprehensive survey of [all districting plans within a State] is impossible.").

Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is.

3

Alabama's final contention with respect to the race-neutral benchmark is that it requires plaintiffs to demonstrate that any deviations between the State's enacted plan and race-neutral

alternatives "can be explained *only* by racial discrimination." Brief for Alabama 44 (emphasis added).

We again find little merit in Alabama's proposal. As we have already explained, our precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under § 2. See, *e.g.*, *Chisom*, 501 U.S. at 403–404, 111 S.Ct. 2354; *Shaw*, 509 U.S. at 641, 113 S.Ct. 2816; *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). Yet Alabama's proposal is even *more* demanding than the intent test Congress jettisoned. Demonstrating discriminatory intent, we have long held, "does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purpose[ ]." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (emphasis added); see also *Reno*, 520 U.S. at 488, 117 S.Ct. 1491. Alabama's proposed approach stands in sharp contrast to all this, injecting into the effects test of § 2 an ***38** evidentiary standard that even our purposeful discrimination cases eschew.

C

Alabama finally asserts that the Court should outright stop applying § 2 in cases like these because the text of § 2 does not apply to single-member redistricting and because § 2 is unconstitutional as the District Court applied it here. We disagree on both counts.

[23] Alabama first argues that § 2 does not apply to single-member redistricting. Echoing Justice THOMAS's concurrence in *Holder* v. *Hall*, Alabama reads § 2's reference to "standard, practice, or procedure" to mean only the "methods for conducting a part of the voting process that might ... be used to interfere with a citizen's ability to cast his vote." 512 U.S. at 917–918, 114 S.Ct. 2581 (opinion concurring ****1515** in judgment). Examples of covered activities would include "registration requirements, ... the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process." *Id.*, at 922, 114 S.Ct. 2581. But not "a single-member districting system or the selection of one set of districting lines over another." *Id.*, at 923, 114 S.Ct. 2581.

This understanding of § 2 cannot be reconciled with our precedent. As recounted above, we have applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades. See *supra*, at 1503 – 1504; see also *Brnovich*, 594 U. S., at ——, n. 5, 141 S.Ct., at 2333, n. 5) (collecting cases). In doing so, we have unanimously held that § 2 and *Gingles* "[c]ertainly ... apply" to claims challenging single-member districts. *Growe*, 507 U.S. at 40, 113 S.Ct. 1075. And we have even invalidated portions of a State's single-district map under § 2. See *LULAC*, 548 U.S. at 427–429, 126 S.Ct. 2594.[9] Alabama's approach would require ***39** "abandoning" this precedent, "overruling the interpretation of § 2" as set out in nearly a dozen of our cases. *Holder*, 512 U.S. at 944, 114 S.Ct. 2581 (opinion of THOMAS, J.).

We decline to take that step. Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course. See, *e.g.*, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015).[10]

The statutory text in any event supports the conclusion that § 2 applies to single-member districts. Alabama's own proffered definition of a "procedure is the manner or method of proceeding in a process or course of action." Brief for Alabama 51 (internal quotation marks omitted). But the manner of proceeding in the act of voting entails determining in which districts voters will vote. The fact that the term "procedure" is preceded by the phrase "qualification or prerequisite to voting," 52 U.S.C. § 10301(a), does not change its meaning. It is hard to imagine many more fundamental "prerequisites" to voting than determining where to cast your ballot or who you are eligible to vote for. Perhaps for ***40** that reason, even Alabama ****1516** does not bear the courage of its conviction on this point. It refuses to argue that § 2 is inapplicable to multimember districting, though its textual arguments apply with equal force in that context.

The dissent, by contrast, goes where even Alabama does not dare, arguing that § 2 is wholly inapplicable to districting because it "focuses on ballot access and counting" only. *Post*, at 1520 (opinion of THOMAS, J.). But the statutory text upon which the dissent relies supports the exact opposite conclusion. The relevant section provides that "[t]he terms 'vote' or 'voting' shall include *all action necessary to make a vote effective*." *Ibid.* (quoting 52 U.S.C. § 10310(c)(1); emphasis added). Those actions "includ[e], but [are] not limited to, ... action[s] required by law prerequisite to voting,

casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." § 10310(c)(1). It would be anomalous to read the broad language of the statute—"all action necessary," "including but not limited to"—to have the crabbed reach that Justice THOMAS posits. And we have already discussed why determining where to cast a ballot constitutes a "prerequisite" to voting, as the statute requires.

The dissent also contends that "applying § 2 to districting rests on systematic neglect of ... the ballot-access focus of the 1960s' voting-rights struggles." *Post*, at 1520 (opinion of THOMAS, J.). But history did not stop in 1960. As we have explained, Congress adopted the amended § 2 in response to the 1980 decision *City of Mobile*, a case about *districting*. And—as the dissent itself acknowledges—"Congress drew § 2(b)'s current operative language" from the 1973 decision *White* v. *Regester*, *post*, at 1521, n. 3 (opinion of THOMAS, J.), a case that was also about districting (in fact, a case that invalidated two multimember districts in Texas and ordered them redrawn into single-member districts, 412 U.S. at 765, 93 S.Ct. 2332). This was not lost on anyone when § 2 was amended. Indeed, it was the precise reason that the contentious debates over ***41** proportionality raged—debates that would have made little sense if § 2 covered only poll taxes and the like, as the dissent contends.

[24] **[25]** We also reject Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment. According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. See Brief for Alabama 73. But we held over 40 years ago "that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." *City of Rome v. United States*, 446 U.S. 156, 173, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). The VRA's "ban on electoral changes that are discriminatory in effect," we emphasized, "is an appropriate method of promoting the purposes of the Fifteenth Amendment." *Id.*, at 177, 100 S.Ct. 1548. As *City of Rome* recognized, we had reached the very same conclusion in *South Carolina* v. *Katzenbach*, a decision issued right after the VRA was first enacted. 383 U.S. at 308–309, 329–337, 86 S.Ct. 803; see also *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2330–2331.

Alabama further argues that, even if the Fifteenth Amendment authorizes the effects test of § 2, that Amendment does not authorize race-based redistricting as a remedy for § 2 violations. But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as ****1517** a remedy for state districting maps that violate § 2. See, *e.g.*, *supra,* at 1503 – 1504; cf. *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984). In light of that precedent, including *City of Rome*, we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.

The concern that § 2 may impermissibly elevate race in the allocation of political power within the States is, of course, ***42** not new. See, *e.g.*, *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."). Our opinion today does not diminish or disregard these concerns. It simply holds that a faithful application of our precedents and a fair reading of the record before us do not bear them out here.

* * *

The judgments of the District Court for the Northern District of Alabama in the *Caster* case, and of the three-judge District Court in the *Milligan* case, are affirmed.

It is so ordered.

Justice KAVANAUGH, concurring in all but Part III–B–1.
I agree with the Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act as interpreted in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). I write separately to emphasize four points.

First, the upshot of Alabama's argument is that the Court should overrule *Gingles*. But the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict. Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as *Gingles*. In the past 37 years, however, Congress and the President have not disturbed *Gingles*, even as they have made

other changes to the Voting Rights Act. Although statutory *stare decisis* is not absolute, "the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process." *Ramos* v. *Louisiana*, 590 U. S. ——, ——, 140 S.Ct. 1390, 1413, 206 L.Ed.2d 583 (2020) (KAVANAUGH, J., concurring in part); see also, *e.g.*, *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015); ***43** *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Flood v. Kuhn*, 407 U.S. 258, 283–284, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).[1]

Second, Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer in § 2(b) of the Voting Rights Act. 52 U.S.C. § 10301(b). But Alabama's ****1518** premise is wrong. As the Court's precedents make clear, *Gingles* does not mandate a proportional number of majority-minority districts. *Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and "geographically compact" minority population and (ii) a plaintiff 's proposed alternative map and proposed majority-minority district are "reasonably configured"—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines. See, *e.g.*, *Cooper v. Harris*, 581 U.S. 285, 301–302, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Voinovich v. Quilter*, 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *ante*, at 1503 – 1505, 1507 – 1510.

If *Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines. But *Gingles* and this Court's later decisions have flatly rejected that approach. See, *e.g.*, *Abbott* v. *Perez*, 585 U. S. ——, —— – ——, 138 S.Ct. 2305, 2331–2332, 201 L.Ed.2d 714 (2018); *Bush v. Vera*, 517 U.S. 952, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); ***44** *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752; see also *Miller v. Johnson*, 515 U.S. 900, 917–920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 644–649, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *ante*, at 1507 – 1510, 113 S.Ct. 2816.[2]

Third, Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State's plan abridges the right to vote on account of race. It is true that computer simulations might help detect the presence or absence of *intentional* discrimination. For example, if all of the computer simulations generated only one majority-minority district, it might be difficult to say that a State had intentionally discriminated on the basis of race by failing to draw a second majority-minority district.

But as this Court has long recognized—and as all Members of this Court today agree—the text of § 2 establishes an effects test, not an intent test. See *ante*, at 1507; *post*, at 1522 – 1523 (THOMAS, J., dissenting); *post*, at 1556 – 1557 (ALITO, J., dissenting). And the effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations. See *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2314–2315; *Johnson v. De Grandy*, 512 U.S. 997, 1006–1007, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Voinovich*, 507 U.S. at 153–154, 113 S.Ct. 1149; see generally *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2341, 210 L.Ed.2d 753 (2021) ("§ 2 does not demand proof of discriminatory purpose"); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (Congress "clearly expressed its desire that § 2 *not* have an intent component"); ****1519** *Holder v. Hall*, 512 U.S. 874, 923–924, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment) (§ 2 adopts a ***45** " 'results' test, rather than an 'intent' test"); *Chisom v. Roemer*, 501 U.S. 380, 394, 404, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991) ("proof of intent is no longer required to prove a § 2 violation" as "Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone"); *Gingles*, 478 U.S. at 71, n. 34, 106 S.Ct. 2752 (plurality opinion) (§ 2 does not require " 'purpose of racial discrimination' ").

Fourth, Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority under the Fourteenth and Fifteenth Amendments. As the Court explains, the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents. See *ante*, at 1516 – 1517; see also *City of Rome v. United States*, 446 U.S. 156, 177–178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Justice THOMAS notes, however, that even if Congress in

1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future. See *post*, at 1543 – 1544 (dissenting opinion). But Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time.

For those reasons, I vote to affirm, and I concur in all but Part III–B–1 of the Court's opinion.

Justice THOMAS, with whom Justice GORSUCH joins, with whom Justice BARRETT joins as to Parts II and III, and with whom Justice ALITO joins as to Parts II–A and II–B, dissenting.

These cases "are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (THOMAS, J., dissenting) (quoting *Holder v. Hall*, 512 U.S. 874, 893, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment)). What distinguishes them is the uncommon clarity with which they lay bare the gulf between our "color-blind" ***46** Constitution, *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), and "the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder*, 512 U.S. at 907, 114 S.Ct. 2581 (opinion of THOMAS, J.). The question presented is whether § 2 of the Act, as amended, requires the State of Alabama to intentionally redraw its longstanding congressional districts so that black voters can control a number of seats roughly proportional to the black share of the State's population. Section 2 demands no such thing, and, if it did, the Constitution would not permit it.

I

At the outset, I would resolve these cases in a way that would not require the Federal Judiciary to decide the correct racial apportionment of Alabama's congressional seats. Under the statutory text, a § 2 challenge must target a "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). I have long been convinced that those words reach only "enactments that regulate citizens' access to the ballot or the processes for counting a ballot"; they "do not include a State's ... choice of one districting scheme over another." *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). "Thus, § 2 cannot provide a basis for invalidating any district." ****1520** *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2335, 201 L.Ed.2d 714 (2018) (THOMAS, J., concurring).

While I will not repeat all the arguments that led me to this conclusion nearly three decades ago, see *Holder*, 512 U.S. at 914–930, 114 S.Ct. 2581 (opinion concurring in judgment), the Court's belated appeal to the statutory text is not persuasive. See *ante*, at 1515 – 1516. Whatever words like "practice" and "procedure" are capable of meaning in a vacuum, the prohibitions *of § 2* apply to practices and procedures that affect "voting" and "the right ... to vote." § 10301(a). "Vote" and "voting" are defined terms under the Act, and the Act's definition plainly focuses on ballot access and counting:

> ***47** "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." § 10310(c)(1).

In enacting the original Voting Rights Act in 1965, Congress copied this definition almost verbatim from Title VI of the Civil Rights Act of 1960—a law designed to protect access to the ballot in jurisdictions with patterns or practices of denying such access based on race, and which cannot be construed to authorize so-called vote-dilution claims. See 74 Stat. 91–92 (codified in relevant part at 52 U.S.C. § 10101(e)). Title I of the Civil Rights Act of 1964, which cross-referenced the 1960 Act's definition of "vote," likewise protects ballot access alone and cannot be read to address vote dilution. See 78 Stat. 241 (codified in relevant part at 52 U.S.C. § 10101(a)). Tellingly, the 1964 Act also used the words "standard, practice, or procedure" to refer specifically to voting qualifications for individuals and the actions of state and local officials in administering such requirements.[1] Our entire enterprise of applying § 2 to districting rests on systematic neglect of these statutory antecedents and, more broadly, of the ballot-access focus of the 1960s' voting-rights struggles. See, *e.g.*, ***48** *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2330, 210 L.Ed.2d 753 (2021) (describing the "notorious methods" by which, prior to the Voting Rights Act, States and localities deprived black Americans of the ballot: "poll

taxes, literacy tests, property qualifications, white primaries, and grandfather clauses" (alterations and internal quotation marks omitted)).[2]

Moreover, the majority drastically overstates the *stare decisis* support for applying § 2 to single-member districting plans **1521 like the one at issue here.[3] As the majority implicitly acknowledges, this Court has only applied § 2 to invalidate one single-member district in one case. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 447, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.). And no party in *49 that case argued that the plaintiffs' vote-dilution claim was not cognizable. As for *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), it held only that the threshold preconditions for challenging multimember and at-large plans must limit challenges to single-member districts with *at least* the same force, as "[i]t would be peculiar [if] a vote-dilution challenge to the (more dangerous) multimember district require[d] a higher threshold showing than a vote-fragmentation challenge to a single-member district." *Id.*, at 40, 113 S.Ct. 1075. *Growe* did not consider (or, thus, reject) an argument that § 2 does not apply to single-member districts.

In any event, *stare decisis* should be no barrier to reconsidering a line of cases that "was based on a flawed method of statutory construction from its inception," has proved incapable of principled application after nearly four decades of experience, and puts federal courts in the business of "methodically carving the country into racially designated electoral districts." *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). This Court has "never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes," and it should not do so here. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Stare decisis* did not save "separate but equal," despite its repeated reaffirmation in this Court and the pervasive reliance States had placed upon it for decades. See, *e.g.*, Brief for Appellees in *Brown* v. *Board of Education*, O. T. 1953, No. 1, pp. 18–30. It should not rescue modern-day forms of *de jure* racial balkanization—which, as these cases show, is exactly where our § 2 vote-dilution jurisprudence has led.[4]

*50 **1522 II

Even if § 2 applies here, however, Alabama should prevail. The District Court found that Alabama's congressional districting map "dilutes" black residents' votes because, while it is *possible* to draw two majority-black districts, Alabama's map only has one.[5] But the critical question in all vote-dilution cases is: "Diluted relative to what benchmark?" *Gonzalez v. Aurora*, 535 F.3d 594, 598 (CA7 2008) (Easterbrook, C. J.). Neither the District Court nor the majority has any defensible answer. The text of § 2 and the logic of vote-dilution claims require a meaningfully race-neutral benchmark, and no race-neutral benchmark can justify the District Court's finding of vote dilution in these cases. The *51 only benchmark that can justify it—and the one that the District Court demonstrably applied—is the decidedly nonneutral benchmark of proportional allocation of political power based on race.

A

As we have long recognized, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). In a challenge to a districting plan, a court must be able to compare a State's enacted plan with "a hypothetical, undiluted plan," *ibid.*, ascertained by an "objective and workable standard." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion); see also *id.*, at 887, 114 S.Ct. 2581 (opinion of O'Connor, J.) (noting the "general agreement" on this point).

To be sure, it is no easy task to identify an objective, "undiluted" benchmark against which to judge a districting plan. As we recently held in the analogous context of partisan gerrymandering, "federal courts are not equipped to apportion political power as a matter of fairness." *Rucho* v. *Common Cause*, 588 U. S. ——, ——, 139 S.Ct. 2484, 2499, 204 L.Ed.2d 931 (2019). Yet § 2 vote-dilution cases require nothing less. If § 2 prohibited only intentional racial discrimination, there would be no difficulty in finding a clear and workable rule of decision. But the "results test" that Congress wrote into § 2 to supersede *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980), eschews intent as the criterion of liability. See *Bossier Parish School Bd.*, 520 U.S. at 482, 117 S.Ct. 1491. Accordingly, a § 2 vote-dilution **1523 claim does not simply "as[k] ... for the elimination of a racial classification." *Rucho*, 588 U. S., at ——, 139 S.Ct., at 2502. It asks, instead, "for a fair share of political power and

influence, with all the justiciability conundrums that entails." *Ibid.* Nevertheless, if § 2 applies to single-member districts, we must accept that some "objective and workable standard for choosing a reasonable benchmark" exists; otherwise, single-member districts "cannot be challenged as dilutive under § 2." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion).

***52** Given the diverse circumstances of different jurisdictions, it would be fanciful to expect a one-size-fits-all definition of the appropriate benchmark. Cf. *Thornburg v. Gingles*, 478 U.S. 30, 79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (explaining that the vote-dilution inquiry "is peculiarly dependent upon the facts of each case and requires an intensely local appraisal" (citation and internal quotation marks omitted)). One overriding principle, however, should be obvious. A proper districting benchmark must be *race neutral*: It must not assume, *a priori*, that an acceptable plan should include any particular number or proportion of minority-controlled districts.

I begin with § 2's text. As relevant here, § 2(a) prohibits a State from "impos[ing] or appl[ying]" any electoral rule "in a manner which results in a denial or abridgement of the right ... to vote on account of race or color." § 10301(a). Section 2(b) then provides that § 2(a) is violated

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

As we held two Terms ago in *Brnovich*, the "equal openness" requirement is "the core" and "touchstone" of § 2(b),

with "equal opportunity" serving an ancillary function.[6] ***53** 594 U. S., at ——, 141 S.Ct., at 2338. Relying significantly on § 2(b)'s disclaimer of a right to proportional representation, we also held that § 2 does not enact a "freewheeling disparate-impact regime." *Id.*, at ——, and n. 14, 141 S.Ct., at 2341, and n. 14. *Brnovich* further stressed the value of "benchmarks with which ... challenged [electoral] rule[s] can be compared," *id.*, at ——, 141 S.Ct., at 2338, and that "a meaningful comparison is essential" in judging the significance of any challenged scheme's racially disparate impact. *Id.*, at ——, 141 S.Ct., at 2339. To the extent § 2 applies to districting plans, then, it requires that they be "equally open to participation" by voters of all races, but it is not a pure disparate-impact statute and does not guarantee proportional representation.

In its main argument here, Alabama simply carries these principles to their logical conclusion: Any vote-dilution benchmark must be race neutral. See Brief for Appellants 32–46. Whatever "equal openness" means in the context of single-member ****1524** districting, no "meaningful comparison" is possible using a benchmark that builds in a presumption in favor of minority-controlled districts. Indeed, any benchmark other than a race-neutral one would render the vote-dilution inquiry fundamentally circular, allowing courts to conclude that a districting plan "dilutes" a minority's voting strength "on account of race" merely because it does not measure up to an ideal already defined in racial terms. Such a question-begging standard would not answer our precedents' demand for an "*objective*," "reasonable benchmark." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion) (emphasis added). Nor could any nonneutral benchmark be reconciled with *Brnovich*'s rejection of a disparate-impact regime or the text's disclaimer of a right to proportional representation. 594 U. S., at ——, and n. 14, 141 S.Ct., at 2341, and n. 14).

There is yet another compelling reason to insist on a race-neutral benchmark. "The Constitution abhors classifications based on race." *Grutter v. Bollinger*, 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). Redistricting is no exception. "Just as the State ***54** may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools," the State also "may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (citations omitted). "[D]istricting maps that sort voters on the basis of race ' "are by their very nature odious." ' " *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*) (quoting *Shaw v. Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*)). Accordingly, our precedents apply strict scrutiny whenever race was "the predominant factor motivating [the

placement of] a significant number of voters within or without a particular district," *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, or, put another way, whenever "[r]ace was the criterion that ... could not be compromised" in a district's formation. *Shaw v. Hunt*, 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*).

Because "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions" and undermine "the goal of a political system in which race no longer matters," *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816, our cases have long recognized the need to interpret § 2 to avoid "unnecessarily infus[ing] race into virtually every redistricting" plan. *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (opinion of Kennedy, J.); accord, *Bartlett v. Strickland*, 556 U.S. 1, 21, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion). Plainly, however, that "infusion" is the inevitable result of any race-based benchmark. Any interpretation of § 2 that permits courts to condemn enacted districting plans as dilutive relative to a nonneutral benchmark "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision,' " thus " 'raising serious constitutional questions.' " *Id.*, at 21–22, 129 S.Ct. 1231 (first quoting *Miller*, 515 U.S. at 916, 115 S.Ct. 2475, then quoting *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594). To avoid setting § 2 on a collision course with the Constitution, courts must apply a race-neutral benchmark in assessing any ***55** claim that a districting plan unlawfully dilutes a racial minority's voting strength.

B

The plaintiffs in these cases seek a "proportional allocation of political power according ****1525** to race." *Holder*, 512 U.S. at 936, 114 S.Ct. 2581 (opinion of THOMAS, J.). According to the 2020 census, black Alabamians account for 27.16% of the State's total population and 25.9% of its voting-age population, both figures slightly less than two-sevenths. Of Alabama's seven existing congressional districts, one, District 7, is majority-black.[7] ***56** These cases were brought to compel "the creation of *two* majority-minority congressional districts"—roughly proportional control. 1 App. 135 (emphasis added); see also *id.*, at 314 ("Plaintiffs seek an order ... ordering a congressional redistricting plan that includes two majority-Black congressional districts").

Remarkably, the majority fails to acknowledge that two minority-controlled districts would mean proportionality, or even that black Alabamians are about two-sevenths of the State. Yet that context is critical to the issues before us, not least because it explains the extent of the racial sorting the plaintiffs' goal would require. "[A]s a matter of mathematics," single-member districting "tends to deal out representation far short of proportionality to virtually *all* minorities, from environmentalists in Alaska to Republicans in Massachusetts." M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744, 752 (2021) (Duchin & Spencer). As such, creating two majority-black districts would require Alabama to aggressively "sort voters on the basis of race." *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248.

The plaintiffs' 11 illustrative maps make that clear. All 11 maps refashion existing District 2 into a majority-black district while preserving the current black majority in District 7. They all follow the same approach: Starting with majority-black areas of populous Montgomery County, they expand District 2 east and west to encompass predominantly majority-black areas throughout the rural "Black Belt." In the process, the plans are careful to leave enough of the Black Belt for District 7 to maintain its black majority. Then—and critically—the plans have District 2 extend a southwestern tendril into Mobile County to capture a dense, high-population majority-black ****1526** cluster in urban Mobile.[8] ***57** See Supp. App. 184, 186, 188, 190, 193, 195, 197, 199, 201, 203; see also *id.*, at 149.

Those black Mobilians currently reside in the urban heart of District 1. For 50 years, District 1 has occupied the southwestern pocket of Alabama, consisting of the State's two populous Gulf Coast counties (Mobile and Baldwin) as well as some less populous areas to the immediate north and east. See *id.*, at 205–211. It is indisputable that the Gulf Coast region is the sort of community of interest that the Alabama Legislature might reasonably think a congressional district should be built around. It contains Alabama's only coastline, its fourth largest city, and the Port of Mobile. Its physical geography runs north along the Alabama and Mobile Rivers, whose paths District 1 follows. Its economy is tied to the Gulf —to shipping, shipbuilding, tourism, and commercial fishing. See Brief for Coastal Alabama Partnership as *Amicus Curiae* 13–15.

But, for the plaintiffs to secure their majority-black District 2, this longstanding, compact, and eminently sensible district

must be radically transformed. In the Gulf Coast region, the newly drawn District 1 would retain only the majority-white areas that District 2 did not absorb on its path to Mobile's large majority-black population. To make up the lost population, District 1 would have to extend eastward through largely majority-white rural counties along the length of Alabama's border with the Florida panhandle. The plaintiffs do not assert that white residents on the Gulf Coast have anything special in common with white residents in those communities, and the District Court made no such finding. The plaintiffs' maps would thus reduce District 1 to the leftover white communities of the southern fringe of the State, its shape and constituents defined almost entirely ***58** by the need to make District 2 majority-black while also retaining a majority-black District 7.

The plaintiffs' mapmaking experts left little doubt that their plans prioritized race over neutral districting criteria. Dr. Moon Duchin, who devised four of the plans, testified that achieving "two majority-black districts" was a "nonnegotiable principl[e]" in her eyes, a status shared only by our precedents' "population balance" requirement. 2 App. 634; see also *id.*, at 665, 678. Only "after" those two "nonnegotiable[s]" were satisfied did Dr. Duchin then give lower priority to "contiguity" and "compactness." *Id.*, at 634. The architect of the other seven maps, William Cooper, considered "minority voting strengt[h]" a "traditional redistricting principl[e]" in its own right, *id.*, at 591, and treated "the minority population in and of itself" as the paramount community of interest in his plans, *id.*, at 601.

Statistical evidence also underscored the illustrative maps' extreme racial sorting. Another of the plaintiffs' experts, Dr. Kosuke Imai, computer generated 10,000 districting plans using a race-blind algorithm programmed to observe several objective districting criteria. Supp. App. 58–59. None of those plans contained even one majority-black district. *Id.*, at 61. Dr. Imai generated another 20,000 plans using the same algorithm, but with the additional constraint that they must contain at least one majority-black district; none of those plans contained a second majority-black ****1527** district, or even a second district with a black voting-age population above 40%. *Id.*, at 54, 67, 71–72. In a similar vein, Dr. Duchin testified about an academic study in which she had randomly "generated 2 million districting plans for Alabama" using a race-neutral algorithm that gave priority to compactness and contiguity. 2 App. 710; see Duchin & Spencer 765. She "found some [plans] with one majority-black district, but never found a second ... majority-black district in 2 million attempts." 2 App. 710. "[T]hat it is hard to draw two majority-black districts by accident," ***59** Dr. Duchin explained, "show[ed] the importance of doing so on purpose." *Id.*, at 714.[9]

The plurality of Justices who join Part III–B–I of THE CHIEF JUSTICE's opinion appear to agree that the plaintiffs could not prove the first precondition of their statewide vote-dilution claim—that black Alabamians could constitute a majority in two "reasonably configured" districts, *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct. at 1248—by drawing an illustrative map in which race was predominant. See *ante*, at 1511 – 1512. That should be the end of these cases, as the illustrative maps here are palpable racial gerrymanders. The plaintiffs' experts clearly applied "express racial target[s]" by setting out to create 50%-plus majority-black districts in both Districts 2 and 7. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 192, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017). And it is impossible to conceive of *the State* adopting the illustrative maps without pursuing the same racially motivated goals. Again, the maps' key design features are: (1) making District 2 majority-black by connecting black residents in one metropolitan area (Montgomery) with parts of the rural Black Belt and black residents in another metropolitan area (Mobile); (2) leaving enough of the Black Belt's majority-black rural areas for District 7 to maintain its majority-black status; and (3) reducing District 1 to the white remainder of the southern third of the State.

If the State did this, we would call it a racial gerrymander, and rightly so. We would have no difficulty recognizing race as "the predominant factor motivating [the placement of] significant number[s] of voters within or without" Districts 1, 2, ***60** and 7. *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. The "stark splits in the racial composition of populations moved into and out of " Districts 1 and 2 would make that obvious. *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788. So would the manifest absence of any nonracial justification for the new District 1. And so would the State's clear intent to ensure that *both* Districts 2 and 7 hit their preordained racial targets. See *ibid.* (noting that "pursu[it of] a common redistricting policy toward multiple districts" may show predominance). That the plan delivered proportional control for a particular minority—a statistical anomaly that over 2 million race-blind simulations did not yield and 20,000 *race-conscious* simulations did not even approximate—would be still further confirmation.

The State could not justify such a plan simply by arguing that it was less bizarre to the naked eye than other, more elaborate racial gerrymanders we have encountered. See *ante*, at 1508 – 1509 (discussing **1528 cases). As we held in *Miller*, visual "bizarreness" is not "a necessary element of the constitutional wrong," only "persuasive circumstantial evidence." 515 U.S. at 912–913, 115 S.Ct. 2475.[10]

*61 Nor could such a plan be explained by supposed respect for the Black Belt. For present purposes, I accept the District Court's finding that the Black Belt is a significant community of interest. But the entire black population of the Black Belt—some 300,000 black residents, see Supp. App. 33—is too small to provide a majority in a *single* congressional district, let alone two.[11] The black residents needed to populate majority-black versions of Districts 2 and 7 are overwhelmingly concentrated in the urban counties of Jefferson (*i.e.*, the Birmingham metropolitan area, with about 290,000 black residents), Mobile (about 152,000 black residents), and Montgomery (about 134,000 black residents). *Id.*, at 83. Of the three, only Montgomery County is in the Black Belt. The plaintiffs' maps, therefore, cannot and do not achieve their goal of two majority-black districts by "join[ing] together" the Black Belt, as the majority seems wrongly to believe. *Ante*, at 1505. Rather, their majority-black districts are anchored by three separate high-density clusters of black residents in three separate metropolitan areas, two of them outside the Black Belt. The Black Belt's largely rural remainder is then *divided* between the two districts to the extent needed to fill out their population numbers with black majorities in both. Respect for the Black Belt as a community of interest cannot explain this approach. The only *62 explanation is the plaintiffs' express racial target: two majority-black districts and statewide proportionality.

The District Court nonetheless found that race did not predominate in the plaintiffs' illustrative maps because Dr. Duchin and Mr. Cooper "prioritized race only as necessary ... to draw two reasonably compact majority-Black congressional districts," as opposed to "maximiz[ing] the **1529 number of majority-Black districts, or the BVAP [black voting-age population] in any particular majority-Black district." *Singleton v. Merrill*, 582 F.Supp.3d 924, 1029–1030 (ND Ala. 2022) (*per curiam*). This reasoning shows a profound misunderstanding of our racial-gerrymandering precedents. As explained above, what triggers strict scrutiny is the intentional use of a racial classification in placing "a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. Thus, *any* plan whose predominant purpose is to achieve a nonnegotiable, predetermined racial target in a nonnegotiable, predetermined number of districts is a racial gerrymander subject to strict scrutiny. The precise fraction used as the racial target, and the number of districts it is applied to, are irrelevant.

In affirming the District Court's nonpredominance finding, the plurality glosses over these plain legal errors,[12] and it *63 entirely ignores Dr. Duchin's plans—presumably because her own explanation of her method sounds too much like textbook racial predominance. Compare 2 App. 634 ("[A]fter ... what I took to be *nonnegotiable* principles of population balance *and seeking two majority-black districts*, *after that*, I took contiguity as a requirement and compactness as paramount" (emphasis added)) and *id.*, at 635 ("I took ... county integrity to take precedence over the level of [black voting-age population] *once that level was past 50 percent*" (emphasis added)), with *Bethune-Hill*, 580 U.S. at 189, 137 S.Ct. 788 (explaining that race predominates when it " 'was the criterion that ... could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made' " (quoting *Shaw II*, 517 U.S. at 907, 116 S.Ct. 1894)), and *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (explaining that race predominates when "the [mapmaker] subordinated traditional race-neutral districting principles ... to racial considerations"). The plurality thus affirms the District Court's finding only in part and with regard to Mr. Cooper's plans alone.

In doing so, the plurality acts as if the only relevant evidence were Mr. Cooper's testimony about his own mental state and the State's expert's analysis of Mr. Cooper's maps. See *ante*, at 1510 – 1511. Such a blinkered view of the issue is unjustifiable. All 11 illustrative maps follow the same approach to creating two majority-black districts. The essential design features of Mr. Cooper's maps are indistinguishable from Dr. Duchin's, and it is those very design features that would require race to predominate. None of the **1530 plaintiffs' maps could possibly be drawn by a mapmaker who was merely "aware of," rather than motivated by, "racial demographics." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475. They could only ever be drawn by a mapmaker whose predominant motive was *64 hitting the "express racial target" of two majority-black districts. *Bethune-Hill*, 580 U.S. at 192, 137 S.Ct. 788.[13]

The plurality endeavors in vain to blunt the force of this obvious fact. See *ante*, at 1511 – 1512. Contrary to the

plurality's apparent understanding, nothing in *Bethune-Hill* suggests that "an express racial target" is not highly probative evidence of racial predominance. 580 U.S. at 192, 137 S.Ct. 788 (placing "express racial target[s]" alongside "stark splits in the racial composition of [redistricted] populations" as "relevant districtwide evidence"). That the *Bethune-Hill* majority "decline[d]" to act as a " 'court of ... first view,' " instead leaving the ultimate issue of predominance for remand, cannot be transmuted into such an implausible holding or, in truth, any holding at all. *Id.*, at 193, 137 S.Ct. 788.

The plurality is also mistaken that my predominance analysis would doom every illustrative map a § 2 plaintiff "ever adduced." *Ante*, at 1511 – 1512 (emphasis deleted). Rather, it would mean only that—because § 2 requires a race-neutral benchmark—plaintiffs cannot satisfy their threshold burden of showing a reasonably configured alternative plan with a proposal that could only be viewed as a racial gerrymander if ***65** enacted by the State. This rule would not bar a showing, in an appropriate case, that a State could create an additional majority-minority district through a reasonable redistricting process in which race did not predominate. It would, on the other hand, screen out efforts to use § 2 to push racially proportional districting to the limits of what a State's geography and demography make possible—the approach taken by the illustrative maps here.

C

The foregoing analysis should be enough to resolve these cases: If the plaintiffs have not shown that Alabama could create two majority-black districts without resorting to a racial gerrymander, they cannot have shown that Alabama's one-majority-black-district map "dilutes" black Alabamians' voting strength relative to any meaningfully race-neutral benchmark. The inverse, however, is not true: Even if it were possible to regard the illustrative maps as not requiring racial predominance, it would not necessarily follow that a two-majority-black-district map was an appropriate benchmark. All that might follow is that the illustrative maps were reasonably configured—in other words, that they were consistent with some reasonable application ****1531** of traditional districting criteria in which race did not predominate. See *LULAC*, 548 U.S. at 433, 126 S.Ct. 2594. But, in virtually all jurisdictions, there are countless possible districting schemes that could be considered reasonable in that sense. The mere fact that a plaintiff 's illustrative map is *one* of them cannot justify making it the benchmark against which other plans should be judged. Cf. *Rucho*, 588 U. S., at —— – ——, 139 S.Ct., at 2500–2501 (explaining the lack of judicially manageable standards for evaluating the relative fairness of different applications of traditional districting criteria).

That conceptual gap—between "reasonable" and "benchmark"—is highly relevant here. Suppose, for argument's sake, that Alabama *reasonably* could decide to create two majority-black districts by (1) connecting Montgomery's ***66** black residents with Mobile's black residents, (2) dividing up the rural parts of the Black Belt between that district and another district with its population core in the majority-black parts of the Birmingham area, and (3) accepting the extreme disruption to District 1 and the Gulf Coast that this approach would require. The plaintiffs prefer that approach because it allows the creation of two majority-black districts, which they think Alabama should have. But even if that approach were reasonable, there is hardly any compelling race-neutral reason to elevate such a plan to a *benchmark* against which all other plans must be measured. Nothing in Alabama's geography or demography makes it clearly the best way, or even a particularly attractive way, to draw three of seven equally populous districts. The State has obvious legitimate, race-neutral reasons to prefer its own map—most notably, its interest in "preserving the cores of prior districts" and the Gulf Coast community of interest in District 1. *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). And even *discounting* those interests would not yield a race-neutral case for treating the plaintiffs' approach as a suitable benchmark: Absent core retention, there is no apparent race-neutral reason to insist that District 7 remain a majority-black district uniting Birmingham's majority-black neighborhoods with majority-black rural areas in the Black Belt.

Finally, it is surely probative that over 2 million race-neutral simulations did not yield a single plan with two majority-black districts, and even 20,000 simulations with a one-majority-black-district floor did not yield a second district with a black voting-age population over 40%. If any plan with two majority-black districts would be an "out-out-out-outlier" within the likely universe of race-neutral districting plans, *Rucho*, 588 U. S., at ——, 139 S.Ct., at 2518 (KAGAN, J., dissenting), it is hard to see how the mere possibility of drawing two majority-black districts could show that a one-district ***67** map diluted black Alabamians' votes relative to any appropriate benchmark.[14]

****1532** D

Given all this, by what benchmark did the District Court find that Alabama's enacted plan was dilutive? The answer is as simple as it is unlawful: The District Court applied a benchmark of proportional control based on race. To be sure, that benchmark was camouflaged by the elaborate vote-dilution framework we have inherited from *Gingles*. But nothing else in that framework or in the District Court's reasoning supplies an alternative benchmark capable of explaining the District Court's bottom line: that Alabama's one-majority-black-district ***68** map dilutes black voters' fair share of political power.

Under *Gingles*, the majority explains, there are three "preconditions" to a vote-dilution claim: (1) the relevant "minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district"; (2) the minority group must be "politically cohesive"; and (3) the majority group must "vot[e] sufficiently as a bloc to enable it to defeat the minority's preferred candidate[s]." *Ante*, at 1503 (alterations and internal quotation marks omitted). If these preconditions are satisfied, *Gingles* instructs courts to "consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." 478 U.S. at 79, 106 S.Ct. 2752 (citation and internal quotation marks omitted).

The majority gives the impression that, in applying this framework, the District Court merely followed a set of well-settled, determinate legal principles. But it is widely acknowledged that "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim," with commentators "noting the lack of any 'authoritative resolution of the basic questions one would need to answer to make sense of [§ 2's] results test.' " *Merrill* v. *Milligan*, 595 U. S. ——, —— – ——, 142 S.Ct. 879, 883, —— L.Ed.2d —— (2022) (ROBERTS, C. J., dissenting from grant of applications for stays) (quoting C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 389 (2012)). If there is any "area of law notorious for its many unsolved puzzles," this is it. J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 871 (2021); see also Duchin & Spencer 758 ("Vote dilution on the basis of group membership is a crucial instance of the lack of a prescribed ideal").

***69** The source of this confusion is fundamental: Quite simply, we have never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark. The second and third preconditions are all but irrelevant to the task. They essentially collapse into one question: Is voting racially polarized such that minority-preferred candidates consistently lose ****1533** to majority-preferred ones? See *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. Even if the answer is yes, that tells a court nothing about "how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Id.*, at 88, 106 S.Ct. 2752 (O'Connor, J., concurring in judgment). Perhaps an acceptable system is one in which the minority simply cannot elect its preferred candidates; it is, after all, a minority. Rejecting that outcome as "dilutive" requires a value judgment relative to a benchmark that polarization alone cannot provide.

The first *Gingles* precondition is only marginally more useful. True, the benchmark in a redistricting challenge must be "a hypothetical, undiluted plan," *Bossier Parish School Bd.*, 520 U.S. at 480, 117 S.Ct. 1491, and the first precondition at least requires plaintiffs to identify *some* hypothetical alternative plan. Yet that alternative plan need only be "reasonably configured," and—as explained above—to say that a plan is *reasonable* is a far cry from establishing an objective standard of fairness.

That leaves only the *Gingles* framework's final stage: the totality-of-circumstances determination whether a State's "political process is equally open to minority voters." 478 U.S. at 79, 106 S.Ct. 2752. But this formulation is mere verbiage unless one knows what an "equally open" system should look like—in other words, what the benchmark is. And, our cases offer no substantive guidance on how to identify the undiluted benchmark at the totality stage. The best they have to offer is a grab bag of amorphous "factors"—widely known as the Senate factors, after the Senate Judiciary Committee Report ***70** accompanying the 1982 amendments to § 2—that *Gingles* said "typically may be relevant to a § 2 claim." See *id.*, at 44–45, 106 S.Ct. 2752. Those factors, however, amount to no more than "a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction." *Holder*, 512 U.S. at 938, 114 S.Ct.

2581 (opinion of THOMAS, J.). Such a *gestalt* view is far removed from the necessary benchmark of a hypothetical, undiluted districting plan.

To see this, one need only consider the District Court's use of the Senate factors here. See 582 F.Supp.3d at 1018–1024. The court began its totality-stage analysis by reiterating what nobody disputes: that voting in Alabama is racially polarized, with black voters overwhelmingly preferring Democrats and white voters largely preferring Republicans. To rebut the State's argument that this pattern is attributable to politics, not race *per se*, the court noted that Donald Trump (who is white) prevailed over Ben Carson (who is black) in the 2016 Republican Presidential primary. Next, the court observed that black candidates rarely win statewide elections in Alabama and that black state legislators overwhelmingly come from majority-minority districts. The court then reviewed Alabama's history of racial discrimination, noted other voting-rights cases in which the State was found liable, and cataloged socioeconomic disparities between black and white Alabamians in everything from car ownership to health insurance coverage. The court attributed these disparities "at least in part" to the State's history of discrimination and found that they hinder black residents from participating in politics today, notwithstanding the fact that black and white Alabamians register and turn out to vote at similar rates. *Id.*, at 1021–1022. Last, the court interpreted a handful of comments by three white politicians as "racial campaign appeals." *Id.*, at 1023–1024.

***71** ****1534** In reviewing this march through the Senate factors, it is impossible to discern any overarching standard or central question, only what might be called an impressionistic moral audit of Alabama's racial past and present. Nor is it possible to determine any logical nexus between this audit and the remedy ordered: a congressional districting plan in which black Alabamians can control more than one seat. Given the District Court's finding that two reasonably configured majority-black districts could be drawn, would Alabama's one-district map have been acceptable if Ben Carson had won the 2016 primary, or if a greater number of black Alabamians owned cars?

The idea that such factors could explain the District Court's judgment line is absurd. The plaintiffs' claims pose one simple question: What is the "right" number of Alabama's congressional seats that black voters who support Democrats "should" control? Neither the Senate factors nor the *Gingles* framework as a whole offers any principled answer.

In reality, the limits of the *Gingles* preconditions and the aimlessness of the totality-of-circumstances inquiry left the District Court only one obvious and readily administrable option: a benchmark of "allocation of seats in direct proportion to the minority group's percentage in the population." *Holder*, 512 U.S. at 937, 114 S.Ct. 2581 (opinion of THOMAS, J.). True, as discussed above, that benchmark is impossible to square with what the majority calls § 2(b)'s "robust disclaimer against proportionality," *ante*, at 1500 – 1501, and it runs headlong into grave constitutional problems. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 730, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (plurality opinion). Nonetheless, the intuitive pull of proportionality is undeniable. "Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim" "is inherently based on ratios between the numbers of the minority ***72** in the population and the numbers of seats controlled," and there is no more logical ratio than direct proportionality. *Holder*, 512 U.S. at 902, 114 S.Ct. 2581 (opinion of THOMAS, J.). Combine that intuitive appeal with the "lack of any better alternative" identified in our case law to date, *id.*, at 937, 114 S.Ct. 2581, and we should not be surprised to learn that proportionality generally explains the results of § 2 cases after the *Gingles* preconditions are satisfied. See E. Katz, M. Aisenbrey, A. Baldwin, E. Cheuse, & A. Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 730–732 (2006) (surveying lower court cases and finding a near-perfect correlation between proportionality findings and liability results).

Thus, in the absence of an alternative benchmark, the vote-dilution inquiry has a strong and demonstrated tendency to collapse into a rough two-part test: (1) Does the challenged districting plan give the relevant minority group control of a proportional share of seats? (2) If not, has the plaintiff shown that some reasonably configured districting plan could better approximate proportional control? In this approach, proportionality is the ultimate benchmark, and the first *Gingles* precondition becomes a proxy for whether that benchmark is reasonably attainable in practice.

Beneath all the trappings of the *Gingles* framework, that two-part test describes how the District Court applied § 2 here. The gravitational force of proportionality is obvious throughout its opinion. At the front end, the District Court even built

proportionality into its understanding of **1535 *Gingles*' first precondition, finding the plaintiffs' illustrative maps to be reasonably configured in part *because* they "provide[d] a number of majority-Black districts ... roughly proportional to the Black percentage of the population." 582 F.Supp.3d at 1016. At the back end, the District Court concluded its "totality" analysis by revisiting proportionality and finding that it "weigh[ed] decidedly in favor of the plaintiffs." *73 *Id.*, at 1025. While the District Court disclaimed giving overriding significance to proportionality, the fact remains that nothing else in its reasoning provides a logical nexus to its finding of a districting wrong and a need for a districting remedy. Finally, as if to leave no doubt about its implicit benchmark, the court admonished the State that "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close." *Id.*, at 1033. In sum, the District Court's thinly disguised benchmark was proportionality: Black Alabamians are about two-sevenths of the State's population, so they should control two of the State's seven congressional seats.

That was error—perhaps an understandable error given the limitations of the *Gingles* framework, but error nonetheless. As explained earlier, any principled application of § 2 to cases such as these requires a meaningfully race-neutral benchmark. The benchmark cannot be an *a priori* thumb on the scale for racially proportional control.

E

The majority opinion does not acknowledge the District Court's express proportionality-based reasoning. That omission is of a piece with its earlier noted failures to acknowledge the well-known indeterminacy of the *Gingles* framework, that black Alabamians are about two-sevenths of the State's population, and that the plaintiffs here are thus seeking statewide proportionality. Through this pattern of omissions, the majority obscures the burning question in these cases. The District Court's vote-dilution finding can be justified only by a racially loaded benchmark—specifically, a benchmark of proportional control based on race. Is that the benchmark the statute demands? The majority fails to confront this question head on, and it studiously avoids mentioning anything that would require it to do so.

The same nonresponsiveness infects the majority's analysis, which is largely devoted to rebutting an argument nobody *74 makes. Contrary to the majority's telling, Alabama does not equate the "race-neutral benchmark" with "the median or average number of majority-minority districts" in a large computer-generated set of race-blind districting plans. *Ante*, at 1506. The State's argument for a race-neutral benchmark is rooted in the text of § 2, the logic of vote-dilution claims, and the constitutional problems with any nonneutral benchmark. See Brief for Appellants 32–46. It then relies on the computer evidence in these cases, among other facts, to argue that the plaintiffs have not shown dilution relative to any race-neutral benchmark. See *id.*, at 54–56. But the idea that "race-neutral benchmark" *means* the composite average of many computer-generated plans is the majority's alone.

After thus straw-manning Alabama's arguments at the outset, the majority muddles its own response. In a perfunctory footnote, it disclaims any holding that "algorithmic map making" evidence "is categorically irrelevant" in § 2 cases. *Ante*, at 1513, n. 8. That conclusion, however, is the obvious implication of the majority's reasoning and rhetoric. See *ante*, at 1513 (decrying a "map-comparison test" as "flawed in its fundamentals" even if it involves **1536 concededly "adequate comparators"); see also *ante*, at 1507 (stating that the "focu[s]" of § 2 analysis is "on the specific illustrative maps that a plaintiff adduces," leaving unstated the implication that other algorithmically generated maps are irrelevant). The majority in effect, if not in word, thus forecloses any meaningful use of computer evidence to help locate the undiluted benchmark.

There are two critical problems with this fiat. The first, which the majority seems to recognize yet fails to resolve, is that excluding such computer evidence from view cannot be reconciled with § 2's command to consider "the totality of circumstances."[15] Second—and more fundamentally—the *75 reasons that the majority gives for downplaying the relevance of computer evidence would more logically support a holding that there is no judicially manageable way of applying § 2's results test to single-member districts. The majority waxes about the "myriad considerations" that go into districting, the "difficult, contestable choices" those considerations require, and how "[n]othing in § 2 provides an answer" to the question of how well any given algorithm approximates the correct benchmark. *Ante*, at 1513 – 1514 (internal quotation marks omitted). In the end, it concludes, "Section 2 cannot require courts to judge a contest of computers" in which "there is no reliable way to determine who wins, or even where the finish line is." *Ante*, at 1514.

The majority fails to recognize that *whether* vote-dilution claims require an undiluted benchmark is not up for debate. If § 2 applies to single-member districting plans, courts cannot dispense with an undiluted benchmark for comparison, ascertained by an objective and workable method. *Bossier Parish School Bd.*, 520 U.S. at 480, 117 S.Ct. 1491; *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion). Of course, I would be the last person to deny that defining the undiluted benchmark is difficult. See *id.*, at 892, 114 S.Ct. 2581 (opinion of THOMAS, J.) (arguing that it "immerse[s] the federal courts in a hopeless project of weighing questions of political theory"). But the "myriad considerations" and "[a]nswerless questions" the majority frets about, *ante*, at 1513, 1514, are inherent in the very enterprise of applying § 2 to single-member districts. Everything the majority says ***76** about the difficulty of defining the undiluted benchmark *with* computer evidence applies with equal or greater force to the task of defining it *without* such evidence. At their core, the majority's workability concerns are an isolated demand for rigor against the backdrop of a legal regime that has long been " 'inherently standardless,' " and must remain so until the Court either discovers a principled and objective method of identifying the undiluted benchmark, *Holder*, 512 U.S. at 885, 114 S.Ct. 2581 (plurality opinion), or abandons this enterprise altogether, see *id.*, at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.).

****1537** Ultimately, the majority has very little to say about the appropriate benchmark. What little it does say suggests that the majority sees no real alternative to the District Court's proportional-control benchmark, though it appears unwilling to say so outright. For example, in a nod to the statutory text and its "equal openness" requirement, the majority asserts that "[a] district is not equally open ... when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Ante*, at 1507. But again, we have held that dilution cannot be shown without an objective, undiluted benchmark, and this verbiage offers no guidance for how to determine it.[16] Later, the majority asserts that "the *Gingles* framework itself imposes meaningful constraints on proportionality." *Ante*, at 1508. But the only constraint on proportionality the majority articulates is that it is often *difficult to* ***77** *achieve*—which, quite obviously, is no principled limitation at all. *Ante*, at 1508 – 1510.

Thus, the end result of the majority's reasoning is no different from the District Court's: The ultimate benchmark is a racially proportional allocation of seats, and the main question on which liability turns is whether a closer approximation to proportionality is possible under any reasonable application of traditional districting criteria.[17] This approach, moreover, is consistent with how the majority describes the role of plaintiffs' illustrative maps, as well as an unjustified practical asymmetry to which its rejection of computer evidence gives rise. Courts are to "focu[s] ... on the specific illustrative maps that a plaintiff adduces," *ante*, at 1507 – 1508, by which the majority means that courts should *not* "focu[s]" on statistical evidence showing those maps to be outliers. Thus, plaintiffs may use an algorithm to generate any number of maps that meet specified districting criteria and a preferred racial target; then, they need only produce one of those maps to "sho[w] it is *possible* that the State's map" is dilutive. *Ante*, at 1507 (emphasis in original). But the State may not use algorithmic evidence to suggest that the plaintiffs' map is an unsuitable benchmark for comparison —not even, apparently, if it can prove that the illustrative map ***78** is an outlier among "billion[s]" or "trillion[s]" of concededly "adequate comparators." *Ante*, at 1513, 1514; see also ****1538** *ante*, at 1514 (rejecting sampling algorithms). This arbitrary restriction amounts to a thumb on the scale for § 2 plaintiffs—an unearned presumption that any "reasonable" map they put forward constitutes a benchmark against which the State's map can be deemed dilutive. And, once the comparison is framed in that way, the only workable rule of decision is proportionality. See *Holder*, 512 U.S. at 941–943, 114 S.Ct. 2581 (opinion of THOMAS, J.).

By affirming the District Court, the majority thus approves its benchmark of proportional control limited only by feasibility, and it entrenches the most perverse tendencies of our vote-dilution jurisprudence. It guarantees that courts will continue to approach vote-dilution claims just as the District Court here did: with no principled way of determining how many seats a minority "should" control and with a strong temptation to bless every incremental step toward a racially proportional allocation that plaintiffs can pass off as consistent with any reasonable map.

III

As noted earlier, the Court has long recognized the need to avoid interpretations of § 2 that " 'would unnecessarily infuse race into virtually every redistricting, raising serious

constitutional questions.' " *Bartlett*, 556 U.S. at 21, 129 S.Ct. 1231 (plurality opinion) (quoting *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (opinion of Kennedy, J.)). Today, however, by approving the plaintiffs' racially gerrymandered maps as reasonably configured, refusing to ground § 2 vote-dilution claims in a race-neutral benchmark, and affirming a vote-dilution finding that can only be justified by a benchmark of proportional control, the majority holds, in substance, that race belongs in virtually every redistricting. It thus drives headlong into the very constitutional problems that the Court has long sought to avoid. The result of this collision is unmistakable: If the ***79** District Court's application of § 2 was correct as a statutory matter, § 2 is unconstitutional as applied here.

Because the Constitution "restricts consideration of race and the [Voting Rights Act] demands consideration of race," *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2315, strict scrutiny is implicated wherever, as here, § 2 is applied to require a State to adopt or reject any districting plan on the basis of race. See *Bartlett*, 556 U.S. at 21–22, 129 S.Ct. 1231 (plurality opinion). At this point, it is necessary to confront directly one of the more confused notions inhabiting our redistricting jurisprudence. In several cases, we have "assumed" that compliance with § 2 of the Voting Rights Act could be a compelling state interest, before proceeding to *reject* race-predominant plans or districts as insufficiently tailored to that asserted interest. See, *e.g.*, *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248; *Cooper v. Harris*, 581 U.S. 285, 292, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017); *Shaw II*, 517 U.S. at 915, 116 S.Ct. 1894; *Miller*, 515 U.S. at 921, 115 S.Ct. 2475. But we have never applied this assumption to *uphold* a districting plan that would otherwise violate the Constitution, and the slightest reflection on first principles should make clear why it would be problematic to do so.[18] The Constitution ****1539** is supreme over statutes, not vice versa. *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803). Therefore, if complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid.

If Congress has any power at all to require States to sort voters into congressional districts based on race, that power must flow from its authority to "enforce" the Fourteenth and ***80** Fifteenth Amendments "by appropriate legislation." Amdt. 14, § 5; Amdt. 15, § 2. Since Congress in 1982 replaced intent with effects as the criterion of liability, however, "a violation of § 2 is no longer *a fortiori* a violation of " either Amendment. *Bossier Parish School Bd.*, 520 U.S. at 482, 117 S.Ct. 1491. Thus, § 2 can be justified only under Congress' power to "enact reasonably prophylactic legislation to deter constitutional harm." *Allen* v. *Cooper*, 589 U. S. ——, ——, 140 S.Ct. 994, 1004, 206 L.Ed.2d 291 (2020) (alteration and internal quotation marks omitted); see *City of Boerne v. Flores*, 521 U.S. 507, 517–529, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Because Congress' prophylactic-enforcement authority is "remedial, rather than substantive," "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[19] *Id.*, at 520, 117 S.Ct. 2157. Congress' chosen means, moreover, must " 'consist with the letter and spirit of the constitution.' " *Shelby County v. Holder*, 570 U.S. 529, 555, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)); accord, *Miller*, 515 U.S. at 927, 115 S.Ct. 2475.

Here, as with everything else in our vote-dilution jurisprudence, the task of sound analysis is encumbered by the lack of clear principles defining § 2 liability in districting. It is awkward to examine the "congruence" and "proportionality" of a statutory rule whose very meaning exists in a perpetual state of uncertainty. The majority makes clear, however, that the primary factual predicate of a vote-dilution claim is "bloc voting along racial lines" that results in majority-preferred candidates defeating minority-preferred ones. *Ante*, at 1507; accord, *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752 ("The theoretical basis for [vote-dilution claims] is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly ***81** defeat the choices of minority voters"). And, as I have shown, the remedial logic with which the District Court's construction of § 2 addresses that "wrong" rests on a proportional-control benchmark limited only by feasibility. Thus, the relevant statutory rule may be approximately stated as follows: If voting is racially polarized in a jurisdiction, and if there exists any more or less reasonably configured districting plan that would enable the minority group to constitute a majority in a number of districts roughly proportional to its share of the population, then the jurisdiction must ensure that its districting plan includes that number of majority-minority districts "or something quite close."[20] 582 F.Supp.3d at 1033. Thus construed ****1540** and applied, § 2 is not congruent and proportional to any provisions of the Reconstruction Amendments.

To determine the congruence and proportionality of a measure, we must begin by "identify[ing] with some precision the scope of the constitutional right at issue." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The Reconstruction Amendments "forbi[d], so far as civil and political rights are concerned, discrimination ... against any citizen because of his race," ensuring that "[a]ll citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (Harlan, J.). They dictate "that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). These principles are why the Constitution presumptively forbids race-predominant districting, "even for remedial purposes." *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816.

These same principles foreclose a construction of the Amendments that would entitle members of racial minorities, ***82** *qua* racial minorities, to have their preferred candidates win elections. Nor do the Amendments limit the rights of members of a racial majority to support *their* preferred candidates—regardless of whether minorities prefer different candidates and of whether "the majority, by virtue of its numerical superiority," regularly prevails. *Gingles*, 478 U.S. at 48, 106 S.Ct. 2752. Nor, finally, do the Amendments establish a norm of proportional control of elected offices on the basis of race. See *Parents Involved*, 551 U.S. at 730–731, 127 S.Ct. 2738 (plurality opinion); *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. And these notions are not merely *foreign to* the Amendments. Rather, they are *radically inconsistent* with the Amendments' command that government treat citizens as individuals and their "goal of a political system in which race no longer matters." *Ibid.*

Those notions are, however, the values at the heart of § 2 as construed by the District Court and the majority. As applied here, the statute effectively considers it a legal wrong by the State if white Alabamians vote for candidates from one political party at high enough rates, provided that black Alabamians vote for candidates from the other party at a still higher rate. And the statute remedies that wrong by requiring the State to engage in race-based redistricting in the direction of proportional control.

I am not certain that Congress' enforcement power could *ever* justify a statute so at odds " 'with the letter and spirit of the constitution.' " *Shelby County*, 570 U.S. at 555, 133 S.Ct. 2612. If it could, it must be because Congress "identified a history and pattern" of actual constitutional violations that, for some reason, required extraordinary prophylactic remedies. *Garrett*, 531 U.S. at 368, 121 S.Ct. 955. But the legislative record of the 1982 amendments is devoid of any showing that might justify § 2's blunt approximation of a "racial register for allocating representation on the basis of race." *Holder*, 512 U.S. at 908, 114 S.Ct. 2581 (opinion of THOMAS, J.). To be sure, the Senate Judiciary Committee Report that accompanied the 1982 amendment to the Voting Rights Act "listed many examples of what ***83** the Committee *took to be* unconstitutional vote dilution." ****1541** *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2333 (emphasis added). But the Report also showed the Committee's fundamental lack of "concern with whether" those examples reflected the "intentional" discrimination required "to raise a constitutional issue." *Allen*, 589 U. S., at ——, 140 S.Ct., at 1006. The Committee's "principal reason" for rejecting discriminatory purpose was simply that it preferred an alternative legal standard; it thought *Mobile*'s intent test was "the wrong question," and that courts should instead ask whether a State's election laws offered minorities "a fair opportunity to participate" in the political process. S. Rep. No. 97–417, p. 36.

As applied here, the amended § 2 thus falls on the wrong side of "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157. It replaces the constitutional right against intentionally discriminatory districting with an amorphous race-based right to a "fair" distribution of political power, a "right" that cannot be implemented without requiring the very evils the Constitution forbids.

If that alone were not fatal, § 2's "reach and scope" further belie any congruence and proportionality between its districting-related commands, on the one hand, and actionable constitutional wrongs, on the other. *Id.*, at 532, 117 S.Ct. 2157. Its "[s]weeping coverage ensures its intrusion at every level of government" and in every electoral system. *Ibid.* It "has no termination date or termination mechanism." *Ibid.* Thus, the amended § 2 is not spatially or temporally "limited to those cases in which constitutional violations [are] most likely." *Id.*, at 533, 117 S.Ct. 2157. Nor does the statute limit its reach to "attac[k] a particular type" of electoral mechanism "with a long history as a 'notorious means to deny and abridge voting rights on racial grounds.' " *Ibid.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 355, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (Black, J., concurring and dissenting)). In view of this "indiscriminate ***84** scope," "it simply cannot be

said that 'many of [the districting plans] affected by the congressional enactment have a significant likelihood of being unconstitutional.' " *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999) (quoting *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157).

Of course, under the logically unbounded totality-of-circumstances inquiry, a court applying § 2 can always embroider its vote-dilution determination with findings about past or present unconstitutional discrimination. But this possibility does nothing to heal either the fundamental contradictions between § 2 and the Constitution or its extreme overbreadth relative to actual constitutional wrongs. "A generalized assertion of past discrimination" cannot justify race-based redistricting, "because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Shaw II*, 517 U.S. at 909, 116 S.Ct. 1894 (internal quotation marks omitted). To justify a statute tending toward the proportional allocation of political power by race throughout the Nation, it cannot be enough that a court can recite some indefinite quantum of discrimination in the relevant jurisdiction. If it were, courts "could uphold [race-based] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). That logic "would effectively assure that race will always be relevant in [redistricting], and that the ultimate goal of eliminating entirely from governmental decisionmaking ****1542** such irrelevant factors as a human being's race will never be achieved." *Parents Involved*, 551 U.S. at 730, 127 S.Ct. 2738 (plurality opinion) (alteration and internal quotation marks omitted).

For an example of these baleful results, we need look no further than the congressional districts at issue here. In 1992, Alabama and a group of § 2 plaintiffs, whom a federal court chose to regard as the representatives "of all African-American ***85** citizens of the State of Alabama," stipulated that the State's black population was " 'sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district,' " and that, " '[c]onsequently,' " such a " 'district should be created.' " *Wesch v. Hunt*, 785 F.Supp. 1491, 1493, 1498 (SD Ala.). Accepting that stipulation, the court reworked District 7 into an irregularly shaped supermajority-black district—one that scooped up populous clusters of black voters in the disparate urban centers of Birmingham and Montgomery to connect them across a swath of largely majority-black rural areas—without even "decid[ing] whether the creation of a majority African-American district [was] mandated by either § 2 or the Constitution." *Id.*, at 1499; see n. 7, *supra*. It did not occur to the court that the Constitution might *forbid* such an extreme racial gerrymander, as it quite obviously did. But, once District 7 had come into being as a racial gerrymander thought necessary to satisfy § 2, it became an all-but-immovable fixture of Alabama's districting scheme.

Now, 30 years later, the plaintiffs here demand that Alabama carve up not two but three of its main urban centers on the basis of race, and that it configure those urban centers' black neighborhoods with the outlying majority-black rural areas so that black voters can control not one but two of the State's seven districts. The Federal Judiciary now upholds their demand—overriding the State's undoubted interest in preserving the core of its existing districts, its plainly reasonable desire to maintain the Gulf Coast region as a cohesive political unit, and its persuasive arguments that a race-neutral districting process would not produce anything like the districts the plaintiffs seek. Our reasons for doing so boil down to these: that the plaintiffs' proposed districts are more or less within the vast universe of reasonable districting outcomes; that Alabama's white voters do not support the black minority's preferred candidates; that Alabama's racial climate, taken as a rarefied whole, crosses some indefinable ***86** line justifying our interference; and, last but certainly not least, that black Alabamians are about two-sevenths of the State's overall population.

By applying § 2 in this way to claims of this kind, we encourage a conception of politics as a struggle for power between "competing racial factions." *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. We indulge the pernicious tendency of assigning Americans to "creditor" and "debtor race[s]," even to the point of redistributing political power on that basis. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (Scalia, J., concurring in part and concurring in judgment). We ensure that the race-based redistricting we impose on Alabama now will bear divisive consequences long into the future, just as the initial creation of District 7 segregated Jefferson County for decades and minted the template for crafting black "political homelands" in Alabama. *Holder*, 512 U.S. at 905, 114 S.Ct. 2581 (opinion of THOMAS, J.). We place States in the impossible position of having to weigh just how much racial sorting is necessary to avoid the "competing hazards" of

violating § 2 and violating the Constitution. *Abbott*, 585 U. S., at ——, 138 S.Ct., at 2315 (internal quotation **1543 marks omitted). We have even put ourselves in the ridiculous position of "assuming" that compliance with a statute can excuse disobedience to the Constitution. Worst of all, by making it clear that there are political dividends to be gained in the discovery of new ways to sort voters along racial lines, we prolong immeasurably the day when the "sordid business" of "divvying us up by race" is no more. *LULAC*, 548 U.S. at 511, 126 S.Ct. 2594 (ROBERTS, C. J., concurring in part, concurring in judgment in part, and dissenting in part). To the extent § 2 requires any of this, it is unconstitutional.

The majority deflects this conclusion by appealing to two of our older Voting Rights Act cases, *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), and *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769, that did not address § 2 at all and, indeed, predate Congress' adoption of the results test. *Ante*, at 1516 – 1517. That maneuver is untenable. *Katzenbach* upheld § 5's preclearance *87 requirements, § 4(b)'s original coverage formula, and other related provisions aimed at "a small number of States and political subdivisions" where "systematic resistance to the Fifteenth Amendment" had long been flagrant. 383 U.S. at 328, 86 S.Ct. 803; see also *id.*, at 315–317, 86 S.Ct. 803 (describing the limited issues presented). Fourteen years later, *City of Rome* upheld the 1975 Act extending § 5's preclearance provisions for another seven years. See 446 U.S. at 172–173, 100 S.Ct. 1548. The majority's reliance on these cases to validate a statutory rule not there at issue could make sense only if we assessed the congruence and proportionality of the Voting Rights Act's rules wholesale, without considering their individual features, or if *Katzenbach* and *City of Rome* meant that Congress has plenary power to enact whatever rules it chooses to characterize as combating "discriminatory ... effect[s]." *Ante*, at 1516 (internal quotation marks omitted). Neither proposition makes any conceptual sense or is consistent with our cases. See, *e.g.*, *Shelby County*, 570 U.S. at 550–557, 133 S.Ct. 2612 (holding the 2006 preclearance coverage formula unconstitutional); *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (emphasizing the distinctness of §§ 2 and 5); *City of Boerne*, 521 U.S. at 533, 117 S.Ct. 2157 (discussing *City of Rome* as a paradigm case of congruence-and-proportionality review of remedial legislation); *Miller*, 515 U.S. at 927, 115 S.Ct. 2475 (stressing that construing § 5 to require "that States engage in presumptively unconstitutional race-based districting" would raise "troubling and difficult constitutional questions," notwithstanding *City of Rome*).

In fact, the majority's cases confirm the very limits on Congress' enforcement powers that are fatal to the District Court's construction of § 2. *City of Rome*, for example, immediately after one of the sentences quoted by the majority, explained the remedial rationale for its approval of the 1975 preclearance extension: "Congress could rationally have concluded that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination* *88 *in voting create the risk of purposeful discrimination*, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177, 100 S.Ct. 1548 (emphasis added; footnote omitted). The next section of *City of Rome* then separately examined and upheld the reasonableness of the extension's 7-year time period. See *id.*, at 181–182, 100 S.Ct. 1548. *City of Rome* thus stands for precisely the propositions for which *City of Boerne* cited it: Congress may adopt "[p]reventive measures ... when there is reason to believe that many of the laws **1544 affected by the congressional enactment have a significant likelihood of being unconstitutional," 521 U.S. at 532, 117 S.Ct. 2157, particularly when it employs "termination dates, geographic restrictions, or egregious predicates" that "tend to ensure Congress' means are proportionate to ends legitimate," *id.*, at 533, 117 S.Ct. 2157; see also *id.*, at 532–533, 117 S.Ct. 2157 (analyzing *Katzenbach* in similar terms); *Shelby County*, 570 U.S. at 535, 545–546, 133 S.Ct. 2612 (same). Again, however, the amended § 2 lacks any such salutary limiting principles; it is unbounded in time, place, and subject matter, and its districting-related commands have no nexus to any likely constitutional wrongs.

In short, as construed by the District Court, § 2 does not remedy or deter unconstitutional discrimination in districting in any way, shape, or form. On the contrary, it *requires* it, hijacking the districting process to pursue a goal that has no legitimate claim under our constitutional system: the proportional allocation of political power on the basis of race. Such a statute "cannot be considered remedial, preventive legislation," and the race-based redistricting it would command cannot be upheld under the Constitution. *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157.[21]

*89 IV

These cases are not close. The plaintiffs did not prove that Alabama's districting plan "impose[s] or applie[s]" any "voting qualification or prerequisite to voting or standard, practice, or procedure" that effects "a denial or abridgement of the[ir] right ... to vote on account of race or color." § 10301(a). Nor did they prove that Alabama's congressional districts "are not equally open to participation" by black Alabamians. § 10301(b). The plaintiffs did not even prove that it is possible to achieve two majority-black districts without resorting to a racial gerrymander. The most that they can be said to have shown is that sophisticated mapmakers can proportionally allocate Alabama's congressional districts based on race in a way that exceeds the Federal Judiciary's ability to recognize as a racial gerrymander with the naked eye. The District Court held that this showing, plus racially polarized voting and its *gestalt* view of Alabama's racial climate, was enough to require the State to redraw its districting plan on the basis of race. If that is the benchmark for vote dilution under § 2, then § 2 is nothing more than a racial entitlement to roughly proportional control of elective offices—limited only by feasibility—wherever different racial groups consistently prefer different candidates.

If that is what § 2 means, the Court should hold that it is unconstitutional. If that is not what it means, but § 2 applies to districting, then the Court should hold that vote-dilution challenges require a race-neutral benchmark that bears no resemblance to unconstitutional racial registers. On the other hand, if the Court believes that finding a race-neutral benchmark is as impossible as much of its rhetoric suggests, it should hold that **1545 § 2 cannot be applied to single-member districting plans for want of an "objective and *90 workable standard for choosing a reasonable benchmark." *Holder*, 512 U.S. at 881, 114 S.Ct. 2581 (plurality opinion). Better yet, it could adopt the correct interpretation of § 2 and hold that a single-member districting plan is not a "voting qualification," a "prerequsite to voting," or a "standard, practice, or procedure," as the Act uses those terms. One way or another, the District Court should be reversed.

The majority goes to great lengths to decline all of these options and, in doing so, to fossilize all of the worst aspects of our long-deplorable vote-dilution jurisprudence. The majority recites *Gingles*' shopworn phrases as if their meaning were self-evident, and as if it were not common knowledge that they have spawned intractable difficulties of definition and application. It goes out of its way to reaffirm § 2's applicability to single-member districting plans both as a purported original matter and on highly exaggerated *stare decisis* grounds. It virtually ignores Alabama's primary argument—that, whatever the benchmark is, it must be race neutral—choosing, instead, to quixotically joust with an imaginary adversary. In the process, it uses special pleading to close the door on the hope cherished by some thoughtful observers, see *Gonzalez*, 535 F.3d at 599–600, that computational redistricting methods might offer a principled, race-neutral way out of the thicket *Gingles* carried us into. Finally, it dismisses grave constitutional questions with an insupportably broad holding based on demonstrably inapposite cases.[22]

I find it difficult to understand these maneuvers except as proceeding from a perception that what the District Court did here is essentially no different from what many courts *91 have done for decades under this Court's superintendence, joined with a sentiment that it would be unthinkable to disturb that approach to the Voting Rights Act in any way. I share the perception, but I cannot understand the sentiment. It is true that, "under our direction, federal courts [have been] engaged in methodically carving the country into racially designated electoral districts" for decades now. *Holder*, 512 U.S. at 945, 114 S.Ct. 2581 (opinion of THOMAS, J.). But that fact should inspire us to repentance, not resignation. I am even more convinced of the opinion that I formed 29 years ago:

> "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the Federal Judiciary. The 'inherent tension'—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the Federal Judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate **1546 understanding of the Act." *Id.*, at 944, 114 S.Ct. 2581.

I respectfully dissent.

APPENDIX

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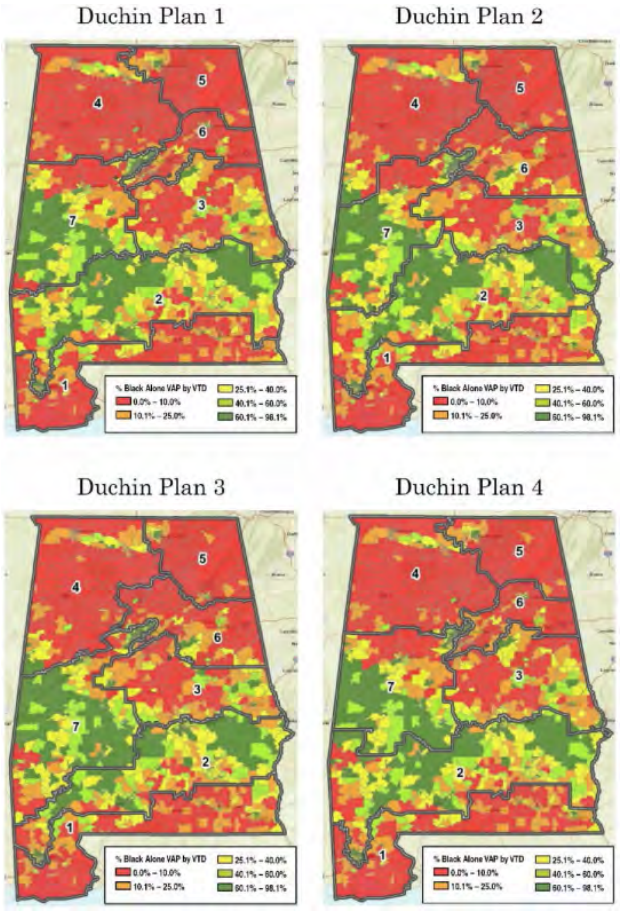

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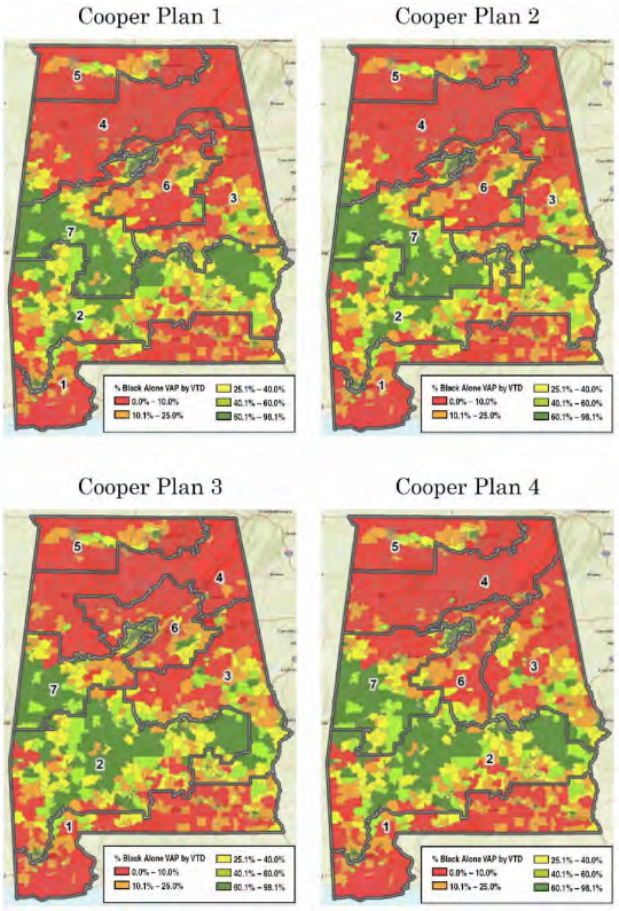

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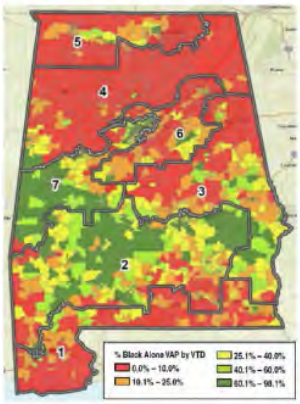
Cooper Plan 5



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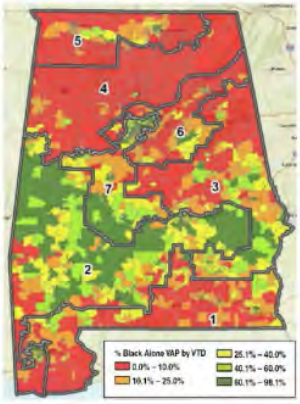

Cooper Plan 7

Justice ALITO, with whom Justice GORSUCH joins, dissenting.

***95** Based on a flawed understanding of the framework adopted in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Court now holds that the congressional districting map adopted by the Alabama Legislature violates § 2 of the Voting Rights Act. Like the Court, I am happy to apply *Gingles* in these cases. But I would interpret that precedent in a way that heeds what § 2 actually says, and I would take constitutional requirements into account. When ****1549** the *Gingles* framework is viewed in this way, it is apparent that the decisions below must be vacated.

I

A

Gingles marked the Court's first encounter with the amended version of § 2 that Congress enacted in 1982, and the Court's opinion set out an elaborate framework that has since been used to analyze a variety of § 2 claims. Under that framework, a plaintiff must satisfy three "preconditions." *Id.*, at 50, 106 S.Ct. 2752. As summarized in more recent opinions, they are as follows:

> "First, [the] 'minority group' [whose interest the plaintiff represents] must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district. Second, the minority group must be 'politically cohesive.' And third, a district's white majority must 'vote[ ] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.' " *Cooper v. Harris*, 581 U.S. 285, 301–302, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (citations omitted).

See also *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U. S. ——, ——, 142 S.Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (*per curiam*); ***96** *Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 886–888, —— L.Ed.2d —— (2022) (KAGAN, J., dissenting from grant of applications for stays).

If a § 2 plaintiff can satisfy all these preconditions, the court must then decide whether, based on the totality of the circumstances, the plaintiff 's right to vote was diluted. See *Gingles*, 478 U.S. at 46–48, 79, 106 S.Ct. 2752. And to aid in that inquiry, *Gingles* approved consideration of a long list of factors set out in the Senate Judiciary Committee's Majority Report on the 1982 VRA amendments. *Id.*, at 44–45, 106 S.Ct. 2752 (citing S. Rep. No. 97–417, pp. 28–30 (1982)).

B

My fundamental disagreement with the Court concerns the first *Gingles* precondition. In cases like these, where the claim is that § 2 requires the creation of an additional majority-minority district, the first precondition means that the plaintiff must produce an additional illustrative majority-minority district that is "reasonably configured." *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455; *Wisconsin Legislature*, 595 U. S., at ——, 142 S.Ct., at 1248; see also *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752.

The Court's basic error is that it misunderstands what it means for a district to be "reasonably configured." Our cases make it clear that "reasonably configured" is not a synonym for

"compact." We have explained that the first precondition also takes into account other traditional districting criteria like attempting to avoid the splitting of political subdivisions and "communities of interest." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433–434, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*).

To its credit, the Court recognizes that compactness is not enough and that a district is not reasonably configured if it flouts other "traditional districting criteria." *Ante*, at 1503. At various points in its opinion it names quite a few: minimizing the splitting of counties and other political subdivisions, keeping "communities of interest" together where possible, and avoiding the creation of new districts that require ***97** two incumbents to run against each other. *Ante*, at 1504 – 1505, 1512 – 1513. In addition, the Court acknowledges that a district is not "reasonably configured" if it does not comport with the Equal Protection ****1550** Clause's one-person, one-vote requirement. *Ante*, at 1513. But the Court fails to explain why compliance with "traditional districting criteria" matters under § 2 or why the only relevant equal protection principle is the one-person, one-vote requirement. If the Court had attempted to answer these questions, the defect in its understanding of the first *Gingles* precondition would be unmistakable.

To explain this, I begin with what is probably the most frequently mentioned traditional districting criterion and ask why it should matter under § 2 whether a proposed majority-minority district is "compact." Neither the Voting Rights Act (VRA) nor the Constitution imposes a compactness requirement. The Court notes that we have struck down bizarrely shaped districts, *ante*, at 1508 – 1509, but we did not do that for esthetic reasons. Compactness in and of itself is not a legal requirement—or even necessarily an esthetic one. (Some may find fancifully shaped districts more pleasing to the eye than boring squares.)

The same is true of departures from other traditional districting criteria. Again, nothing in the Constitution or the VRA demands compliance with these criteria. If a whimsical state legislature cavalierly disregards county and municipal lines and communities of interest, draws weirdly shaped districts, departs radically from a prior map solely for the purpose of change, and forces many incumbents to run against each other, neither the Constitution nor the VRA would make any of that illegal *per se*. Bizarrely shaped districts and other marked departures from traditional districting criteria matter because mapmakers usually heed these criteria, and when it is evident that they have not done so, there is reason to suspect that something untoward—specifically, unconstitutional racial gerrymandering—is afoot. ***98** See, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 643–644, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Bush v. Vera*, 517 U.S. 952, 979, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion); cf. *LULAC*, 548 U.S. at 433–435, 126 S.Ct. 2594.

Conspicuous violations of traditional districting criteria constitute strong *circumstantial evidence* of unconstitutionality. And when it is shown that the configuration of a district is attributable predominantly to race, that is more than circumstantial evidence that the district is unlawful. That is *direct evidence* of illegality because, as we have often held, race may not "predominate" in the drawing of district lines. See, *e.g.*, *Cooper*, 581 U.S. at 292, 137 S.Ct. 1455; *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 191–192, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017); *Shaw v. Hunt*, 517 U.S. 899, 906–907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995).[1]

Because non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff 's illustrative district. If race predominated in the creation of such a district, the plaintiff has failed to satisfy both our precedent, which requires "reasonably configured" districts, and the terms of § 2, which demand equal openness. Two Terms ago, we engaged in a close analysis of the text of § 2 and explained that its "key requirement" is that the political processes leading to nomination or election must be " 'equally open to participation' by members of a protected class." ****1551** *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2332, 2337, 210 L.Ed.2d 753 (2021) (quoting 52 U.S.C. § 10301(b); emphasis deleted). "[E]qual openness," we stressed, must be our "touchstone" in interpreting and applying that provision. 594 U. S., at ——, 141 S.Ct., at 2338.

When the race of one group is the predominant factor in the creation of a district, that district goes beyond making the electoral process equally open to the members of the group in question. It gives the members of that group an ***99** advantage that § 2 does not require and that the Constitution may forbid. And because the creation of majority-minority districts is something of a zero-sum endeavor, giving an advantage to one minority group may disadvantage others.

C

What all this means is that a § 2 plaintiff who claims that a districting map violates § 2 because it fails to include an additional majority-minority district must show at the outset that such a district can be created without making race the predominant factor in its creation. The plaintiff bears both the burden of production and the burden of persuasion on this issue, see *Voinovich v. Quilter*, 507 U.S. 146, 155–156, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), but a plaintiff can satisfy the former burden simply by adducing evidence—in any acceptable form—that race did not predominate.

A plaintiff need not offer computer-related evidence. Once upon a time, legislative maps were drawn without using a computer, and nothing prevents a § 2 plaintiff from taking this old-school approach in creating an illustrative district. See, *e.g.*, M. Altman, K. McDonald, & M. McDonald, From Crayons to Computers: The Evolution of Computer Use in Redistricting, 23 Soc. Sci. Computer Rev. 334, 335–336 (2005). In that event, the plaintiff can simply call upon the mapmaker to testify about the process he or she used and the role, if any, that race played in that process. The defendant may seek to refute that testimony in any way that the rules of civil procedure and evidence allow.

If, as will often be the case today, a § 2 plaintiff 's mapmaker uses a computer program, the expert can testify about the weight, if any, that the program gives to race. The plaintiff will presumably argue that any role assigned to race was not predominant, and the defendant can contest this by cross-examining the plaintiff 's expert, seeking the actual program in discovery, and calling its own expert to testify ***100** about the program's treatment of race. After this, the trial court will be in a position to determine whether the program gave race a "predominant" role.

This is an entirely workable scheme. It does not obligate either party to offer computer evidence, and it minimizes the likelihood of a clash between what § 2 requires and what the Constitution forbids. We have long assumed that § 2 is consistent with the Constitution. See, *e.g.*, *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455 (assuming States have a compelling interest in complying with § 2); *Shaw II*, 517 U.S. at 915, 116 S.Ct. 1894 (same); *Vera*, 517 U.S. at 977, 116 S.Ct. 1941 (plurality opinion) (same). But that cannot mean that every conceivable interpretation of § 2 is constitutional, and I do not understand the majority's analysis of Alabama's constitutional claim to suggest otherwise. *Ante*, at 1516 – 1517; *ante*, at 1518 – 1519 (KAVANAUGH, J., concurring in part).

Our cases make it perfectly clear that using race as a "predominant factor" in drawing legislative districts is unconstitutional unless the stringent requirements of ****1552** strict scrutiny can be satisfied,[2] and therefore if § 2 can be found to require the adoption of an additional majority-minority district that was created under a process that assigned race a "predominant" role, § 2 and the Constitution would be headed for a collision.

II

When the meaning of a "reasonably configured" district is properly understood, it is apparent that the decisions below must be vacated and that the cases must be remanded for the application of the proper test. In its analysis of whether the plaintiffs satisfied the first *Gingles* precondition, the District Court gave much attention to some traditional districting criteria—specifically, compactness and avoiding the splitting of political subdivisions and communities of interest—but ***101** it failed to consider whether the plaintiffs had shown that their illustrative districts were created without giving race a "predominant role." *Singleton v. Merrill*, 582 F.Supp.3d 924, 1008–1016 (ND Ala. 2022). For this reason, the District Court's § 2 analysis was deficient.

It is true that the District Court addressed the question of race-predominance when it discussed and rejected the State's argument that the plaintiffs' maps violated the Equal Protection Clause, but the court's understanding of predominance was deeply flawed. The court began this part of its opinion with this revealing statement:

> "Dr. Duchin and Mr. Cooper [plaintiffs' experts] testified that they *prioritized race* only for the purpose of determining and to the extent necessary to determine whether it was possible for the *Milligan* plaintiffs and the *Caster* plaintiffs to state a Section Two claim. As soon as they determined the answer to that question, they assigned greater weight to other traditional redistricting criteria." *Id.*, at 1029–1030 (emphasis added).

This statement overlooks the obvious point that by "prioritiz[ing] race" at the outset, Dr. Duchin and Mr. Cooper gave race a predominant role.

The next step in the District Court's analysis was even more troubling. The court wrote, "Dr. Duchin's testimony that she considered two majority-Black districts as 'nonnegotiable' does not" show that race played a predominant role in her districting process. *Id.*, at 1030. But if achieving a certain objective is "non-negotiable," then achieving that objective will necessarily play a predominant role. Suppose that a couple are relocating to the Washington, D. C., metropolitan area, and suppose that one says to the other, "I'm flexible about where we live, but it has to be in Maryland. That's non-negotiable." Could anyone say that finding a home in Maryland was not a "predominant" factor in the couple's search? Or suppose that a person looking for ***102** a flight tells a travel agent, "It has to be non-stop. That's non-negotiable." Could it be said that the number of stops between the city of origin and the destination was not a "predominant" factor in the search for a good flight? The obvious answer to both these questions is no, and the same is true about the role of race in the creation of a new district. If it is "non-negotiable" that the district be majority black, then race is given a predominant role.

The District Court wrapped up this portion of its opinion with a passage that highlighted its misunderstanding of the first *Gingles* precondition. The court ****1553** thought that a § 2 plaintiff cannot proffer a reasonably configured majority-minority district without first attempting to see if it is possible to create such a district—that is, by first making the identification of such a district "non-negotiable." *Ibid.* But that is simply not so. A plaintiff 's expert can first create maps using only criteria that do not give race a predominant role and then determine how many contain the desired number of majority-minority districts.

One final observation about the District Court's opinion is in order. The opinion gives substantial weight to the disparity between the percentage of majority-black House districts in the legislature's plan (14%) and the percentage of black voting-age Alabamians (27%), while the percentage in the plaintiffs' plan (29%) came closer to that 27% mark. See, *e.g.*, *id.*, at 946, 1016, 1018, 1025–1026; see also *id.*, at 958–959, 969, 976, 982, 991–992, 996–997. Section 2 of the VRA, however, states expressly that no group has a right to representation "in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). This provision was a critical component of the compromise that led to the adoption of the 1982 amendments, as the Court unanimously agreed two Terms ago. See *Brnovich*, 594 U. S., at ——, and n. 14, 141 S.Ct., at 2341, and n. 14); *id.*, at ——, n. 6, 141 S.Ct., at 2360, n. 6 (KAGAN, J., dissenting). The District Court's reasoning contravened this statutory proviso. See *ante*, at 1524 – 1525, 1534 – 1535 (THOMAS, J., dissenting).

***103** III

The Court spends much of its opinion attacking what it takes to be the argument that Alabama has advanced in this litigation. I will not debate whether the Court's characterization of that argument is entirely correct, but as applied to the analysis I have just set out, the Court's criticisms miss the mark.

A

The major theme of this part of the Court's opinion is that Alabama's argument, in effect, is that "*Gingles* must be overruled." *Ante*, at 1512. But as I wrote at the beginning of this opinion, I would decide these cases under the *Gingles* framework. We should recognize, however, that the *Gingles* framework is not the same thing as a statutory provision, and it is a mistake to regard it as such. *National Pork Producers Council* v. *Ross*, 598 U. S. ——, ——, 143 S.Ct. 1142, 1155, —— L.Ed.2d —— (2023) ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979))). In applying that framework today, we should keep in mind subsequent developments in our case law.

One important development has been a sharpening of the methodology used in interpreting statutes. *Gingles* was decided at a time when the Court's statutory interpretation decisions sometimes paid less attention to the actual text of the statute than to its legislative history, and *Gingles* falls into that category. The Court quoted § 2 but then moved briskly to the Senate Report. See 478 U.S. at 36–37, 43, and n. 7, 106 S.Ct. 2752. Today, our statutory interpretation decisions focus squarely on the statutory text. *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, 127, 138 S.Ct. 617, 199 L.Ed.2d 501 (2018); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125, 136 S.Ct. 1938, 195 L.Ed.2d 298 (2016); cf. *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2337. And as we held in *Brnovich*, "[t]he key requirement" set out in the text of § 2 is that a State's electoral process must be " 'equally ****1554** open' " ***104** to members of all

racial groups. *Id.*, at ——, 141 S.Ct., at 2337. The *Gingles* framework should be interpreted in a way that gives effect to this standard.

Another development that we should not ignore concerns our case law on racial predominance. Post-*Gingles* decisions like *Miller*, 515 U.S. at 920, 115 S.Ct. 2475, *Shaw II*, 517 U.S. at 906–907, 116 S.Ct. 1894, and *Vera*, 517 U.S. at 979, 116 S.Ct. 1941 (plurality opinion), made it clear that it is unconstitutional to use race as a "predominant" factor in legislative districting. "[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v. *Rodriguez*, 583 U. S. ——, ——, 138 S.Ct. 830, 836, 200 L.Ed.2d 122 (2018). This same principle logically applies with even greater force when we interpret language in one of our prior opinions. It therefore goes without question that we should apply the *Gingles* framework in a way that does not set up a confrontation between § 2 and the Constitution, and understanding the first *Gingles* precondition in the way I have outlined achieves that result.[3]

B

The Court's subsidiary criticisms of Alabama's arguments are likewise inapplicable to my analysis. The Court suggests that the "centerpiece" of Alabama's argument regarding the role race can permissibly play in a plaintiff 's illustrative map seeks the imposition of "a new rule." *Ante*, at 1506, 1510. But I would require only what our cases already demand: ***105** that all legislative districts be produced without giving race a "predominant" role.[4]

The Court maintains that Alabama's benchmark scheme would be unworkable because of the huge number of different race-neutral maps that could be drawn. As the Court notes, there are apparently numerous "competing metrics on the issue of compactness" alone, and each race-neutral computer program may assign different values to each traditional districting criterion. *Ante*, at 1513 (internal quotation marks omitted).

My analysis does not create such problems. If a § 2 plaintiff chooses to use a computer program to create an illustrative district, the court need ask only whether *that program* assigned race a predominant role.

The Court argues that Alabama's focus on race-neutral maps cannot be squared with a totality-of-the-circumstances test because "Alabama suggests there is only one 'circumstance[ ]' that matters—how the State's map stacks up relative to the ****1555** benchmark" maps. *Ante*, at 1507. My analysis, however, simply follows the *Gingles* framework, under which a court must first determine whether a § 2 plaintiff has satisfied three "preconditions" before moving on to consider the remainder of relevant circumstances. See *Growe v. Emison*, 507 U.S. 25, 40–41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) (unless plaintiffs establish all three preconditions, there "neither has been a wrong nor can be a remedy").

***106** IV

As noted, I would vacate and remand for the District Court to apply the correct understanding of *Gingles* in the first instance. Such a remand would require the District Court to determine whether the plaintiffs have shown that their illustrative maps did not give race a predominant role, and I will therefore comment briefly on my understanding of the relevant evidence in the record as it now stands.

A

In my view, there is strong evidence that race played a predominant role in the production of the plaintiffs' illustrative maps and that it is most unlikely that a map with more than one majority-black district could be created without giving race such a role. An expert hired by the *Milligan* plaintiffs, Dr. Kosuke Imai, used a computer algorithm to create 30,000 potential maps, none of which contained two majority-black districts. See 2 App. 571–572; Supp. App. 59, 72. In fact, in 20,000 of those simulations, Dr. Imai intentionally created one majority-minority district, and yet even with one majority-minority district guaranteed as a baseline, none of those 20,000 attempts produced a second one. See 2 App. 571–572; Supp. App. 72.

Similarly, Dr. Moon Duchin, another expert hired by the *Milligan* plaintiffs, opined that "it is hard to draw two majority-black districts by accident." 2 App. 714. Dr. Duchin also referred to a study where she generated two million maps of potential district configurations in Alabama, none of which contained a second majority-minority district. *Id.*, at 710. And the first team of trained mapmakers that plaintiff Milligan

consulted was literally unable to draw a two-majority-black-district map, even when they tried. *Id.*, at 511–512. Milligan concluded at the time that the feat was impossible. *Id.*, at 512.

The majority quibbles about the strength of this evidence, protesting that Dr. Imai's studies failed to include as controls ***107** certain redistricting criteria and that Dr. Duchin's two-million-map study was based on 2010 census data, see *ante*, at 1512 – 1513, and nn. 6–7, but this is unconvincing for several reasons. It is plaintiffs' burden to produce evidence and satisfy the *Gingles* preconditions, so if their experts' maps were deficient, that is no strike against Alabama. And the racial demographics of the State changed little between 2010 and 2020, Supp. App. 82, which is presumably why Dr. Duchin herself raised the older study in answering questions about her work in this litigation, see 2 App. 710. If it was impossible to draw two such districts in 2010, it surely at least requires a great deal of intentional effort now.

The Court suggests that little can be inferred from Dr. Duchin's two-million-map study because two million maps are not that many in comparison to the "trillion trillion" maps that are possible. See *ante*, at 1513 – 1514, and n. 9. In making this argument, the Court relies entirely on an *amicus* brief submitted by three computational redistricting experts in support of the appellees. See Brief for Computational Redistricting Experts 2, 6, n. 7. These experts' argument concerns a complicated statistical issue, and I think it is ****1556** unwise for the Court to make their argument part of our case law based solely on this brief. By the time this *amicus* brief was submitted, the appellants had already filed their main brief, and it was too late for any experts with contrary views to submit an *amicus* brief in support of appellants. Computer simulations are widely used today to make predictions about many important matters, and I would not place stringent limits on their use in VRA litigation without being quite sure of our ground. If the cases were remanded, the parties could take up this issue if they wished and call experts to support their positions on the extent to which the two million maps in the study are or can be probative of the full universe of maps.

In sum, based on my understanding of the current record, I am doubtful that the plaintiffs could get by the first *Gingles* ***108** precondition, but I would let the District Court sort this matter out on remand.

B

Despite the strong evidence that two majority-minority districts cannot be drawn without singular emphasis on race, a plurality nonetheless concludes that race did not predominate in the drawing of the plaintiffs' illustrative maps. See *ante*, at 1510 – 1512. Their conclusion, however, rests on a faulty view of what non-predominance means.

The plurality's position seems to be that race does not predominate in the creation of a districting map so long as the map does not violate other traditional districting criteria such as compactness, contiguity, equally populated districts, minimizing county splits, etc. *Ibid*. But this conclusion is irreconcilable with our cases. In *Miller*, for instance, we acknowledged that the particular district at issue was not "shape[d] ... bizarre[ly] on its face," but we nonetheless held that race predominated because of the legislature's "overriding desire to assign black populations" in a way that would create an additional "majority-black district." 515 U.S. at 917, 115 S.Ct. 2475.

Later cases drove home the point that conformity with traditional districting principles does not necessarily mean that a district was created without giving race a predominant role. In *Cooper*, we held that once it was shown that race was " 'the overriding reason' " for the selection of a particular map, "a further showing of 'inconsistency between the enacted plan and traditional redistricting criteria' is unnecessary to a finding of racial predominance." 581 U.S. at 301, n. 3, 137 S.Ct. 1455 (quoting *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788). We noted that the contrary argument was "foreclosed almost as soon as it was raised in this Court." *Cooper*, 581 U.S. at 301, n. 3, 137 S.Ct. 1455; see also *Vera*, 517 U.S. at 966, 116 S.Ct. 1941 (plurality opinion) (race may still predominate even if "traditional districting principle[s] do correlate to some extent with the district's layout"). "Traditional redistricting principles ... are numerous and ***109** malleable.... By deploying those factors in various combinations and permutations, a [mapmaker] could construct a plethora of potential maps that look consistent with traditional, race-neutral principles." *Bethune-Hill*, 580 U.S. at 190, 137 S.Ct. 788. Here, a plurality allows plaintiffs to do precisely what we warned against in *Bethune-Hill*.

The plurality's analysis of predominance contravenes our precedents in another way. We have been sensitive to the gravity of " 'trapp[ing]' " States " 'between the competing

hazards of liability' " imposed by the Constitution and the VRA. *Id.*, at 196, 137 S.Ct. 788 (quoting *Vera*, 517 U.S. at 977, 116 S.Ct. 1941). The VRA's demand that States not unintentionally "dilute" the **1557 votes of particular groups must be reconciled with the Constitution's demand that States generally avoid intentional augmentation of the political power of any one racial group (and thus the diminution of the power of other groups). The plurality's predominance analysis shreds that prudential concern. If a private plaintiff can demonstrate § 2 liability based on the production of a map that the State has every reason to believe it could not constitutionally draw, we have left "state legislatures too little breathing room" and virtually guaranteed that they will be on the losing end of a federal court's judgment. *Bethune-Hill*, 580 U.S. at 196, 137 S.Ct. 788.

* * *

The Court's treatment of *Gingles* is inconsistent with the text of § 2, our precedents on racial predominance, and the fundamental principle that States are almost always prohibited from basing decisions on race. Today's decision unnecessarily sets the VRA on a perilous and unfortunate path. I respectfully dissent.

All Citations

599 U.S. 1, 143 S.Ct. 1487, 216 L.Ed.2d 60, 23 Cal. Daily Op. Serv. 5172, 29 Fla. L. Weekly Fed. S 905

Footnotes

* Together with No. 21–1087, *Allen, Alabama Secretary of State, et al*. v. *Caster et al.*, on certiorari before judgment to the United States Court of Appeals for the Eleventh Circuit.

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

* Justice KAVANAUGH joins all but Part III–B–1 of this opinion.

1 As originally enacted, § 2 provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1970 ed.).

2 Judge Manasco, presiding in *Caster*, also preliminarily enjoined Alabama from using HB1. Her opinion was based on the same evidentiary record as was before the three-judge Court, and it adopted in full that Court's "recitation of the evidence, legal analysis, findings of fact and conclusions of law." 1 App. to Emergency Application for Stay in No. 2:21–cv–1536, p. 4; see also 582 F.Supp.3d at 942–943, and n. 4. Any reference to the "District Court" in this opinion applies to the *Caster* Court as well as to the three-judge Court.

3 The principal dissent complains that "what the District Court did here is essentially no different from what many courts have done for decades under this Court's superintendence." *Post*, at 1545 (opinion of THOMAS, J.). That is not such a bad definition of *stare decisis*.

4 Despite this all, the dissent argues that courts have apparently been "methodically carving the country into racially designated electoral districts" for decades. *Post*, at 1545 (opinion of THOMAS, J.). And that, the dissent inveighs, "should inspire us to repentance." *Ibid.* But proportional representation of minority voters is absent from nearly every corner of this country despite § 2 being in effect for over 40 years. And in case after case, we have rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria. See *supra*, at 1508 – 1509. It seems it is the dissent that is "quixotically joust[ing] with an imaginary adversary." *Post*, at 1545 (opinion of THOMAS, J.).

5 The dissent claims that Cooper "treated 'the minority population in and of itself' as the paramount community of interest in his plans." *Post*, at 1526 (opinion of THOMAS, J.) (quoting 2 App. 601). But Cooper testified that he was "aware that the minority population in and of itself *can* be a community of interest." *Id.,* at 601 (emphasis added). Cooper then explained that the relevant community of interest here—the Black Belt—was a "*historical* feature" of the State, not a demographic

one. *Ibid.* (emphasis added). The Black Belt, he emphasized, was defined by its "historical boundaries"—namely, the group of "rural counties plus Montgomery County in the central part of the state." *Ibid.* The District Court treated the Black Belt as a community of interest for the same reason.

The dissent also protests that Cooper's "plans prioritized race over neutral districting criteria." *Post*, at 1526 (opinion of THOMAS, J.). But as the District Court found, and as Alabama does not contest, Cooper's maps satisfied other traditional criteria, such as compactness, contiguity, equal populations, and respect for political subdivisions.

6 Dr. Duchin created her two million map sample as part of an academic article that she helped author, not for her work on this case, and the article was neither entered into evidence below nor made part of the record here. See 2 App. 710; see also M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744, 763–764 (2021) (Duchin & Spencer).

7 The principal dissent decrees that Dr. Duchin's and Dr. Imai's maps are "surely probative," forgiving the former's use of stale census data as well as both mapmakers' collective failure to incorporate many traditional districting guidelines. *Post*, at 1531 – 1532, and n. 14 (opinion of THOMAS, J.); see also *post*, at 1527, n. 9, 1527 – 1528. In doing so, that dissent ignores Dr. Duchin's testimony that—when using the correct census data—the "randomized algorithms" she employed "found plans with two majority-black districts in literally thousands of different ways." MSA 316–317. The principal dissent and the dissent by Justice ALITO also ignore Duchin's testimony that "it is certainly possible" to draw the illustrative maps she produced in a race-blind manner. 2 App. 713. In that way, even the race-blind standard that the dissents urge would be satisfied here. See *post*, at 1530 (opinion of THOMAS, J.); *post*, at 1551 (opinion of ALITO, J.). So too could that standard be satisfied in every § 2 case; after all, as Duchin explained, any map produced in a deliberately race-predominant manner would necessarily emerge at some point in a random, race-neutral process. 2 App. 713. And although Justice ALITO voices support for an "old-school approach" to § 2, even that approach cannot be squared with his understanding of *Gingles*. *Post*, at 1551. The very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist.

8 None of this is to suggest that algorithmic mapmaking is categorically irrelevant in voting rights cases. Instead, we note only that, in light of the difficulties discussed above, courts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim. And in evaluating algorithmic evidence more generally in this context, courts should be attentive to the concerns we have discussed.

9 The dissent suggests that *Growe* does not support the proposition that § 2 applies to single-member redistricting. *Post*, at 1520 – 1521 (opinion of THOMAS, J.). The Court has understood *Growe* much differently. See, *e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 90, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) ("Our decision in [*Gingles*] set out the basic framework for establishing a vote dilution claim against at-large, multimembers districts; we have since extended the framework to single-member districts." (citing *Growe*, 507 U.S. at 40–41, 113 S.Ct. 1075)); *Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) ("In *Growe*, we held that a claim of vote dilution in a single-member district requires proof meeting *the same* three threshold conditions for a dilution challenge to a multimember district ...."); *Bartlett v. Strickland*, 556 U.S. 1, 12, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion) ("The Court later held that the three *Gingles* requirements apply equally in § 2 cases involving single-member districts ...." (citing *Growe*, 507 U.S. at 40–41, 113 S.Ct. 1075)).

10 Justice ALITO argues that "[t]he *Gingles* framework should be [re]interpreted" in light of changing methods in statutory interpretation. *Post*, at 1554 (dissenting opinion). But as we have explained, *Gingles* effectuates the delicate legislative bargain that § 2 embodies. And statutory *stare decisis* counsels strongly in favor of not "undo[ing] ... the compromise that was reached between the House and Senate when § 2 was amended in 1982." *Brnovich*, 594 U. S., at ——, 141 S.Ct., at 2341.

1 Unlike ordinary statutory precedents, the "Court's precedents applying common-law statutes and pronouncing the Court's own interpretive methods and principles typically do not fall within that category of stringent statutory *stare decisis*." *Ramos*, 590 U. S., at ——, n. 2, 140 S.Ct., at 1413, n. 2 (opinion of KAVANAUGH, J.); see also, *e.g.*, *Kisor* v. *Wilkie*, 588 U. S. ——, —— – ——, 139 S.Ct. 2400, 2443–2445, 204 L.Ed.2d 841 (2019) (GORSUCH, J., concurring in judgment); *id.*, at —— – ——, 139 S.Ct., at 2448–2449 (KAVANAUGH, J., concurring in judgment); *Leegin Creative Leather Products,*

Inc. v. PSKS, Inc., 551 U.S. 877, 899–907, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

2 To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply the "geographically compact" and "reasonably configured" requirements. See *ante*, at 1510 (§ 2 requirements under *Gingles* are "exacting"). In this case, for example, it is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan. See *ante*, at 1504 – 1505.

1 "No person acting under color of law shall ... in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 52 U.S.C. § 10101(a)(2)(A).

2 The majority suggests that districting lines are a " 'prerequisite to voting' " because they "determin[e] where" voters "cast [their] ballot[s]." *Ante*, at 1515. But, of course, a voter's polling place is a separate matter from the district to which he is assigned, and communities are often moved between districts without changing where their residents go to vote. The majority's other example ("who [voters] are eligible to vote for," *ibid.*) is so far a stretch from the Act's focus on voting qualifications and voter action that it speaks for itself.

3 The majority chides Alabama for declining to specifically argue that § 2 is inapplicable to multimember and at-large districting plans. But these cases are about a single-member districting plan, and it is hardly uncommon for parties to limit their arguments to the question presented. Further, while I do not myself believe that the text of § 2 applies to multimember or at-large plans, the idea that such plans might be especially problematic from a vote-dilution standpoint is hardly foreign to the Court's precedents, see *Johnson v. De Grandy*, 512 U.S. 997, 1012, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); cf. *Holder v. Hall*, 512 U.S. 874, 888, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (O'Connor, J., concurring in part and concurring in judgment) (explaining that single-member districts may provide the benchmark when multimember or at-large systems are challenged, but suggesting no benchmark for challenges to single-member districts), or to the historical evolution of vote-dilution claims. Neither the case from which the 1982 Congress drew § 2(b)'s current operative language, see *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), nor the one it was responding to, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980), involved single-member districts.

4 Justice KAVANAUGH's partial concurrence emphasizes the supposedly enhanced *stare decisis* force of statutory-interpretation precedents. See *ante*, at 1517 – 1518. This emphasis is puzzling in several respects. As an initial matter, I can perceive no conceptual "basis for applying a heightened version of *stare decisis* to statutory-interpretation decisions"; rather, "our judicial duty is to apply the law to the facts of the case, regardless of how easy it is for the law to change." *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 1987, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring). Nor does that approach appear to have any historical foundation in judicial practice at the founding or for more than a century thereafter. See T. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 708–732 (1999). But, even putting those problems aside, any appeal to heightened statutory *stare decisis* is particularly misplaced in this context. As the remainder of this dissent explains in depth, the Court's § 2 precedents differ from "ordinary statutory precedents" in two vital ways. *Ante*, at 1517, n. 1 (opinion of KAVANAUGH, J.). The first is their profound tension with the Constitution's hostility to racial classifications, a tension that Justice KAVANAUGH acknowledges and that makes every § 2 question the reverse side of a corresponding constitutional question. See *ante*, at 1518 – 1519. The second is that, to whatever extent § 2 applies to districting, it can only "be understood as a delegation of authority to the courts to develop a common law of racially fair elections." C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 383 (2012). It would be absurd to maintain that this Court's "notoriously unclear and confusing" § 2 case law follows, in any straightforward way, from the statutory text's high-flown language about the equal openness of political processes. *Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 881, —— L.Ed.2d —— (2022) (KAVANAUGH, J., concurring in grant of applications for stays).

5 Like the majority, I refer to both courts below as "the District Court" without distinction.

6 While *Brnovich* involved a time-place-and-manner voting rule, not a vote-dilution challenge to a districting plan, its analysis logically must apply to vote-dilution cases if the text of § 2 covers such claims at all.

7 District 7 owes its majority-black status to a 1992 court order. See *Wesch v. Hunt*, 785 F.Supp. 1491, 1493–1494, 1496–1497, 1501–1502 (SD Ala.), aff 'd *sub nom. Camp v. Wesch*, 504 U.S. 902, 112 S.Ct. 1926, 118 L.Ed.2d 535 (1992). At the time, the Justice Department's approach to preclearance under § 5 of the Act followed the "so-called 'max-black' policy," which "required States, including Alabama, to create supermajority-black voting districts or face denial of preclearance." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 298, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (THOMAS, J., dissenting). Although *Wesch* was a § 2 case and the court-imposed plan that resulted was not subject to preclearance, see 785 F.Supp. at 1499–1500, there can be little doubt that a similar ethos dominated that litigation, in which all parties stipulated to the desirability of a *65%-plus* majority-black district. See *id.*, at 1498–1499. To satisfy that dubious need, the *Wesch* court aggressively adjusted the northeast and southeast corners of the previous District 7. In the northeast, where District 7 once encompassed all of Tuscaloosa County and the more or less rectangular portion of Jefferson County not included in District 6, the 1992 plan drew a long, thin "finger" that traversed the southeastern third of Tuscaloosa County to reach deep into the heart of urban Birmingham. See Supp. App. 207–208. Of the Jefferson County residents captured by the "finger," 75.48% were black. *Wesch*, 785 F.Supp. at 1569. In the southeast, District 7 swallowed a jigsaw-shaped portion of Montgomery County, the residents of which were 80.18% black. *Id.*, at 1575. Three years later, in *Miller v. Johnson*, 515 U.S. 900, 923–927, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), we rejected the "max-black" policy as unwarranted by § 5 and inconsistent with the Constitution. But "much damage to the States' congressional and legislative district maps had already been done," including in Alabama. *Alabama Legislative Black Caucus*, 575 U.S. at 299, 135 S.Ct. 1257 (THOMAS, J., dissenting).

8 I have included an Appendix, *infra*, illustrating the plaintiffs' 11 proposed maps. The first 10 images display the "black-only" voting-age population of census-designated voting districts in relation to the maps' hypothetical district lines. The record does not contain a similar illustration for the 11th map, but a simple visual comparison with the other maps suffices.

9 The majority notes that this study used demographic data from the 2010 census, not the 2020 one. That is irrelevant, since the black population share in Alabama changed little (from 26.8% to 27.16%) between the two censuses. To think that this minor increase might have changed Dr. Duchin's results would be to entirely miss her point: that proportional representation for *any* minority, unless achieved "by design," is a statistical anomaly in almost all single-member-districting systems. Duchin & Spencer 764.

10 Of course, bizarreness is in the eye of the beholder, and, while labels like " 'tentacles' " or " 'appendages' " have no ultimate legal significance, it is far from clear that they do not apply here. See *ante*, at 1504 – 1505. The tendrils with which the various versions of illustrative District 2 would capture black Mobilians are visually striking and are easily recognized as a racial grab against the backdrop of the State's demography. The District 7 "finger," which encircles the black population of the Birmingham metropolitan area in order to separate them from their white neighbors and link them with black rural areas in the west of the State, also stands out to the naked eye. The District Court disregarded the "finger" because it has been present in every districting plan since 1992, including the State's latest enacted plan. *Singleton v. Merrill*, 582 F.Supp.3d 924, 1011 (ND Ala. 2022) (*per curiam*). But that reasoning would allow plaintiffs to bootstrap one racial gerrymander as a reason for permitting a second. Because the question is not before us, I express no opinion on whether existing District 7 is constitutional as enacted by the State. It is indisputable, however, that race predominated in the original creation of the district, see n. 7, *supra*, and it is plain that the primary race-neutral justification for the district today must be the State's legitimate interest in "preserving the cores of prior districts" and the fact that the areas constituting District 7's core have been grouped together for decades. *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); see also *id.*, at 758, 103 S.Ct. 2653 (Stevens, J., concurring) (explaining that residents of a political unit "often develop a community of interest"). The plaintiffs' maps, however, necessarily would require the State to assign little weight to core retention with respect to other districts. There could then be no principled race-neutral justification for prioritizing core retention only when it preserved an existing majority-black district, while discarding it when it stood in the way of creating a new one.

11 The equal-population baseline for Alabama's seven districts is 717,154 persons per district.

12 The plurality's somewhat elliptical discussion of "the line between racial predominance and racial consciousness," *ante*, at 1510, suggests that it may have fallen into a similar error. To the extent the plurality supposes that, under our precedents, a State may purposefully sort voters based on race to some indefinite extent without crossing the line into predominance, it is wrong, and its predominance analysis would water down decades of racial-gerrymandering jurisprudence. Our constitutional precedents' line between racial awareness and racial predominance simply tracks the distinction between awareness of consequences, on the one hand, and discriminatory *purpose*, on the other. See *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (" 'Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects' " (alterations and some internal quotation marks omitted)); accord, *Shaw I*, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). And our statements that § 2 "demands consideration of race," *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 2315, 201 L.Ed.2d 714 (2018), and uses a "race-conscious calculus," *De Grandy*, 512 U.S. at 1020, 114 S.Ct. 2647, did not imply that a State can ever purposefully sort voters on a race-predominant basis without triggering strict scrutiny.

13 The plurality's reasoning does not withstand scrutiny even on its own terms. Like Dr. Duchin, Mr. Cooper found it "necessary to consider race" to construct two majority-black districts, 2 App. 591, and he frankly acknowledged "reconfigur[ing]" the southern part of the State "to create the second African-American majority district," *id.*, at 610. Further, his conclusory statement that race did not "predominate" in his plans, *id.*, at 595, must be interpreted in light of the rest of his testimony and the record as a whole. Mr. Cooper recognized communities of interest as a traditional districting principle, but he applied that principle in a nakedly race-focused manner, explaining that "the minority population in and of itself " was the community of interest that was "top of mind as [he] was drawing the plan[s]." *Id.*, at 601. As noted, he also testified that he considered "minority voting strengt[h]" to be a "traditional redistricting principl[e]" in its own right. *Id.*, at 591. His testimony therefore buttresses, rather than undermines, the conclusion already obvious from the maps themselves: Only a mapmaker pursuing a fixed racial target would produce them.

14 The majority points to limitations of Dr. Duchin's and Dr. Imai's algorithms that do not undermine the strong inference from their results to the conclusion that no two-majority-black-district plan could be an appropriate proxy for the undiluted benchmark. *Ante*, at 1512, 1513 – 1514. I have already explained why the fact that Dr. Duchin's study used 2010 census data is irrelevant. See n. 9, *supra*. As for the algorithms' inability to incorporate all possible districting considerations, the absence of additional *constraints* cannot explain their failure to produce any maps hitting the plaintiffs' preferred racial target. Next, while it is true that the number of possible districting plans is extremely large, that does not mean it is impossible to generate a statistically significant sample. Here, for instance, Dr. Imai explained that "10,000 simulated plans" was sufficient to "yield statistically precise conclusions" and that any higher number would "not materially affect" the results. Supp. App. 60. Finally, the majority notes Dr. Duchin's testimony that her "exploratory algorithms" found "thousands" of possible two-majority-black-district maps. 2 App. 622; see *ante*, at 1512 – 1513, n. 7. Setting aside that Dr. Duchin never provided the denominator of which those "thousands" were the numerator, it is no wonder that the algorithms in question generated such maps; as Dr. Duchin explained, she programmed them with "an algorithmic preference" for "plans in which there would be a second majority-minority district." 2 App. 709. Thus, all that those algorithmic results prove is that it is *possible* to draw two majority-black districts in Alabama if one sets out to do so, especially with the help of sophisticated mapmaking software. What is still lacking is any justification for treating a two-majority-black-district map as a proxy for the undiluted benchmark.

15 The majority lodges a similar accusation against the State's arguments (or what it takes to be the State's arguments). See *ante*, at 1507 ("Alabama suggests there is only one 'circumstance' that matters—how the State's map stacks up relative to the benchmark" (alteration omitted)). But its rebuke is misplaced. The "totality of circumstances" means that courts must consider all circumstances relevant to an issue. It does not mean that they are forbidden to attempt to define the substantive standard that governs that issue. In arguing that a vote-dilution claim requires judging a State's plan relative to an undiluted benchmark to be drawn from the totality of circumstances—including, where probative, the results of districting simulations—the State argues little more than what we have long acknowledged. See *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997).

16 To the extent it is any sort of answer to the benchmark question, it tends inevitably toward proportionality. By equating a voting minority's inability to win elections with a vote that has been "render[ed] ... unequal," *ante*, at 1507, the majority assumes "that members of [a] minority are denied a fully effective use of the franchise unless they are able to control seats

in an elected body." *Holder*, 512 U.S. at 899, 114 S.Ct. 2581 (opinion of THOMAS, J.). That is precisely the assumption that leads to the proportional-control benchmark. See *id.*, at 902, 937, 114 S.Ct. 2581.

17 Indeed, the majority's attempt to deflect this analysis only confirms its accuracy. The majority stresses that its understanding of *Gingles* permits the rejection of "plans that would bring States closer to proportionality *when those plans violate traditional districting criteria*." *Ante*, at 1509 – 1510, n. 4 (emphasis added). Justice KAVANAUGH, similarly, defends *Gingles* against the charge of "mandat[ing] a proportional number of majority-minority districts" by emphasizing that it requires only the creation of majority-minority districts that are compact and reasonably configured. *Ante*, at 1518 (opinion concurring in part). All of this precisely tracks my point: As construed by the District Court and the majority, § 2 mandates an ever closer approach to proportional control that stops only when a court decides that a further step in that direction would no longer be consistent with any reasonable application of traditional districting criteria.

18 In *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 137 S.Ct. 788, 197 L.Ed.2d 85 (2017), the Court upheld a race-predominant district based on the assumed compelling interest of complying with § 5 of the Voting Rights Act. *Id.*, at 193–196, 137 S.Ct. 788. There, the Court was explicit that it was still merely "assum[ing], without deciding," that the asserted interest was compelling, as the plaintiffs "d[id] not dispute that compliance with § 5 was a compelling interest at the relevant time." *Id.*, at 193, 137 S.Ct. 788.

19 While our congruence-and-proportionality cases have focused primarily on the Fourteenth Amendment, they make clear that the same principles govern "Congress' parallel power to enforce the provisions of the Fifteenth Amendment." *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157.

20 This formulation does not specifically account for the District Court's findings under the Senate factors, which, as I have explained, lack any traceable logical connection to the finding of a districting wrong or the need for a districting remedy.

21 Justice KAVANAUGH, at least, recognizes that § 2's constitutional footing is problematic, for he agrees that "race-based redistricting cannot extend indefinitely into the future." *Ante*, at 1519 (opinion concurring in part). Nonetheless, Justice KAVANAUGH votes to sustain a system of institutionalized racial discrimination in districting—under the aegis of a statute that applies nationwide and has no expiration date—and thus to prolong the "lasting harm to our society" caused by the use of racial classifications in the allocation of political power. *Shaw I*, 509 U.S. at 657, 113 S.Ct. 2816. I cannot agree with that approach. The Constitution no more tolerates this discrimination today than it will tolerate it tomorrow.

22 The Court does not address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court. See *Brnovich* v. *Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (GORSUCH, J., concurring).

1 Alabama's districting guidelines explicitly incorporate this nonpredominance requirement. See *Singleton v. Merrill*, 582 F.Supp.3d 924, 1036 (ND Ala. 2022).

2 Although our cases have posited that racial predominance may be acceptable if strict scrutiny is satisfied, the Court does not contend that it is satisfied here.

3 The second and third *Gingles* preconditions, which concern racially polarized voting, cannot contribute to avoiding a clash between § 2 and the Constitution over racial predominance in the drawing of lines. Those preconditions do not concern the drawing of lines in plaintiffs' maps, and in any event, because voting in much of the South is racially polarized, they are almost always satisfied anyway. Alabama does not contest that they are satisfied here.

4 The Court appears to contend that it does not matter if race predominated in the drawing of these maps because the maps *could have* been drawn without race predominating. See *ante*, at 1512 – 1513, n. 7. But of course, many policies *could be* selected for race-neutral reasons. They nonetheless must be assessed under the relevant standard for intentional reliance on race if their imposition was in fact motivated by race. See, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227–231, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 241–248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

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United States District Court, E.D. New York.

Bruce A. BLAKEMAN, in his official capacity as County Executive of the County of Nassau; County of Nassau; Marc Mullen, as parent and natural guardian of K.E.M., an infant under the age of eighteen years; and Jeanine Mullen, as parent and natural guardian of K.E.M., an infant under the age of eighteen years, Plaintiffs,

v.

Letitia JAMES, as Attorney General of the State of New York; State of New York Office of the Attorney General; and State of New York, Defendants.

2:24-cv-1655 (NJC) (LGD)
|
Signed April 4, 2024

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OPINION AND ORDER

NUSRAT J. CHOUDHURY, District Judge:

***1** Plaintiffs Bruce A. Blakeman ("Blakeman") and Nassau County (together "County Plaintiffs"), and Marc and Jeanine Mullen (together "Individual Plaintiffs") filed a Complaint for declaratory and injunctive relief against the State of New York ("New York"), the State of New York Office of the Attorney General ("OAG"),[1] and Letitia James ("James"), in her capacity as the Attorney General of the State of New York ("NY Attorney General," collectively, "Defendants"). (Compl., ECF No. 1.) The Complaint brings a single claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶¶ 33–35.) Plaintiffs' claim concerns a cease-and-desist letter from the OAG to Nassau County asserting that Nassau County Executive Order 2-2024 ("Executive Order") violates the New York Human Rights Law's prohibition against discrimination on the bases of sex and gender identity and expression. (OAG Ltr., ECF No. 10-3 (citing N.Y. Exec. Law §§ 296(2), (6)).) The letter calls for the County Plaintiffs to rescind the Executive Order and produce the documents that supported its issuance, or else face further legal action by the OAG. (*Id.* at 9.) The Complaint alleges that the OAG's action to enforce the New York Human Rights Law as applied to the Executive Order violates the rights of women and girl athletes in Nassau County to equal protection under the law. (Compl. ¶¶ 35, 38–41.)

On March 7, 2024, the County Plaintiffs filed an Order to Show Cause seeking an order "temporarily restrain[ing] and enjoin[ing]" Defendants "from initiating any legal proceedings and/or actions" against Blakeman "related to [the Executive Order]." (ECF No. 10 at 2.) The County Plaintiffs' supporting brief asks for an order "staying AG James' demand for document production, preventing her from taking further legal action and declaring Executive Order Number 2-2024 valid under the U.S. Constitution, Federal Law, and State Law." (Cnty. Pls.' Br. at 5, ECF No. 10-5.) On March 11, 2024, following the reassignment of this case to this Court's docket, the County Plaintiffs filed a proposed Temporary Restraining Order ("TRO") reiterating these requests for a temporary restraining order and preliminary injunction. (*See* Proposed TRO, ECF No. 17 at 3–4.) The Court construes the Order to Show Cause as the County Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction ("TRO/PI Motion").[2]

***2** The Court has reviewed the parties' submissions on the fully briefed TRO/PI Motion: (1) the Complaint (ECF No. 1); (2) the County Plaintiffs' Order to Show Cause and Proposed Temporary Restraining Order (ECF Nos. 10, 17); (3) the County Plaintiffs' Memorandum of Law (ECF No. 10-5); (4) the Affidavit of Bruce A. Blakeman (ECF No. 10-4); (5) the Declaration of County Plaintiffs' counsel,

Victoria LaGreca, and attached exhibits (ECF Nos. 10-1–10-3); (6) the Defendants' opposition brief (ECF No. 18); and (7) the County Plaintiffs' reply brief (ECF No. 21). The Individual Plaintiffs did not join in the County Plaintiffs' TRO/PI Motion. (*See* ECF Nos. 10, 17.) Although the Court provided the Individual Plaintiffs an opportunity to present their position on the TRO/PI Motion, they elected not to do so.[3]

At a conference with the Court on March 12, 2024, the County Plaintiffs requested an expedited resolution of the TRO Motion. (Conf., Mar. 12, 2024.) No party requested discovery or an evidentiary hearing on the PI Motion, whether during the conference or in their submissions to the Court. (*Id.*; *see also* ECF Nos. 1, 10, 10-1–10-5, 17, 18, 21.)

The County Plaintiffs' TRO/PI Motion falls far short of meeting the high bar for securing the extraordinary relief of a temporary restraining order from this Court. Plaintiffs' claims are nonjusticiable for multiple reasons: (1) Eleventh Amendment sovereign immunity bars the declaratory and injunctive relief claim against Defendants New York and the OAG, as well as any claim for retrospective declaratory relief against Defendant James in her official capacity; (2) the County Plaintiffs lack capacity to bring the equal protection claim under Rule 17(b), Fed. R. Civ. P., and New York's capacity-to-sue rule; and (3) the record does not establish Plaintiffs' standing to bring the equal protection claim pled in the Complaint. Moreover, the County Plaintiffs' submission fails to demonstrate irreparable harm—a critical prerequisite for the issuance of a temporary restraining order. For the reasons addressed below, the Court denies the County Plaintiffs' TRO Motion and reserves decision on the PI Motion following the resolution of Defendants' Motion to Dismiss (ECF No. 20).

BACKGROUND

The NY Attorney General is New York's chief legal officer. *See* N.Y. Const. art. V, § 4; N.Y. Exec. Law § 63(1). Under New York law, the Attorney General:

> [p]rosecut[es] and defend[s] all actions and proceedings in which the state is interested, and ha[s] charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state ....

N.Y. Exec. Law § 63(1). The New York Legislature has granted the Attorney General a central role in ensuring the consistent application and enforcement of laws enacted by the legislature, including New York's anti-discrimination laws. The New York Executive Law empowers the Attorney General to "[b]ring and prosecute or defend upon request of the commissioner of labor or the state division of human rights, any civil action or proceeding ... necessary for effective enforcement of the laws of this state against discrimination ...." *Id.* § 63(9). It also grants the Attorney General authority to prosecute people for criminal violations of state anti-discrimination laws in certain circumstances, *id.* § 63(10), to file a complaint of Human Rights Law violations, *id.* § 297(1), and to play a role in the investigation and handling of Human Rights Law complaints, *id.* § 297. The New York Civil Rights Law requires notice to be served upon the Attorney General prior to the commencement of any private litigation alleging the violation of state civil rights laws. N.Y. Civ. Rts. Law § 40-d.

***3** On February 22, 2024, Blakeman signed into law Executive Order 2024-2, titled "An Executive Order for Fairness for Women and Girls in Sports." (E.O., ECF No. 10-2.) The Executive Order relates to the process for securing a permit to use Nassau County Parks property[4] for "organizing a sporting event or competition" and does three main things. (E.O. at 1.) First, it requires that any permit applicant seeking to use Nassau County Parks property for a sporting event or competition "must expressly designate" whether the activity relates to (1) "[m]ales, men, or boys," (2) "[f]emales, women, or girls," or (3) "[c]oed or mixed, including both males and females" "based on [participants'] biological sex at birth." (*Id.*) Second, the Executive Order prohibits the Nassau County Department of Parks, Recreation and Museums (the "Parks Department") from issuing a permit for any sporting event or competition designated for "females, women, or girls" that allows "biological males" to participate, but allows the Parks Department to issue permits for sporting events or competitions designated for "males, men, or boys" that include participation by "biological females." (*Id.* at 1–2.)[5] Third, the Executive Order defines "gender" as "the individual's biological sex at birth" and permits the Parks Department to consider a birth certificate as identification of a participant's sex only when the birth certificate was "filed at or near the time" of the participant's birth. (*Id.* at 2.)

The plain text of the Executive Order prohibits transgender[6] women and girls, as well as any women and girls' sports teams that include them, from participating in women and

girls' sporting events on Nassau County Parks property. (*Id.* at 1–2.) Transgender women and girls are only permitted to participate in sporting events designated as "male" or "coed." (*Id.*) By contrast, the plain text of the Executive Order permits transgender men and boys to participate in any sporting events on Nassau County Parks property, whether the events are designated as "female," "male," or "coed." (*Id.* at 2.) The Executive Order does not address people who may identify as intersex or nonbinary. (*See* Defs.' Br. at 4.)

***4** On March 1, 2024, the OAG's Civil Rights Bureau sent a letter to Blakeman indicating that the office had reviewed the Executive Order and concluded that it is "in clear violation of New York State anti-discrimination laws." (OAG Ltr. at 1, ECF No. 10-3.) In the letter, the OAG demands rescission of the Executive Order within five business days and that Blakeman "immediately produce any and all documents constituting the record supporting [his] decision to issue the Order." (*Id.* at 3.) The OAG also states that "[f]ailure to comply with this directive may result in further legal action by the OAG." (*Id.*)

According to the March 1, 2024 letter, facilities covered by the Executive Order "rang[e] from general playing fields in parks to baseball, football, and soccer fields, basketball and tennis courts, indoor and outdoor swimming pools, as well as ice rinks and shooting ranges" and "would apply to approximately 100 venues." (*Id.* at 2.) The OAG asserts that the immediate effect of the Order is "to force sports leagues to make an impossible choice: discriminate against transgender women and girls, in violation of New York law, or find somewhere else to play." (*Id.*) It argues that the Executive Order violates the New York Human Rights Law's prohibition against discrimination on the bases of "sex" and "gender identity or expression" in places of public accommodation, N.Y. Exec. Law §§ 292(9), 296(2), and its prohibition against " 'compel[ling]' others to discriminate in ways that will violate the Human Rights Law" under N.Y. Exec. Law § 296(6). (OAG Ltr. at 2.) The OAG further argues that the Executive Order violates the New York Civil Rights Law, which provides that "no person shall be subjected to any discrimination in [their] civil rights" based on "sex ... [or] gender expression or identity," N.Y. Civ. Rts. Law § 40-c, as well as the Equal Protection Clause of the New York State Constitution. (OAG Ltr. at 2–3.)

Rather than respond to the letter, Plaintiffs filed suit in this Court on March 5, 2024. (*See* Compl.) The Complaint pleads a single cause of action alleging that the OAG's March 1, 2024 letter, as well as any other actions by Defendants "to prevent enforcement of" the Executive Order, violates the rights of "biological girls and women" under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶¶ 33–43.) Plaintiffs bring this claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, but do not cite 42 U.S.C. § 1983 ("Section 1983") or any other basis for the cause of action. (*Id.*) The Complaint alleges that the Executive Order advances the important government interest of "ensuring equality in women's athletics," and that the OAG's position "effectively vitiates biological females' right to equal opportunities in athletics as well as the right to a safe playing field by exposing biological females to the risk of injury by transgender women (i.e., biological males) as well as unfair competitive advantage." (*Id.* ¶¶ 29, 38.) It alleges that the New York Human Rights Law "is unconstitutional" as applied to the Executive Order because it purportedly "elevates transgender women to a level not recognized by Federal law in the athletics context all to the detriment of biological girls and women." (*Id.* ¶ 40.) Plaintiffs seek relief in the form of: (1) a declaration that Defendants' application of the New York Human Rights Law against the Executive Order violates the Equal Protection Clause;[7] (2) a declaration that the Executive Order "is valid under the United States Constitution, Federal law, and state law"; (3) a permanent injunction preventing "Defendants from taking any action to prevent" the County Plaintiffs "from implementing and enforcing" the Executive Order; and (4) costs, disbursements, reasonable attorney fees, and any further relief. (Compl. at 12.)

***5** On March 7, 2024, the County Plaintiffs filed the TRO/PI Motion (ECF No. 10), seeking to bar Defendants from "taking further action" relating to the Executive Order, including by "initiating any legal proceedings and/or actions" against the County Plaintiffs. (Cnty. Pls.' Br. at 27; TRO/PI Mot. at 2.) The County Plaintiffs' supporting brief also requests an order "staying AG James' demand for document production ... and declaring [the Executive Order] valid under the U.S. Constitution, Federal Law, and State Law." (Cnty. Pls.' Br. at 5.)[8] Blakeman attests that, without immediate injunctive relief, Nassau County "will suffer immediate and irreparable injury, loss, and damage in that women and girls in Nassau County will be discriminated against and their constitutional rights under the United States Constitution will be violated." (Blakeman Aff. ¶ 3, ECF No. 10-4.) According to Blakeman, without the Executive Order:

> [W]omen and girls will not receive equal and fair opportunities to obtain recognition and accolades, college scholarships, and numerous other long-term benefits that result from participating and competing in athletic endeavors; women and girls will not have access to a supportive and safe environment for the purpose of engaging in sports; and biological males will have an unfair advantage over women and girls in sports.

(*Id.* ¶ 4.)

The Court permitted Defendants and the Individual Plaintiffs to respond to the County Plaintiffs' TRO/PI Motion by March 22, 2024. (Elec. Order, Mar. 23, 2024.) Defendants opposed the Motion (Defs.' Br.), but the Individual Plaintiffs did not provide a brief or factual submissions addressing any position on the Motion (*see* Elec. Order, Mar. 23, 2024). The Court further permitted the County Plaintiffs the opportunity to submit a reply brief addressing the arguments raised in Defendants' opposition brief by March 28, 2024. (*Id.*; Elec. Order, Mar. 26, 2024.) The County Plaintiffs filed a timely reply. (Cnty. Pls.' Reply, ECF No. 21.)

The County Plaintiffs have not provided any factual submissions addressing how the Executive Order is implemented in practice. Their brief asserts that permit applicants must "merely indicate whether said [athletic] competition is male, female, or coed and ... supply a copy of the applicants['] 'athlete participation policy.' " (Cnty. Pls.' Br. at 6.) The "athlete participation policy" has not been introduced into evidence; nor have the County Plaintiffs provided any sworn statements about what information applicants must provide on this document to ensure compliance with the terms of the Executive Order or how applicants procure that information from their participants. The record is further silent as to whether any athletic/sports entity has applied for a permit to use Nassau County Parks property since the enactment of the Executive Order. The County Plaintiffs' brief asserts that "[n]o permit has been denied since the County's Executive Order was executed." (*Id.*)

VENUE AND JURISDICTION

Venue is proper under 28 U.S.C. § 1391(b)(2) because, as described above, a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

There is no dispute that this Court has personal jurisdiction over Defendants. New York State and the OAG are clearly state entities and James is sued in her role as NY Attorney General—a state official.

Plaintiffs assert that this Court has federal question jurisdiction over Plaintiffs' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Fourteenth Amendment pursuant to 18 U.S.C. § 1331. (Compl. ¶¶ 12, 34–35.) Defendants challenge Plaintiffs' standing to bring this claim under Article III of the U.S. Constitution. (Defs.' Br. at 13–14.) "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 283 (2d Cir. 2023) (quotation marks omitted). As discussed in detail below, this Court lacks subject matter jurisdiction because Plaintiffs lack standing to bring the sole claim pled in the Complaint (Compl. ¶¶ 33–34). *Bohnak*, 79 F.4th at 283; *see infra*, Section I.C.

STANDARD OF REVIEW

***6** The Second Circuit has long established that a party seeking a preliminary injunction must show three things: (1) irreparable harm in the absence of an injunction pending resolution of the action, (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party, and (3) that a preliminary injunction is in the public interest. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n*, 883 F.3d 32, 37 (2d Cir. 2018). The Second Circuit has "consistently applied the likelihood-of-success standard to cases challenging government actions taken in the public interest pursuant to a statutory or regulatory scheme," in lieu of the lower standard requiring a showing only of serious questions on the merits and a balance of hardships decidedly favoring the moving party. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 279 n.13 (2d Cir. 2021), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021); *N. Am. Soccer League*, 883 F.3d at 37; *see, e.g.*, *Gazzola v. Hochul*, 88 F.4th 186, 194 (2d Cir. 2023) (requiring showing of a likelihood of success on the merits on preliminary injunction motion against New York commercial regulations on firearms and ammunition sales and related state licensing scheme and background-check and training requirements), *petition for cert. filed*, No. 23-995 (Mar. 12, 2024). Courts apply the same standard when considering an application for a TRO. *See e.g.*, *Dukes v. Cold Spring Harbor Cent. Sch. Dist. Bd. of Educ.*, No.

20CV4532JMAST, 2021 WL 308341, at *4 (E.D.N.Y. Jan. 29, 2021); *Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932 (PAC), 2021 WL 8200607, at *1 (S.D.N.Y. Jan. 8, 2021).

The Second Circuit has made clear that when a party seeks "mandatory" rather than "prohibitory" preliminary relief, "the likelihood-of-success and irreparable-harm requirements become more demanding still, requiring that the plaintiff show a *clear or substantial* likelihood of success on the merits and make a *strong showing* of irreparable harm." *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, No. 23-690, 2024 WL 1145347, at *3 (2d Cir. Mar. 18, 2024) (citing *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015)) (quotation marks and citations omitted). A mandatory temporary restraining order typically requires the non-movant to take some action, whereas a prohibitory temporary restraining order "typically requires the non-movant to refrain from taking some action." *Id.* "This higher standard is particularly appropriate when a plaintiff seeks a preliminary injunction against a government body ...." *Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) (citations omitted); *see also C.C. v. New York City Dep't of Educ.*, No. 22-0459, 2023 WL 2545665, at *2 (2d Cir. Mar. 17, 2023) (recognizing that this higher standard applies to a request for a mandatory injunction against governmental action) (citing *Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021)). Determining whether requested preliminary relief is mandatory or prohibitory "is sometimes unclear":

> In borderline cases, essentially identical injunctions can be phrased either in mandatory or prohibitory terms. We have therefore explained that [p]rohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it. In this context, the status quo is really the status quo *ante* – that is, the last actual, peaceable[,] uncontested status which preceded the pending controversy.

Daileader, 2024 WL 1145347, at *3 (citing *N. Am. Soccer League*, 883 F.3d at 36 n.4, 37 n.5) (quotation marks and citations omitted).

The County Plaintiffs contend, without explanation, that they may secure a temporary restraining order by meeting the lowest standard, which requires showing only "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor." (Cnty. Pls.' Br. at 23.) Defendants argue that the highest standard applicable to mandatory injunctions—requiring a showing of a "clear or substantial likelihood of success on the merits"—applies because the requested relief "will affect government action taken in the public interest pursuant to a statutory or regulatory scheme." (Defs.' Br. at 6.) Defendants do not explicitly address, however, whether the requested preliminary relief is mandatory or prohibitory in nature.

***7** The lesser "serious questions" standard is inapplicable here because the requested temporary restraining order will affect the OAG and James' enforcement of the New York Human Rights Law, which constitutes "government action taken in the public interest pursuant to a statutory or regulatory scheme." *We the Patriots USA, Inc.*, 17 F.4th at 279 n.13; *see* N.Y. Exec. Law § 292 *et seq.*; *id.* § 63(1). The Court does not resolve at this time, however, whether the TRO/PI Motion seeks mandatory or prohibitory relief. The status quo *ante*—the last actual, peaceable, uncontested status that preceded the pending controversy—was shortly after Blakeman issued the Executive Order and before the OAG issued the March 1, 2024 letter calling for the Executive Order's rescission and requesting the documents supporting its issuance. At that time, James and the OAG could exercise discretion under New York law to bring an enforcement action against the County Plaintiffs under the New York Human Rights Law. *See* N.Y. Exec. Law § 63(1). On the one hand, the County Plaintiffs' requested temporary restraining order is prohibitory because it would require the "non-movant to refrain from taking some action"—here, OAG and James' action to enforce state anti-discrimination laws. *Daileader*, 2024 WL 1145347, at *3. On the other hand, the requested temporary restraining order is mandatory because it would upend the status quo in which the New York Legislature has granted the NY Attorney General broad discretion to enforce the state's anti-discrimination laws. *See* N.Y. Exec. Law § 63. There is an additional question about whether the requested order may "provide the movant with substantially all the relief sought" and whether "that relief cannot be undone even if the defendant prevails at a trial on the merits," factors that weigh in favor of framing the requested TRO as mandatory. *Yang v. Kosinski*, 960 F.3d 119, 127–28 (2d Cir. 2020).

The Court need not resolve these questions at this time because, as explained in this opinion, the County Plaintiffs fail to meet the lower "likelihood of success on the merits" standard applied to a motion for a temporary restraining order seeking prohibitory relief against government actions taken in the public interest pursuant to a statutory or regulatory scheme. *See, e.g.*, *We the Patriots USA, Inc.*, 17 F.4th at 279; *Gazzola*, 88 F.4th at 194.

DISCUSSION

The County Plaintiffs fail to meet the standard for securing the "extraordinary remedy" of a temporary restraining order for two principal reasons. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) ("[A] preliminary injunction is an extraordinary remedy never awarded as of right.") (quotation marks omitted); *Gazzola*, 88 F.4th at 193–94 (same). First and foremost, the County Plaintiffs' TRO Motion fails to demonstrate a likelihood of success on the merits of the sole equal protection claim pled in the Complaint. Based on the record before the Court, the claim is nonjusticiable under the doctrine of Eleventh Amendment sovereign immunity, the application of Rule 17(b) and New York's capacity-to-sue rule, and the requirements of Article III standing. Second, the County Plaintiffs' submissions fail to show that they will suffer irreparable harm without the requested temporary restraining order.

I. Likelihood of Success on the Merits

The Plaintiffs' single claim for declaratory and injunctive relief under the Equal Protection Clause suffers from defects that render it nonjusticiable. The Eleventh Amendment affords New York and the OAG sovereign immunity from Plaintiffs' claim for injunctive and declaratory relief and bars any claim for retrospective declaratory relief against James. Additionally, the County Plaintiffs lack the capacity to sue all Defendants under Rule 17(b), Fed. R. Civ. P., and New York law. Furthermore, the record does not establish that any of the Plaintiffs—whether Nassau County, Blakeman, or the Individual Plaintiffs—have demonstrated an actual and imminent injury that is concrete and particularized as required for Article III standing to bring the equal protection claim pled in the Complaint.

A. Eleventh Amendment Sovereign Immunity

Defendants argue that the Eleventh Amendment bars Plaintiffs' claim for injunctive and declaratory relief against New York and the OAG, as well as any claim for "retroactive relief" against James for conduct taken in her official capacity as the NY Attorney General. (Defs.' Br. at 8–9.) The County Plaintiffs fail to address the Eleventh Amendment in their opening brief and to respond to any of Defendants' arguments in their reply brief in support of the TRO Motion. (*See generally* Defs.' Br. at 8–9; Cnty. Pls.' Reply.) Defendants are correct. The Eleventh Amendment bars almost all aspects of Plaintiffs' equal protection claim, with the sole exception of an equal protection claim for injunctive and prospective declaratory relief against James in her official capacity as the NY Attorney General.[9]

***8** The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Though not set forth in the text, the Eleventh Amendment also bars "suits in federal court against a state brought by that state's own citizens." *Mary Jo C. v. New York State & Loc. Ret. Sys.*, 707 F.3d 144, 151 (2d Cir. 2013). Eleventh Amendment sovereign immunity also applies to suits by a municipality—such as Nassau County—against a state. *See Monroe Cnty. v. State of Fla.*, 678 F.2d 1124, 1131 (2d Cir. 1982) (holding that a New York county bringing suit against Florida is a "Citizen of another State" within the meaning of the Eleventh Amendment), *cert. denied*, 459 U.S. 1104 (1983); *see also Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (holding that the Eleventh Amendment bars a county's cross-claim against New York for indemnification), *reh'g denied*, 471 U.S. 1062 (1985). Eleventh Amendment sovereign immunity applies not just to lawsuits filed in federal court against states themselves, but also to "certain actions against state agents and instrumentalities." *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)); *see also Mary Jo C.*, 707 F.3d at 151–52 (same). An entity "asserting Eleventh Amendment immunity ... bear[s] the burden of demonstrating entitlement." *Leitner*, 779 F.3d at 134. "[T]he question is whether the state instrumentality is independent or whether it is an 'arm of the state.' " *Id.*; *see, e.g.*, *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009) (holding that the New York State Unified Court System is an "arm of the State" entitled to Eleventh Amendment sovereign immunity). The Second Circuit has applied two different tests to answer this question. *Leitner*, 779 F.3d at 134–35, 137.[10] Both tests are ultimately guided by what the Supreme Court has recognized are the Eleventh Amendment's "twin reasons for being": the need to "preserv[e] the state's treasury and protect[ ] the integrity of the state." *Id.* at 134 (citing *Hess v. PATH*, 513 U.S. 30, 47–48 (1994)).

Entities shielded from suit by the Eleventh Amendment "may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogate[d] the states' Eleventh Amendment immunity

when acting pursuant to its authority under Section 5 of the Fourteenth Amendment." *Gollomp*, 568 F.3d at 366 (quotation marks omitted). The Eleventh Amendment thus "generally bars suits in federal court" against "non-consenting states." *Leitner*, 779 F.3d at 134. This bar applies to federal court suits against a state and its agents and instrumentalities "regardless of the nature of the relief sought." *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023), *cert. denied*, No. 22-1130, 2024 WL 674658 (U.S. Feb. 20, 2024); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984) ("[I]f a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting *any relief* on that claim.") (emphasis supplied). Accordingly, states and their agents and instrumentalities are immune from suits seeking monetary damages and injunctive relief, *McGinty v. New York*, 251 F.3d 84, 91 (2d Cir. 2001) (citations omitted), as well as declaratory relief, *Ashmore v. Prus*, 510 F. App'x 47, 48 (2d Cir. 2013) (citing *Pennhurst*, 465 U.S. at 100–01); *Manners v. New York*, 175 F.3d 1008, 1999 WL 96136 at *1 (2d Cir. 1999) (summary order) (citing *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993)).

***9** Notwithstanding the Eleventh Amendment's bar to federal court suits against states and their agents and instrumentalities, a plaintiff may sue a state official acting in their official capacity "for prospective, injunctive relief from violations of federal law" under the doctrine established by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908). *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 94 (2d Cir. 2007). The *Ex parte Young* exception applies to a claim against a state official when the "complaint (a) alleges an ongoing violation of federal law and (b) seeks relief properly characterized as prospective." *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (citing *Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)) (quotation marks omitted). The *Ex parte Young* exception does not apply if a plaintiff seeks declaratory relief that "would have the same effect as an award of damages against the state." *Williams v. Marinelli*, 987 F.3d 188, 197 (2d Cir. 2021) (citing *Green v. Mansour*, 474 U.S. 64, 73 (1985)); *see also Bythewood v. New York*, No. 22-2542-CV, 2023 WL 6152796, at *1 (2d Cir. Sept. 21, 2023) ("Retrospective declaratory relief cannot otherwise serve as an end run around the Eleventh Amendment's bar on retrospective awards of monetary relief.") (citing *Ward v. Thomas*, 207 F.3d 114, 120 (2d Cir. 2000)) (quotation marks omitted).

1) Plaintiffs' Claim against New York and the OAG

The Eleventh Amendment precludes Plaintiffs' claim against New York and the OAG because New York has not waived its Eleventh Amendment immunity to claims brought under the Fourteenth Amendment's Equal Protection Clause and Congress has not abrogated that immunity. *Gollomp*, 568 F.3d at 366; *Barone v. Laws.' Fund for Client Prot.*, 2023 WL 1975783, at *2 (2d Cir. 2023).

First, the Eleventh Amendment applies to both New York and the OAG. As one of the "United States," New York is squarely covered by the plain text of the Eleventh Amendment. U.S. Const. Amend. XI. The OAG also falls within the Amendment's reach because it "is unquestionably an arm of the State of New York for purposes of Eleventh Amendment immunity." *Giordani v. U.S. Dep't of Just.*, No. 22-CV-642 (AMD) (LB), 2022 WL 17488494, at *6 (E.D.N.Y. Dec. 7, 2022) (citation omitted), *appeal dismissed* (Nov. 6, 2023); *see also Butler v. New York State Dep't of L.*, 211 F.3d 739, 746 (2d Cir. 2000) (affirming dismissal of employment discrimination claim against the OAG (referred to as the "New York State Department of Law") as barred by Eleventh Amendment sovereign immunity); *Mitchell v. New York*, No. 23-705, 2024 WL 319106, at *2 (2d Cir. Jan. 29, 2024) (holding that "no relief, either legal or equitable, is available against ... the New York Attorney General" because it is entitled to Eleventh Amendment immunity); *Smith v. United States*, 554 F. App'x 30, 31 (2d Cir. 2013) (affirming district court's dismissal of a suit against New York and the NY Attorney General as barred by the Eleventh Amendment); *Petreykov v. Vacco*, 159 F.3d 1347 (2d Cir. 1998) (same); *Rivera v. United States Citizenship & Immigr. Servs.*, No. 19-CV-3101, 2020 WL 4705220, at *9 (S.D.N.Y. Aug. 12, 2020) (collecting district court decisions holding that the Eleventh Amendment bars claims against the OAG).[11]

***10** Second, Congress has not abrogated the States' Eleventh Amendment immunity as to Plaintiffs' Fourteenth Amendment claim. The Complaint appears to assert a claim under the Declaratory Judgment Act and the Fourteenth Amendment's Equal Protection Clause without identifying a valid cause of action under which Plaintiffs bring this claim. (*See generally* Compl.)[12] Even if the Court were to liberally construe the Complaint to assert a Fourteenth Amendment claim pursuant to 42 U.S.C. § 1983, it is well established that "Congress did not abrogate the state's Eleventh Amendment

immunity by enacting 42 U.S.C. § 1983." *Barone*, 2023 WL 1975783, at *2 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)).

Third, there is no indication that New York has waived its immunity by "voluntarily invok[ing] federal court jurisdiction, or else ... mak[ing] a clear declaration that it intends to submit itself to federal court jurisdiction." *Kelly v. New York State Unified Ct. Sys.*, No. 21-1633, 2022 WL 1210665, at *2 (2d Cir. Apr. 25, 2022) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999)) (brackets omitted); *see also, e.g.*, *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 37–38 (2d Cir. 1977) (finding that clause in interstate charter permitting New York to "sue and be sued," was not a clear declaration that New York intended to waive sovereign immunity).

Fourth, the Eleventh Amendment applies to the injunctive and declaratory relief Plaintiffs seek through their equal protection claim against New York and the OAG, as well as the specific relief they seek on the TRO/PI Motion. Plaintiffs' requests for a temporary restraining order, preliminary injunction, and permanent injunction all include requests for injunctive relief that is squarely barred by the Eleventh Amendment. *See McGinty*, 251 F.3d at 91 (holding that the Eleventh Amendment bars claims for "injunctive relief" against nonconsenting states).[13] Plaintiffs' request for a declaration that Defendants' application of the New York Human Rights Law to the Executive Order violates the Fourteenth Amendment and a declaration that the Executive Order is lawful under federal and state law concern declaratory relief that is also barred by the Eleventh Amendment. *See Ashmore*, 510 F. App'x at 48; *Manners*, 1999 WL 96136 at *1.

***11** Accordingly, Plaintiffs' equal protection claim for declaratory and injunctive relief against Defendants New York and the OAG are barred by Eleventh Amendment sovereign immunity.

2) Claims against Defendant James, in her Capacity as NY Attorney General

Defendants argue that any claims for "retroactive relief" against Defendant James acting in her official capacity are also barred by Eleventh Amendment sovereign immunity. (Defs.' Br. at 9.) This raises the question of whether any part of Plaintiffs' claim against James withstands Defendants' invocation of immunity.

The Complaint by its caption sues James "as attorney General of the State of New York" and its allegations solely address conduct by James' staff at the OAG, both of which suggest that Plaintiffs sue James only in her official capacity, rather than in her individual capacity. (*See* Compl. at 1.) The Complaint's request for a declaration that Defendants' application of the New York Human Rights Law to the Executive Order violates the Equal Protection Clause could be construed to include a request for a declaration that the OAG's March 1, 2024 letter violated the Equal Protection Clause. (*See* Compl. ¶ 41 (alleging that "[i]n fact, the cease-and-desist order violates the constitutional rights of biologically [sic] girls and women who are a federally recognized protected class")). The Eleventh Amendment bars this demand for retrospective declaratory relief against James in her official capacity. *Williams*, 987 F.3d at 197; *Green*, 474 U.S. at 73; *Bythewood*, 2023 WL 6152796, at *1.

At least a portion of the requested declaratory relief pled against James, however, is forward looking. That portion seeks to establish that the Executive Order is lawful going forward and that the New York Human Rights Law's provisions prohibiting discrimination on the bases of sex and gender identity and expression are invalid. These aspects of Plaintiffs' declaratory relief claim against James, as well as the request for an injunction barring James from taking any action to prevent implementation of the Executive Order, fall within the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. *See Seneca Nation*, 58 F.4th at 672 n.39; *Rowland*, 494 F.3d at 95–98. As discussed below, however, those aspects of Plaintiffs' declaratory relief claim against James are nonjusticiable for other reasons.

B. The County Plaintiffs' Capacity to Sue

Defendants argue that both Nassau County and Blakeman, who sues in his official capacity as the Nassau County Executive, lack the capacity to sue Defendants for the equal protection claim pled in the Complaint.

Rule 17(b) of the Federal Rules of Civil Procedure governs the capacity of an entity to bring a claim in federal court. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 136 (E.D.N.Y. 2013), *aff'd* 868 F.3d 104 (2d Cir. 2017). "Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing." *Sonterra Cap. Master Fund, Ltd. v. Barclays*

Bank PLC, 403 F. Supp. 3d 257, 267 (S.D.N.Y. 2019). As relevant here, the "[c]apacity to sue or be sued is determined ... by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3); *Orraca v. City of New York*, 897 F. Supp. 148, 152 (S.D.N.Y. 1995) (noting that under Rule 17(b), "the capacity of a governmental entity to sue or be sued is a question of state law"); *see, e.g.*, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58, 63–64 (2d Cir. 2017) (applying New York law to determine whether a public benefit corporation had the capacity to challenge a New York claim-revival statute under the New York Constitution). "[A] party must maintain its capacity to sue throughout litigation, and lack of capacity is grounds for dismissal." *Sonterra*, 403 F. Supp. 3d at 267 (quotation marks and citation omitted). If not raised by motion, a defense of lack of capacity to sue "can be waived." *City of New York v. State of New York*, 86 N.Y.2d 286, 292 (1995).

***12** New York follows the "traditional" capacity-to-sue rule, according to which "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York*, 86 N.Y.2d at 289; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63. This rule "flows" from the recognition that "municipal corporate bodies—counties, towns and school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York*, 86 N.Y.2d at 289. The Second Circuit has recognized that "[t]his rule is also a necessary outgrowth of separation of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63 (citing *City of New York*, 86 N.Y.2d at 296). Thus, New York counties "cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants." *City of New York*, 86 N.Y.2d at 290. "Municipal officials ... suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent." *Id.* at 291.[14]

The New York Court of Appeals recognizes only four limited exceptions to the general rule that municipal corporate entities and their officers lack capacity to mount constitutional challenges to State action and legislation:

> (1) [where there is] an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and (4) where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.

City of New York, 86 N.Y.2d at 291–92 (quotation marks and citations omitted); *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d at 63–64. The New York Court of Appeals has emphasized that these four exceptions are "narrow." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 387 (2017). Thus, the capacity-to-sue rule has been applied to bar:

> public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village operated hospital's operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, laws mandating that counties make certain expenditures, state land use regulations and state laws requiring electronic voting systems to be installed at polling places in lieu of lever-operated machines.

Id. (citations to New York Court of Appeals decisions omitted).

Defendants have timely raised the County Plaintiffs' lack of capacity to sue in their opposition to the TRO/PI Motion and in a timely filed Motion to Dismiss the Complaint. (*See* Defs.' Br. at 9; Defs.' Mem. Supp. Mot. Dismiss at 9, ECF No. 20-1.) Under well-established New York law, both Nassau County and Blakeman lack the capacity to sue Defendants for the sole claim pled in the Complaint. Plaintiffs explicitly seek a ruling from this Court that Defendants violate the rights of women and girl athletes to equal protection by applying state anti-discrimination laws to the Executive Order. (Compl. ¶¶ 35–41; *id.* at 12.) Blakeman attests that he and Nassau County bring this suit to vindicate the rights of women and girls in Nassau County. (Blakeman Aff. ¶¶ 3–4.) As a subdivision and creation of Defendant New York, Nassau County lacks the authority to bring such a claim "contest[ing] the actions of [its] principal or creator affecting [it] in [its] governmental capacity or as representatives of [its] inhabitants." *City of New York*, 86 N.Y.2d at 290. Because Blakeman sues in his role as Nassau County's top official, he too lacks the authority to

bring such a claim. *See id.* at 291 ("Municipal officials ... suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent.").

***13** The County Plaintiffs fail to show that any of the four limited exceptions to New York's capacity-to-sue rule apply to their claim. First, they do not identify any express statutory language or legislative history showing that the New York Legislature intended to confer upon a county or a county executive the capacity to sue Defendants under the Fourteenth Amendment for any type of relief, much less the specific relief sought in the Complaint. *See e.g.*, *City of New York*, 86 N.Y.2d at 289 (holding that the New York capacity-to-sue doctrine barred an equal protection claim by New York City, its Mayor, and other city entities against New York State and "various State officials" for public school funding issues where there was no "any express statutory language or legislative history" showing "capacity to bring suit challenging State legislation").[15]

This case does not trigger the second exception to New York's capacity-to-sue rule because the Plaintiffs do not show that the challenged provisions of the New York Human Rights Law adversely affect Nassau County's "proprietary interest in a specific fund of moneys." *City of New York*, 86 N.Y.2d at 287. There is no argument, much less a showing, that Plaintiffs' claims concern any Nassau County proprietary interest in any monetary fund.

The County Plaintiffs argue that the third exception to New York's capacity-to-sue rule—the "home rule" exception—applies to their Fourteenth Amendment equal protection claim because the New York Constitution's home rule provision "provides protections to local governments more extensive than those in many other states," the "laws enacted and adopted by the Nassau County Legislature carry the weight of state law," and that body delegated to the County Executive the authority to develop policies and procedures for the issuance of permits to use Nassau County Park property. (Cnty. Pls.' Reply at 2–3.) This argument is unpersuasive.

The New York Court of Appeals first recognized the home rule exception in *Town of Black Brook v. State*, 41 N.Y.2d 486 (1977), finding "a limited exception" to the rule that a municipality cannot attack "state legislative action affecting its powers" where the "local government's claim is based on one of the [home rule] protections of article IX [of the New York Constitution]." *Id.* at 487–89. This "limited exception" applies only to a municipality's claim that a state statute violates Article IX of the New York Constitution. *See id.* at 489 (noting that the home rule exception applies "when a home rule challenge is brought"); *New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 758 (2011) (affirming the lower court's ruling "that the municipal petitioners lack capacity to sue on all claims other than that alleging a violation of their home rule powers" under "article IX of the N.Y. Constitution"), *appeal dismissed* 17 N.Y.3d 947 (2011), *lv. denied* 18 N.Y.3d 806 (2012); *Town of Verona v. Cuomo*, 136 A.D.3d 36, 41 (2015) (noting that the home rule exception "applies when a municipality's claim is based upon a violation of its home rule powers").[16]

***14** Here, the home rule exception does not apply because the Complaint does not plead a claim that the New York Human Rights law, as applied to the Executive Order, violates the home rule provision of the New York Constitution. *See New York Blue Line Council*, 86 A.D.3d at 759 (2011) (applying the home rule exception to hold that municipal entities only had capacity to sue state agency under article IX of the N.Y. Constitution, but not to bring other claims); *Town of Black Brook*, 41 N.Y.2d at 489 (the home rule exception applies "when a home rule challenge is brought"). The sole claim set forth in the Complaint concerns an alleged violation of the Equal Protection Clause and the Declaratory Judgment Act. (Compl. ¶¶ 33–43.) Without providing any legal authority, the County Plaintiffs appear to argue that the home rule exception permits a municipality and a municipal official to sue state defendants for claims *other than* an alleged violation of the home rule protections of article IX of the New York Constitution. (*See* Reply Br. at 2–3). This Court will not expand the home rule exception beyond the contours laid out by New York courts. Based on the record before the Court, the home rule exception is inapplicable to this case and the County Plaintiffs lack capacity to sue Defendants for violation of the Fourteenth Amendment's Equal Protection Clause and the Declaratory Judgment Act.

Finally, the fourth exception to the New York capacity-to-sue rule, which the County Plaintiffs invoke on reply, does not apply. (*Id.*) The record does not establish that any action by Defendants to enforce the New York Human Rights Law against the Executive Order would compel either Nassau County or Blakeman "to violate a constitutional proscription." *City of New York*, 86 N.Y.2d at 292. "New York courts have interpreted constitutional ... proscriptions to be something expressly forbidden ...." *Merola v. Cuomo*, 427 F. Supp. 3d 286, 292 (2019). The County Plaintiffs broadly argue that rescission of the Executive Order would "allow[ ]

transgender females (biological males) to play sports with biological females, thereby violating the constitutional rights of women as a protected class" and that rescission of the Executive Order would "violate the rights afforded to [women] by Title IX." (Cnty. Pls.' Reply at 2.) The County Plaintiffs' claim that rescission of the Executive Order would lead to Title IX violations is confusing and out of place because that statute applies to educational institutions, and the County Plaintiffs concede that Title IX does not apply to any sporting and athletic endeavors on Nassau County Parks property. (Cnty. Pls.' Br. at 7 n.1.) The County Plaintiffs' assertion that invalidation of the Executive Order would compel them to violate the equal protection rights of women and girls is also unpersuasive. There is no record evidence that the County Plaintiffs would be forced to violate the Equal Protection Clause's prohibition against intentional discrimination with respect to any individual or group if Nassau County were to revert to the procedures in place prior to enactment of the Executive Order for evaluating and granting permits to use Nassau County Parks facilities. *See Howard v. City of New York*, 602 F. App'x 545, 547 (2d Cir. 2015) ("[T]he Equal Protection Clause[ ] only prohibits intentional ... discrimination.") (quoting *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000)). Indeed, the County Plaintiffs' argument suggests that prior to the Executive Order's enactment, the County Plaintiffs were violating the rights of women and girls by not having such a permitting process in place.

C. Standing

Plaintiffs' equal protection claim boils down to the argument that the OAG's application of the New York Human Rights Law's prohibitions against discrimination on the bases of gender identity and expression to the Executive Order will cause violations of women and girls' rights under the Equal Protection Clause of the Fourteenth Amendment. (*See* Compl. ¶¶ 33–43.) Based on this claim, Plaintiffs seek a declaration that those provisions of the New York Human Rights Law are unconstitutional as applied to the Executive Order and that the Executive Order complies with federal and state law, and an injunction barring New York, the OAG, and James in her role as NY Attorney General, from taking any enforcement action that might lead to invalidation of the Executive Order. (*Id.* at 12.) The Court lacks jurisdiction over this claim under Article III of the Constitution because none of the Plaintiffs have standing to bring it.

***15** Article III of the Constitution "limits the federal judicial power to deciding 'Cases' and 'Controversies.' " *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 45 (2d Cir. 2023) (citing U.S. Const. art. III § 2). A case or controversy only exists when the plaintiff has "standing" to sue because they have "a personal stake in the outcome of the litigation." *Id.* (citing *United States v. Texas*, 599 U.S. 670 (2023)) (quotation marks omitted). In order to establish Article III standing, a plaintiff must show: "(1) that they suffered an injury in fact, (2) that the injury is fairly traceable to Defendants' challenged conduct, and (3) that the injury is likely to be redressed by a favorable judicial decision." *Id.* (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)) (quotation marks omitted). A "plaintiff[ ] must demonstrate standing for each claim that they press and for each form of relief that they seek." *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021)). When seeking the extraordinary relief of a temporary restraining order or preliminary injunction, a plaintiff's burden to demonstrate standing "will normally be no less than that required on a motion for summary judgment." *Do No Harm v. Pfizer Inc.*, No. 23-15, 2024 WL 949506, at *7 (2d Cir. Mar. 6, 2024) (citing *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011)). Accordingly, a plaintiff seeking such extraordinary relief "cannot rest on such mere allegations as would be appropriate at the pleading stage but must set forth by affidavit or other evidence specific facts" to establish injury-in-fact, redressability, and standing. *Id.* (citing *Cacchillo*, 638 F.3d at 404); *see also Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. New York State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78–79 (2d Cir. 2021) (same); *Pers. v. United States*, No. 19 CIV. 154 (LGS), 2019 WL 258095, at *1 n.2 (S.D.N.Y. Jan. 18, 2019) (applying the same rule "in the context of a temporary restraining order, since the legal standard for granting temporary restraining orders and preliminary injunctions is the same").

In order to demonstrate an "injury in fact," a plaintiff must establish "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted); *see also Soule*, 90 F.4th at 45, 50 (citing *TransUnion*, 594 U.S. at 423). To be "concrete," an injury must be "real, and not abstract." *Id.* at 45. An injury is "particularized" only when it "affect[s] the plaintiff in a personal and individual way." *Id.* at 45–46 (citing *Spokeo*, 578 U.S. at 339). Lastly, an injury is "actual or imminent" where the injury "has actually happened or is certainly impending." *Id.* at 46, 50 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S.

398, 409 (2013), and then citing *Lujan*, 504 U.S. at 560–61) (quotation marks omitted).

Under these standards, the County Plaintiffs' submissions fail to establish that any Plaintiff—Nassau County, Blakeman, or K.E.M., whose claim is brought by the Mullens—have the required injury-in-fact for standing to bring a claim for the requested relief against Defendants. (Compl. at 12.)

1) County Plaintiffs

The County Plaintiffs' submissions fail to show they have standing for two reasons. First, in the Second Circuit, it is well established that a county lacks standing to challenge the constitutionality of a state statute under the Fourteenth Amendment. Blakeman does not demonstrate that he meets any exception to this rule for county officials who bring a legal claim in their official capacity. Second, the County Plaintiffs fail to show that they have any constitutional interest implicated by an OAG enforcement action against them related to the Executive Order. Even if an OAG enforcement action implicated the constitutional interest of third-parties —such as women and girls in Nassau County—the County Plaintiffs lack standing to assert an equal protection claim on behalf of these third-parties.

a. Standing to Challenge the Constitutionality of the New York Human Rights Law

The County Plaintiffs lack standing to bring the equal protection claim pled in the Complaint. (*See* Compl. ¶¶ 33–43.) The Second Circuit has squarely held that "a political subdivision" of a state, such as a county, "does not have standing to sue its state under the Fourteenth Amendment." *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 n.7 (2d Cir. 2019). "Political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) (citations omitted); *see also Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973).[17] Accordingly, under longstanding Second Circuit precedent, Nassau County, as a political subdivision of New York, does not have standing to bring a claim for injunctive and declaratory relief against any of the Defendants to challenge the OAG's application of the New York Human Rights Law to the Executive Order under the Fourteenth Amendment's Equal Protection Clause. *See Tweed*, 930 F.3d at 73 n.7.[18]

***16** The Second Circuit has recognized a limited theory of standing—the so-called "dilemma" theory—where, unlike a municipal corporation, a municipal official acting in their official capacity may have standing to challenge a state statute under the Fourteenth Amendment in certain circumstances. *See Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. New York State Tchrs. Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995) (citing *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968)). The county official must demonstrate that "compliance with state law will require them to violate their oaths to act constitutionally" and "that their positions as officials or funding for [their governmental entity] is in jeopardy if they refuse" to comply. *New York State Tchrs. Ret. Sys.*, 60 F.3d at 110–112 (finding that county officials who did not make such allegations lacked standing to bring Fourteenth Amendment and Contracts Clause claims against a state statute under the dilemma theory); *see also Merola v. Cuomo*, 427 F. Supp. 3d 286, 290–91 (N.D.N.Y. 2019).

Blakeman has failed to make the required showing. The County Plaintiffs have not set forth any evidence that an OAG enforcement action against them or even the eventual invalidation of the Executive Order would require Blakeman to violate his oath to act in accordance with the U.S. Constitution. Further, the County Plaintiffs have not submitted evidence showing that Blakeman's failure to comply with the New York Human Rights Law would likely result in the loss of his position as County Executive or a reduction in funding for Nassau County. Without evidence as to any "realistic threat of harm" to Blakeman if the OAG were to prevail on its theory that the Executive Order violates the New York Human Rights Law's prohibitions against discrimination on the bases of sex and gender identity and expression, the County Plaintiffs fail to establish any dilemma that could support Blakeman's standing to bring the Fourteenth Amendment claim pled in the Complaint. *New York State Tchrs. Ret. Sys.*, 60 F.3d at 112.

b. Standing to Bring a Pre-Enforcement Challenge

Finally, the County Plaintiffs' submissions fail to establish their standing to bring a pre-enforcement equal protection claim challenging Defendants' application of the New York Human Rights Law to the Executive Order. The OAG has not initiated any legal action against Nassau County related to the

Executive Order, although the March 1, 2024 letter conveys a demand that the County Plaintiffs rescind the Executive Order and produce the documentary record supporting its issuance or face "further legal action by the OAG." (OAG Ltr. at 3). For standing to bring a pre-enforcement challenge, a plaintiff must show a "sufficiently imminent" injury-in-fact by demonstrating (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and (2) that there exists "a credible threat of prosecution thereunder." *Silva v. Farrish*, 47 F.4th 78, 86 (2d Cir. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)) (quotations omitted); *see, e.g.*, *Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687–691 (2d Cir. 2013) (holding that an organization had standing to bring a pre-enforcement First Amendment challenge to a state law where the plaintiff intended to engage in arguably protected speech and fear of violating the law had a chilling effect on that speech).

Defendants argue that implementation of the Executive Order does not implicate any "constitutional interest" of the County Plaintiffs themselves as required for a pre-enforcement challenge. (Defs.' Br. at 13.) Indeed, the County Plaintiffs have not pointed to any constitutional interest in maintaining the Executive Order that they themselves—rather than third parties—possess. *Cf. Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 525 (N.D. Cal. 2017) (finding that plaintiff counties demonstrated injury-in-fact to support standing for a pre-enforcement challenge to a federal executive order where plaintiffs' failure to comply would lead to the withdrawal of federal funding and "implicate a constitutional interest, the rights of states and local governments to determine their own local policies and enforcement priorities pursuant to the Tenth Amendment"). Instead, the County Plaintiffs allege that the OAG's enforcement actions will cause "women and girls in Nassau County" to face "discriminat[ion]" and violations of "their constitutional rights." (Blakeman Aff. ¶ 3.) The County Plaintiffs contend that they have standing because of an asserted "increased risk of future physical injury" to these third parties and rely on two district court decisions that address organizational standing. (Cnty. Pls.' Br. at 23–24) (citing *Rural & Migrant Ministry v. United States EPA*, 510 F. Supp. 3d 138, 155 (S.D.N.Y. 2020), *amended and superseded by Rural & Migrant Ministry v. United States EPA*, 565 F. Supp. 3d 578 (S.D.N.Y. 2021); *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 416 (S.D.N.Y. 2012)). The County is not an organization, however, and the County Plaintiffs do not provide any legal authority for the proposition that a municipality is treated as an organization for purposes of Article III standing. *Cf. City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 268 (D.C. Cir. 2002) (assuming, without deciding, that a city may not establish standing on behalf of its citizens under the doctrine of organizational standing).

***17** Moreover, even if Nassau County could avail itself of organizational standing doctrine, it would not be able to assert the equal protection rights of its female residents. It is well established in the Second Circuit that an organization lacks "standing to assert the rights of its members" under 42 U.S.C. § 1983. *Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 447 (2d Cir. 2021) (quotation marks omitted); *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011) ("It is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983, as we have 'interpret[ed] the rights [§ 1983] secures to be personal to those purportedly injured.").

In the section of their reply brief addressing irreparable harm, the County Plaintiffs also argue that Nassau County and Blakeman will suffer an injury in the form of budget uncertainty due to the potential for "[a]n influx of [personal injury] lawsuits against the County" in the absence of the Executive Order, which "can result in millions of dollars of increase in the County budget in the form of settlements or verdicts." (Cnty. Pls.' Reply at 4.) These assertions, which are not alleged in the Complaint or supported by any evidence, are speculative and fail to establish that enforcement of the Executive Order implicates any constitutional interest of the County itself. *Cf. County of Santa Clara*, 250 F. Supp. 3d at 528–29.

Accordingly, the record fails to show that the County Plaintiffs have standing to sue Defendants in a pre-enforcement claim that the New York Human Rights Law as applied to the Executive Order violates the Equal Protection Clause.

2) Individual Plaintiffs

In addition to the County Plaintiffs, the Individual Plaintiffs bring an equal protection claim against Defendants on behalf of their minor child, K.E.M. The record also fails to demonstrate an injury in fact supporting K.E.M.'s Article III standing to sue Defendants for the requested relief.

"Parents generally have standing to assert the claims of their minor children." *Nguyen v. Milliken*, No. 15-CV-0587 (MKB), 2016 WL 2962204, at *7 (E.D.N.Y. May 20, 2016) (citing *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70 (2d Cir. 2001)) (quotation marks omitted); *see, e.g.*, *Soule*, 90 F.4th 51 (finding standing to bring Title IX claim for some requested injunctive relief where parents sued on behalf of their minor daughters). Where a parent asserts a claim in federal court on behalf of a child, the child must meet the requirements for Article III standing. *See id.* at 45–51 (analyzing whether the plaintiffs' children met the Article III requirements); *see also McCormick ex. Rel. v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir. 2004) (same).

There is no evidence in the record relating to K.E.M. The Complaint alleges only that K.E.M. is a "16-year-old biological female high school volleyball player" whose parents reside in Nassau County, and that "the Mullens are being forced into making the impossible determination whether to expose their 16-year-old daughter to the risk of injury by a transgender girl or simply to not play volleyball at all and forego whatever opportunities may present because of her participation in volleyball." (Compl. ¶¶ 7–8, 30.) Plaintiffs have not put forward any evidence addressing whether K.E.M. plays on a volleyball team, whether that team engages in athletic endeavors on Nassau County Parks property, whether K.E.M. plays against or alongside transgender girls in those activities, or how rescission of the Executive Order will directly cause K.E.M. any concrete and imminent injury. The record lacks any evidence showing that K.E.M. has suffered, or imminently will suffer, an injury that is real, and not abstract and actual and imminent based on the OAG's application of the New York Human Rights Law to the Executive Order. The record thus fails to show that K.E.M has standing to seek a declaration that the New York Human Rights Law's prohibition against discrimination on the bases of gender identity and expression violates the Equal Protection Clause, a declaration that the Executive Order is lawful, or an injunction barring the OAG's enforcement of the New York Human Rights Law against the Executive Order. *See Do No Harm v. Pfizer Inc.*, 2024 WL 949506, at *7 (requiring plaintiff seeking preliminary relief to establish injury-in-fact, causation and redressability as required for standing by "affidavit or other evidence"); *Green Haven Prison*, 16 F.4th at 78–79 (same); *cf. Soule*, 90 F.4th 45 (finding plaintiffs established an injury in a Title IX action against a sports conference policy permitting athletes to play on teams consistent with their gender identities, where each plaintiff alleged, among other things, that they had competed in covered events and finished behind a transgender girl at least once).

***18** Further, to the extent the Complaint alleges that the Individual Plaintiffs themselves will suffer an injury based on any violation of K.E.M.'s constitutional right to equal protection, they lack standing to pursue such a claim. *Nguyen*, 2016 WL 2962204, at *7 ("[A]lthough parents may sue on behalf of their minor child, they do not have standing to assert claims on their own behalf for a violation of their child's rights."); *see also T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist.*, No. 11 CV 5133 VB, 2012 WL 860367, at *3 (S.D.N.Y. Feb. 27, 2012) (finding that a mother could not recover on a derivative claim under Section 1983 for the violation of her child's constitution rights).

D. The Merits of Plaintiffs' Equal Protection Claim

The County Plaintiffs cannot show a likelihood of success on the merits of their equal protection claim where, as here, the Court finds that (1)Eleventh Amendment sovereign immunity bars all aspects of the claim except for the portion seeking injunctive and prospective declaratory relief against James in her official capacity; (2) the County Plaintiffs lack the capacity to sue Defendants under Rule 17(b) and New York law; and (3) the record fails to show that Nassau County, Blakeman, or the Individual Plaintiffs have standing to bring the sole equal protection claim pled in the Complaint. In this context, the Court need not address the merits of Plaintiffs' equal protection challenge to Defendants' application of the New York Human Rights Law to the Executive Order. *See Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 134 (2d Cir. 2020) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.") (citation and quotation marks omitted); *see also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

II. Irreparable Harm

The County Plaintiffs fail to show that they will suffer irreparable harm absent the requested TRO. A demonstration of irreparable harm is "the single most important prerequisite for the issuance of" a temporary restraining order. *JTH Tax, LLC v. Agnant*, 62 F.4th 658, 672 (2d Cir. 2023) (internal citation omitted). That is because a temporary restraining order, like a preliminary injunction, seeks to maintain the

status quo in order "to protect [the] plaintiff from irreparable injury" while awaiting final decision on the merits. 11A Charles Alan Wright et al., Federal Practice and Procedure § 2947 (3d ed. April 2023 Update). Therefore, Plaintiffs must show that without a temporary restraining order, "they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *JTH Tax*, 62 F.4th at 672.

In cases concerning claims of constitutional injury, a bare assertion of a constitutional injury, without evidence "*convincingly show[ing]*" the existence of noncompensable damages, is insufficient to automatically trigger a finding of irreparable harm. *KM Enters. v. McDonald*, 11-cv-5098, 2012 WL 540955, at *4 (E.D.N.Y. Feb. 16, 2012) (citing *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988), *aff'd* 518 Fed. App'x 12 (2d Cir. 2013)) (emphasis supplied); *Weinstein v. Krumpter*, 120 F. Supp. 3d 289, 297 (E.D.N.Y. 2015) (same). By contrast, irreparable harm is satisfied when "the constitutional deprivation is convincingly shown and that violation carries noncompensable damages." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012). Indeed, when "the violation of a constitutional right is the irreparable harm ... the two prongs of the preliminary injunction threshold merge into one: in order to show irreparable injury, plaintiff must show a likelihood of success on the merits." *Turley v. Giulani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000) (citation omitted); *Jansen v. New York City Dep't of Educ.*, No. 23-cv-6756, 2023 WL 6160691, at *3 (E.D.N.Y. Sept. 20, 2023), *recons. denied*, No. 23-cv-6756, 2023 WL 6541901 (E.D.N.Y. Oct. 6, 2023). Even in a case concerning an alleged constitutional injury, "it often will be more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights." *Time Warner Cable of New York City, a division of Time Warner Ent. Co., L.P. v. Bloomberg L.P.*, 118 F.3d 917, 924 (2d Cir. 1997) (addressing motion for a preliminary injunction on a First Amendment claim).

***19** The County Plaintiffs make three irreparable harm arguments—none of which are persuasive or supported by the record. First, Blakeman attests that if the Executive Order is rescinded, "women and girls in Nassau County" will "not have access to a supportive and safe environment" for sporting activities and will face "discriminat[ion]" and exclusion from the "long-term benefits" of participation in these endeavors, including "recognition and accolades, [and] college scholarships." (Blakeman Aff. ¶¶ 3–4; *see also* Cnty. Pls.' Reply at 3.) The County Plaintiffs have not put forward evidence about any specific women and girls in Nassau County who would face an imminent threat of physical injury, discrimination, or exclusion from recognition, accolades, or college scholarships, or any other long-term benefit from any current or future athletic activities on Nassau County Parks property in the absence of a temporary restraining barring the OAG from securing documents supporting the Executive Order's issuance and from exercising discretion to take legal action against the Executive Order, or even in the event the Executive Order is rescinded. As discussed above, the record provides no facts addressing whether K.E.M. plays on a volleyball team that uses Nassau County Parks property or involves the participation of transgender women or girls, much less that any transgender women or girls pose to K.E.M. an actual or imminent threat of either physical injury or exclusion from recognition or other benefits from athletic activities. Instead, the County Plaintiffs rely on several media reports of injuries to cisgender women and girls in athletic endeavors with transgender women and girls outside of Nassau County (and even outside of New York) (*see* TRO/PI Motion at 20; Reply Br. at 4), which do not meet their high burden to demonstrate that "they will suffer an injury that is neither remote nor speculative, but actual and imminent" as required for the extraordinary relief of a temporary restraining order. *JTH Tax*, 62 F.4th at 672.

The County Plaintiffs cite several cases to support the undisputed proposition that a "substantial risk of serious illness or death" presents a situation where "monetary damages are difficult to ascertain or are inadequate." (Cnty. Pls.' Br. at 25.) Those cases concerning serious medical illness and death are readily distinguishable because the plaintiffs were able to establish, through both expert and lay testimonial evidence, that a specific illness or disease from which they suffered would result in injury or illness absent the requested preliminary relief. In *Shapiro v. Cadman Towers, Inc.*, for example, the Second Circuit upheld the district court's finding that the plaintiff established irreparable harm to support a preliminary injunction requiring her apartment complex to provide her a parking space inside the apartment's garage where the district court found, based upon testimony from medical experts, that the plaintiff suffered from multiple sclerosis and that requiring her to park on the street could result in humiliation and injury from urinary dysfunction and loss of balance. 51 F.3d 328, 332–33 (2d Cir. 1995). In other words, the plaintiff established, through expert

testimonial evidence, that a disease from which she presently suffered could cause symptoms that would increase her risk of injury and humiliation absent injunctive relief. Likewise, in *Innovative Health Systems, Inc. v. City of White Plains*, the Second Circuit upheld the district court's finding of irreparable harm if a drug and alcohol treatment center were to close based on testimonial evidence that the plaintiffs being treated for substance abuse at the center were at risk of relapse and consequent harms, including illness, disability, or death. 117 F.3d 37, 43–44 (2d Cir. 1997), *superseded on other grounds in Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2001). Further, the Circuit upheld a finding that one plaintiff in particular would *not* suffer irreparable harm where that individual had completed treatment at the program and provided no evidence that he continued to use their services. *Id.*[19] By contrast, here, the County Plaintiffs have not presented any evidence showing that K.E.M. or any other woman or girl would be physically injured or be excluded from recognition, accolades, or other long-term benefits from athletic activities by invalidation of the Executive Order, much less a denial of the requested TRO barring Defendants from securing the record supporting issuance of the Executive Order and from taking enforcement action related to the Executive Order.

***20** The County Plaintiffs' second irreparable harm argument is that without the Executive Order, they face "the risk of substantial personal injury judgments by allowing participation on women's athletic teams based on gender identity." (Cnty. Pls.' Br. at 19). This argument has no basis in the record. The County Plaintiffs fail to identify a single past or current personal injury lawsuit filed against them due to an alleged injury suffered by a cisgender women during an athletic endeavor involving the participation of a transgender woman or girl on Nassau County Parks property. Moreover, as noted above, the record does not support the conclusion that any such personal injury lawsuits would imminently be filed against the County if the requested TRO is denied because there are no facts in the record showing that any specific cisgender woman or girl in Nassau County will face imminent injury in an athletic event involving a transgender woman or girl on Nassau County Parks property if the Executive Order is invalidated.

Third, the County Plaintiffs argue that irreparable harm is "presumed" in this case because the Complaint alleges that "the NYS AG is effectively seeking to deprive Plaintiffs their constitutional right to equal protection." (Cnty. Pls.' Br. at 25.) The County Plaintiffs misstate the law. As discussed, "the mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm." *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996). The burden remains on the County Plaintiffs to "convincingly show[ ]" irreparable constitutional injury in order to secure a temporary restraining order. *Donohue*, 886 F. Supp. 2d at 150; *KM Enters.*, 2012 WL 540955, at *4 (same); *Weinstein*, 120 F. Supp. 3d at 297 (same). Based on the current record before the Court, the County Plaintiffs fail to meet this burden because: (1) Eleventh Amendment sovereign immunity bars Plaintiffs' equal protection claim for declaratory and injunctive relief against Defendants New York and the OAG, and Plaintiffs' claim for retrospective declaratory relief against James; (2) the County Plaintiffs lack the capacity to bring their equal protection claim under Rule 17(b) and New York's capacity-to-sue rule; and (3) all of the Plaintiffs lack standing to bring the sole equal protection claim pled in the Complaint. *See supra*, Section I.

III. Balance of Hardships and Public Interest

A plaintiff seeking a temporary restraining order must additionally establish that the "public interest" and "balance of equities" of the parties weigh in favor of granting the injunction. *Yang*, 960 F.3d at 127. "When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge." *We the Patriots USA, Inc.*, 17 F.4th at 295. The Court declines to address these factors because the County Plaintiffs' submissions do not meet the critical requirements of showing a likelihood of success on the merits of their equal protection claim and irreparable harm in the absence of the requested temporary restraining order.

CONCLUSION

For the reasons set forth above, the Court denies the County Plaintiffs' TRO Motion (ECF No. 10) and reserves decision on the PI Motion pending resolution of Defendants' Motion to Dismiss (ECF No. 20).

All Citations

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Footnotes

1 New York law refers to the OAG as the "New York Department of Law." *See* N.Y. Const. art. V, § 4 ("The head of the ... department of law[shall be] the attorney-general."); *see also* N.Y. Exec. Law § 60.

2 The Court overlooks any procedural deficiency in the County Plaintiffs' submission and construes it as a TRO/PI Motion because Plaintiffs "submitt[ed] a memorandum of law and supporting documents that allow the Court to consider the proposed motion" (ECF Nos. 10-5, 14, 17) and because "the parties are fairly and adequately apprised of the nature and basis of the application." *Fiedler v. Incandela*, 222 F. Supp. 3d 141, 155 (E.D.N.Y. 2016) (quotation marks omitted).

3 As discussed below, the Court set a March 22, 2024 deadline for the Defendants and the Individual Plaintiffs to respond to the County Plaintiffs' TRO/PI Motion. Although the Defendants provided a timely response, the Individual Plaintiffs did not submit anything. (Elec. Order, Mar. 28, 2024.)

4 The plain text of the Executive Order refers to permits to use and occupy "Nassau County Parks property" (*see* E.O. at 1), but Defendants characterize the Executive Order as applying to all property under the purview of the Nassau County Department of Parks, Recreation and Museums. (Defs.' Br. at 3.) The full name of the department overseeing Nassau County Parks property is the "Nassau County Department of Parks, Recreation, and Museums." *See* Nassau County, Departments, Parks, Recreation and Museums, About Parks, https://www.nassaucountyny.gov/1768/About-Parks (last visited Apr. 2, 2024). According to Nassau County's website, there are "more than 70 parks, preserves, museums, historic properties, and athletic facilities comprising 6,000 acres throughout the county." *Id.* The Court need not resolve whether the Executive Order applies to all property under the purview of the Nassau County Department of Parks, Recreation and Museums or only a subset consisting of "Nassau County Parks property," as that term is used in the Executive Order, in order to resolve the County Plaintiffs' TRO Motion.

5 This Opinion and Order uses the terms "biological males" and "biological females" only when quoting from the Executive Order. These terms are scientifically "imprecise" and are viewed as derogatory to transgender women and girls. *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34 at 83 n.8 (2d Cir. 2023) (Judges Chin, Carney, Kahn, Lee, Pérez, dissenting) (referring to intervening parties as "transgender females" and transgender girls" rather than "biological males" (the term used by appellants) to "afford them the respect and dignity they are due" because "calling attention to a transgender person's biological sex by referring to them as a 'biological male' is harmful and invalidating" and because such terms are scientifically "imprecise") (citing Wylie C. Hembree, Peggy T. Cohen-Kettenis, et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102(11) J. Clinical Endocrinology & Metabolism, 3869, 3875 tbl. 1 (2017)); Glossary of Terms: Transgender, GLADD Media Reference Guide: 11th Edition, GLADD, https://glaad.org/reference/trans-terms/ (last visited Apr. 22, 2024); *see also Hecox v. Little*, 79 F.4th 1009, 1023–24 (9th Cir. 2023) ("[T]he [challenged] Act's definition of 'biological sex' is likely an oversimplification of the complicated biological reality of sex and gender.").

6 This Opinion and Order uses the term "transgender" to refer to individuals whose gender identity does not correspond to their sex assigned at birth. The term "gender identity" refers to a person's sense of being male, female, neither, or some combination of both, which may or may not correspond to an individual's sex assigned at birth. *See* N.Y. Exec. Law § 292(35) ("The term 'gender identity or expression' means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.").

7 Although the March 1, 2024 letter set forth the OAG's position that the Executive Order violates both the New York Human Rights Law and the New York Civil Rights Law, Plaintiffs' requested declaratory relief concerns only the alleged unconstitutionality of the New York Human Rights Law as applied to the Executive Order. (*See* Compl. at 12.)

8 Although this requested declaration is part of the ultimate relief sought in the Complaint (Compl. at 12), it is not identified as a part of the preliminary relief requested in the Order to Show Cause or proposed TRO. (*See* ECF Nos. 10, 17.)

9 Defendants do not argue that Eleventh Amendment sovereign immunity bars any claim for injunctive relief by Plaintiffs against James for conduct taken in her official capacity. (Defs' Br. at 8–9). As discussed below, Plaintiffs' equal protection

claim for injunctive relief against James for conduct taken in her official capacity is permissible under the exception to Eleventh Amendment sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908).

10 The Second Circuit has recognized that both arm-of-the-state tests "have much in common" and that "the choice of test is rarely outcome-determinative." *Leitner*, 779 F.3d at 137. The first arm-of-the-state test requires courts to consider (1) "the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity," and (2) "the degree of supervision exercised by the state over the defendant entity." *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79, 82 (2d Cir. 2004) (quotation marks omitted). The second arm-of-the state test requires consideration of six factors:

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

Mancuso v. New York State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996). If the factors from the second test do not lean in a clear direction, a court must consider "the twin reasons for the Eleventh Amendment: (1) protecting the dignity of the state, and (2) preserving the state treasury." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006) (citing *Mancuso*, 86 F.3d at 293). If consideration of these two reasons does not clarify the determination, the court then focuses on "whether a judgment against the governmental entity would be paid out of the state treasury." *Id.* at 241.

11 Given the weight of this authority, the Court does not address all of the factors of the *Mancuso* arm-of-the-state test, but recognizes that the first four *Mancuso* factors weigh in favor of finding the OAG to be an arm of the state. The OAG is referenced in the New York Constitution and its duties and powers are established in New York statutes (the first *Mancuso* factor). *See* N.Y. Const. art. V, §§ 1, 4; N.Y. Exec Law § 60 *et seq.* The NY Attorney General is elected in "the same general election as the governor" (the second *Mancuso* factor). N.Y. Const. art. V, § 1. The budget for the office comes from the New York Legislature (the third *Mancuso* factor). *See* N.Y. Exec. Law § 60. The powers and duties of the NY Attorney General are traditionally those of state government (the fourth *Mancuso* factor). *See e.g.*, N.Y. Exec. Law § 63 ("The attorney-general shall ... [p]rosecute and defend all actions and proceedings in which the state is interested ... and have charge and control of all the legal business of the departments and bureaus of the state ... in order to protect the interest of the state ....").

12 The Complaint does not cite 42 U.S.C. § 1983, which established a cause of action for bringing constitutional claims against people acting under color of state law. (*See* Compl. ¶ 14; *id.* at 9.) The only statute Defendants' cite—the Declaratory Judgment Act, 28 U.S.C. § 2201—"does not create an independent cause of action." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244–45 (2d Cir. 2012). In their reply brief, the County Plaintiffs state that the claim "was in fact asserted under the Equal Protection Clause" (Cnty. Pls.' Reply at 1), but point to no authority for the proposition that there is an implied cause of action against state governments under the Fourteenth Amendment. *Cf. Pauk v. Bd. of Trs. of City Univ. of New York*, 654 F.2d 856, 864 (2d Cir. 1981) (collecting cases where courts have found implied causes of action for certain constitutional violations, but not in the Equal Protection Clause context); *Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979) (abrogating prior Second Circuit decision finding an implied cause of action under the Fourteenth Amendment for suits against municipalities). Even if Plaintiffs could bring an implied cause of action under the Fourteenth Amendment, the Supreme Court has held that Congress did not express an intent to abrogate states' Eleventh Amendment immunity by ratifying the Fourteenth Amendment itself. *See Santiago v. New York State Dept. of Corr. Servs.*, 945 F.2d 25, 30–32 (2d Cir. 1991) ("[W]e are unpersuaded that the states, in ratifying the Fourteenth Amendment, waived their Eleventh Amendment immunity ....").

13 As discussed, the Complaint requests a permanent injunction barring Defendants from "taking any action" against implementation and enforcement of the Executive Order. (Compl. at 12). Plaintiffs also seek a temporary restraining order and preliminary injunction barring Defendants from "taking further legal action" and "from initiating any legal proceedings and/or actions against" the County Plaintiffs, and enjoining Defendants "from obtaining any and all documents produced or maintained by" the County Plaintiffs. (Proposed TRO at 1.)

14 As discussed later in this Opinion and Order, *see* Section I.C n.18, the Second Circuit has employed a similar rationale in finding that political subdivisions lack "standing" to sue their state creators in a challenge to a state statute under the Fourteenth Amendment. *See* *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 n.7 (2d Cir. 2019); *Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973).

15 In arguing that the first exception to New York's capacity-to-sue rule does not apply to this case, Defendants contend that county and county officials generally lack capacity to assert a Fourteenth Amendment claim against a state because "they are not 'persons' within the meaning" of the Due Process Clause. (Defs.' Br. at 11) (citing *Cnty. of Chautauqua v. Shah*, 126 A.D.3d 1317, 1321 (4th Dep't 2015), *aff'd sub nom* *Cnty. of Chemung v. Shah*, 28 N.Y.3d 244 (2016)). The Court does not need to reach this question because the County Plaintiffs point to no express statutory language or legislative history demonstrating the New York Legislature's intent to grant them capacity to sue Defendants under the Fourteenth Amendment.

16 In *Town of Babylon, NY v. James*, No. 22-CV-1681(KAM)(AYS), 2023 WL 8734201 (E.D.N.Y. Dec. 19, 2023), *appeal docketed*, No. 24-177 (2d Cir. Jan. 22, 2024), however, the parties brought claims against the NY Attorney General challenging a state statute under the Fourteenth Amendment and article IX of the New York Constitution. The Court held that the home rule exception did not apply to the case and did not explicitly distinguish whether it was invoked with respect to both claims, or just the home rule claim. *Id.*

17 By contrast, the Second Circuit held in *Tweed* that a political subdivision "may sue its state under the Supremacy Clause" because that clause "raises unique federalism concerns." 930 F.3d at 73. *Tweed* did not abrogate the Second Circuit's previous decisions in *Richardson* and *Aguayo* as to a political subdivision's lack of standing to sue the state under the Fourteenth Amendment, finding that those cases "present[ed] considerations different from those we consider here." *Tweed*, 930 F.3d at 73 n.7. Accordingly, this Court is bound to follow the holdings of *Richardson* and *Aguayo*. *See, e.g.*, *Town of Babylon*, 2023 WL 8734201, at *9 (finding that under the *Tweed-Richardson-Aguayo* line of cases, a New York municipality is barred from bringing due process and equal protection claims against a New York statute).

18 The Second Circuit has characterized its analysis in the *Tweed-Richardson-Aguayo* line of cases as concerning a political subdivision's "standing" to sue. *See* *Tweed*, 930 F.3d at 73 n.7; *Aguayo*, 473 F.2d at 1100; *but see* *Richardson*, 473 F.2d at 929 (describing the rule as one where the state lacks "privileges or immunities ... [to] invoke in opposition to the will of its creator" (citing *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933))). This concept of standing is distinct from New York law on the capacity to sue. *Sonterra*, 403 F. Supp. 3d at 267 ("Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.").

19 *See also* *New York v. Heckler*, 742 F.2d 729, 736 (2d Cir. 1984) (plaintiffs established irreparable harm where they suffered from mental illnesses and presented "ample evidence" that they would likely suffer "a severe medical setback" as a result of the challenged requirement), *aff'd sub nom.* *Bowen v. City of New York*, 476 U.S. 467 (1986); *New York v. Sullivan*, 906 F.2d 910, 918 (S.D.N.Y. 1990) (plaintiffs, who had cardiovascular disease, established that irreparable harm would result if they did not receive disability benefits needed to ensure treatment).

60 F.3d 106
United States Court of Appeals, Second Circuit.

BOARD OF EDUCATION OF THE MT. SINAI UNION FREE SCHOOL DISTRICT; Mt. Sinai Union Free School District; Peter C. Paciolla, Superintendent of Mt. Sinai Union Free School District; Nicholas C. DiPiazza, as President of the Board of Education of the Mt. Sinai Union Free School District and individually; Gail Litsch; Maureen Poerio; Board of Education of the Sewanhaka Central High School District; Sewanhaka Central High School District; Dr. George Goldstein, Superintendent of Sewanhaka Central High School District; and James Parla, as President of the Board of Education, Plaintiffs–Appellants,

v.

NEW YORK STATE TEACHERS RETIREMENT SYSTEM; H.N. Langlitz, in his capacity as Executive Director, New York State Teachers Retirement System; Richard E. Tehhaken, President; Richard F. Lindstrom, Vice President; Michael R. Corn; R. Michael Kraus; Lucy P. Martin; Joseph P. McLaughlin; S.J. Salenger; H. Carl McCall; Ruth E. Williams; Iris Wolfson, in their capacity as members of the Board of Directors of the New York State Teachers Retirement System; Charles Golding; and William Conboy, Defendants–Appellees.

No. 1275, Docket 94–9006
|
Argued Feb. 15, 1995.
|
Decided July 12, 1995.

Synopsis

School districts, boards of education of school districts, officials of school districts, and citizen taxpayers sued officers and directors of state teachers' retirement system and two teachers who had previously retired from positions as police officers, challenging application of statute which required school districts employing individuals who had previously retired from service in another part of public sector to make contributions to state teachers' retirement system in amount school district would have made had retiree been member of system throughout entire period of second employment. The United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., Chief Judge, dismissed for lack of subject matter jurisdiction. School districts, boards of education, officials and taxpayers appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) taxpayers did not have common-law taxpayer standing or statutory standing to sue, and (2) school district and board officials did not have standing.

Affirmed.

West Headnotes (11)

[1] **Federal Courts** Standing

Court of Appeals reviews dismissal of complaint for lack of standing de novo. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

3 Cases that cite this headnote

[2] **Federal Courts** Standing

In exercising its de novo review of dismissal of complaint for lack of standing, Court of Appeals must accept as true all material allegations of complaint, and must construe complaint in favor of complaining party. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

9 Cases that cite this headnote

[3] **Federal Civil Procedure** In general; injury or interest

It is burden of party who seeks exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is proper party to invoke judicial resolution of dispute. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

27 Cases that cite this headnote

[4] **Municipal Corporations** Nature and scope in general

Whether plaintiff has standing in his capacity as taxpayer turns largely on sovereign whose act he challenges.

6 Cases that cite this headnote

[5] **United States** Taxpayer standing

Federal taxpayer cannot rest standing to challenge acts of Congress, or acts taken by other arms of federal government, on theory that challenged conduct injures him through its effect on his taxes.

6 Cases that cite this headnote

[6] **United States** Taxpayer standing

Generally, standing premised on federal taxpayer status fails for want of concrete injury; abstract injury shared by public does not suffice.

9 Cases that cite this headnote

[7] **States** Standing in general

State taxpayers, like federal taxpayers, do not have standing to challenge actions of state governments based upon fact that they pay taxes to the state.

9 Cases that cite this headnote

[8] **Education** Taxpayers' Suits and Other Remedies

Citizen taxpayers of school district did not have standing as municipal taxpayers to challenge state statute which required school districts employing individuals who had previously retired from service in another part of public sector to make contributions to state teachers' retirement system in amount it would have made had retiree been member of system throughout entire period of second employment; challenge was directed against state, rather than municipal action. N.Y.Laws 1990, c. 666, § 1 et seq.

7 Cases that cite this headnote

[9] **Municipal Corporations** Misapplication of Funds

Availability of municipal taxpayer standing does not extend to actions in which municipal taxpayer challenges expenditure of municipal funds mandated by state law.

10 Cases that cite this headnote

[10] **Courts** Suits involving validity or construction of state statutes

Municipal taxpayers did not have standing to challenge in federal district court state statute which required school districts employing individuals who had retired from service in another part of public sector to make contributions to state teachers' retirement system in amount school district would have made had retiree been member of system throughout entire period of second employment pursuant to statute which confers standing on citizen taxpayers to bring action against state employees who have caused or are about to cause wrongful expenditure of state funds; such actions must be brought in state court. N.Y. McKinney's State Finance Law §§ 123–b, 123–c; N.Y.Laws 1990, c. 666, § 1 et seq.

3 Cases that cite this headnote

[11] **Education** Rights of action and defenses

Officials of school districts and school boards did not have standing to challenge in federal district court state statute which required school districts employing individuals who had retired from service in another part of public sector to make contributions to state teachers' retirement system in amount school district would have made had retiree been member of system throughout entire

period of second employment, pursuant to *Allen* in which court stated that "dilemma" of being required to choose between violating oath to support constitution and refusing to comply with law, which would most likely result in their expulsion from office and reduction in state funds for their school districts; officials did not allege that their positions or funding for their schools was in jeopardy if they refused to implement state statute. N.Y.Laws 1990, c. 666, § 1 et seq.

5 Cases that cite this headnote

Attorneys and Law Firms

***107** Scott J. Steiner, New York City (Curt Rogg–Meltzer, Rogg–Meltzer, Steiner & Ebeling, New York City, of counsel), for plaintiffs-appellants.

Elizabeth Bradford, Asst. Atty. Gen. State of N.Y. (G. Oliver Koppell, Atty. Gen. State of N.Y., of counsel), for defendants-appellees.

***108** Before: MINER and JACOBS, Circuit Judges.[*]

Opinion

MINER, Circuit Judge:

Plaintiffs-appellants are the Mt. Sinai Union Free School District ("Mt. Sinai"), the Sewanhaka Central School District ("Sewanhaka"), the boards of education of the school districts, officials of the school districts, and citizen taxpayers of one of the districts. They appeal from a judgment entered in the United States District Court for the Eastern District of New York (Platt, then-Chief Judge) dismissing their amended complaint, pursuant to Fed.R.Civ.P. 12(b)(1), on the ground that none of the plaintiffs had standing to pursue the claims alleged in the complaint. The district court concluded that: (1) the school districts and their boards of education, as political subdivisions of the state, lack standing to challenge state legislation, (2) the taxpayer plaintiffs were to be considered state taxpayers and, as such, could not demonstrate adequate injury to support Article III standing, nor did they have standing under state law, and (3) the school-board officials lack the requisite personal stake in the outcome of the controversy to support standing. For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

This case involves a challenge to the constitutionality of Chapter 666 of the Laws of 1990 of New York State ("Chapter 666"), a law aimed at reducing unfairness in the provision of pensions to public employees. It appears from the amended complaint that the two defendant teachers in this action, William Conboy and Charles Golding, were former members of the New York City Police Department. Accordingly, both had been members of the New York City Police Pension Fund and, upon retirement from the Police Department, each became eligible for a pension from the Police Pension Fund. Like many retired police officers, the two men chose to pursue second careers. Conboy was employed as a teacher by Mt. Sinai beginning in 1979, and Golding was employed as a teacher by Sewanhaka beginning in 1971. When they were hired as teachers, state law permitted them to draw their pensions from the Police Pension Fund only on the condition that they not become members of the New York State Teachers' Retirement System ("NYSTRS"), the pension fund established for teachers in New York State schools.

In 1990, the legislature passed Chapter 666, which was designed to permit individuals like Conboy and Golding to receive a pension benefit that would reflect all of their years in public service. Under the law, an individual who has retired from service in one part of the public sector and is reemployed in another, including a school district, may apply for relief under Chapter 666. Upon proper application, Chapter 666 requires the school district employing such an individual to make contributions to NYSTRS in the amount the school district would have made had the retiree been a member of the system throughout the entire period of his second employment.

In 1992, Conboy and Golding applied for and were granted the benefits provided under Chapter 666. Accordingly, NYSTRS billed their school district employers for the payments that would have been made had Conboy and Golding been NYSTRS members from the start of their employment as teachers. As a result, Mt. Sinai was instructed to pay $89,172 to NYSTRS on Mr. Conboy's behalf, and Sewanhaka was instructed to pay $93,563 on Mr. Golding's behalf.[1] The school districts refused to make the payments, and brought this suit in the ***109** district court to challenge the validity of Chapter 666.

The amended complaint was filed by three groups of plaintiffs: 1) the school districts that employ the two teachers and their boards of education; 2) officers and directors of those school districts and boards, namely Peter C. Paciolla, who is the Superintendent of Mt. Sinai, Nicholas C. DiPiazza, who is the President of the Board of Education of Mt. Sinai, Dr. George Goldstein, who is the Superintendent of Sewanhaka, and James Parla, who is the President of Sewanhaka; and 3) taxpayers of the Mt. Sinai School District, namely Gail Litsch, Maureen Poerio, and Nicholas DiPiazza. The defendants named in the complaint were various officers and directors of NYSTRS, in their official capacities, and the two teachers.

Upon the facts described above, the plaintiffs alleged violations of federal and state law. Plaintiffs alleged that Chapter 666 violates the Contracts Clause of the Constitution by impairing the contracts between the school districts and the teachers, that Chapter 666 violates the Contracts Clause by impairing the contracts between the plaintiffs and NYSTRS, and that Chapter 666 violates the Due Process Clause of the Fourteenth Amendment. The plaintiffs also pleaded various state-law claims, including violations of the state constitution, misapplication of Chapter 666, defects in the teachers' applications for benefits under Chapter 666, and a claim of conversion.

NYSTRS and its officers moved to dismiss the complaint for lack of subject matter jurisdiction, under Fed.R.Civ.P. 12(b)(1), on the ground that none of the plaintiffs has standing to maintain the action, and for failure to state a claim, under Fed.R.Civ.P. 12(b)(6).[2] The district court granted the defendants' motion on the ground that the plaintiffs lacked standing to bring suit. The court held that (1) the taxpayer plaintiffs were to be considered state taxpayers, rather than municipal taxpayers, and, as such, did not suffer a "concrete" injury sufficient to support standing; (2) the taxpayer plaintiffs did not have standing under Article 7–A of the New York State Finance Law, which grants standing to challenge state expenditures, because the expenditures at issue would be made by school districts and not by the state; (3) the plaintiff school district officials lacked a sufficient injury to give rise to standing; and (4) the plaintiff school districts and boards of education lacked standing to contest the state legislation because they were creatures of the state legislature.

In this appeal, plaintiffs-appellants challenge only that portion of the district court's judgment in which the court determined that the taxpayers and the officials of the school districts and of the boards of education lack standing. They do not challenge the determination that the school districts and boards of education lack standing.

DISCUSSION

I. Standard of Review

[1] **[2]** **[3]** This court reviews the dismissal of a complaint for lack of standing *de novo*. *See Thompson v. County of Franklin,* 15 F.3d 245, 249 (2d Cir.1994). In exercising our review, we must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id.* (quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) (internal quotation marks omitted)). Nonetheless, "it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990) (citations and internal quotation marks omitted). We conclude that, viewed under these standards, the plaintiffs have failed to establish that they have standing under any of the theories that they invoke.

II. Taxpayer Standing

The taxpayer plaintiffs contend that they have standing to challenge Chapter 666 under the taxpayer standing doctrine enunciated in *Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) and its ***110** progeny. They further contend that they have standing as taxpayers under a state statute.

a. Common–Law Taxpayer Standing

[4] **[5]** **[6]** It is well settled that whether a plaintiff has standing in his capacity as a taxpayer turns largely on the sovereign whose act he challenges. A federal taxpayer, for example, cannot rest standing to challenge acts of Congress, or acts taken by other arms of the federal government, on the theory that the challenged conduct injures him through its effect on his taxes. This is so because the federal taxpayer's "interest in the moneys of the Treasury ... is shared with millions of others [and] is comparatively minute and indeterminable; and [because] the effect upon future taxation, of any payment out of the funds ... [is too] remote, fluctuating

and uncertain." *Frothingham,* 262 U.S. at 487, 43 S.Ct. at 601. As a general matter, therefore, standing premised on federal taxpayer status fails for want of a concrete injury; an abstract injury shared by the public does not suffice. *See Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 219–221, 94 S.Ct. 2925, 2931–32, 41 L.Ed.2d 706 (1974). *Cf. Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (delineating limited exception to the bar against federal taxpayer standing).

[7] State taxpayers, like federal taxpayers, do not have standing to challenge the actions of state government simply because they pay taxes to the state. In *Doremus v. Board of Educ. of Hawthorne,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), the Supreme Court likened state taxpayers to federal taxpayers for the purposes of standing, and held that a state taxpayer's action only amounts to a case or controversy when it is a "good-faith pocketbook action," in which the taxpayer alleges injury to a "direct and particular financial interest." *Id.* at 434–35, 72 S.Ct. at 398; *see also ASARCO Inc. v. Kadish,* 490 U.S. 605, 613, 109 S.Ct. 2037, 2043, 104 L.Ed.2d 696 (1989) (Kennedy, J., joined by three justices) ("[W]e have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury....' "). We note, however, that the lower courts have employed differing interpretations of *Doremus* in regard to the question of taxpayer standing. *Compare Colorado Taxpayers Union, Inc. v. Romer,* 963 F.2d 1394, 1402–03 (10th Cir.1992) (requirements for federal and state taxpayer standing the same), *cert. denied,* 507 U.S. 949, 113 S.Ct. 1360, 122 L.Ed.2d 739 (1993) and *Taub v. Kentucky,* 842 F.2d 912, 918 (6th Cir.) (same), *cert. denied,* 488 U.S. 870, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988) *with Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1180 (9th Cir.1984) (state taxpayer standing found where each plaintiff alleged "status as a taxpayer" and identified "amounts of money appropriated" for challenged actions). It seems to us that the "direct and particular" interest referred to in *Doremus* requires more than the mere payment of taxes alleged here.

However, while the foregoing rules present substantial obstacles to taxpayers who challenge federal or state actions, a taxpayer who challenges municipal actions stands on a different footing for reasons explained by the *Frothingham* Court:

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate.... The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

262 U.S. at 486–87, 43 S.Ct. at 601 (citations omitted). In reliance upon this passage, this court has concluded that a municipal taxpayer has standing to challenge allegedly unlawful municipal expenditures. *See United States v. City of New York,* 972 F.2d 464, 470–71 (2d Cir.1992). In *City of New York,* we were presented with a municipal taxpayer's challenge to New York City's action in entering into certain contracts, in alleged violation of state law. We concluded that, under *Frothingham,* the relationship of a municipal taxpayer to the municipality is presumed to be sufficiently "direct and immediate" ***111** to confer standing upon a taxpayer who challenges a municipal activity involving a " 'measurable appropriation or loss of revenue.' " *Id.* at 470 (quoting *District of Columbia Common Cause v. District of Columbia,* 858 F.2d 1, 5 (D.C.Cir.1988)); *see also Freedom From Religion Found., Inc. v. Zielke,* 845 F.2d 1463, 1469–70 (7th Cir.1988) (municipal taxpayer standing available to challenge improper use of tax revenues).

[8] Unlike in *City of New York,* the taxpayer plaintiffs' challenge here is directed at a state, rather than a municipal, action. Plaintiffs nonetheless argue that, although they challenge an action of the state legislature, they are being injured by an unlawful expenditure of municipal funds, and they therefore have standing as municipal taxpayers. In support of this position, they rely upon *Gwinn Area Community Schools v. Michigan,* 741 F.2d 840 (6th Cir.1984), where the court held that municipal taxpayers had standing to challenge a state law that would adversely impact the municipal fisc. Under plaintiffs' theory, whether a taxpayer has standing would turn not on the governmental unit whose act is challenged, but simply on the governmental unit whose funds were affected by the challenged action.

[9] We believe that such a rule is not supported by the cases establishing taxpayer standing, and thus decline to extend the availability of municipal taxpayer standing to actions where a municipal taxpayer challenges an expenditure of municipal funds mandated by state law. As is evident from *City of New York,* 972 F.2d at 470, one of the central premises of municipal taxpayer standing is that the taxpayer's suit be brought against *a municipality.* Here, the taxpayers do not rely on a "peculiar relation" with the municipality, *see Frothingham,* 262 U.S. at 486–87, 43 S.Ct. at 601. Indeed, this suit was not brought

against a municipality, but against a state. Accordingly, the plaintiff taxpayers do not have standing as taxpayers to bring this suit, and the district court properly granted the motion to dismiss as to the claims brought under the common-law theory of taxpayer standing.

b. Statutory Standing

[10] The municipal taxpayer plaintiffs also contend that they have standing as taxpayers to challenge Chapter 666 under § 123–b of Article 7–A of the New York State Finance Law. That statute confers standing on citizen taxpayers to bring an action

> against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property.

Whether or not this provision would give the taxpayer plaintiffs standing, § 123–c of Article 7–A also provides that:

> An action pursuant to this article *shall* be brought in the *supreme court* in any county wherein the disbursement has occurred, is likely to occur, or is occurring, or in the county in which the state officer or employee has his or her principal office. (emphasis supplied).

Thus, actions under this statute are, by the statute's own terms, restricted to state fora, and may not be brought in federal court.

III. Standing of School District and Board Officials

[11] The plaintiffs also challenge the district court's determination that the officials of the school districts and the school boards, acting in their official capacities, did not have standing to challenge Chapter 666. We agree with the district court.

The basis for the contention of plaintiff officials that they have standing is *Board of Educ. v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). That case involved a suit brought by the majority of a New York City school board to challenge a New York statute that required public school authorities to lend textbooks to all students, including students attending parochial schools. *Id.* at 239–40, 88 S.Ct. at 1924–25. The plaintiff board members claimed that the statute violated the Establishment Clause of the federal Constitution. In a footnote, the Court noted that the defendants had abandoned any challenge ***112** to the plaintiffs' standing, but went on to state:

> [The school board members] have taken an oath to support the United States Constitution. Believing [the statute at issue] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the law]—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that [the board members] thus have a "personal stake in the outcome" of this litigation. *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

Id. at 241 n. 5, 88 S.Ct. at 1925 n. 5 (parallel citations omitted); *see also Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 544 n. 7, 106 S.Ct. 1326, 1333 n. 7, 89 L.Ed.2d 501 (1986) (applying *Allen* but finding no standing). In reliance upon *Allen* 's "dilemma" theory of standing, this court has held that the City Social Services Commissioner had standing to pursue constitutional claims against the state of New York where he believed that implementing a state-mandated work project would compel him to violate his oath of office by abrogating the Equal Protection rights of public assistance recipients. *See Aguayo v. Richardson,* 473 F.2d 1090, 1100 (2d Cir.1973), *cert. denied,* 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974); *see also City of New York v. Richardson,* 473 F.2d 923, 933 (2d Cir.) (mayor and commissioner of social services of City of New York have standing to challenge state and federal laws), *cert. denied,* 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973); *Akron Bd. of Educ. v. State Bd. of Educ.,* 490 F.2d 1285, 1291 (6th Cir.), *cert. denied,* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974).

Here, however, the plaintiff officials have failed to recognize that "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute," *Warth,* 422 U.S. at 518, 95 S.Ct. at 2215. Plaintiffs do not allege that compliance with state law will require them to violate their oaths to act constitutionally; the burden of the complaint is that *others* (those who adopted and signed the legislation) violated *their* oaths by impairing the contract rights of the boards of education. Plaintiffs' claims also fail because nowhere in the complaint do they allege that their positions as officials or funding for their schools is in jeopardy if they refuse to implement Chapter 666, and no such allegation appears anywhere in the record that was before the district court. In

contrast, the plaintiffs in *Allen* had alleged in their complaint that a loss of their jobs and state funding was likely if they refused to comply with the state law. *See* 392 U.S. at 240, 88 S.Ct. at 1925. Moreover, even in this court, the plaintiffs do not contend that any actual threat has been made to remove them from their positions, or that any realistic threat of harm to them exists if they fail to implement Chapter 666. Accordingly, even if we were to assume that plaintiffs fear that they might violate their constitutional oaths, they have failed to demonstrate that they are presented with the dilemma that gave rise to standing in *Allen* and *Aguayo*.

It is true that, in their brief in this court, plaintiffs describe a number of vague untoward harms that might befall them, such as interference with the performance of "their fiduciary and statutory duty," interference with their "fully staffing their schools," a "direct impact upon [their] ability ... to govern," and the fact that they will be "held ultimately accountable when the community under their supervision is damaged." These alleged harms do not provide plaintiffs with *Allen* standing for two reasons. For one, unlike in *Allen,* these harms allegedly will result from compliance with Chapter 666, rather than from a refusal to comply. Second, we conclude that these harms simply are too speculative and too insubstantial to support standing. *Cf. Clarke v. United States,* 705 F.Supp. 605, 608 (D.D.C.1988) (where refusal to obey law would lead to "almost certain loss of ... salar[y] and staff[ ]," injury sufficient to provide standing under *Allen*), *aff'd,* 886 F.2d 404 (D.C.Cir.1989), *vacated as moot,* 915 F.2d 699 (D.C.Cir.1990).

Doubtless, many officials believe that mandated expenditures are wasteful or counterproductive; but it is difficult to see how ***113** compliance with a state law mandate, however foolish the law is, would violate plaintiffs' "fiduciary and statutory duty," or why the public responsibility of public officials in these circumstances cannot be discharged in the political arena. In *Board of Supervisors of Warren County v. Virginia Dep't of Social Servs.,* 731 F.Supp. 735 (W.D.Va.1990), plaintiff officials challenged a federal formula under which the State was required to distribute federal money in a way allegedly unconstitutional under both the Equal Protection Clause and the Due Process clauses. In rejecting standing under *Allen,* the district court for the Western District of Virginia noted:

> The state action does not place the plaintiffs in any conflict, certainly not any conflict with a duty to uphold the constitution; it merely gives them less money than they would like with which to provide services. While the court recognizes the problems that dwindling funds have created for local governments, they are not problems which give the present plaintiffs a sufficiently personal stake in the outcome of this action.

Id. at 743. The plaintiffs in this case are faced with a problem that confronts all officials having limited and restricted resources available to serve their constituencies.

We thus conclude that the plaintiff officials, having failed to allege a realistic threat that they will lose their positions or substantial funding for their local operations if they refuse to comply with Chapter 666, are not presented with a dilemma that gives them standing to challenge the law. Therefore, the district court properly dismissed the claims brought by the plaintiff officials.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

All Citations

60 F.3d 106, 101 Ed. Law Rep. 668

Footnotes

* The Honorable James L. Oakes of the United States Court of Appeals for the Second Circuit, who originally was a member of the panel, recused himself just prior to oral argument. The case is being decided by the remaining two judges of the panel, pursuant to Local Rule § 0.14(b). *See Murray v. National Broadcasting Co.,* 35 F.3d 45 (2d Cir.1994), *cert. denied,* 513 U.S. 1082, 115 S.Ct. 734, 130 L.Ed.2d 637 (1995).

1 Although Golding began his employment as a teacher about eight years before Conboy, Golding apparently suspended his police retirement benefits and joined NYSTRS in September of 1983. Therefore, his school district employer was billed for payments not made during the period 1971–1983.

2 The teachers Conboy and Golding defaulted and did not appear in this litigation.

End of Document

116 S.Ct. 1941
Supreme Court of the United States

George W. BUSH, Governor
of Texas, et al., Appellants,
v.
Al VERA et al.
William LAWSON, et al., Appellants,
v.
Al VERA et al.
UNITED STATES, Appellant,
v.
Al VERA et al.

Nos. 94–805, 94–806 and 94–988.
|
Argued Dec. 5, 1995.
|
Decided June 13, 1996.

Synopsis

Registered voters brought action for injunctive and declaratory relief from Texas' redistricting plan adopted after the 1990 census revealed a population increase entitling Texas to three additional congressional seats. The three-judge United States District Court for the Southern District of Texas, 861 F.Supp. 1304, held that the three new districts were unconstitutional. Appeal was taken. The Supreme Court, Justice O'Connor, held that: (1) the new district lines were drawn with race as the predominant factor and, thus, the districts were subject to strict scrutiny; (2) the challenged districts could not be upheld under the Voting Rights Act's "results" test; and (3) one district could not be upheld under the "nonretrogression" principle underlying the Act's preclearance requirement where Texas substantially augmented, and did not just maintain, the African-American population percentage in the district.

Affirmed.

Justice O'Connor, filed a separate concurring opinion.

Justice Kennedy, filed a concurring opinion.

Justice Thomas, with whom Justice Scalia joined, filed an opinion concurring in the judgment.

Justice Stevens, with whom Justice Ginsburg and Justice Breyer joined, filed a dissenting opinion.

Justice Souter, with whom Justice Ginsburg and Justice Breyer joined, filed a dissenting opinion.

West Headnotes (38)

[1] Constitutional Law Elections

Voter who did not live in newly-created majority-minority congressional districts, and who did not allege any specific facts showing that he personally had been subjected to any racial classification, lacked standing to challenge districts as racial gerrymanders in violation of Fourteenth Amendment, but voters who lived in districts had standing. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

6 Cases that cite this headnote

[2] Constitutional Law Electoral districts and gerrymandering

Strict scrutiny applies where congressional redistricting legislation is so extremely irregular on its face that it rationally can be viewed only as effort to segregate races for purposes of voting, without regard for traditional districting principles, or where race for its own sake, and not other districting principles, was legislature's dominant and controlling rationale in drawing its district lines and legislature subordinated traditional race-neutral districting principles to racial considerations. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act

of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

68 Cases that cite this headnote

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

Strict scrutiny does not apply to congressional redistricting legislation merely because redistricting is performed with consciousness of race. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

16 Cases that cite this headnote

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

Evidence supported district court's findings that Texas' challenged congressional districts had no integrity in terms of traditional, neutral redistricting criteria, for purposes of determining whether race was predominant factor in drawing districts, subjecting them to strict scrutiny; district court found that generally Texas had not intentionally disregarded traditional districting criteria in the past, that compactness as measured by "eyeball" approach was much less important in challenged redistricting plan than in its predecessor, and that districts were especially irregular in shape in urban areas in which challenged districts were located. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

29 Cases that cite this headnote

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

Evidence supported district court's findings that tools used by Texas when it drew challenged congressional districts permitted state to pay unprecedented attention to race, for purposes of determining whether race was predominant factor in drawing districts, subjecting them to strict scrutiny; primary tool used in drawing district lines was computer program that permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed at block-by-block level, whereas other data, such as party registration and past voting statistics, were available only at level of voter tabulation districts, and that, before 1990 census, data were not broken down beyond census tract level. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

21 Cases that cite this headnote

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

District court's findings that Texas substantially neglected traditional districting criteria such as compactness when it drew challenged congressional districts, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data, together, weighed in favor of application of strict scrutiny to districting plan, but no one factor was independently sufficient to require strict scrutiny. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

23 Cases that cite this headnote

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

Constitution does not mandate regularity of congressional district shape, and neglect of traditional districting criteria is merely necessary, not sufficient, to require application of strict scrutiny; for strict scrutiny to apply, traditional districting criteria must be

subordinated to race. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

20 Cases that cite this headnote

[8] **Constitutional Law** Electoral Districts

State's decision to create majority-minority congressional district is not objectionable in and of itself; rather, direct evidence of that decision is merely one of several essential ingredients to require application of strict scrutiny. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

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

Direct evidence of racial considerations in drawing congressional districts, coupled with fact that computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provided substantial evidence that it was race that led to neglect of traditional districting criteria in drawing challenged congressional districts and, therefore, Texas' districting decisions were subject to strict scrutiny. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

4 Cases that cite this headnote

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

Strict scrutiny would not be appropriately applied to congressional districting decisions if race-neutral, traditional districting considerations predominated over racial ones. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

14 Cases that cite this headnote

[11] **Constitutional Law** Gerrymandering in general

Political gerrymandering in congressional districting is not subjected to strict scrutiny. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

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

Race predominated over traditional districting principles, including factors such as congressional district's consistently urban character, its common media sources throughout, and several major transportation lines, in drawing congressional district and, thus, district was subject to strict scrutiny when it was challenged as racial gerrymander; district court found that Texas' supporting data were not available to Legislature in any organized fashion before district was created, that factors did not differentiate district from surrounding areas with the same degree of correlation to district lines that racial data exhibited, and that State made no apparent attempt to compile equivalent data regarding communities of interest other than race. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

32 Cases that cite this headnote

[13] **United States** Method of apportionment in general

If State's goal in congressional districting is otherwise constitutional political

gerrymandering, it is free to use kind of political data such as precinct general election voting patterns, precinct primary voting patterns, and legislators' experience to achieve that goal regardless of its awareness of data's racial implications and regardless of the fact that it does so in context of majority-minority district. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

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

If State uses race as proxy for political data such as precinct general election voting patterns, precinct primary voting patterns, and legislators' experience in drawing congressional districts, racial stereotype requiring strict scrutiny is in operation. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

[15] **Constitutional Law** Elections, Voting, and Political Rights

Constitutional Law Juries

United States Equality of representation and discrimination; Voting Rights Act

Racial stereotyping that has been scrutinized closely in the context of jury service cannot pass without justification in context of voting for congressional representatives; if promise of Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, Supreme Court cannot pick and choose between basic forms of political participation in its efforts to eliminate unjustified racial stereotyping by government actors. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amends. 13–15; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

2 Cases that cite this headnote

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

Evidence supported district court's findings that racially motivated gerrymandering had a qualitatively greater influence on drawing of congressional district lines in Texas than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by use of race as proxy for political data such as precinct general election voting patterns, precinct primary voting patterns, and legislators' experience. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

6 Cases that cite this headnote

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

Although oddly-shaped Texas congressional district did not evince consistent, single-minded effort to "segregate" voters on basis of race, and did not represent "apartheid," fact that racial data were used in complex ways, and for multiple objectives, did not mean that race did not predominate over other considerations and, thus, district was subject to strict scrutiny; record disclosed intensive and pervasive use of race both as proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing minority population of district, regardless of traditional districting principles. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

16 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Interlocking Texas congressional districts with majority African-American and majority Hispanic populations were formed in disregard of traditional redistricting criteria and had shapes that were ultimately unexplainable on grounds other than race, were product of presumptively unconstitutional racial gerrymandering and, thus, were subject to strict scrutiny. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2 et seq., as amended, 42 U.S.C.A. § 1973 et seq.

5 Cases that cite this headnote

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

Under "results" test for determining violation of Voting Rights Act's prohibition against imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen to vote on account of race or color," violation exists if, based on totality of circumstances, it is shown that political processes leading to nomination or election in state or political subdivision are not equally open to participation by members of a protected class, in that its members have less opportunity than other members of electorate to participate in political process and to elect representatives of their choice. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

1 Case that cites this headnote

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

"Narrow tailoring" requirement of strict scrutiny allows states limited degree of leeway in furthering compelling state interests; if state has "strong basis in evidence" for concluding that creation of majority-minority district is reasonably necessary to comply with Voting Rights Act's results test, and if districting that is based on race possible violation of Act, racially conscious districting satisfies strict scrutiny. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

23 Cases that cite this headnote

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

Under narrow tailoring requirement of strict scrutiny applied to congressional districts that were alleged racial gerrymandering, district need not have the least possible amount of irregularity in shape, making allowances for traditional districting criteria; states have limited degree of leeway in furthering compelling state interests under "results" test for determining violation of Voting Rights Act's prohibition against imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen to vote on account of race or color." (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

17 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Under "results" test for determining violation of Voting Rights Act's prohibition against imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen to vote on account of race or color," congressional district that is reasonably compact and regular, taking into account traditional districting principles such

as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by objectors' experts in endless "beauty contests." (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

33 Cases that cite this headnote

[23] **United States** Apportionment of Representatives; Reapportionment and Redistricting

In federal system, importance attaches to each state's sovereign interest in implementing its congressional redistricting plan. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.)

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

States retain flexibility that federal courts lack when dealing with congressional districts that are challenged under Voting Rights Act, both insofar as states may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, liability for vote dilution; state has discretion to apply traditional districting principles in majority-minority, as in other, districts and constitutional problem arises only from subordination of those principles to race. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

14 Cases that cite this headnote

[25] **Constitutional Law** Voting and political rights

Strict scrutiny remains, nonetheless, strict, although states retain flexibility that federal courts lack when dealing with congressional districts that are challenged under Voting Rights Act's prohibition against vote dilution. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

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

State must have "strong basis in evidence" for finding that threshold conditions for Voting Rights Act liability are present when it draws majority-minority districts; state must have strong evidence that minority group is sufficiently large and geographically compact to be majority in single member district, that it is politically cohesive, and that white majority votes sufficiently as a bloc to enable it usually to defeat minority's preferred candidate, and State must not subordinate traditional districting principles to race substantially more than is "reasonably necessary" to avoid liability. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

22 Cases that cite this headnote

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

Majority-minority congressional districts in Texas could not be upheld under "results" test for determining violation of Voting Rights Act, even if Texas had strong basis in evidence for finding that minority population in each district was politically cohesive and that white majority voted sufficiently as a bloc to enable it usually to defeat minority's preferred candidate; challenged districts were bizarrely shaped and far from compact, and those characteristics were predominantly attributable to gerrymandering

that was racially motivated and/or achieved by use of race as a proxy for traditional political considerations. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

15 Cases that cite this headnote

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

If, because of dispersion of the minority population, reasonably compact majority-minority district cannot be created, Voting Rights Act's prohibition against vote dilution does not require majority-minority district; if reasonably compact district can be created, nothing requires race-based creation of district that is far from compact in order to satisfy "results" test. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

23 Cases that cite this headnote

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

Bizarre shaping and noncompactness of majority-minority congressional districts in Texas raised narrow tailoring concerns of strict scrutiny, despite claim that shape was relevant only as evidence of improper motive; significant deviations from traditional districting principles, such as bizarre shape and noncompactness, caused constitutional harm insofar as they could convey message that political identity was, or should have been, predominantly racial. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

9 Cases that cite this headnote

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

State's interest in remedying past discrimination is compelling and may justify race-based congressional districting if discrimination that state seeks to remedy is specific, "identified discrimination" and if state has strong basis in evidence to conclude that remedial action is necessary, before it embarks on affirmative action program. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

2 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Existing racial bloc voting by white voters in majority-minority districts was not sufficient to justify race-based districts that were not narrowly tailored to comply with strict scrutiny; alleged vote dilution was the same concern that formed basis of compliance with Voting Rights Act's "results" test as unsuccessful defense to claim of racial gerrymandering. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

8 Cases that cite this headnote

[32] **Election Law** In general; covered jurisdictions

Voting Rights Act's preclearance requirement has limited substantive goal to insure that no voting procedure changes would be made that would lead to retrogression in position of racial minorities with respect to their effective exercise of electoral franchise. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.)

Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

4 Cases that cite this headnote

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

Noncompact majority-minority congressional district could not be upheld under "nonretrogression" principle underlying Voting Rights Act's preclearance requirement where State substantially augmented, and did not just maintain, African-American population percentage in district; at previous redistricting, district's population was 40.8% African-American and district increased to 50.9% African-American population. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

6 Cases that cite this headnote

[34] **Election Law** In general; covered jurisdictions

Nonretrogression principle underlying Voting Rights Act's preclearance requirement is not a license for state to do whatever it deems necessary to insure continued electoral success of minority voters; it merely mandates that minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by state's actions. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

8 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Congressional reapportionment plan would not be narrowly tailored to goal of avoiding retrogression, which is principle underlying Voting Rights Act's preclearance requirement, and, thus, would not satisfy strict scrutiny when plan is challenged as racial gerrymandering, if state went beyond what was reasonably necessary to avoid retrogression. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

2 Cases that cite this headnote

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

Fact that congressional districts are created with view to satisfying Voting Rights Act's prohibition against vote dilution do not involve "racial subjugation," and may in a sense be "benignly" motivated, does not exempt those districts from strict scrutiny if they are challenged as racial gerrymandering. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

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

Racial classifications in drawing congressional districts are subjected to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

4 Cases that cite this headnote

[38] **Constitutional Law** Elections

United States Equality of representation and discrimination; Voting Rights Act

Recognition of cause of action to challenge racial gerrymandering in drawing congressional districts does not threaten excessive judicial entanglement into state's districting process, despite complexity of districting process that prevents adoption of bright-line rules; courts will remain in their customary and appropriate backstop role. (Per Justice O'Connor, with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a, b), as amended, 42 U.S.C.A. § 1973(a, b).

1 Case that cites this headnote

****1948** *Syllabus* *

Because the 1990 census revealed a population increase entitling Texas to three additional congressional seats, and in an attempt to comply with the Voting Rights Act of 1965 (VRA), the Texas Legislature promulgated a redistricting plan that, among other things, created District 30 as a new majority-African-American district in Dallas County and District 29 as a new majority-Hispanic district in Harris County, and reconfigured District 18, which is adjacent to District 29, as a majority-African-American district. After the Department of Justice precleared the plan under VRA § 5, the plaintiffs, six Texas voters, filed this challenge alleging that 24 of the State's 30 congressional districts constitute racial gerrymanders in violation of the Fourteenth Amendment. The three-judge District Court held Districts 18, 29, and 30 unconstitutional. The Governor of Texas, private intervenors, and the United States (as intervenor) appeal.

Held: The judgment is affirmed.

861 F.Supp. 1304 (S.D.Tex.1994), affirmed.

Justice O'CONNOR, joined by THE CHIEF JUSTICE and Justice KENNEDY, concluded:

1. Plaintiff Chen, who resides in District 25 and has not alleged any specific facts showing that he personally has been subjected to any racial classification, lacks standing under *United States v. Hays,* 515 U.S. 737, 744–745, 115 S.Ct. 2431, 2436, 132 L.Ed.2d 635. But plaintiffs Blum and Powers, who reside in District 18, plaintiffs Thomas and Vera, who reside in District 29, and plaintiff Orcutt, who resides in District 30, have standing to challenge Districts 18, 29, and 30. See, *e.g., ibid.* P. 1951.

2. Districts 18, 29, and 30 are subject to strict scrutiny under this Court's precedents. Pp. 1951–1960.

(a) Strict scrutiny applies where race was "*the predominant* factor" motivating the drawing of district lines, see, *e.g., Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995) (emphasis added), and traditional, race-neutral districting principles were subordinated to race, see *ibid.* This is a mixed motive suit, and a careful review is therefore necessary to ***953** determine whether the districts at issue are subject to such scrutiny. Findings that Texas substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data, taken together, weigh in favor of the application of strict scrutiny. However, because factors other than race, particularly incumbency protection, clearly influenced the legislature, each of the challenged districts must be scrutinized to determine whether the District Court's conclusion that race predominated can be sustained. Pp. 1951–1954.

(b) District 30 is subject to strict scrutiny. Appellants do not deny that the district shows substantial disregard for the traditional districting principles of compactness and regularity, or that the redistricters pursued unwaveringly the objective of creating a majority-African-American district. Their argument that the district's bizarre shape is explained by efforts to unite communities of interest, as manifested by the district's consistently urban character and its shared media sources and major transportation lines to Dallas, must be rejected. The record contains no basis for displacing the District Court's conclusion that race predominated over the latter factors, particularly in light of the court's findings that the State's supporting data were largely unavailable to the legislature before the district was created and that the factors do not differentiate the district from surrounding areas with the same degree of correlation to district lines that racial data exhibit. Appellants' more substantial claim

that incumbency protection rivaled race in determining the district's shape is also unavailing. The evidence amply supports the District Court's conclusions that **1949 racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, which is not subject to strict scrutiny, see *Davis v. Bandemer,* 478 U.S. 109, 132, 106 S.Ct. 2797, 2810, 92 L.Ed.2d 85 (White, J., plurality opinion); and that political gerrymandering was accomplished in large part by the use of race as a proxy for political characteristics, which is subject to such scrutiny, cf. *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411. Pp. 1954–1958.

(c) Interlocking Districts 18 and 29 are also subject to strict scrutiny. Those districts' shapes are bizarre, and their utter disregard of city limits, local election precincts, and voter tabulation district lines has caused a severe disruption of traditional forms of political activity and created administrative headaches for local election officials. Although appellants adduced evidence that incumbency protection played a role in determining the bizarre district lines, the District Court's conclusion that the districts' shapes are unexplainable on grounds other than race and, as such, are the product of presumptively *954 unconstitutional racial gerrymandering is inescapably corroborated by the evidence. Pp. 1958–1960.

3. Districts 18, 29, and 30 are not narrowly tailored to serve a compelling state interest. Pp. 1960–1963.

(a) Creation of the three districts was not justified by a compelling state interest in complying with the "results" test of VRA § 2(b). It may be assumed without deciding that such compliance can be a compelling state interest. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 1905, 135 L.Ed.2d 207 (1996) *(Shaw II).* States attempting to comply with § 2 retain discretion to apply traditional districting principles and are entitled to a limited degree of leeway. But a district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is reasonably necessary. The districts at issue fail this test, since all three are bizarrely shaped and far from compact, and those characteristics are predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. Appellants Lawson et al. misinterpret *Miller, supra,* 515 U.S., at 913, 115 S.Ct., at 2486, when they argue that bizarre shaping and noncompactness go only to motive and are irrelevant to the narrow tailoring inquiry. Also unavailing is the United States' contention that insofar as bizarreness and noncompactness are necessary to achieve the State's compelling interest in compliance with § 2 while simultaneously achieving other legitimate redistricting goals, the narrow tailoring requirement is satisfied. The bizarre shaping and noncompactness of the districts in question were predominantly attributable to racial, not political, manipulation, while the Government's argument addresses the case of an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation. Pp. 1960–1962.

(b) The district lines at issue are not justified by a compelling state interest in ameliorating the effects of racially polarized voting attributable to Texas' long history of discrimination against minorities in electoral processes. Among the conditions that must be satisfied to render an interest in remedying discrimination compelling is the requirement that the discrimination be specific and "identified." *Shaw II,* at 910, 116 S.Ct., at 1903. Here, the only current problem that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, the same concern that underlies their VRA § 2 compliance defense. Once the correct standard is applied, the fact that these districts are not narrowly tailored to comply with § 2 forecloses this line of defense. Pp. 1962–1963.

(c) Creation of District 18 (only) was not justified by a compelling state interest in complying with VRA § 5, which seeks to prevent voting-procedure changes leading to a retrogression in the position of *955 racial minorities with respect to their effective exercise of the electoral franchise. See, *e.g., Miller,* 515 U.S., at 926, 115 S.Ct., at 2493. The problem with appellants' contention that this "nonretrogression" principle applies because Harris County previously contained a congressional district in which African– **1950 American voters always succeeded in selecting African–American representatives is that it seeks to justify not maintenance, but substantial augmentation, of the African–American population percentage, which has grown from 40.8% in the previous district to 50.9% in District 18. Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success;* it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions. District 18 is not narrowly tailored to the avoidance of § 5 liability. See *Shaw v. Reno,*

509 U.S. 630, 655, 113 S.Ct. 2816, 2831, 125 L.Ed.2d 511. P. 1963.

4. Various of the dissents' arguments, none of which address the specifics of this suit, and which have been rebutted in other decisions, must be rejected. Pp. 1963–1964.

Justice THOMAS, joined by Justice SCALIA, concluded that application of strict scrutiny in this suit was never a close question, since this Court's decisions have effectively resolved that the intentional creation of majority-minority districts, by itself, is sufficient to invoke such scrutiny. See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (strict scrutiny applies to all government classifications based on race); *Miller v. Johnson,* 515 U.S. 900, 918–919, 115 S.Ct. 2475, 2489, 132 L.Ed.2d 762 (1995) (Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was a predominant, motivating factor in its redistricting). *DeWitt v. Wilson,* 515 U.S. 1170, 115 S.Ct. 2637, 132 L.Ed.2d 876, distinguished. Application of strict scrutiny is required here because Texas has readily admitted that it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics. Assuming that the State has asserted a compelling state interest, its redistricting attempts were not narrowly tailored to achieve that interest. Pp. 1972–1974.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined. O'CONNOR, J., also filed a separate concurring opinion, *post,* p. 1968. KENNEDY, J., filed a concurring opinion, *post,* p. 1971. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post,* p. 1972. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 1974. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 1997.

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Opinion

Justice O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice KENNEDY join.

This is the latest in a series of appeals involving racial gerrymandering challenges to state redistricting efforts in the wake of the 1990 census. See *Shaw v. Hunt,* 515 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 *(Shaw II); United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) *(Shaw I).* That census revealed a population increase,largely ***957** in urban minority populations, that entitled Texas to three additional congressional seats. In response, and with a view to complying with the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 42 U.S.C. § 1973 *et seq.,* the Texas Legislature promulgated a ****1951** redistricting plan that, among other things, created District 30, a new majority-African-American district in Dallas County; created District 29, a new majority-Hispanic district in and around Houston in Harris County; and reconfigured District 18, which is adjacent to District 29, to make it a majority-African-American district. The Department of Justice precleared that plan under VRA § 5 in 1991, and it was used in the 1992 congressional elections.

The plaintiffs, six Texas voters, challenged the plan, alleging that 24 of Texas' 30 congressional districts constitute racial gerrymanders in violation of the Fourteenth Amendment. The three-judge United States District Court for the Southern District of Texas held Districts 18, 29, and 30 unconstitutional. *Vera v. Richards,* 861 F.Supp. 1304 (1994). The Governor of Texas, private intervenors, and the United States (as intervenor) now appeal. We noted probable jurisdiction, 515 U.S. 1172, 115 S.Ct. 2639, 132 L.Ed.2d 877 (1995). Finding that, under this Court's decisions in *Shaw I* and *Miller,* the district lines at issue are subject to strict scrutiny, and that they are not narrowly tailored to serve a compelling state interest, we affirm.

I

[1] As a preliminary matter, the State and private appellants contest the plaintiffs' standing to challenge these districts. Plaintiff Chen resides in Texas congressional District 25, and

has not alleged any specific facts showing that he personally has been subjected to any racial classification. Under our decision in *Hays,* he lacks standing. See *Hays, supra,* at 744–745, 115 S.Ct., at 2435–2436. But plaintiffs Blum and Powers are residents of District 18, plaintiffs Thomas and Vera are residents of District 29, and plaintiff Orcutt is a resident of District 30. We ***958** stated in *Hays* that "[w]here a plaintiff resides in a racially gerrymandered district, ... the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Hays, supra,* at 744–745, 115 S.Ct., at 2436; accord, *Miller, supra,* at 910–911, 115 S.Ct., at 2485. Under this rule, these plaintiffs have standing to challenge Districts 18, 29, and 30.

II

[2] We must now determine whether those districts are subject to strict scrutiny. Our precedents have used a variety of formulations to describe the threshold for the application of strict scrutiny. Strict scrutiny applies where "redistricting legislation ... is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," *Shaw I, supra,* 509 U.S., at 642, 113 S.Ct., at 2824, or where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller,* 515 U.S., at 913, 115 S.Ct., at 2486, and "the legislature subordinated traditional race-neutral districting principles ... to racial considerations," *id.,* at 916, 115 S.Ct., at 2488. See also *id.,* at 928, 115 S.Ct., at 2497 (O'CONNOR, J., concurring) (strict scrutiny only applies where "the State has relied on race in substantial disregard of customary and traditional districting practices").

[3] Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. See *Shaw I, supra,* at 646, 113 S.Ct., at 2826. Nor does it apply to all cases of intentional creation of majority-minority districts. See *DeWitt v. Wilson,* 856 F.Supp. 1409 (E.D.Cal.1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), summarily aff'd, 515 U.S. 1170, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995); cf. *Shaw I, supra,* 509 U.S., at 649, 113 S.Ct., at 2828 (reserving this question). Electoral district lines are "facially race neutral," so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of "classifications based explicitly on race." See ***959** *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 213, 115 S.Ct. 2097, 2105, 132 L.Ed.2d 158; cf. *post,* at 1972–1973, 1973–1974, (THOMAS, J., concurring in judgment) (assimilating our redistricting cases to *Adarand*). For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. ****1952** *Miller,* 515 U.S., at 916, 115 S.Ct., at 2488. By that, we mean that race must be "*the predominant* factor motivating the legislature's [redistricting] decision." *Ibid.* (emphasis added). We thus differ from Justice THOMAS, who would apparently hold that it suffices that racial considerations be *a* motivation for the drawing of a majority-minority district. See *post,* at 1973–1974.

The present suit is a mixed motive suit. The appellants concede that one of Texas' goals in creating the three districts at issue was to produce majority-minority districts, but they also cite evidence that other goals, particularly incumbency protection (including protection of "functional incumbents," *i.e.,* sitting members of the Texas Legislature who had declared an intention to run for open congressional seats), also played a role in the drawing of the district lines. The record does not reflect a history of " '*purely* race-based' " districting revisions. Cf. *Miller, supra,* at 918, 115 S.Ct., at 2489 (emphasis added). A careful review is, therefore, necessary to determine whether these districts are subject to strict scrutiny. But review of the District Court's findings of primary fact and the record convinces us that the District Court's determination that race was the "predominant factor" in the drawing of each of the districts must be sustained.

[4] We begin with general findings and evidence regarding the redistricting plan's respect for traditional districting principles, the legislators' expressed motivations, and the methods used in the redistricting process. The District Court began its analysis by rejecting the factual basis for appellants' claim that Texas' challenged "districts cannot be unconstitutionally bizarre in shape because Texas does not have and never has used traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, ***960** and conformity to political subdivisions." 861 F.Supp., at 1333. The court instead found that "generally, Texas has not intentionally disregarded traditional districting criteria," and that only one pre–1991 congressional district in Texas was comparable in its irregularity and noncompactness to the three challenged districts. *Id.,* at 1334. The court also noted that "compactness as measured by an 'eyeball' approach was much less

important," *id.,* at 1313, n. 9, in the 1991 plan, App. 144, than in its predecessor, the 1980 Texas congressional districting plan, *id.,* at 138, and that districts were especially irregular in shape in the Dallas and Harris County areas where the challenged districts are located, see 861 F.Supp., at 1313, n. 9.

These findings comport with the conclusions of an instructive study that attempted to determine the relative compactness of districts nationwide in objective, numerical terms. That study gave Texas' 1980 districting plan a roughly average score for the compactness and regularity of its district shapes, but ranked its 1991 plan among the worst in the Nation. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After *Shaw v. Reno,* 92 Mich. L.Rev. 483, 571–573, table 6 (1993). The same study ranked Districts 18, 29, and 30 among the 28 least regular congressional districts nationwide. See *id.,* at 565, table 3. Our own review gives us no reason to disagree with the District Court that the districts at issue "have no integrity in terms of traditional, neutral redistricting criteria," 861 F.Supp., at 1339.

The District Court also found substantial direct evidence of the legislature's racial motivations. The State's submission to the Department of Justice for preclearance under VRA § 5 reports a consensus within the legislature that the three new congressional districts

> " 'should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives. Accordingly, the three ***961** new districts include a predominantly black district drawn in the Dallas County area [District 30] and predominantly Hispanic districts in the Harris County area [District 29] and in the South Texas region. In addition to creating the three new minority districts, the proposed Congressional redistricting plan increases the black voting strength of the current District 18 (Harris County) by increasing the ****1953** population to assure that the black community may continue to elect a candidate of its choice.' " *Id.,* at 1315 (quoting Narrative of Voting Rights Act Considerations in Affected Districts, reprinted in App. 104–105).

The appellants also conceded in this litigation that the three districts at issue "were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress." 861 F.Supp., at 1337. And testimony of individual state officials confirmed that the decision to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned.

[5] The means that Texas used to make its redistricting decisions provides further evidence of the importance of race. The primary tool used in drawing district lines was a computer program called "REDAPPL." REDAPPL permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed updated racial composition statistics for the district as drawn. REDAPPL contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts). The availability and use of block-by-block racial data was unprecedented; before the 1990 census, data were not broken down beyond the census tract level. See App. 123. By providing uniquely ***962** detailed racial data, REDAPPL enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information. The District Court found that the districters availed themselves fully of that opportunity:

> "In numerous instances, the correlation between race and district boundaries is nearly perfect.... The borders of Districts 18, 29, and 30 change from block to block, from one side of the street to the other, and traverse streets, bodies of water, and commercially developed areas in seemingly arbitrary fashion until one realizes that those corridors connect minority populations." 861 F.Supp., at 1336.

[6] **[7]** **[8]** **[9]** These findings—that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data—together weigh in favor of the application of strict scrutiny. We do not hold that any one of these factors is independently sufficient to require strict scrutiny. The Constitution does not mandate regularity of district shape, see *Shaw I,* 509 U.S., at 647, 113 S.Ct., at 2826–2827, and the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race. Miller,* 515 U.S., at 916, 115 S.Ct., at 2488. Nor, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself. The direct evidence of that decision is not, as Justice

STEVENS suggests, *post,* at 1984, "the real key" to our decision; it is merely one of several essential ingredients. Nor do we "condemn state legislation merely because it was based on accurate information." *Post,* at 1988, n. 28. The use of sophisticated technology and detailed information in the drawing of majority-minority districts is no more objectionable than it is in the drawing of majority-majority districts. ***963** But, as the District Court explained, the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly *more* sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria here. We must therefore consider what role other factors played in order to determine whether race predominated.

Several factors other than race were at work in the drawing of the districts. Traditional districting criteria were not *entirely* neglected: Districts 18 and 29 maintain the integrity of county lines; each of the three districts takes its character from a principal city and the surrounding urban area; and none of the districts is as widely dispersed as ****1954** the North Carolina district held unconstitutional in *Shaw II,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207. (These characteristics are, however, unremarkable in the context of large, densely populated urban counties.) More significantly, the District Court found that incumbency protection influenced the redistricting plan to an unprecedented extent:

> "[A]s enacted in Texas in 1991, many incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives have selected the people." 861 F.Supp., at 1334 (citations and footnotes omitted).

***964** See also *id.,* at 1317–1318 (describing specific evidence of incumbency protection efforts statewide). This finding receives inferential support from the fact that all but one of Texas' 27 incumbents won in the 1992 elections. See *id.,* at 1318. And the appellants point to evidence that in many cases, race correlates strongly with manifestations of community of interest (for example, shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches) and with the political data that are vital to incumbency protection efforts, raising the possibility that correlations between racial demographics and district lines may be explicable in terms of nonracial motivations. For example, a finding by a district court that district lines were drawn in part on the basis of evidence (other than racial data) of where communities of interest existed might weaken a plaintiff's claim that race predominated in the drawing of district lines. Cf. *post,* at 2000 (SOUTER, J., dissenting) (recognizing the legitimate role of communities of interest in our system of representative democracy).

[10] **[11]** Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny. See *Davis v. Bandemer,* 478 U.S. 109, 132, 106 S.Ct. 2797, 2810, 92 L.Ed.2d 85 (1986) (White, J., plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"); *id.,* at 147, 106 S.Ct., at 2818 (O'CONNOR, J., concurring in judgment) ("[P]urely political gerrymandering claims" are not justiciable). And we have recognized incumbency protection, at least in the limited form of "avoiding contests between incumbent[s]," as a legitimate state goal. See *Karcher v. Daggett,* 462 U.S. 725, 740, 103 S.Ct. 2653, 2663, 77 L.Ed.2d 133 (1983); *White v. Weiser,* 412 U.S. 783, 797, 93 S.Ct. 2348, 2355–2356, 37 L.Ed.2d 335 (1973); *Burns v. Richardson,* 384 U.S. 73, 89, n. 16, 86 S.Ct. 1286, 1294, n. 16, 16 L.Ed.2d 376 (1966); cf. *Gaffney v. Cummings,* 412 U.S. 735, 751–754, and 752, n. 18, 93 S.Ct. 2321, 2330–2332, and 2331, n. 18, 37 L.Ed.2d 298 (1973) (State may draw irregular district lines in order ***965** to allocate seats proportionately to major political parties). Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained.

A

[12] The population of District 30 is 50% African–American and 17.1% Hispanic. Fifty percent of the district's population is located in a compact, albeit irregularly shaped, core in

south Dallas, which is 69% African–American. But the remainder of the district consists of narrow and bizarrely shaped tentacles—the State identifies seven "segments"—extending primarily to the north and west. See App. 335; see also M. Barone **1955 & G. Ujifusa, Almanac of American Politics 1996, p. 1277 (1995) (describing the district). Over 98% of the district's population is within Dallas County, see App. 118, but it crosses two county lines at its western and northern extremities. Its western excursion into Tarrant County grabs a small community that is 61.9% African–American, *id.,* at 331; its northern excursion into Collin County occupies a hook-like shape mapping exactly onto the only area in the southern half of that county with a combined African–American and Hispanic percentage population in excess of 50%, *id.,* at 153. The District Court's description of the district as a whole bears repeating:

> "The district sprawls throughout Dallas County, deliberately excludes the wealthy white neighborhoods of Highland Park and University Park and extends fingers into Collin County, which include the outermost suburbs of Dallas. In Collin County, the district picks up a small African–American neighborhood. The district extends into Tarrant County only to pick up a small border area with a high African–American concentration. It **966 also reaches out to claim Hamilton Park, an affluent African–American neighborhood surrounded by whites. Part of the district runs along Trinity River bottom, using it to connect dispersed minority population. Numerous [voter tabulation districts] were split in order to achieve the population mix required for the district.
>
> . . . . .
>
> "... It is at least 25 miles wide and 30 miles long." 861 F.Supp., at 1337–1338. See also Appendix A to this opinion (outline of District 30).

Appellants do not deny that District 30 shows substantial disregard for the traditional districting principles of compactness and regularity, or that the redistricters pursued unwaveringly the objective of creating a majority-African-American district. But they argue that its bizarre shape is explained by efforts to unite communities of interest in a single district and, especially, to protect incumbents.

Appellants highlight the facts that the district has a consistently urban character and has common media sources throughout, and that its tentacles include several major transportation lines into the city of Dallas. These factors, which implicate traditional districting principles, do correlate to some extent with the district's layout. But we see no basis in the record for displacing the District Court's conclusion that race predominated over them, particularly in light of the court's findings that the State's supporting data were not "available to the Legislature in any organized fashion before District 30 was created," 861 F.Supp., at 1338, and that they do not "differentiate the district from surrounding areas," *ibid.,* with the same degree of correlation to district lines that racial data exhibit, see App. 150. In reaching that conclusion, we do not, as Justice STEVENS fears, require States engaged in redistricting to compile "a comprehensive administrative record," *post,* at 1986 (STEVENS, J., dissenting), and we do not dismiss facts not explicitly mentioned in the redistricting plan's legislative history as "irrelevant," **967 *post,* at 1985. If, as may commonly happen, traditional districting principles are substantially followed without much conscious thought, they cannot be said to have been "subordinated to race." In considering whether race was the "predominant factor motivating the legislatur [e]," it is, however, *evidentially* significant that at the time of the redistricting, the State had compiled detailed racial data for use in redistricting, but made no apparent attempt to compile, and did not refer specifically to, equivalent data regarding communities of interest.

Appellants present a more substantial case for their claim that incumbency protection rivaled race in determining the district's shape. Representative Johnson was the principal architect of District 30, which was designed in part to create a safe Democratic seat for her. At an early stage in the redistricting process, Johnson submitted to the state legislature a plan for Dallas County with a relatively compact 44% African–American district that did not violate the integrity of any voter tabulation district or county lines. See App. 139; 861 F.Supp., at 1338. The District Court found that "[w]hile minority voters did not object" to it, *id.,* at 1330, "[t]hat plan drew much opposition from incumbents and was quickly abandoned," **1956 *id.,* at 1321, n. 22. "[F]ive other congressmen would have been thrown into districts other than the ones they currently represent." *Id.,* at 1330–1331. Appellants also point to testimony from Johnson and others to the effect that the incumbents of the adjacent Democratic Districts 5 and 24 exerted strong and partly successful efforts to retain predominantly African–American Democratic voters in their districts. (There was evidence that 97% of African–American voters in and around the city of Dallas vote Democrat.) See generally *id.,* at 1321–1322.

In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines. And ***968** the fact that, "[a]s it happens, ... many of the voters being fought over [by the neighboring Democratic incumbents] were African–American," *id.,* at 1338, would not, in and of itself, convert a political gerrymander into a racial gerrymander, no matter how conscious redistricters were of the correlation between race and party affiliation. See *Shaw I,* 509 U.S., at 646, 113 S.Ct., at 2826. If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime, cf. *post,* at 1988, n. 30 (STEVENS, J., dissenting) (discussing *United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996)).

[13] **[14]** **[15]** If the State's goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which Justice STEVENS focuses —precinct general election voting patterns, *post,* at 1987, precinct primary voting patterns, *post,* at 1981, and legislators' experience, *post,* at 1985—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. To the extent that the District Court suggested the contrary, it erred. But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation. Cf. *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("Race cannot be a proxy for determining juror bias or competence"). We cannot agree with the dissenters, see *post,* at 1988 (STEVENS, J., dissenting); *post,* at 2001, n. 5 (SOUTER, J., dissenting); see also *Shaw II,* at 924–925, n. 4, 116 S.Ct., at 1910, n. 4 (STEVENS, J., dissenting), that racial stereotyping that we have scrutinized closely in the context of jury service can pass without justification in the context of voting. If the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of ***969** political participation in our efforts to eliminate unjustified racial stereotyping by government actors.

[16] Here, the District Court had ample bases on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by the use of race as a proxy. The State's own VRA § 5 submission explains the drawing of District 30, and the rejection of Johnson's more compact plan, in exclusively racial terms:

> "... Throughout the course of the Congressional redistricting process, the lines of the proposed District 30 were constantly reconfigured in an attempt to maximize the voting strength for this black community in Dallas County ... While the legislature was in agreement that a safe black district should be drawn in the Dallas County area, the real dispute involved the composition, configuration and *quality* of that district. The community insisted that [a] 'safe' black district be drawn that had a total black population of at least 50%....
>
> "... Although some [alternative] proposals showed a more compact configuration, none of them reached the threshold 50% total black population which the community felt was necessary to assure its ability to ****1957** elect its own Congressional representative without having to form coalitions with other minority groups....
>
> "... The goal was to not only create a district that would maximize the opportunity for the black community to elect a Congressional candidate of its choice in 1992, but also one that included some of the major black growth areas which will assure continued electoral and economic opportunities over the next decades." App. 106–107.

As the District Court noted, testimony of state officials in earlier litigation (in which District 30 was challenged as a political gerrymander) contradicted part of their testimony ***970** here, and affirmed that "race was the primary consideration in the construction of District 30." 861 F.Supp., at 1338; see also *id.,* at 1319–1321. And Johnson explained in a letter to the Department of Justice written at the end of the redistricting process that incumbency protection had been achieved by using race as a proxy:

> " 'Throughout the course of the Congressional redistricting process, the lines were continuously reconfigured to assist in protecting the Democratic incumbents in the Dallas/Fort Worth metroplex area by spreading the Black population to increase the Democratic party index in those areas.' " *Id.,* at 1322 (quoting Plaintiff Exh. 6E6).

This is not to say that the direct evidence of the districters' intent showed race to be the sole factor considered. As Justice STEVENS notes, *post,* at 1984–1985, nn. 23–24, state officials' claims have changed as their interests have

changed. In the prior political gerrymandering suit and to the Department of Justice, they asserted that race predominated. In this suit, their testimony was that political considerations predominated. These inconsistent statements must be viewed in light of their adversarial context. But such questions of credibility are matters for the District Court, and we simply differ from the dissenters in our reading of the record when they find insupportable the District Court's reliance on the State's own statements indicating the importance of race, see *post,* at 1984–1985, nn. 23–24, 1989, n. 31 (opinion of STEVENS, J.).

Finally, and most significantly, the objective evidence provided by the district plans and demographic maps suggests strongly the predominance of race. Given that the districting software used by the State provided only racial data at the block-by-block level, the fact that District 30, unlike Johnson's original proposal, splits voter tabulation districts and even individual streets in many places, see App. 150; ***971** 861 F.Supp., at 1339, suggests that racial criteria predominated over other districting criteria in determining the district's boundaries. And, despite the strong correlation between race and political affiliation, the maps reveal that political considerations were subordinated to racial classification in the drawing of many of the most extreme and bizarre district lines. For example, the northernmost hook of the district, where it ventures into Collin County, is tailored perfectly to maximize minority population, see App. 153 (all whole and parts of 1992 voter tabulation districts within District 30's Collin County hook have a combined African–American and Hispanic population in excess of 50%, with an average African–American population of 19.8%, *id.,* at 331, while the combined African–American and Hispanic population in all surrounding voter tabulation districts, and the other parts of split districts, in Collin County is less than 25%), whereas it is far from the shape that would be necessary to maximize the Democratic vote in that area, see *id.,* at 196 (showing a Republican majority, based on 1990 voting patterns in seven of the eight 1990 voter tabulation districts wholly or partly included in District 30 in Collin County).*

****1958** **[17]** ***972** The combination of these factors compels us to agree with the District Court that "the contours of Congressional District 30 are unexplainable in terms other than race." 861 F.Supp., at 1339. It is true that District 30 does not evince a consistent, single-minded effort to "segregate" voters on the basis of race, *post,* at 1984 (STEVENS, J., dissenting), and does not represent "apartheid," *post,* at 2002, 2012 (SOUTER, J., dissenting). But the fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both ***973** as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre, noncompact shape and overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another is exceptional; Texas Congressional District 6, for example, which Justice STEVENS discusses in detail, *post,* at 1982–1983, has only the former characteristic. That combination of characteristics leads us to conclude that District 30 is subject to strict scrutiny.

B

[18] In Harris County, centered in the city of Houston, Districts 18 and 29 interlock "like a jigsaw puzzle ... in which it might be impossible to get the pieces apart." Barone & Ujifusa, Almanac of American Politics 1996, at 1307–1308; see also Appendixes B and C to this opinion (outlines of Districts 18, 29). As the District Court noted: "[T]hese districts are so finely 'crafted' that one *cannot* visualize their exact boundaries without looking at a map at least three feet square." 861 F.Supp., at 1323. According to the leading statistical study of relative district compactness and regularity, they are two of the three least regular districts in the country. See Pildes & Niemi, 92 Mich. L.Rev., at 565.

District 18's population is 51% African–American and 15% Hispanic. App. 110. It "has some of the most irregular boundaries of any congressional district in the country[,] ... boundaries that squiggle north toward Intercontinental Airport and northwest out radial highways, then spurt south on one side toward the port and on the other toward the Astrodome." Barone & Ujifusa, *supra,* at 1307. Its "many narrow corridors, wings, or fingers ... reach out to enclose black voters, ****1959** while excluding nearby Hispanic residents." Pildes & Niemi, *supra,* at 556.

District 29 has a 61% Hispanic and 10% African–American population. App. 110. It resembles

***974** " 'a sacred Mayan bird, with its body running eastward along the Ship Channel from downtown Houston until the tail terminates in Baytown. Spindly legs reach

> south to Hobby Airport, while the plumed head rises northward almost to Intercontinental. In the western extremity of the district, an open beak appears to be searching for worms in Spring Branch. Here and there, ruffled feathers jut out at odd angles.' " Barone & Ujifusa, *supra,* at 1335.

Not only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines. See, *e.g.,* 861 F.Supp., at 1340 (60% of District 18 and District 29 residents live in split precincts). This caused a severe disruption of traditional forms of political activity. Campaigners seeking to visit their constituents "had to carry a map to identify the district lines, because so often the borders would move from block to block"; voters "did not know the candidates running for office" because they did not know which district they lived in. *Ibid.* In light of Texas' requirement that voting be arranged by precinct, with each precinct representing a community that shares local, state, and federal representatives, it also created administrative headaches for local election officials:

> "The effect of splitting dozens of [voter tabulation districts] to create Districts 18 and 29 was an electoral nightmare. Harris County estimated that it must increase its number of precincts from 672 to 1,225 to accommodate the new Congressional boundaries. Polling places, ballot forms, and the number of election employees are correspondingly multiplied. Voters were thrust into new and unfamiliar precinct alignments, a few with populations as low as 20 voters." *Id.,* at 1325.

See also App. 119–127 (letter from local official setting forth administrative problems and conflict with local districting ***975** traditions); *id.,* at 147 (map showing splitting of city limits); *id.,* at 128, Plaintiffs' Exh. 6E1, Attachment A (map illustrating splitting of voting precincts).

As with District 30, appellants adduced evidence that incumbency protection played a role in determining the bizarre district lines. The District Court found that one constraint on the shape of District 29 was the rival ambitions of its two "functional incumbents," who distorted its boundaries in an effort to include larger areas of their existing state legislative constituencies. 861 F.Supp., at 1340. But the District Court's findings amply demonstrate that such influences were overwhelmed in the determination of the districts' bizarre shapes by the State's efforts to maximize racial divisions. The State's VRA § 5 submission explains that the bizarre configuration of Districts 18 and 29 "result[s] in the maximization of minority voting strength" in Harris County, App. 110, corroborating the District Court's finding that "[i]n the earliest stages of the Congressional redistricting process, state Democratic and Republican leaders rallied behind the idea of creating a new Hispanic safe seat in Harris County while preserving the safe African–American seat in District 18." 861 F.Supp., at 1324. State officials testified that "it was particularly necessary to split [voter tabulation districts] in order to capture pockets of Hispanic residents" for District 29, and that a 61% Hispanic population in that district—not a mere majority—was insisted upon. *Id.,* at 1340–1341. The record evidence of the racial demographics and voting patterns of Harris County residents belies any suggestion that party politics could explain the dividing lines between the two districts: The district lines correlate almost perfectly with race, see App. 151–152, while both districts are similarly solidly Democratic, see *id.,* at 194. And, even more than in District 30, the intricacy of the lines drawn, separating Hispanic voters from African–American voters on a block-by-block basis, betrays the critical impact of the block-by-block racial data available on the REDAPPL program. The District ***976** Court's conclusion is, therefore, inescapable: "Because Districts 18 and 29 are formed in utter disregard for traditional ****1960** redistricting criteria and because their shapes are ultimately unexplainable on grounds other than the racial quotas established for those districts, they are the product of [presumptively] unconstitutional racial gerrymandering." 861 F.Supp., at 1341.

III

Having concluded that strict scrutiny applies, we must determine whether the racial classifications embodied in any of the three districts are narrowly tailored to further a compelling state interest. Appellants point to three compelling interests: the interest in avoiding liability under the "results" test of VRA § 2(b), the interest in remedying past and present racial discrimination, and the "nonretrogression" principle of VRA § 5 (for District 18 only). We consider them in turn.

A

[19] Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color." In 1982, Congress amended the VRA by changing the language of § 2(a) and adding § 2(b), which

provides a "results" test for violation of § 2(a). A violation exists if,

> "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

***977** Appellants contend that creation of each of the three majority-minority districts at issue was justified by Texas' compelling state interest in complying with this results test.

[20] **[21]** As we have done in each of our previous cases in which this argument has been raised as a defense to charges of racial gerrymandering, we assume without deciding that compliance with the results test, as interpreted by our precedents, see, *e.g., Growe v. Emison,* 507 U.S. 25, 37–42, 113 S.Ct. 1075, 1082–1085, 122 L.Ed.2d 388 (1993), can be a compelling state interest. See *Shaw II,* at 915, 116 S.Ct., at 1905; *Miller,* 515 U.S., at 920–921, 115 S.Ct., at 2490. We also reaffirm that the "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests. If the State has a "strong basis in evidence," *Shaw I,* 509 U.S., at 656, 113 S.Ct., at 2832 (internal quotation marks omitted), for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," *Shaw II,* at 918, 116 S.Ct., at 1907, it satisfies strict scrutiny. We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." 861 F.Supp., at 1343. Cf. *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 291, 106 S.Ct. 1842, 1856, 90 L.Ed.2d 260 (1986) (O'CONNOR, J., concurring in part and concurring in judgment) (state actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny).

[22] **[23]** **[24]** A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests." The dissenters misread us when they make the leap from our disagreement about the facts of this ***978** suit to the conclusion that we are creating a "stalemate" by requiring the States to "get things just right," *post,* at 2006 (SOUTER, J., dissenting), or to draw "the precise compact district that a court would impose in a successful § 2 challenge," *post,* at 1990 (STEVENS, J., dissenting); see also *Shaw II,* at 949, 116 S.Ct., at 1921–1922 (STEVENS, J., dissenting). Rather, we adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting ****1961** plan. See *Voinovich v. Quilter,* 507 U.S. 146, 156, 113 S.Ct. 1149, 1156, 122 L.Ed.2d 500 (1993) ("[I]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place"); *Miller, supra,* at 915, 115 S.Ct., at 2488 ("It is well settled that reapportionment is primarily the duty and responsibility of the State") (internal quotation marks omitted). Under our cases, the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability. And nothing that we say today should be read as limiting "a State's discretion to apply traditional districting principles," *post,* at 1998 (SOUTER, J., dissenting), in majority-minority, as in other, districts. The constitutional problem arises only from the subordination of those principles to race.

[25] **[26]** Strict scrutiny remains, nonetheless, strict. The State must have a "strong basis in evidence" for finding that the threshold conditions for § 2 liability are present:

> "first, 'that [the minority group] is sufficiently large and *geographically compact* to constitute a majority in a single member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.' " *Growe, supra,* at 40, 113 S.Ct., at 1084 (emphasis added) (quoting *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766–2767, 92 L.Ed.2d 25 (1986)).

***979** And, as we have noted above, the district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is "reasonably necessary" to avoid § 2 liability. Districts 18, 29, and 30 fail to meet these requirements.

[27] We assume, without deciding, that the State had a "strong basis in evidence" for finding the second and third threshold conditions for § 2 liability to be present. We have, however, already found that all three districts are bizarrely

shaped and far from compact, and that those characteristics are predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. See Part II, *supra.* District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race as a proxy to further neighboring incumbents' interests. See *supra,* at 1954–1955, 1956–1958.

[28] These characteristics defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact." See *Johnson v. De Grandy,* 512 U.S. 997, 1008, 114 S.Ct. 2647, 2655, 129 L.Ed.2d 775 (1994). If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.

[29] Appellants argue that bizarre shaping and noncompactness do not raise narrow tailoring concerns. Appellants Lawson et al. claim that under *Shaw I* and *Miller,* "[s]hape is relevant only as evidence of an improper motive." ***980** Brief for Appellants Lawson et al. 56. They rely on our statement in *Miller:*

> "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 515 U.S., at 913, 115 S.Ct., at 2486.

The United States takes a more moderate position, accepting that in the context of narrow tailoring, "consideration must be given ****1962** to the extent to which the districts drawn by a State substantially depart from its customary redistricting practices," Brief for United States 36, but asserting that insofar as bizarreness and noncompactness are necessary to achieve the State's compelling interest in compliance with § 2 "while simultaneously achieving other legitimate redistricting goals," *id.,* at 37, such as incumbency protection, the narrowly tailoring requirement is satisfied. Similarly, Justice STEVENS' dissent argues that "noncompact districts should ... be a permissible method of avoiding violations of [§ 2]." *Post,* at 1989.

These arguments cannot save the districts before us. The Lawson appellants misinterpret *Miller:* District shape is not irrelevant to the narrow tailoring inquiry. Our discussion in *Miller* served only to emphasize that the ultimate constitutional values at stake involve the harms caused by the use of unjustified racial classifications, and that bizarreness is not necessary to trigger strict scrutiny. See *Miller,* 515 U.S., at 912–913, 115 S.Ct., at 2486. Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. For example, the bizarre shaping of Districts 18 and 29, cutting across pre-existing ***981** precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.

Nor is the United States' argument availing here. In determining that strict scrutiny applies here, we agreed with the District Court that in fact the bizarre shaping and noncompactness of these districts were predominantly attributable to racial, not political, manipulation. The United States' argument, and that of the dissent, *post,* at 1989–1990 (STEVENS, J., dissenting), address the case of an otherwise compact majority-minority district that is misshapen by predominantly nonracial, political manipulation. See also *post,* at 2009 (SOUTER, J., dissenting) (raising "the possibility that a State could create a majority-minority district that does not coincide with the *Gingles* shape so long as racial data are not overused"). We disagree with the factual premise of Justice sTEVENS' dissent, that these districts were drawn using "racial considerations only in a way reasonably designed" to avoid a § 2 violation, *post,* at 1989. The districts before us exhibit a level of racial manipulation that exceeds what § 2 could justify.

B

The United States and the State next contend that the district lines at issue are justified by the State's compelling interest in "ameliorating the effects of racially polarized voting attributable to past and present racial discrimination." Brief for United States 32; Brief for Appellants Bush et

al. 24–25. In support of that contention, they cite Texas' long history of discrimination against minorities in electoral processes, stretching from the Reconstruction to modern times, including violations of the Constitution and of the VRA. See, *e.g., Williams v. Dallas,* 734 F.Supp. 1317 (N.D.Tex.1990); *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Nixon v. Condon,* 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Nixon v.* ***982** *Herndon,* 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); see also 861 F.Supp., at 1317 (because of its history of official discrimination, Texas became a covered jurisdiction under VRA § 5 in 1975, and the Department of Justice has since "frequently interposed objections against the State and its subdivisions"). Appellants attempt to link that history to evidence that in recent elections in majority-minority districts, "Anglos usually bloc voted against" Hispanic and African–American candidates. *Ibid.*

[30] **[31]** A State's interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, "identified discrimination"; second, the State "must have had a 'strong basis in evidence' to conclude that remedial action ****1963** was necessary, '*before* it embarks on an affirmative action program.' " *Shaw II,* at 910, 116 S.Ct., at 1903 (citations omitted). Here, the only current problem that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, the same concern that underlies their VRA § 2 compliance defense, which we have assumed to be valid for purposes of this opinion. We have indicated that such problems will not justify race-based districting unless "the State employ[s] sound districting principles, and ... the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." *Shaw I,* 509 U.S., at 657, 113 S.Ct., at 2832 (internal quotation marks omitted). Once that standard is applied, our agreement with the District Court's finding that these districts are not narrowly tailored to comply with § 2 forecloses this line of defense.

C

[32] The final contention offered by the State and private appellants is that creation of District 18 (only) was justified by a compelling state interest in complying with VRA § 5. We have made clear that § 5 has a limited substantive goal: " 'to insure that no voting-procedure changes would be made that ***983** would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " *Miller,* 515 U.S., at 926, 115 S.Ct., at 2493 (quoting *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1363–1364, 47 L.Ed.2d 629 (1976)). Appellants contend that this "nonretrogression" principle is implicated because Harris County had, for two decades, contained a congressional district in which African–American voters had succeeded in selecting representatives of their choice, all of whom were African–Americans.

[33] **[34]** **[35]** The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African–American population percentage in District 18. At the previous redistricting, in 1980, District 18's population was 40.8% African–American. Plaintiffs' Exh. 13B, p. 55. As a result of Hispanic population increases and African–American emigration from the district, its population had reached 35.1% African–American and 42.2% Hispanic at the time of the 1990 census. The State has shown no basis for concluding that the *increase* to a 50.9% African–American population in 1991 was necessary to ensure nonretrogression. Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success;* it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions. We anticipated this problem in *Shaw I,* 509 U.S., at 655, 113 S.Ct., at 2831: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." Applying that principle, it is clear that District 18 is not narrowly tailored to the avoidance of § 5 liability.

IV

[36] **[37]** The dissents make several further arguments against today's decision, none of which address the specifics of this case. We have responded to these points previously. Justice SOUTER, for example, reiterates his contention from ***984** *Shaw I* that because districts created with a view to satisfying § 2 do not involve "racial subjugation," *post,* at 2002, and may in a sense be " 'benign[ly]' " motivated, *Shaw I,* 509 U.S., at 685, 113 S.Ct., at 2848 (SOUTER, J., dissenting), strict scrutiny should not apply to them. We rejected that argument in *Shaw I,* and we reject it now. As we explained then, see *id.,* at 653, 113 S.Ct., at 2830, we subject

racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign —as Justice STEVENS' hypothetical of a targeted outreach program to protect victims of sickle cell anemia, see *post,* at 1988, would, no doubt, be—or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification. We see no need to revisit our prior debates.

[38] Both dissents contend that the recognition of the *Shaw I* cause of action threatens ****1964** public respect for, and the independence of, the Federal Judiciary by inserting the courts deep into the districting process. We believe that the dissents both exaggerate the dangers involved, and fail to recognize the implications of their suggested retreat from *Shaw I.*

As to the dangers of judicial entanglement, Justice STEVENS' dissent makes much of cases stemming from State districting plans originally drawn up before *Shaw I,* in which problems have arisen from the uncertainty in the law prior to and during its gradual clarification in *Shaw I, Miller,* and today's cases. See *post,* at 1990–1991 (STEVENS, J., dissenting). We are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available. But we believe that today's decisions, which both illustrate the defects that offend the principles of *Shaw I* and reemphasize the importance of the States' discretion in the redistricting process, see *supra,* at 1960–1961, will serve ***985** to clarify the States' responsibilities. The States have traditionally guarded their sovereign districting prerogatives jealously, and we are confident that they can fulfill that requirement, leaving the courts to their customary and appropriate backstop role.

This Court has now rendered decisions after plenary consideration in five cases applying the *Shaw I* doctrine (*Shaw I, Miller, Hays, Shaw II,* and this suit). The dissenters would have us abandon those precedents, suggesting that fundamental concerns relating to the judicial role are at stake. See *post,* at 1990, 1991, 1993 (STEVENS, J., dissenting); *post,* at 1998–1999 and n. 2, 2001, 2007, 2011, 2012 (SOUTER, J., dissenting); *Shaw II,* 919–920, 922–923, and n. 3, 929, 116 S.Ct., at 1907–1908, 1908–1910, and n. 3, 1912 (STEVENS, J., dissenting); but see *ante,* at 932–933, 116 S.Ct., at 1913–1914 (noting that the judicial task of distinguishing race-based from non-race-based action in *Shaw I* cases is far from unique). While we agree that those concerns are implicated here, we believe they point the other way. Our legitimacy requires, above all, that we adhere to *stare decisis,* especially in such sensitive political contexts as the present, where partisan controversy abounds. Legislators and district courts nationwide have modified their practices —or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census —in response to *Shaw I.* Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter. Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes. See, *e.g., Georgia v. McCollum,* 505 U.S. 42, 59, 112 S.Ct. 2348, 2359, 120 L.Ed.2d 33 (1992) ("[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party"); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 630–631, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize ***986** that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury"); *Powers,* 499 U.S., at 410, 111 S.Ct., at 1370 ("We may not accept as a defense to racial discrimination the very stereotype the law condemns"); *Holland v. Illinois,* 493 U.S. 474, 484, n. 2, 110 S.Ct. 803, 809, n. 2, 107 L.Ed.2d 905 (1990) ("[A] prosecutor's 'assumption that a black juror may be presumed to be partial simply because he is black' ... violates the Equal Protection Clause"); *Batson v. Kentucky,* 476 U.S. 79, 104, 106 S.Ct. 1712, 1727, 90 L.Ed.2d 69 (1986) ("[T]he Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes"). We decline to retreat from that commitment today.

The judgment of the District Court is

Affirmed.

****1965** APPENDIX A TO OPINION OF O'CONNOR, J.

**1966 APPENDIX B TO OPINION OF O'CONNOR, J.

**1967 APPENDIX C TO OPINION OF O'CONNOR, J.

**1968 *990 Justice O'CONNOR, concurring.

I write separately to express my view on two points. First, compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest. Second, that test can coexist in principle and in practice with *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), and its progeny, as elaborated in today's opinions.

I

As stated in the plurality opinion, *ante,* at 1960 (O'CONNOR, J., joined by REHNQUIST, C.J., and KENNEDY, J.), this Court has thus far assumed without deciding that compliance with the results test of VRA § 2(b) is a compelling state interest. See *Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 1905, 135 L.Ed.2d 207 (1996) *(Shaw II)*; *Miller v. Johnson,* 515 U.S. 900, 920–921, 115 S.Ct. 2475, 2490–2491, 132 L.Ed.2d 762 (1995). Although that assumption is not determinative of the Court's decisions today, I believe that States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA.

The results test is violated if,

> "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [*e.g.,* a racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

In the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligations that it places on

States in a succession of cases, assuming but never directly addressing its constitutionality. See *Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Holder v. Hall,* 512 U.S. 874, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994); *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Growe v. Emison,* 507 U.S. 25, 37–42, 113 S.Ct. 1075, 1083–1085, 122 L.Ed.2d 388 (1993); *Chisom v. Roemer,* 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991); *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); cf. *Chisom,* ***991** *supra,* at 418, 111 S.Ct., at 2376 (KENNEDY, J., dissenting) (noting that a constitutional challenge to the statute was not before the Court). Meanwhile, lower courts have unanimously affirmed its constitutionality. See *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1556–1563 (C.A.11), cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Jones v. Lubbock,* 727 F.2d 364, 372–375 (C.A.5 1984); *Shaw v. Hunt,* 861 F.Supp. 408, 438 (E.D.N.C.1994), aff'd, *Shaw II,* 899, 116 S.Ct. 1894, 135 L.Ed.2d 207; *Prosser v. Elections Bd.,* 793 F.Supp. 859, 869 (W.D.Wis.1992); *Wesley v. Collins,* 605 F.Supp. 802, 808 (M.D.Tenn.1985), aff'd, 791 F.2d 1255 (C.A.6 1986); *Jordan v. Winter,* 604 F.Supp. 807, 811 (N.D.Miss.), aff'd. *sub nom. Allain v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 83 L.Ed.2d 343 (1984); *Sierra v. El Paso Independent School Dist.,* 591 F.Supp. 802, 806 (W.D.Tex.1984); *Major v. Treen,* 574 F.Supp. 325, 342–349 (E.D.La.1983); accord, Hartman, Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards, 50 Geo. Wash. L.Rev. 689, 739–752 (1982). Cf. *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (upholding the original VRA as a valid exercise of Congress' power under § 2 of the Fifteenth Amendment); *Fullilove v. Klutznick,* 448 U.S. 448, 477, 100 S.Ct. 2758, 2774, 65 L.Ed.2d 902 (1980) (*Katzenbach* and its successors interpreting § 2 of the Fifteenth Amendment "confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination"); *White v. Alabama,* 867 F.Supp. 1519, 1549 (M.D.Ala.1994) (the results test "has not been held unconstitutional and complying with it remains a strong state interest"), vacated and remanded on other grounds, 74 F.3d 1058, 1069 (C.A.11 1996) (noting that "Section 2 was enacted to enforce the Fifteenth Amendment's prohibition against denying a citizen the right to vote 'on account of race' ").

****1969** Against this background, it would be irresponsible for a State to disregard the § 2 results test. The Supremacy Clause obliges the States to comply with all constitutional ***992** exercises of Congress' power. See U.S. Const., Art. VI, cl. 2. Statutes are presumed constitutional, see, *e.g., Fairbank v. United States,* 181 U.S. 283, 285, 21 S.Ct. 648, 649, 45 L.Ed. 862 (1901), and that presumption appears strong here in light of the weight of authority affirming the results test's constitutionality. In addition, fundamental concerns of federalism mandate that States be given some leeway so that they are not "trapped between the competing hazards of liability." *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 291, 106 S.Ct. 1842, 1856, 90 L.Ed.2d 260 (1986) (O'CONNOR, J., concurring). We should allow States to assume the constitutionality of § 2 of the VRA, including the 1982 amendments.

This conclusion is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments. See *City of Rome v. United States,* 446 U.S. 156, 179, 100 S.Ct. 1548, 1562–1563, 64 L.Ed.2d 119 (1980). The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment "to confront its conscience and fulfill the guarantee of the Constitution" with respect to equality in voting. S.Rep. No. 97–417, p. 4 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177, 181. Congress considered the test "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Id.,* at 27, U.S.Code Cong. & Admin.News 1982, p. 204. It believed that without the results test, nothing could be done about "overwhelming evidence of unequal access to the electoral system," *id.,* at 26, U.S.Code Cong. & Admin.News 1982, p. 204, or about "voting practices and procedures [that] perpetuate the effects of past purposeful discrimination," *id.,* at 40, U.S.Code Cong. & Admin.News 1982, p. 218. And it founded those beliefs on the sad reality that "there still are some communities in our Nation where racial politics do dominate the electoral process." *Id.,* at 33, U.S.Code Cong. & Admin.News 1982, p. 211. Respect for those legislative conclusions mandates that the § 2 results test be accepted and applied unless and until current lower court precedent is reversed and it is held unconstitutional.

In my view, therefore, the States have a compelling interest in complying with the results test as this Court has interpreted it.

***993** II

Although I agree with the dissenters about § 2's role as part of our national commitment to racial equality, I differ from them in my belief that that commitment can and must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes. At the same time that we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease.

Today's decisions, in conjunction with the recognition of the compelling state interest in compliance with the reasonably perceived requirements of § 2, present a workable framework for the achievement of these twin goals. I would summarize that framework, and the rules governing the States' consideration of race in the districting process, as follows.

First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. See *ante,* at 1951–1952 (plurality opinion); *post,* at 1976–1978, and n. 8, 1985 (STEVENS, J., dissenting); *post,* at 2003, 2007, 2011 (SOUTER, J., dissenting). Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply. *Ante,* at 1953, 1954, 1961 (plurality opinion).

Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to ... elect representatives of their choice." § 2(b). That principle may require a State to create ****1970** a majority-minority district where the three *Gingles* factors are present—viz., (i) the minority group "is sufficiently large and geographically compact to constitute a ***994** majority in a single-member district," (ii) "it is politically cohesive," and (iii) "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate," *Thornburg v. Gingles,* 478 U.S., at 50–51, 106 S.Ct., at 2766–2767.

Third, the state interest in avoiding liability under VRA § 2 is compelling. See *supra,* at 1968–1969; *post,* at 1989 (STEVENS, J., dissenting); *post,* at 2007 (SOUTER, J., dissenting). If a State has a strong basis in evidence for concluding that the *Gingles* factors are present, it may create a majority-minority district without awaiting judicial findings. Its "strong basis in evidence" need not take any particular form, although it cannot simply rely on generalized assumptions about the prevalence of racial bloc voting.

Fourth, if a State pursues that compelling interest by creating a district that "substantially addresses" the potential liability, *Shaw II,* 517 U.S., at 918, 116 S.Ct., at 1907, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, cf. *ante,* at 1961 (plurality opinion) (explaining how District 30 fails to satisfy these criteria), its districting plan will be deemed narrowly tailored. Cf. *ante,* at 1962 (plurality opinion) (acknowledging this possibility); *post,* at 2009 (SOUTER, J., dissenting) (same); *post,* at 1989–1990 (STEVENS, J., dissenting) (contending that it is applicable here).

Finally, however, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons,* are unconstitutional. See *ante,* at 1961 (plurality opinion).

District 30 illustrates the application of these principles. Dallas County has a history of racially polarized voting. See, *e.g., White v. Regester,* 412 U.S. 755, 765–767, 93 S.Ct. 2332, 2339–2340, 37 L.Ed.2d 314 (1973); *Lipscomb v. Wise,* 399 F.Supp. 782, 785–786 (N.D.Tex.1975), rev'd, 551 F.2d 1043 (C.A.5 1977), rev'd, 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). One year before the redistricting at issue here, a District Court invalidated under § 2 the Dallas City Council election ***995** scheme, finding racial polarization and that candidates preferred by African–American voters were consistently defeated. See *Williams v. Dallas,* 734 F.Supp. 1317, 1387–1394 (N.D.Tex.1990). Expert testimony in this litigation also confirmed the existence of racially polarized voting in and around Dallas County. 4 Tr. 187; see also App. 227. With respect to geographical compactness, the record contains two quite different possible designs for District 30, the original Johnson Plan, *id.,* at 139, and the Owens–Pate Plan, *id.,* at 141, that are reasonably compact and include, respectively, 44% and 45.6% African–American populations. This evidence provided a strong basis for Texas' belief that the creation of a majority-minority district was appropriate. But Texas allowed race to dominate the drawing of District 30 to the almost total exclusion of nonracial districting considerations, and ultimately produced a district that, because of the misuse of race as a proxy in addition to legitimate efforts to satisfy § 2, is bizarrely shaped and far from compact. See *ante,* at 1954–1955, 1956–1959, and n.

(plurality opinion); compare *post,* at 1979–1989 (STEVENS,, JJ., dissenting). It thus came under strict scrutiny and failed the narrow tailoring test.

As the disagreement among Members of this Court over District 30 shows, the application of the principles that I have outlined sometimes requires difficult exercises of judgment. That difficulty is inevitable. The VRA requires the States and the courts to take action to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government. But I believe that the States, playing a primary role, and the courts, in their secondary role, are capable of distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses.

****1971** ***996** Justice KENNEDY, concurring.

I join the plurality opinion, but the statements in Part II of the opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts, *ante,* at 1951, 1953–1954, require comment. Those statements are unnecessary to our decision, for strict scrutiny applies here. I do not consider these dicta to commit me to any position on the question whether race is predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State. In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races.

We need not answer this question here, for there is ample evidence that otherwise demonstrates the predominance of race in Texas' redistricting, as the plurality shows, *ante,* at 1951–1960. And this question was not at issue in *DeWitt v. Wilson,* 856 F.Supp. 1409 (E.D.Cal.1994), summarily aff'd. in part and dism'd in part, 515 U.S. 1170, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995). (I note that our summary affirmance in *DeWitt* stands for no proposition other than that the districts reviewed there were constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of the judgment. *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 2240–2241, 53 L.Ed.2d 199 (1977) *(per curiam); Edelman v. Jordan,* 415 U.S. 651, 671, 94 S.Ct. 1347, 1359–1360, 39 L.Ed.2d 662 (1974).)

On the narrow-tailoring issue, I agree that the districts challenged here were not reasonably necessary to serve the assumed compelling state interest in complying with § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. As the plurality opinion indicates, *ante,* at 1961, in order for compliance with § 2 to be a compelling interest, the State must have a strong basis in the evidence for believing that all three of the threshold conditions for a § 2 claim are met:

> "[F]irst, 'that [the minority group] is sufficiently large and geographically compact to constitute a majority in ***997** a single-member district'; second, 'that it is politically cohesive'; and third, 'that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.' " *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993), quoting *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766–2767, 92 L.Ed.2d 25 (1986).

The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district. As the plurality observes: "If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district...." *Ante,* at 1961. We may assume, as the plurality does expressly, *ibid.,* that there was sufficient evidence of racial polarization to fulfill the second and third *Gingles* conditions, and we may assume, as must be done to reach the narrow-tailoring question, that the African–American and Hispanic populations in Harris County and the African–American population in Dallas County were each concentrated enough to form a majority in a reasonably compact district, thereby meeting the first *Gingles* condition.

If a State has the assumed compelling interest in avoiding § 2 liability, it still must tailor its districts narrowly to serve that interest. "[T]he districting that is based on race [must] 'substantially addres[s] the § 2 violation.' " *Ante,* at 1960 (quoting *Shaw v. Hunt,* 517 U.S., at 918, 116 S.Ct., at 1907 *(Shaw II)*). The State may not engage in districting based on race except as reasonably necessary to cure the anticipated § 2 violation, nor may it use race as a proxy to serve other interests. *Ante,* at 1961. The plurality gives as an example of the former the fact that "District 30 ... reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district." *Ibid.* (referring to tentacles of District 30 that coil around outlying African–American communities in Collin and Tarrant Counties, ***998** *ante,* at 1955). And, as the plurality further holds ****1972**

in a portion of its predominant-factor analysis that is central to the narrow-tailoring inquiry, District 30 also involved the illicit use of race as a proxy when legislators shifted blocs of African–American voters to districts of incumbent Democrats in order to promote partisan interests. See *ante,* at 1956–1957.

Narrow tailoring is absent in Districts 18 and 29 as well. Although the State could have drawn either a majority-African-American or majority-Hispanic district in Harris County without difficulty, there is no evidence that two reasonably compact majority-minority districts could have been drawn there. Of the major alternative plans considered below, only the Owens–Pate plan drew majority-African-American and majority-Hispanic districts in Harris County, App. 142, but those districts were not compact. Section 2 does not require the State to create two noncompact majority-minority districts just because a compact district could be drawn for either minority independently. See *ante,* at 1961 ("§ 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact' "); *Johnson v. De Grandy,* 512 U.S. 997, 1024, 114 S.Ct. 2647, 2663, 129 L.Ed.2d 775 (1994) (affirming, upon a finding of no vote dilution, District Court decision not to give § 2 remedies to both African–Americans and Hispanics because population overlap made the remedies mutually exclusive). The race-based districting that the State performed in drawing Districts 18, 29, and 30 was not justified by § 2, or indeed by any other compelling interest, either real or assumed. That itself suffices to defeat the State's claim that those three districts were narrowly tailored. *Shaw II,* at 915–918, 116 S.Ct., at 1905–1907. (In this respect, I disagree with the apparent suggestion in Justice O'CONNOR's separate concurrence that a court should conduct a second predominant-factor inquiry in deciding whether a district was narrowly tailored, see *ante,* at 1970. There is nothing in ***999** the plurality opinion or any opinion of the Court to support that proposition. The simple question is whether the race-based districting was reasonably necessary to serve a compelling interest.)

While § 2 does not require a noncompact majority-minority district, neither does it forbid it, provided that the rationale for creating it is proper in the first instance. Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one. States are not prevented from taking into account race-neutral factors in drawing permissible majority-minority districts. If, however, the bizarre shape of the district is attributable to race-based districting unjustified by a compelling interest (*e.g.,* gratuitous race-based districting or use of race as a proxy for other interests), such districts may "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial," *ante,* at 1962. While districts "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests,' " *ante,* at 1960, the District Court was right to declare unconstitutional the egregious, unjustified race-based districting that occurred here.

Justice THOMAS, with whom Justice SCALIA joins, concurring in the judgment.

In my view, application of strict scrutiny in this suit was never a close question. I cannot agree with Justice O'CONNOR's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts. See *ante,* at 1951. Though *Shaw v. Reno,* 509 U.S. 630, 649, 113 S.Ct. 2816, 2828, 125 L.Ed.2d 511 (1993) *(Shaw I),* expressly reserved that question, we effectively resolved it in subsequent cases. Only last Term, in *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995), we vigorously asserted that all governmental racial classifications ***1000** must be strictly scrutinized.[1] And in ****1973** *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was a predominant, motivating factor in its redistricting. *Id.,* at 918–919, 115 S.Ct., at 2489–2490.

Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting. *Id.,* at 913–915, 115 S.Ct., at 2486–2487; *Shaw I, supra,* at 643–647, 113 S.Ct., at 2824–2827. While we have recognized the evidentiary difficulty of proving that a redistricting plan is, in fact, a racial gerrymander, see *Miller, supra,* at 916–917, 115 S.Ct., at 2488; *Shaw I,* 509 U.S., at 646–647, 113 S.Ct., at 2826–2827, we have never suggested that a racial gerrymander is subject to anything less than strict scrutiny. See *id.,* at 646, 113 S.Ct., at 2826 ("The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race").

In *Shaw I,* we noted that proving a racial gerrymander "sometimes will not be difficult at all," *ibid.,* and suggested that evidence of a highly irregular shape or disregard for traditional race-neutral districting principles could suffice to invoke strict scrutiny. We clarified in *Miller* that a plaintiff may rely on both circumstantial and direct evidence

and said that a plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles ... to racial considerations." 515 U.S., at 916, 115 S.Ct., at 2488. The shape of Georgia's Eleventh District was itself "quite compelling" evidence of ***1001** a racial gerrymander, but there was other evidence that showed that the legislature was motivated by a "predominant, overriding desire" to create a third majority-black district. That evidence was the State's own concession that the legislature had intentionally created an additional majority-black district. See *id.,* at 918–919, 115 S.Ct., at 2489–2490. On that record, we found that the District Court could not have "reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District." *Id.,* at 918, 115 S.Ct., at 2489.

We have said that impermissible racial classifications do not follow inevitably from a legislature's mere awareness of racial demographics. See *id.,* at 916, 115 S.Ct., at 2488; *Shaw I, supra,* at 646, 113 S.Ct., at 2826. But the intentional creation of a majority-minority district certainly means more than mere awareness that application of traditional, race-neutral districting principles will result in the creation of a district in which a majority of the district's residents are members of a particular minority group. See *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (distinguishing discriminatory intent from "intent as volition" or "intent as awareness of consequences"). In my view, it means that the legislature affirmatively undertakes to create a majority-minority district that would not have existed but for the express use of racial classifications—in other words, that a majority-minority district is created "because of," and not merely "in spite of," racial demographics. See *ibid.* When that occurs, traditional race-neutral districting principles are necessarily subordinated (and race necessarily predominates), and the legislature has classified persons on the basis of race. The resulting redistricting must be viewed as a racial gerrymander.

Our summary affirmance of *DeWitt v. Wilson,* 856 F.Supp. 1409 (E.D.Cal.1994), summarily aff'd. in part and dism'd in part, 515 U.S. 1170, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995), cannot justify exempting intentional race-based redistricting from our well-established Fourteenth Amendment standard. "When we summarily ***1002** affirm, without opinion, the judgment of a three-judge district court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance ****1974** settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Fusari v. Steinberg,* 419 U.S. 379, 391–392, 95 S.Ct. 533, 541, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring) (footnote omitted). I would not read our summary affirmance of *DeWitt* to eviscerate the explicit holding of *Adarand* or to undermine the force of our discussion of Georgia's concessions in *Miller.*

In this suit, Texas readily admits that it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics. As the State concedes in its brief:

> "Texas intentionally maintained [District] 18 as an African–American opportunity district and intentionally created [Districts] 29 and 30 as minority opportunity districts in order to comply voluntarily with its reasonable belief, based upon strong evidence, that it was required to do so by the Voting Rights Act, and because it desired to insure that minorities who have historically been excluded from the electoral process in Texas had a reasonable opportunity to elect candidates of their choice." Brief for State Appellants 25.

See also *ante,* at 1951–1953, 1956–1957 (reciting similar concessions by Texas). That is enough to require application of strict scrutiny in this suit.[2] I am content to reaffirm our holding in *Adarand* that all racial classifications by government must be strictly scrutinized and, even in the ***1003** sensitive area of state legislative redistricting, I would make no exceptions.

I am willing to assume without deciding that the State has asserted a compelling state interest. Given that assumption, I agree that the State's redistricting attempts were not narrowly tailored to achieve its asserted interest. I concur in the judgment.

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

The 1990 census revealed that Texas' population had grown, over the past decade, almost twice as fast as the population of the country as a whole. As a result, Texas was entitled to elect three additional Representatives to the United States Congress, enlarging its delegation from 27 to 30. Because Texas' growth was concentrated in south Texas and the cities of Dallas and Houston, the state legislature concluded that the new congressional districts should be carved out of existing districts in those areas. The consequences of the political

battle that produced the new map are some of the most oddly shaped congressional districts in the United States.

Today, the Court strikes down three of Texas' majorityminority districts, concluding, *inter alia,* that their odd shapes reveal that the State impermissibly relied on predominantly racial reasons when it drew the districts as it did. For two reasons, I believe that the Court errs in striking down those districts.

First, I believe that the Court has misapplied its own tests for racial gerrymandering, both by applying strict scrutiny to all three of these districts, and then by concluding that none can meet that scrutiny. In asking whether strict scrutiny should apply, the Court improperly ignores the "complex interplay" of political and geographical considerations that went into the creation of Texas' new congressional districts, *Miller v. Johnson,* 515 U.S. 900, 915–916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995), and ***1004** focuses exclusively on the role that race played in the State's decisions to adjust the shape of its districts. A quick comparison of the unconstitutional majority-minority districts with three equally bizarre majority-Anglo districts, compare *ante,* at Appendixes A–C, with *infra,* at Appendixes A–C, demonstrates that race was not necessarily the predominant factor contorting the district lines. I would follow the fair implications of the District ****1975** Court's findings,[1] and conclude that Texas' entire map is a political, not a racial, gerrymander.[2] See Part IV, *infra.*

Even if strict scrutiny applies, I would find these districts constitutional, for each considers race only to the extent necessary to comply with the State's responsibilities under the Voting Rights Act while achieving other race-neutral political and geographical requirements. The plurality's finding to the contrary unnecessarily restricts the ability of States to conform their behavior to the Voting Rights Act while simultaneously complying with other race-neutral goals. See Part V, *infra.*

Second, even if I concluded that these districts failed an appropriate application of this still-developing law to appropriately read facts, I would not uphold the District Court decision. The decisions issued today serve merely to reinforce ***1005** my conviction that the Court has, with its "analytically distinct" jurisprudence of racial gerrymandering, *Shaw v. Reno (Shaw I),* 509 U.S. 630, 652, 113 S.Ct. 2816, 2829–2830, 125 L.Ed.2d 511 (1993), struck out into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts. See Parts VI–VII, *infra; Shaw v. Hunt,* 517 U.S., at 918–919, 116 S.Ct., at 1907 (*Shaw II*) (STEVENS, J., dissenting). Though we travel ever farther from it with each passing decision, I would return to the well-traveled path that we left in *Shaw I.*

I

The factors motivating Texas' redistricting plan are clearly revealed in the results of the 1992 elections. Both before and immediately after the 1990 census, the Democratic Party was in control of the Texas Legislature. Under the new map in 1992, more than two-thirds of the Districts—including each of the new ones—elected Democrats, even though Texas voters are arguably more likely to vote Republican than Democrat.[3] Incumbents of both parties were just as successful: 26 of the 27 incumbents were reelected, while each of the three new districts elected a state legislator who had essentially acted as an incumbent in the districting process,[4] giving "incumbents" a 97% success rate.

****1976** ***1006** It was not easy for the State to achieve these results while simultaneously guaranteeing that each district enclosed the residence of its incumbent, contained the same number of people, and complied with other federal and state districting requirements. Much of Dallas and Houston, for example, was already represented in Congress by Democrats, and creating new Democratic districts in each city while ensuring politically safe seats for sitting Representatives required significant political gerrymandering. This task was aided by technological and informational advances that allowed the State to adjust lines on the scale of city blocks, thereby guaranteeing twists and turns that would have been essentially impossible in any earlier redistricting.[5] "[T]he result of the Legislature's efforts," the District Court concluded, was "a ***1007** crazy-quilt of districts" that bore little resemblance to "the work of public-spirited representatives." *Vera v. Richards,* 861 F.Supp. 1304, 1309 (S.D.Tex.1994); see, *e.g.,* Appendixes A–D.

It is clear that race also played a role in Texas' redistricting decisions. According to the 1990 Census, Texas contained 16,986,510 residents, of whom 22.5% were of Hispanic origin, and 11.6% were non-Hispanic African–American. 861 F.Supp., at 1311. Under the pre–1990 districting scheme,

Texas' 27–member delegation included four Hispanics and one African–American. In Harris County, a concentrated Hispanic community was divided among several majority-Anglo districts as well as the majority-minority District 18. In Dallas County, the majority-black community in South Dallas was split down the middle between two majority-Anglo districts. The legislature was well aware, after the 1990 census, that the minority communities in each county were disproportionately responsible for the growth in population that gained three representatives for the State. Given the omnipresence of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the demographics of the two communities, and the pressure from leaders of the minority communities in those cities, it was not unreasonable—and certainly not invidious discrimination of any sort—for the State to accede to calls for the creation of majority-minority districts in both cities.[6]

***1008** While complying with a multitude of other political and legal requirements, then, Texas created three new majority-minority congressional districts and significantly reconfigured one pre-existing district. The District Court concluded that the State impermissibly emphasized race over nonracial factors when it drew two of these new districts (District 30 in Dallas and District 29 in Houston) and the reconfigured District 18 in Houston. To determine whether the Court correctly affirms that decision, I begin, as does the plurality, by asking whether "strict scrutiny" should be applied to the State's ****1977** consideration of race in the creation of these majority-minority districts.

II

We have traditionally applied strict scrutiny to state action that discriminates on the basis of race. Prior to *Shaw I,* however, we did so only in cases in which that discrimination harmed an individual or set of individuals because of their race. In contrast, the harm identified in *Shaw I* and its progeny is much more diffuse. See *Shaw II,* 517 U.S., at 921–925, 116 S.Ct., at 1908–1910 (STEVENS, J., dissenting). Racial gerrymandering of the sort being addressed in these cases is "discrimination" only in the sense that the lines are drawn based on race, not in the sense that harm is imposed on specific persons on account of their race. *Id.,* at 923–924, 116 S.Ct., at 1909–1910 (STEVENS, J., dissenting).

Aware of this distinction, a majority of this Court has endorsed a position crucial to a proper evaluation of Texas' congressional districts: Neither the Equal Protection Clause nor any other provision of the Constitution was offended merely because the legislature considered race when it deliberately ***1009** created three majority-minority districts.[7] The plurality's statement that strict scrutiny "does [not] apply to all cases of intentional creation of majority-minority districts," *ante,* at 1951, merely caps a long line of discussions, stretching from *Shaw I* to *Shaw II,* which have both expressly and implicitly set forth precisely that conclusion.[8]

***1010** The conclusion that race-conscious districting should not always be subject to strict scrutiny merely recognizes that our equal protection jurisprudence can sometimes mislead us with its rigid characterization of suspect classes and levels of scrutiny. As I have ****1978** previously noted, all equal protection jurisprudence might be described as a form of rational basis scrutiny; we apply "strict scrutiny" more to describe the likelihood of success than the character of the test to be applied. See *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 452–453, 105 S.Ct. 3249, 3260–3261, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring). Because race has rarely been a legitimate basis for state classifications, and more typically an irrational and invidious ground for discrimination, a "virtually automatic invalidation of racial classifications" has been the natural result of the application of our equal protection jurisprudence. *Id.,* at 453, 105 S.Ct., at 3261. In certain circumstances, however, when the state action (i) has neither the intent nor effect of harming any particular group, (ii) is not designed to give effect to irrational prejudices held by its citizens but to break them down, and (iii) uses race as a classification because race is "relevant" to the benign goal of the classification, *id.,* at 454, 105 S.Ct., at 3262, we need not view the action with the typically fatal skepticism that we have used to strike down the most pernicious forms of state behavior. See ***1011** *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316–317, 106 S.Ct. 1842, 1869–1870, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 320, 98 S.Ct. 2733, 2763–2764, 57 L.Ed.2d 750 (1978). While the Court insisted in *Shaw I* that racial classifications of this sort injure the Nation (though not necessarily any particular group) in myriad ways, see 509 U.S., at 647–648, 113 S.Ct., at 2827, redistricting that complies with the three factors I outline above simply is not the sort of despicable practice that has been taken in the past to exclude minorities from the electoral process. See *Shaw II,* 517 U.S., at 931–933, 116 S.Ct., at 1913–1914 (STEVENS,, JJ., dissenting); *Shaw I,* 509 U.S., at 682–685, 113 S.Ct., at 2846–2848 (SOUTER, J., dissenting); cf., *e.g., Gomillion v. Lightfoot,*

364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). While any racial classification may risk some stereotyping, the risk of true "discrimination" in this case is extremely tenuous in light of the remedial purpose the classification is intended to achieve and the long history of resistance to giving minorities a full voice in the political process. Given the balancing of subtle harms and strong remedies —a balancing best left to the political process, not to our own well-developed but rigid jurisprudence—the plurality reasonably concludes that race-conscious redistricting is not always a form of "discrimination" to which we should direct our most skeptical eye.

III

While the Court has agreed that race can, to a point, govern the drawing of district lines, it nonetheless suggests that at a certain point, when the State uses race "too much," illegitimate racial stereotypes threaten to overrun and contaminate an otherwise legitimate redistricting process. In *Miller,* the Court concluded that this point was reached when "race for its own sake, and not other districting principles, was the ... dominant and controlling rationale" behind the shape of the district. 515 U.S., at 913, 115 S.Ct., at 2486. For strict scrutiny to apply, therefore, the plaintiff must demonstrate that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, ***1012** contiguity, [and] respect for political subdivisions ... to racial considerations." *Id.,* at 916, 115 S.Ct., at 2488; see also *id.,* at 928, 115 S.Ct., at 2497 (O'CONNOR, J., concurring) (strict scrutiny should be applied only if State emphasized race in "substantial disregard" for traditional districting principles); *ante,* at 1953 (opinion of O'CONNOR, J.).

Of course, determining the "predominant" motive of the Texas Legislature, *ante,* at 1953 (citing *Miller,* 515 U.S., at 916, 115 S.Ct., at 2488), is not a simple matter.[9] The ****1979** members of that body ***1013** faced many unrelenting pressures when they negotiated the creation of the contested districts. They had to ensure that there was no deviation in population from district to district.[10] They reasonably believed that they had to create districts that would comply with the Voting Rights Act. See *supra,* at 1976. If the redistricting legislation was to be enacted, they had to secure the support of incumbent Congressmen of both parties by drawing districts that would ensure their election. And all of these desires had to be achieved within a single contiguous district. Every time a district line was shifted from one place to another, each of these considerations was implicated, and additional, compensating shifts were necessary to ensure that all competing goals were simultaneously accomplished. In such a constrained environment, there will rarely be one "dominant and controlling" influence. Nowhere is this better illustrated ***1014** than in Dallas' District 30 where, at the very least, it is clear that race was *not* such an overriding factor.

IV

The plurality lists several considerations which, when taken in combination, lead it to conclude that race, and no other cause, was the predominant factor influencing District 30's configuration. First, there is the shape itself. Second, there is evidence that the districts were intentionally drawn with consciousness of race in an effort to comply with the Voting Rights Act. Third, the plurality dismisses two race-neutral considerations (communities of interest and incumbency protection) that appellants advanced as race-neutral considerations that led to the odd ****1980** shape of the districts. Finally, the plurality concludes that race was impermissibly used as a proxy for political affiliation during the course of redistricting. In my opinion, an appropriate reading of the record demonstrates that none of these factors—either singly or in combination—suggests that racial considerations "subordinated" race-neutral districting principles. I discuss each in turn.

Bizarre Shape

As noted, *supra,* at 1974, and n. 6, Texas' Legislature concluded that it would add a new district to Dallas County that would incorporate the rapidly growing minority communities in South Dallas. To do so, the new district would have to fit into the existing districts: Before redistricting, most of southern Dallas County (including the African–American communities in South Dallas) was divided between Districts 5 and 24, represented by Democratic Representatives Bryant and Frost, respectively. The middle of the northern section of the county was divided between Districts 3 and 26, both represented by Republicans.

Then–State Senator Johnson began the redistricting process by proposing a compact, Democratic, majority-minority ***1015** district encompassing all of South Dallas. See App.

139; 861 F.Supp., at 1321, n. 22. Representatives Bryant and Frost objected, however, because the proposed district included not only Johnson's residence, but their own homes, located within only 10 miles of each other on opposite sides of the city. Furthermore, Johnson's plan transferred many of Frost and Bryant's most reliable Democratic supporters into the proposed district. Rather than acquiesce to the creation of this compact majority-minority district, Frost and Bryant insisted that the new district avoid both their own homes and many of the communities that had been loyal to them. Johnson's plan was, therefore, "quickly abandoned." *Ibid.*

To accommodate the incumbents' desires, District 30 required geographical adjustments that had telling effects on its shape. First, two notches carefully avoiding the residences of and neighborhoods surrounding Frost and Bryant were carved out of District 30's side. See Appendix D, *infra.*[11] Furthermore, Frost and Bryant retained several communities —many majority-black—along the southern and eastern sides of the proposed district. See generally 861 F.Supp., at 1321–1322.[12]

***1016** Had these communities been retained by District 30, it would have been much more compact. By giving up these voters to Frost and Bryant, however, District 30 was forced to seek out population and Democratic voters elsewhere. The Democratic incumbents had blocked its way to the south and east; north (and, to a lesser extent, west) was the only way it could go.[13]

It would not have helped the prospects of a Democratic candidate in the new District 30 had it simply plowed directly north to pick up additional population. Immediately north of the city of Dallas are the "Park Cities," ****1981** which include a population that has voted strongly Republican throughout recent elections. See State's Exhs. 9A and 9B (depicting one index of political affiliation in 1990 and 1992 elections). Rather than dilute the Democratic vote (and threaten the Republican incumbents) in this manner, District 30 skirted these communities on the west, and then curved east, picking up communities on either side of the region's major interstate freeways.[14]

As the process of extracting Democratic voters out of the core of the Republican districts in North Dallas progressed, the distinction between Democratic and Republican voters moved from the precinct level (the smallest level at which political affiliation data was immediately available in the redistricting ***1017** programs) down to the smaller census block level (the smallest level at which demographic and socioeconomic data was available).[15] In an effort to further identify which census blocks were likely to support their candidacy, the incumbents used not only census data, but their own long experience as local representatives as well as the experiences of staffers and supporters. See 3 Tr. 177–179, 181–182 (describing methods, such as simply driving through neighborhoods, that staff members and candidates for office used to develop block-specific information regarding the likely political affiliation of voters).[16]

In addition, although information about political affiliation was not available at the block level through the computer program, legislators and staffers were able to get relatively precise information about voter preferences through a system, developed by the Democratic Party, that allowed candidates to determine in which party primary voters had participated. *Id.,* at 179–180. By examining this information, legislators were able to further fine-tune district lines to include likely supporters and exclude those who would probably ***1018** support their opponents. Cf. *Gaffney v. Cummings,* 412 U.S. 735, 753, 93 S.Ct. 2321, 2331, 37 L.Ed.2d 298 (1973) ("[W]hen [political profiles are] overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another").[17]

The careful gerrymandering conducted by the Texas Legislature under the watchful eye of Johnson and her staff was a success not ****1982** only on a districtwide level (Johnson was elected with over 70% of the vote in both 1992 and 1994), but on a precinct level. While the pre–1990 precincts in the heavily Republican North Dallas gave little reason for a Democratic incumbent to hope for much support, see State's Exh. 9B (maps of Dallas and Collin Counties with 1990 election index results showing only a few Democrat-leaning precincts in North Dallas), the gerrymandering that occurred in 1991 resulted in smaller precincts that, by all indications, gathered concentrations of Democratic voters into District 30 while leaving concentrations of Republican voters in surrounding Districts 3 and 26. See State's Exh. 9A (maps of Dallas and Collin Counties with 1992 election index results showing many more Democrat-leaning precincts in the North Dallas sections of District 30).

Presumably relying on *Shaw I* 's statement that "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other

than an effort to 'segregat[e] ... voters' on the basis of race," ***1019** 509 U.S., at 646–647, 113 S.Ct., at 2826, the plurality offers mathematical proof that District 30 is one of the most bizarre districts in the Nation, see *ante,* at 1952, and relates the now-obligatory florid description of the district's shape, *ante,* at 1954–1955; see also *ante,* at 1958–1959 (describing District 29). As the maps appended to this opinion demonstrate, neither District 30 nor the Houston districts have a monopoly on either of these characteristics. Three other majority-white districts are ranked along with the majority-minority districts as among the oddest in the Nation. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After *Shaw v. Reno,* 92 Mich. L.Rev. 483, 565 (1993). Perhaps the clearest example of partisan gerrymandering outside of the context of majority-minority districts is District 6, a majority-Anglo district represented by a Republican.[18]

***1020** For every geographic atrocity committed by District 30, District 6 commits its own and more. District 30 split precincts to gerrymander Democratic voters out of Republican precincts; District 6 did the same. See State's Exh. 9B (Tarrant County, showing District 6 cuts). District 30 travels down a riverbed; District 6 follows the boundaries of a lake. District 30 combines various unrelated communities of interest within Dallas and its suburbs; District 6 combines rural, urban, and suburban communities. District 30 sends tentacles nearly 20 miles out from its core; District 6 *is* a tentacle, hundreds of miles long (as the candidate walks), and it has no core.

The existence of the equally bizarre majority-white District 6 makes the plurality's discussion ****1983** of District 30's odd shape largely irrelevant. If anything, the similarities between Districts 6 and 30 suggest that it is more likely than not that the incumbency considerations that led to the mutation of District 6 were the same considerations that forced District 30 to twist and turn its way through North Dallas.[19]

***1021** The political, rather than the racial, nature of District 30's gerrymander is even more starkly highlighted by comparing it with the districts struck down in *Shaw II* and *Miller.* District 30's black population is, for instance, far more concentrated than the minority population in North Carolina's District 12. And in *Miller,* the Court made it clear that the odd shape of Georgia's Eleventh District was the result of a conscious effort to *increase* its proportion of minority populations: It was, the Court found, " 'exceedingly obvious' from the shape of the Eleventh District, together with the racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing *nearly 80%* of the district's total black population was a deliberate attempt to bring black populations into the district." *Miller,* 515 U.S., at 917, 115 S.Ct., at 2489 (emphasis added; citation omitted).

District 30 is the precise demographic *converse* of the district struck down in *Miller.* District 30, for example, has a compact core in South Dallas which contains 50% of the district population and *nearly 70%* of the district's total black population. Cf. *ibid.* Unlike the appendages to Georgia's District 11, the tentacles stretching north and west ***1022** from District 30 add progressively less in the way of population, and, more important for purposes of this inquiry, they actually *reduce* the proportional share of minorities in the district. See State's Exh. 33.

For example: The worst offender, in the trained eye of the Court, may be the northern arm of the district that winds around the Park Cities and then up into Collin County. But that arm, which contains 22% of the population, is only 21% black, *ibid.*—a proportion essentially identical to the proportion of African–Americans in Dallas County as a whole.[20]

The plurality is certainly correct in pointing out that District 30's outlying reaches encompass some communities with high concentrations of minorities.[21] It is implausible ****1984** ***1023** to suggest, however, that an effort to "segregate" voters drove District 30 to collect those populations. After all, even the District Court noted that African–American voters immediately adjacent to the core of District 30 were intentionally *excluded* from the district "*in order to protect incumbents*." 861 F.Supp., at 1339 (emphasis added). Forced into Republican territory to collect Democratic votes, the district intentionally picked up some minority communities (though far more majority-white communities). If it had not, the goal of creating a majority-black district would have been sacrificed to incumbency protection (the very sort of "predominance" of race over race-neutral factors that the plurality discredits). But unlike Georgia's District 11 and North Carolina's District 12, the *reason* that the district was there in the first place was not to collect minority communities, but to collect population—preferably Democrats. It would, therefore, be fanciful to assert that the "several appendages" to District 30 were "drawn for the obvious," let alone the *predominant,* "purpose of putting

black populations into the district." *Miller,* 515 U.S., at 910, 115 S.Ct., at 2485.[22]

In sum, a fair analysis of the shape of District 30, like the equally bizarre shape of District 6, belies the notion that its shape was determined by racial considerations.

***1024** *Intent*

Perhaps conscious that noncompact congressional districts are the rule rather than the exception in Texas, the plurality suggests, *ante,* at 1952–1953, 1956–1957, that the real key is the direct evidence, particularly in the form of Texas' § 5 Voting Rights Act submissions and the person of then-State Senator Johnson, that the State expressed an intent to create these districts with a given "minimum percentage of the favored minority." 861 F.Supp., at 1309. Even if it were appropriate to rest this test of dominance on an examination of the subjective motivation of individual legislators,[23] or on ***1025** testimony ****1985** given in a legal proceeding designed to prove a conflicting conclusion,[24] this information does little more than confirm that the State believed it necessary to comply with the Voting Rights Act. Given its reasonable understanding of its legal responsibilities, see *supra,* at 1976, the legislature acted to ensure that its goal of creating a majority-black district in Dallas County was not undermined by the changes made to accommodate District 30 to other, race-neutral districting principles. As the plurality admits, see *ante,* at 1951, the intent to create majority-minority districts does not in itself trigger strict scrutiny; these admissions prove nothing more than that. See also *Shaw II,* 517 U.S., at 930–932, 116 S.Ct., at 1912–1914 (STEVENS, J., dissenting).

Nonracial Factors: Community

In an effort to provide a definitive explanation for the odd shape of the district, the State emphasized two factors: The ***1026** presence of communities of interest tying together the populations of the district, and the role of incumbency protection. The District Court and the plurality improperly dismissed these considerations as ultimately irrelevant to the shape of the districts.

First, the appellants presented testimony that the districts were drawn to align with certain communities of interest, such as land use, family demographics, and transportation corridors. See 861 F.Supp., at 1322–1323. Although the District Court recognized that these community characteristics amounted to accurate descriptions of District 30, *id.,* at 1323, it dismissed them as irrelevant to the districting process, concluding that there was no evidence that "the Legislature had these particular 'communities of interest' in mind when drawing the boundaries of District 30." *Ibid.* The plurality concludes that appellants present no reason to displace that conclusion. *Ante,* at 1955.

I do not understand why we should require such evidence ever to exist. It is entirely reasonable for the legislature to rely on the experience of its members when drawing particular boundaries rather than on clearly identifiable "evidence" presented by demographers and political scientists. Most of these representatives have been members of their communities for years. Unless the Court intends to interfere in state political processes even more than it has already expressed an intent to do, I presume that it does not intend to require States to create a ****1986** comprehensive administrative record in support of their redistricting process. State legislators should be able to rely on their own experience, not only prepared reports. To the extent that the presence of obvious communities of interest among members of a district explicitly or implicitly guided the shape of District 30, it amounts to an entirely legitimate nonracial consideration.[25]

***1027** *Nonracial Factors: Incumbency*

The plurality admits that the appellants "present a ... substantial case for their claim that incumbency protection rivaled race in determining the district's shape." *Ante,* at 1955. Every individual who participated in the redistricting process knew that incumbency protection was a critical factor in producing the bizarre lines and, as the plurality points out, *ante,* at 1954, even the District Court recognized that this nearly exclusive focus on the creation of "safe" districts for incumbents was intimately related to the bizarre shape of district lines throughout the State.

> "[I]n Texas in 1991, many incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The Legislature obligingly carved out districts of apparent supporters of incumbents, ... and then added appendages to connect

their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives ***1028** have selected the people." 861 F.Supp., at 1334 (citations and footnotes omitted).

See also *id.,* at 1335, n. 43. Despite this overwhelming evidence that incumbency protection was *the* critical motivating factor in the creation of the bizarre Texas districts, the District Court reached the stunning conclusion that because the process was so "different in degree" from the "generalized, and legitimate, goal of incumbent and seniority protection" that this Court has previously recognized, it could not serve as a legitimate explanation for the bizarre boundaries of the congressional districts. *Id.,* at 1334–1335. In dismissing incumbency protection once and for all, the District Court stated that "[i]ncumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." *Id.,* at 1336.

It is difficult to know where to begin to attack the misperceptions reflected in these conclusions,[26] and the plurality's failure to do so seriously taints its evaluation of the relative importance of nonracial considerations in the creation of District 30. The initial problem, of course, is that under the Court's threshold test as set forth in *Miller,* one must consider the role of incumbency protection *before* determining whether there is an "unconstitutional racial gerrymander." And because the ultimate focus in these gerrymandering cases is the claim that race was the "dominant and controlling rationale in drawing [the] district lines," 515 U.S., at 913, 115 S.Ct., at 2486, a court *must,* in applying ****1987** that test, consider a State's claim that a given race-neutral rationale controlled the creation of those lines. See *id.,* at 916, 115 S.Ct., at 2488 ("Where [compactness, contiguity,] or *other race-neutral considerations* are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been ***1029** gerrymandered on racial lines' "). Although a court may not like the State's explanation, that is no excuse for ignoring it.

If some independent bar prevented the use of that race-neutral criterion, then the District Court might be in a position to object to the State's use of it. We have, however, affirmed that a State has an interest in incumbency protection, see, *e.g., ante,* at 1954 (opinion of O'CONNOR, J.); *White v. Weiser,* 412 U.S. 783, 791, 797, 93 S.Ct. 2348, 2352–2353, 2355–2356, 37 L.Ed.2d 335 (1973), and also assured States that the Constitution does not require compactness, contiguity, or respect for political borders, see *Shaw I,* 509 U.S., at 647, 113 S.Ct., at 2826–2827. While egregious political gerrymandering may not be particularly praiseworthy, see *infra,* at 1991–1992, it may nonetheless provide the race-neutral explanation necessary for a State to avoid strict scrutiny of the district lines where gerrymandering is the "dominant and controlling" explanation for the odd district shapes.[27]

The District Court's error had an apparently dispositive effect on its assessment of whether strict scrutiny should apply at all. Although aspects of our dispute with the plurality are "largely factual," *ante,* at 1957, n., they arise not out of our disagreement with the District Court's credibility assessments, but out of that court's erroneous conclusion that the State's overwhelming reliance on this race-neutral factor was illegitimate and irrelevant to its evaluation of the factors involved in the shifting of this district's lines. A fair evaluation of the record made in light of appropriate legal standards requires a conclusion very different from the District Court's. By following the District Court down its misdirected path, the plurality itself goes astray.

***1030** *Race as a Proxy*

Faced with all this evidence that politics, not race, was the predominant factor shaping the district lines, the plurality ultimately makes little effort to contradict appellants' assertions that incumbency protection was far more important in the placement of District 30's lines than race. See *ante,* at 1956. Instead, it adopts a fallback position based on an argument far removed from even the "analytically distinct" claim set forth in *Shaw I,* 509 U.S., at 652, 113 S.Ct., at 2829–2830. In it, the plurality suggests that even if the predominant reason for the bizarre features of the majority-minority districts was incumbency protection, the State impermissibly used race as a proxy for determining the likely political affiliation of blocks of voters. See *ante,* at 1956–1957 (opinion of O'CONNOR, J.).

The effect of this process, in all likelihood, was relatively unimportant to the overall shape of the district. A comparison of the 1992 precinct results with a depiction of the proportion of black population in each census block reveals that Democratic-leaning precincts cover a far greater area than majority-black census blocks. Compare State's Exh. 9A with State's Exh. 45. One would expect the opposite effect if the single-minded goal of those drawing the districts was racial composition rather than political affiliation. At the very least, the maps suggest that the drawing of boundaries involves a

demographic calculus far more complex than simple racial stereotyping.

Furthermore, to the extent that race served as a proxy at all, it did so merely as a means of "fine tuning" borders that were already in particular locations for primarily political reasons. This "fine tuning" through the use of race is, of course, little different from the kind of fine tuning that could have legitimately occurred around the edges of a **1988 compact majority-minority district.[28] I perceive no reason why a *1031 legitimate process—choosing minority voters for inclusion in a majority-minority district—should become suspect once nonracial considerations force district lines away from its core.

Finally, I note that in most contexts racial classifications are invidious because they are irrational. For example, it is irrational to assume that a person is not qualified to vote or to serve as a juror simply because she has brown hair or brown skin. It is neither irrational, nor invidious, however, to assume that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97% of the blacks in that community vote in Democratic primary elections. See Brief for United States 44. For that reason, the fact that the architects of the Texas plan sometimes appear to have used racial data as a proxy for making political judgments seems to me to be no more "unjustified," *ante,* at 1956 (opinion of O'CONNOR, J.), and to have no more constitutional significance, than an assumption that wealthy suburbanites, whether black or white, are more likely to be Republicans *1032 than Communists.[29] Requiring the State to ignore the association between race and party affiliation would be no more logical, and potentially as harmful, as it would be to prohibit the Public Health Service from targeting African–American communities in an effort to increase awareness regarding sickle-cell anemia.[30]

Despite all the efforts by the plurality and the District Court, then, the evidence demonstrates that race was not, in all likelihood, the "predominant" goal leading to the creation of District 30. The most reasonable interpretation of the record evidence instead demonstrates that political considerations were. In accord with the presumption against interference with a legislature's consideration of complex and competing factors, see n. 9, *supra,* I would conclude that the configuration of District 30 does not require strict scrutiny.

**1989 *1033 V

The Houston districts present a closer question on the application of strict scrutiny. There is evidence that many of the same race-neutral factors motivating the zigzags of District 30 were present at the creation (or recreation) of Districts 29 and 18. In contrast to District 30, however, there is also evidence that the interlocking shapes of the Houston districts were specifically, and almost exclusively, the result of an effort to create, out of largely integrated communities, both a majority-black and a majority-Hispanic district. For purposes of this opinion, then, I am willing to accept, *arguendo,* the plurality's conclusion that the Houston districts should be examined with strict scrutiny.[31] Even so, the plurality errs by concluding that these districts would fail that test.

The plurality begins with the perfectly obvious assumptions that a State has a compelling interest in complying with § 2 of the Voting Rights Act and that Texas had a strong basis for believing that it would have violated that Act in 1991 if it did not create three new majority-minority districts.[32] The plurality goes on to conclude, however, that because the final shape of these districts is not coextensive with the community that would form the core of a § 2 violation, these districts would not be "narrowly tailored" to further that state interest. *Ante,* at 1961. I respectfully disagree.

Neither evidence nor insinuation suggests that the State in the redistricting process considered race for any reason *1034 other than as a means of accomplishing its compelling interest of creating majority-minority districts in accord with the Voting Rights Act. The goal was, by all accounts, achieved, for these districts would certainly avoid liability under § 2 of the Voting Rights Act.[33] For reasons that continue to escape me, however, the plurality simply insists that the lack of compactness in the districts prevents them from being "narrowly tailored" solutions to the State's interests.

The plurality uses two premises to reach its conclusion that compactness is required to meet the "narrow tailoring" requirement: (i) § 2 would not have been violated unless a reasonably compact majority-minority district could have been created; and (ii) nothing in § 2 requires the creation of a noncompact district. I have no quarrel with either proposition, but each falls far short of mandating the conclusion that the plurality draws from it. While a State can be liable for a § 2

violation only if it could have drawn a compact district and failed to do so, it does not follow that creating such a district is the only way to avoid a § 2 violation. See generally *Shaw II,* 517 U.S., at 946–950, 116 S.Ct., at 1920–1922 (STEVENS, J., dissenting). The plurality admits that a State retains "a limited degree of leeway" in drawing a district to alleviate fears of § 2 liability, *ante,* at 1960, but if there is no independent constitutional duty to create compact districts in the first place, and the plurality suggests none, there is no reason why noncompact districts should not be a permissible method of avoiding violations of law. The fact that they might be unacceptable judicial remedies does not speak to the question whether they ***1035** may be acceptable when adopted by a state legislature. Because these districts satisfy the State's compelling interest and do so in a manner that uses racial considerations only in a way reasonably designed to ensure such ****1990** a satisfaction, I conclude that the districts are narrowly tailored.

VI

I cannot profess to know how the Court's developing jurisprudence of racial gerrymandering will alter the political and racial landscape in this Nation—although it certainly *will* alter that landscape. As the Court's law in this area has developed, it has become ever more apparent to me that the Court's approach to these cases creates certain perverse incentives and (I presume) unanticipated effects that serve to highlight the essentially unknown territory into which it strides. Because I believe that the social and political risks created by the Court's decisions are not required by the Constitution, my first choice would be to avoid the preceding analysis altogether, and leave these considerations to the political branches of our Government.

The first unintended outcome of the legal reasoning in *Shaw II* and this case is the very result that those decisions seek to avoid: the predominance of race in the districting process, over all other principles of importance. Given the Court's unwillingness to recognize the role that race-neutral districting principles played in the creation of the bizarrely shaped districts in both this case and *Shaw II,* it now seems clear that the only way that a State can both create a majority-minority district and avoid a racial gerrymander is by drawing, "without much conscious thought," *ante,* at 1955 (opinion of O'CONNOR, J.), and within the "limited degree of leeway" granted by the Court, *ante,* at 1960, the precise compact district that a court would impose in a successful § 2 challenge. See *post,* at 2008 (SOUTER, J., dissenting). After the Court's decisions today, therefore, minority voters can make up a majority only in compact districts, whether ***1036** intentionally or accidentally drawn, while white voters can be placed into districts as bizarre as the State desires.

The great irony, of course, is that by *requiring* the State to place the majority-minority district in a particular place and with a particular shape, the district may stand out as a stark, placid island in a sea of oddly shaped majority-white neighbors. See Karlan, Still Hazy After All These Years: Voting Rights in the Post-*Shaw* Era, 26 Cumberland L.Rev. 287, 309 (1995–1996). The inviolable sanctity of the § 2–eligible districts will signal in a manner more blatant than the most egregious of these racial gerrymanders that "a minority community sits here: Interfere with it not." The Court-imposed barriers limiting the shape of the district will interfere more directly with the ability of minority voters to participate in the political process than did the oddly shaped districts that the Court has struck down in recent cases. Unaffected by the new racial jurisprudence, majority-white communities will be able to participate in the districting process by requesting that they be placed into certain districts, divided between districts in an effort to maximize representation, or grouped with more distant communities that might nonetheless match their interests better than communities next door. By contrast, none of this political maneuvering will be permissible for majority-minority districts, thereby segregating and balkanizing them far more effectively than the districts at issue here, in which they were manipulated in the political process as easily as white voters. This result, it seems to me, involves "discrimination" in a far more concrete manner than did the odd shapes that so offended the Court's sensibilities in *Miller, Shaw II,* and these cases.

In light of this Court's recent work extolling the importance of state sovereignty in our federal scheme, cf. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), I would have expected the Court's sensibilities to steer a course rather more deferential to the States than the one that it charts with its ***1037** decisions today. As we have previously noted, "[e]lectoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller,* 515 U.S., at 915, 115 S.Ct., at 2488; see also *post,* at 1998–1999 (SOUTER, J., dissenting). The record in these cases evidences the "complex interplay of forces that enter a legislature's redistricting calculus," 515

U.S., at 915–916, 115 S.Ct., at 2488, and **1991 the Court's failure to respect those forces demonstrates even less respect for the legislative process than I would have expected after the decision in *Miller*.

The results are not inconsequential. After *Miller* and today's decisions, States may find it extremely difficult to avoid litigation flowing from decennial redistricting. On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny. See *Miller,* 515 U.S., at 949, 115 S.Ct., at 2507 (GINSBURG,, JJ., dissenting). Perhaps States will simply avoid the problem by abandoning voluntary compliance with § 2 of the Voting Rights Act altogether. See *Shaw I,* 509 U.S., at 672, 113 S.Ct., at 2841 (White, J., dissenting); *post,* at 2006–2007 (SOUTER, J., dissenting).[34] This result would not necessarily bring peace to redistricting, for there is no guarantee that districts created by court order to comply with § 2 will be immune from attack under *Shaw;* in both Florida and Illinois, for instance, that very sort of schizophrenic second-guessing has already occurred. See *1038 *King v. State Bd. of Elections,* No. 95–C–827, 1996 WL 130439 (N.D.Ill., Mar. 15, 1996); *Johnson v. Mortham,* 926 F.Supp. 1460 (N.D.Fla.1996). Given the difficulty of reconciling these competing legal responsibilities, the political realities of redistricting, and the cost of ongoing litigation, some States may simply step out of the redistricting business altogether, citing either frustration or hopes of getting a federal court to resolve the issues definitively in a single proceeding. See, *e.g., Johnson v. Miller,* 922 F.Supp. 1556, 1559 (S.D.Ga.1995) (after remand from *Miller,* Georgia Legislature abdicated its redistricting responsibilities to Federal District Court); *post,* at 2007 (SOUTER, J., dissenting) (noting the likely "vacuum of responsibility" at the state level).

Regardless of the route taken by the States, the Court has guaranteed that federal courts will have a hand—and perhaps the only hand—in the "abrasive task of drawing district lines." *Wells v. Rockefeller,* 394 U.S. 542, 553, 89 S.Ct. 1241, 1241, 22 L.Ed.2d 519 (1969) (WHITE, J., dissenting). Given the uniquely political nature of the redistricting process, I fear the impact this new role will have on the public's perception of the impartiality of the Federal Judiciary. I can only reiterate the Court's cautionary admonition, issued over two decades ago, that "[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' " *White v. Weiser,* 412 U.S., at 795, 93 S.Ct., at 2355 (citing *Whitcomb v. Chavis,* 403 U.S. 124, 160, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971)).

I do not wish to leave the impression that decisions of the Court from *Shaw I* to the present are focusing on entirely nonexistent problems. I merely believe that the Court has entirely misapprehended the nature of the harm that flows from this sort of gerrymandering. Rather than attach blameworthiness to a decision by the majority to *share* political power with the victims of past discriminatory practices, the Court's real concern should be with the more significant harms that flow from legislative decisions that "serve no *1039 purpose other than to favor one segment —whether racial, ethnic, religious, economic, or political— that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community." *Karcher v. Daggett,* 462 U.S. 725, 748, 103 S.Ct. 2653, 2668–2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring). These cases are as good an illustration of such self-serving behavior on the part of legislators as any —but not with respect to racial gerrymandering. **1992 The real problem is the politically motivated gerrymandering that occurred in Texas. Many of the oddest twists and turns of the Texas districts would never have been created if the legislature had not been so intent on protecting party and incumbents. See also *Shaw II, ante,* at 937–938, 116 S.Ct. at 1916–1917 (STEVENS, JJ., dissenting) (noting the same influences behind the bizarre shape of North Carolina's District 12).

By minimizing the critical role that political motives played in the creation of these districts, I fear that the Court may inadvertently encourage this more objectionable use of power in the redistricting process.[35] Legislatures and elected representatives have a responsibility to behave in a way that incorporates the "elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Cleburne,* 473 U.S., at 452, 105 S.Ct., at 3261. That responsibility is not discharged when legislatures permit and even encourage incumbents to use their positions as public servants to protect themselves and their parties rather than the interests of their constituents. See *Karcher v. Daggett,* 462 U.S., at 748, 754, 103 S.Ct., at 2668, 2672 (STEVENS, J., concurring). If any lines in Texas are worth straightening, *1040 it is those that were twisted to exclude, not those altered to include.[36]

VII

The history of race relations in Texas and throughout the South demonstrates overt evidence of discriminatory voting practices lasting through the 1970's. Brischetto, Richards, Davidson, & Grofman, Texas, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, pp. 233–248 (C. Davidson & B. Grofman eds.1994). Even in recent years, Texans have elected only two black candidates to statewide office; majority-white Texas districts have never elected a minority to either the State Senate or the United States Congress. Brief for Appellants in No. 94–806, p. 53. One recent study suggests that majority-white districts throughout the South remain suspiciously unlikely ***1041** to elect black representatives. Davidson & Grofman, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the South, at 344. And nationwide, fewer than 15 of the hundreds of legislators that have passed through Congress since 1950 have been black legislators elected from majority-white districts.[37] In 1994, for example, ****1993** 36 of the Nation's 39 black Representatives were elected from majority-minority districts, while only 3 were elected from majority-white districts.[38] See *post,* at 2000–2001 (SOUTER, J., dissenting).

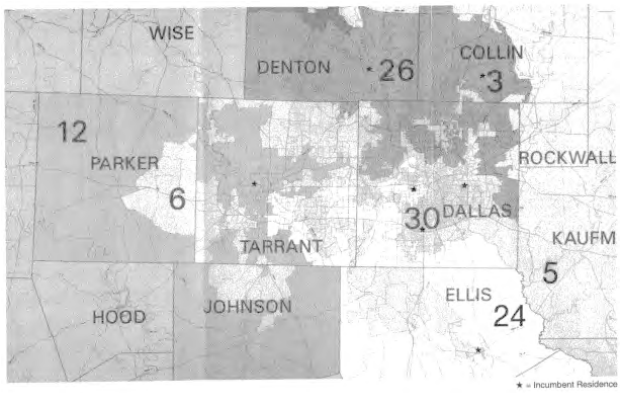
Perhaps the state of race relations in Texas and, for that matter, the Nation, is more optimistic than might be expected in light of these facts. If so, it may be that the plurality's exercise in redistricting will be successful. Perhaps minority candidates, forced to run in majority-white districts, will be able to overcome the long history of stereotyping and discrimination that has heretofore led the vast majority of majority-white districts to reject minority candidacies. Perhaps not. I am certain only that bodies of elected federal and state officials are in a far better position than anyone on this Court to assess whether the Nation's long history of discrimination has been overcome, and that nothing in the Constitution requires this unnecessary intrusion into the ability of States to negotiate solutions to political differences while providing long-excluded groups the opportunity to participate effectively in the democratic process. I respectfully dissent.

****1994** APPENDIX A TO OPINION OF STEVENS, J.

****1995** APPENDIX B TO OPINION OF STEVENS, J.

****1996** APPENDIX C TO OPINION OF STEVENS, J.

**1997 APPENDIX D TO OPINION OF STEVENS, J.



*1045 Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

When the Court devises a new cause of action to enforce a constitutional provision, it ought to identify an injury distinguishable from the consequences of concededly constitutional conduct, and it should describe the elements necessary and sufficient to make out such a claim. Nothing less can give **1998 notice to those whose conduct may give rise to liability or provide standards for courts charged with enforcing the Constitution. Those principles of justification, fair notice, and guidance have never been satisfied in the instance of the action announced three Terms ago in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*), when a majority of this Court decided that a State violates the Fourteenth Amendment's Equal Protection Clause by excessive consideration of race in drawing the boundaries of voting districts, even when the resulting plan does not dilute the voting strength of any voters and so would not otherwise give rise to liability under the Fourteenth or Fifteenth Amendments, or under the Voting Rights Act.

Far from addressing any injury to members of a class subjected to differential treatment, the standard presupposition of an equal protection violation, *Shaw I* addressed a putative harm subject to complaint by any voter objecting to an untoward consideration of race in the political process. Although the Court has repeatedly disclaimed any intent to go as far as to outlaw all conscious consideration of race in districting, after three rounds of appellate litigation seeking to describe the elements and define the contours of the *Shaw* cause of action, a helpful statement of a *Shaw* claim still eludes this Court. This is so for reasons that go to the conceptual bone.

The result of this failure to provide a practical standard for distinguishing between the lawful and unlawful use of race has not only been inevitable confusion in statehouses and courthouses, but a consequent shift in responsibility for *1046 setting district boundaries from the state legislatures, which are invested with front-line authority by Article I of the Constitution, to the courts, and truly to this Court, which is left to superintend the drawing of every legislative district in the land.

Today's opinions do little to solve *Shaw* 's puzzles or return districting responsibility to the States. To say this is not to denigrate the importance of Justice O'CONNOR's position in her separate opinion, *ante,* at 1968–1969, that compliance with § 2 of the Voting Rights Act is a compelling state interest; her statement takes a very significant step toward alleviating apprehension that *Shaw* is at odds with the Voting Rights Act. It is still true, however, that the combined plurality, minority, and Court opinions do not ultimately leave the law dealing with a *Shaw* claim appreciably clearer or more manageable than *Shaw I* itself did. And to the extent that some clarity follows from the knowledge that race may be considered when reasonably necessary to conform to the

Voting Rights Act, today's opinions raise the specter that this ostensible progress may come with a heavy constitutional price. The price of *Shaw I,* indeed, may turn out to be the practical elimination of a State's discretion to apply traditional districting principles, widely accepted in States without racial districting issues as well as in States confronting them.

As the flaws of *Shaw I* persist, and as the burdens placed on the States and the courts by *Shaw* litigation loom larger with the approach of a new census and a new round of redistricting, the Court has to recognize that *Shaw* 's problems result from a basic misconception about the relation between race and districting principles, a mistake that no amount of case-by-case tinkering can eliminate. There is, therefore, no reason for confidence that the Court will eventually bring much order out of the confusion created by *Shaw I,* and because it has not, in any case, done so yet, I respectfully dissent.

***1047** I

As its text indicates and our cases have necessarily and repeatedly recognized,[1] Article I of the Constitution places responsibility for drawing voting districts on the States in the first instance. See Art. I, § 2, cl. 1 ****1999** ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"). The Court has nonetheless recognized limits on state districting autonomy when it could discern a strong constitutional justification and a reasonably definite standard for doing so, as, for example, in announcing the numerical requirement of one person, one vote, see *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).[2] But the Court has never ignored the ***1048** Constitution's commitment of districting responsibility to the political branches of the States and has accordingly assumed over the years that traditional districting principles widely accepted among States represented an informal baseline of acceptable districting practices. We have thus accorded substantial respect to such traditional principles (as those, for example, meant to preserve the integrity of neighborhood communities, to protect incumbents, to follow existing political boundaries, to recognize communities of interest, and to achieve compactness and contiguity); we have seen these objectives as entirely consistent with the Fourteenth and Fifteenth Amendments' demands. See, *e.g., id.,* at 578, 84 S.Ct., at 1390 ("A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme"); *White v. Weiser,* 412 U.S. 783, 797, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973) ("[T]he District Court did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable"); *Voinovich v. Quilter,* 507 U.S. 146, 156, 113 S.Ct. 1149, 1157, 122 L.Ed.2d 500 (1993) ("Because the States ... derive their reapportionment authority ... from independent provisions of state and federal law, the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements") (internal quotation marks omitted; citation omitted).

The fundamental tenet underlying most of these constitutionally unobjectionable principles (respect for communities of interest or neighborhoods, say) is that voting is more than ***1049** an atomistic exercise.[3] Although it is the law of the Constitution that representatives ****2000** represent people, not places or things or particular interests, *Reynolds, supra,* at 562, 84 S.Ct., at 1381, the notion of representative democracy within the federalist framework presumes that States may group individual voters together in a way that will let them choose a representative not only acceptable to individuals but ready to represent widely shared interests within a district. Aleinikoff & Issacharoff, Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno,* 92 Mich. L.Rev. 588, 601 (1993) ("It is only as collective partisans of the same political preference—whether that preference is defined by party or race or any other measure—that voters can assert their right to meaningful participation in the political process"). Hence, in respecting the States' implementation of their own, traditional districting criteria, the Court has recognized the basically associational character of voting rights in a representative democracy.

***1050** A

Accordingly, before *Shaw I,* the Court required evidence of substantial harm to an identifiable group of voters to justify any judicial displacement of these traditional districting principles. Such evidence existed in *Reynolds v.*

Sims, supra, when the disparate weighting of votes was held unconstitutional, and it was present again when the Court recognized the unconstitutional consequences of vote dilution, see *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). In the one case, the harm was mathematically identifiable; in the other, the arithmetic provided powerful circumstantial evidence of the impossibility of political success for the chosen candidate of a racial and numerical minority in an area with pervasive racial-bloc voting. In both cases, the complainants were from an easily identified group of voters; and even in cases of racial vote-dilution claims, which were conceptually more difficult to state than the principle of one person, one vote, there were readily recognized examples of the harm in question. Indeed, even when one acknowledged that voters would be served by a representative not of their own race and that the Constitution guaranteed no right to pick a winner, see *Whitcomb, supra,* at 153–155, 91 S.Ct., at 1873–1875, it was impossible to see mere happenstance in the facts that the American voting-age population was 10.5% black, but the Congress that assembled in 1981 had only 17 black representatives out of 435 and no black senator. Statistical Abstract of the United States, 1982–83, p. 490 (103d ed. 1982) (Table 802); Black Americans: A Statistical Sourcebook 142 (L. Hornor ed. 1995) (Table 4.02); see also Parker, The Damaging Consequences of the Rehnquist Court's Commitment to Color–Blindness Versus Racial Justice, 45 Am. U.L.Rev. 763, 770–771 (1996) (observing that "[p]rior to the latest round of redistricting after the 1990 Census, ... [b]lacks, who constitute 11.1% of the nation's voting age population, made up only 4.9% of the members of Congress"). The conclusion was inescapable that what we ***1051** know of as intentional vote dilution accounted for this astonishing fact,[4] just as it is equally inescapable that remedies ****2001** for vote dilution (and hedges against its reappearance) in the form of majority-minority districts account for the fact that the 104th Congress showed an increase of 39 black members over the 1981 total. Minorities in Congress, 52 Cong. Q., Supplement to No. 44, p. 10 (Nov. 12, 1994); see also Parker, *supra,* at 771 (noting "a fifty percent increase in the number of black members of Congress").[5]

***1052** Before *Shaw I,* we not only thus limited judicial interference with state districting efforts to cases of readily demonstrable harm to an identifiable class of voters, but we also confined our concern with districting to cases in which we were capable of providing a manageable standard for courts to apply and for legislators to follow. Within two years of holding in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), that malapportionment was a justiciable issue, "the Court recognized that its general equal protection jurisprudence was insufficient for the task and announced an increasingly rigid, simple to apply, voting-specific mandate of equipopulousity." Karlan, Still Hazy After All These Years: Voting Rights in the Post-*Shaw* Era, 26 Cumberland L.Rev. 287, 299 (1996) (hereinafter Karlan, Post-*Shaw* Era). Likewise, although it is quite true that the common definition of a racial vote-dilution injury ("less opportunity ... to participate in the political process and to elect representatives ...," 42 U.S.C. § 1973(b)) is no model of concrete description, the Court has identified categories of readily comprehensible evidence bearing on the likelihood of such an injury, including facts about size of minority population, quantifiable indications of political cohesiveness and bloc voting, historical patterns of ***1053** success or failure of favored candidates, and so on. See, *e.g., Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *White v. Regester,* 412 U.S., at 766–770, 93 S.Ct., at 2339–2341. The particularity of this evidence goes far to separate victims of political "inequality" from those who just happened to support losing candidates.

B

Shaw I, however, broke abruptly with these standards, including the very understanding of equal protection as a practical guarantee against harm to some class singled out for disparate treatment. Whereas malapportionment measurably reduces the influence of voters in more populous districts, and vote dilution predestines members of a racial minority to perpetual frustration as political losers, what *Shaw I* spoke of as harm is not confined to any identifiable class singled out for disadvantage. See ****2002** *Shaw v. Hunt,* 517 U.S., at 923–925, 928, 116 S.Ct., at 1909–1910, 1911–1912 (*Shaw II*) (sTEVENS, J., dissenting) (noting the absence of a customary disadvantaged class and describing the *Shaw I* cause of action as a substantive due process, rather than an equal protection, claim). If, indeed, what *Shaw I* calls harm is identifiable at all in a practical sense, it would seem to play no favorites, but to fall on every citizen and every representative alike. The Court in *Shaw I* explained this conception of injury by saying that the forbidden use of race "reinforces the perception that members of the same racial group ... think alike, share the same political interests, and will prefer the same candidates at the polls," and that it leads elected officials "to believe that their primary obligation is to

represent only the members of that group, rather than their constituency as a whole." *Shaw I,* 509 U.S., at 647–648, 113 S.Ct., at 2827. This injury is probably best understood as an "expressive harm," that is, one that "results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." Pildes & Niemi, ***1054** Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances after *Shaw v. Reno,* 92 Mich. L.Rev. 483, 506–507 (1993); see also *id.,* at 493 ("The theory of voting rights [that *Shaw I*] endorses centers on the perceived legitimacy of structures of political representation, rather than on the distribution of actual political power between racial or political groups"). To the extent that racial considerations do express such notions, their shadows fall on majorities as well as minorities, whites as well as blacks, the politically dominant as well as the politically impotent. Thus, as an injury supposed to be barred by the Equal Protection Clause, this subject of the "analytically distinct" cause of action created by *Shaw I, supra,* at 652, 113 S.Ct., at 2830, bears virtually no resemblance to the only types of claims for gerrymandering we had deemed actionable following *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), those involving districting decisions that removed an identifiable class of disfavored voters from effective political participation. See, *e.g., Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Thornburg v. Gingles, supra*.[6]

Just as the logic of traditional equal protection analysis is at odds with *Shaw* 's concept of injury, so the Court's rhetoric of racially motivated injury is inapposite to describe the consideration of race that it thinks unreasonable. Although the Court used the metaphor of "political apartheid" as if to refer to the segregation of a minority group to eliminate its association with a majority that opposed integration, *Shaw I, supra,* at 647, 113 S.Ct., at 2827, talk of this sort of racial separation is not on point here. The *de jure* segregation that the term "political ***1055** apartheid" brings to mind is unconstitutional because it emphatically implies the inferiority of one race. See *Brown v. Board of Education,* 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) ("To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community"). *Shaw I,* in contrast, vindicated the complaint of a white voter who objected not to segregation but to the particular racial proportions of the district. See Karlan, Our Separatism? Voting Rights as an American Nationalities Policy, 1995 U. Chi. Legal Forum 83, 94 (hereinafter Karlan, Our Separatism) (noting the irony of using the term "apartheid" to describe what are "among the most integrated districts in the country"). Whatever this district may have symbolized, it was not "apartheid." Nor did the proportion of its racial mixture reflect any purpose of racial subjugation, the district in question having been created in an ****2003** effort to give a racial minority the same opportunity to achieve a measure of political power that voters in general, and white voters and members of ethnic minorities in particular, have enjoyed as a matter of course. In light of a majority-minority district's purpose to allow previously submerged members of racial minorities into the active political process, this use of race cannot plausibly be said to affect any individual or group in any sense comparable to the injury inflicted by *de jure* segregation. It obviously conveys no message about the inferiority or outsider status of members of the white majority excluded from a district. And because the condition addressed by creating such a district is a function of numbers, the plan implies nothing about the capacity or value of the minority to which it gives the chance of electoral success.

Added to the anomalies of *Shaw I* 's idea of equal protection injury and the rhetoric of its descriptions, there is a further conceptual inadequacy in *Shaw I.* Whereas it defines injury as the reinforcement of the notion that members of a racial group will prefer the same candidates at the polls, the immediate ***1056** object of the constitutional prohibition against the intentional dilution of minority voting strength is to protect the right of minority voters to make just such a preference effective. There would, for example, be no vote dilution by virtue of racial-bloc voting unless voters of a racial minority would themselves tend to stick together in voting for a given candidate (perhaps, though not necessarily, of their own race, as well). Indeed, if there were no correlation between race and candidate preference, it would make no sense to say that minority voters had less opportunity than others to elect whom they would; they would be part of the mainstream and the winners would be their own choices. When voting is thus racially polarized, it is just because of this polarization that majority-minority districts provide the only practical means of avoiding dilution or remedying the dilution injury that has occurred already. *Shaw I* has thus placed those who choose to avoid the long-recognized constitutional harm of vote dilution at risk by casting doubt on the legitimacy of its classic remedy; the creation of a majority-minority district "reinforces" the notion that there is a correlation between race and voting, for that correlation is the very condition on which the success of the court-ordered remedy depends. So

it is that the Court's definition of injury is so broad as to cover constitutionally necessary efforts to prevent or remedy a violation of the Fourteenth and Fifteenth Amendments and of § 2 of the Voting Rights Act.

One way to temper the overreach of the Court's concept of injury (though it would not avoid the difficulty that there is no equal protection injury in the usual sense, discussed above, see *supra,* at 2000) would be simply to exclude by definition from *Shaw I* injury a use of race in districting that is reasonably necessary to remedy or avoid dilution; the Court's move at least in this direction, see *infra,* at 2007–2009, is a sound one, as is its continuing recognition (despite its broad definition of harm) that not every intentional creation of a majority-minority district requires strict scrutiny. ***1057** See *ante,* at 1951; *ante,* at 1969 (o'CONNOR, J., concurring); cf. *Miller,* 515 U.S., at 928, 115 S.Ct., at 2497 (o'CONNOR, J., concurring). But the suggested qualification would fall short of eliminating the difficulty caused by the existing definition, for the uses of race to remedy past dilution or to hedge against future dilution are not the only legitimate uses of race that are covered, and threatened, by the overbreadth of the *Shaw* injury. This will become clear in examining the Court's efforts to solve its definitional problems by relying upon the degree to which race is used in defining the injury it discerns.

C

The Court's failure to devise a concept of *Shaw* harm that distinguishes those who are injured from those who are not, or to differentiate violation from remedy, is matched by its inability to provide any manageable standard to distinguish forbidden districting conduct from the application of traditional state districting principles and the plans that they produce. This failure, while regrettable, need not have occurred, for when the Court spoke in *Shaw I* of a district shape so "bizarre" as to be an unequivocal indication that race had influenced the districting decision to ****2004** an unreasonable degree, *Shaw I* could have been pointing to some workable criterion of shape translatable into objective standards. Leaving *Shaw* 's theoretical inadequacies aside, it would have been possible to devise a cause of action that rested on the expressive character of a district's shape, and created a safe harbor in the notion of a compact district objectively quantified in terms of dispersion, perimeter, and population. See Pildes & Niemi, 92 Mich. L.Rev., at 553–575. Had the Court followed this course, the districts whose grotesque shapes provoke the sharpest reaction would have been eliminated in racially mixed States, which would have known how to avoid *Shaw* violations and, thus, federal judicial intrusion. *Shaw* would have been left a doctrinal incongruity, but not an unmanageable one.

***1058** The Court, however, rejected this opportunity last Term in *Miller v. Johnson, supra,* when it declined to contain *Shaw* by any standard sufficiently quantifiable to guide the decisions of state legislators or to inform and limit review of districting decisions by the courts. The Court rejected shape as a sufficient condition for finding a *Shaw* violation, or even a necessary one. 515 U.S., at 915, 115 S.Ct., at 2488. See also Issacharoff, The Constitutional Contours of Race and Politics, 1995 S.Ct. Rev. 45, 56 (hereinafter Isaacharoff, Constitutional Contours) ("*Miller* is rather categorical in its refusal to limit the application of the equal protection clause to bizarre districts alone"). Instead, it recharacterized the cause of action in terms devised in other cases addressing essentially different problems, by proscribing the consideration of race when it is the "predominant factor motivating the legislatur[e]," 515 U.S., at 916, 115 S.Ct., at 2488, or when the use of race is "in substantial disregard of customary and traditional districting practices," *id.,* at 928, 115 S.Ct., at 2497 (O'CONNOR,, JJ., concurring).

As a standard addressed to the untidy world of politics, neither "predominant factor" nor "substantial disregard" inspires much hope.[7] It is true of course that the law rests certain other liability decisions on the feasibility of untangling mixed motives, and courts and juries manage to do the untangling. See, *e.g., Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977) (employee's burden to show that constitutionally protected conduct is a "substantial factor" in ***1059** decision not to rehire him; employer's burden to show that it would have made same decision "even in the absence of the protected conduct"); *Hunter v. Underwood,* 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind the enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor"); but see *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"). At first glance, then, it may not seem entirely out of the question for courts to sort out the

strands in *Shaw* cases. But even this cool comfort would be misplaced.

While a court may be entitled to some confidence that in most cases it will be able, for example, to distinguish the relative strength of an employer's dissatisfaction with an employee's job performance from his displeasure over a worker's union membership, see *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403–405, 103 S.Ct. 2469, 2475–2476, 76 L.Ed.2d 667 (1983), such confidence ****2005** would be unwarranted in the districting context. It is not merely that the very nature of districting decisions makes it difficult to identify whether any particular consideration, racial or otherwise, was the "predominant motive," though that is certainly true:

> "Districting plans are integrated bundles of compromises, deals and principles. To ask about the reason behind the design of any one particular district is typically to implicate the entire pattern of purposes and trade-offs behind a districting plan as a whole. Searching for 'the reason' or 'the dominant reason' behind a particular district's shape is often like asking why one year's federal budget is at one level rather than another. Moreover, to require a coherent explanation for the specific ***1060** shape of even one district is to impose a model of legalistic decisionmaking on the one political process that least resembles that model." Pildes & Niemi, *supra,* at 585–586 (footnote omitted).

The reason that use of the predominant motive standard in reviewing a districting decision is bound to fail is more fundamental than that: in the political environment in which race can affect election results, many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations. See Pildes & Niemi, *supra,* at 578 ("[R]ace frequently correlates with other socioeconomic factors. In evaluating oddly shaped districts, this correlation will require courts to attempt to untangle legitimate communities of interest from the now-illegitimate one of race. If blacks as blacks cannot be grouped into a 'highly irregular' district, but urban residents or the poor can, how will courts distinguish these contexts, and under what mixed-motive standard?"); Issacharoff, Constitutional Contours 58 ("Given the palpability of racial concerns in the political arena, [*Miller* 's causation standard could] ... either doom all attempts to distribute political power in multi-ethnic communities or ... fail to provide a basis for distinguishing proper from improper considerations in redistricting").

If, for example, a legislature may draw district lines to preserve the integrity of a given community, leaving it intact so that all of its members are served by one representative, this objective is inseparable from preserving the community's racial identity when the community is characterized, or even self-defined, by the race of the majority of those who live there. This is an old truth, having been recognized every time the political process produced an Irish or Italian or Polish ward.

> ***1061** "[E]thnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life....
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> . . . . .
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> "... The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation." *Miller v. Johnson,* 515 U.S., at 944–945, 115 S.Ct., at 2504–2505 (gINSBURG, J., dissenting).

Or take the traditional principle of providing protection for incumbents. The plurality seems to assume that incumbents may always be protected by drawing lines on the basis of data about political parties. Cf. *ante,* at 1956, 1957–1958. But what if the incumbent has drawn support largely for racial reasons? What, indeed, if the incumbent was elected in a majority-minority district created to remedy vote dilution that resulted from racial-bloc voting? It would be sheer fantasy to assume that consideration of race in these circumstances is somehow separable from application of the traditional principle of incumbency protection, and sheer incoherence to think that the consideration of race that is constitutionally required to remedy Fourteenth and Fifteenth Amendment vote dilution somehow becomes unconstitutional when aimed at protecting the incumbent the next time the census requires redistricting.

Thus, it is as impossible in theory as in practice to untangle racial consideration from the application of traditional districting principles in a society plagued by racial-bloc voting ****2006** [8] with a racial minority population of political significance, or at least the unrealized potential for achieving it. And it ***1062** is for just this fundamental reason that a test turning on predominant purpose is incapable of producing any answer when traditional districting principles

are applied in the political environment in which *Shaw I* actions are brought.

II

Shaw I 's recognition of a misuse of race in districting even when no vote dilution results thus rests upon two basic deficiencies: first, the failure to provide a coherent concept of equal protection injury, there being no separably injured class and no concept of harm that would not condemn a constitutionally required remedy for past dilution as well as many of the districting practices that the Court is seeking to preserve; second, the failure to provide a coherent test for distinguishing a "predominant" racial consideration from the application of traditional districting principles in a society whose racial mixture is politically significant and where racial-bloc voting exists. The necessary consequence of these shortcomings is arbitrariness; it is impossible to distinguish what is valid from what is not, or to decide how far members of racial minorities may engage "in the same sort of pluralist electoral politics that every other bloc of voters enjoys." Karlan, Our Separatism 103. Indeed, if one needed further proof of this arbitrariness, one need go no further than Justice STEVENS's dissent in this case. The plurality effectively concedes that Justice STEVENS has not unfairly applied the principles governing the *Shaw* cause of action, cf. *ante,* at 1957, n. (noting that "[i]n the application of our precedents to District 30, our disagreement with Justice STEVENS' dissent, [*ante*], at 1979–1988, is largely factual"); in my judgment he has faithfully applied those principles in the spirit intended by the plurality. And yet the conclusions that the two sides reach after applying precisely the same test could not be more different.

***1063** Along with this endemic unpredictability has come the destruction of any clear incentive for the States with substantial minority populations to take action to avoid vote dilution. Before *Shaw,* state politicians who recognized that minority vote dilution had occurred, or was likely to occur without redistricting aimed at preventing it, could not only urge their colleagues to do the right thing under the Fourteenth Amendment, but counsel them *in terrorem* that losing a dilution case would bring liability for counsel fees under 42 U.S.C. § 1988(b) or 42 U.S.C. § 1973*l* (e). See Issacharoff, Constitutional Contours 48 ("Minority political actors could leverage not only their political power but the enforcement provisions of Section 5 of the Voting Rights Act, and the threat of suit under Section 2 of the Act against adverse districting decisions"); cf. *Hastert v. Illinois State Bd. of Election Commr's,* 28 F.3d 1430, 1444 (C.A.7 1993) (awarding fees to the prevailing parties in a case in which the state legislature failed to draw congressional districts, over the Board of Elections's objection that it had "no interest in the eventual outcome except that there *be* an outcome" for it to implement) (emphasis in original). But this argument is blunted now, perhaps eliminated in practice, by the risk of counsel fees in a *Shaw I* action. States seeking to comply in good faith with the requirements of federal civil rights laws "now find themselves walking a tightrope: if they draw majority-black districts they face lawsuits under the equal protection clause; if they do not, they face both objections under section 5 of the Voting Rights Act and lawsuits under section 2." Karlan, Post-*Shaw* Era 289. See *ante,* at 1991 (sTEVENS, J., dissenting) ("On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny"). The States, in short, have been told to get things just right, no dilution and no predominant consideration ***1064** of race short of dilution, without being told how to do it. The tendency of these conflicting incentives is toward a stalemate, and neither the moral force of the ****2007** Constitution nor the mercenary threat of liability can operate effectively in this obscurity.

As a consequence, where once comprehensible districting obligations confronted the legislators and governors of the States, there is now a vacuum of responsibility in any State with the mixed population from which *Shaw* suits come. We can no longer say with the old assurance that such States have a duty to comply with federal requirements in districting, since a State, like an individual, can hardly be blamed for failing to fulfill an obligation that has never been explained. It is true, of course, that a State may suffer consequences if the ultimate arbiter decides on a result different from the one the State has put in place, but that bad luck does not change the fact that a State cannot be said to be obliged to apply a standard that has not been revealed. Because the responsibility for the result can only be said to rest with the final arbiter, the practical responsibility over districting has simply shifted from the political branches of the States with mixed populations to the courts, and to this Court in particular. "The Court has apparently set itself upon a course of ... reviewing challenged districts one by one and issuing opinions that depend so idiosyncratically on the unique facts of each case that they provide no real guidance to either lower courts or legislatures." Karlan, Post-*Shaw* Era 288. The tragedy in this shift of political responsibility lies not only in

the fact of its occurrence in this instance, but in the absence of coherent or persuasive justifications for causing it to occur.

III

Although today's cases do not address the uncertainties that stem from *Shaw* 's underlying incoherence, they do aim to mitigate its inscrutability with some specific rules.

***1065** A

In each of today's cases, the Court expressly assumes that avoiding a violation of the Voting Rights Act qualifies as a sufficiently compelling government interest to satisfy the requirements of strict scrutiny. See *ante,* at 1960 ("As we have done in each of our three previous cases ..., we assume without deciding that compliance with the results test [of § 2 of the Voting Rights Act] ... can be a compelling state interest"); *Shaw II,* 517 U.S. at 915, 116 S.Ct. at 1905 ("We assume, *arguendo,* for the purpose of resolving this case, that compliance with § 2 could be a compelling interest"). While the Court's decision to assume this important point, *arguendo,* is no holding, see *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 125, 116 S.Ct. 1114, 1157, 134 L.Ed.2d 252 (1996) (SOUTER, J., dissenting), the assumption itself is encouraging because it confirms the view that the intentional creation of majority-minority districts is not necessarily a violation of *Shaw I, ante,* at 1951 (strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts"), and it indicates that the Court does not intend to bring the *Shaw* cause of action to what would be the cruelly ironic point of finding in the Voting Rights Act of 1965 (as amended) a violation of the Fourteenth Amendment's equal protection guarantee. Cf. Pildes & Niemi, 92 Mich. L.Rev., at 498 (observing that "[i]f the Court believed there were serious constitutional questions with the fundamental structure of this scheme, the Court had numerous means to avoid permitting an unconstitutionally composed legislature to assume power," and seeing the reservation of this question in *Voinovich v. Quilter,* 507 U.S., at 157, 113 S.Ct., at 1157, as "evidence that a majority of the Court is not prepared to find a general ban on race-conscious districting in the Constitution"). Justice O'CONNOR's separate opinion, *ante,* at 1968–1969, bears on each of these points all the more emphatically, for her view that compliance with § 2 is (not just *arguendo*) a compelling state interest and her statement of that position virtually insulate the Voting Rights Act from jeopardy under *Shaw* as such.

***1066** B

The second point of reference to come out of today's cases is the rule that if a State begins its map-drawing efforts with a compact majority-minority district required by *Gingles,* the State may not rely too heavily ****2008** on racial data in adjusting that district to serve traditional districting principles. While this rule may indeed provide useful guidance to state legislatures, its inherent weakness is clear from what was said *supra,* at 2005–2006: it is in theory and in fact impossible to apply "traditional districting principles" in areas with substantial minority populations without considering race. As to some of those principles, to be sure, the ban on the overuse of racial data may not have much significance; racially identified communities can be identified in other ways and will be, after today. But protecting a minority incumbent may be another matter, since we cannot assume, as the plurality does, that reliance on information about "party affiliation" will serve to protect a minority incumbent, and we cannot tell when use of racial data will go too far on the plurality's view, *ante,* at 1953. It therefore may well be that loss of the capacity to protect minority incumbency is the price of the rule limiting States' use of racial data. If so, it will be an exceedingly odd result, when the whole point of creating yesterday's majority-minority district was to remedy prior dilution, thus permitting the election of the minority incumbent who (the Court now seems to declare) cannot be protected as any other incumbent could be.

C

The third point of reference attributable to today's cases is as yet only a possibility; a suggestion in the discussions of the narrow tailoring test that States seeking to avoid violating § 2 of the Voting Rights Act may draw the district that the Voting Rights Act compels, and this district alone. See *Shaw II,* 517 U.S., at 915–918, 116 S.Ct., at 1905–1906 (rejecting North Carolina's District 12 because it does not sufficiently coincide with the ***1067** assumed *Gingles* district); *ante,* at 1990 (sTEVENS, J., dissenting) ("[I]t now seems clear that the only way that a State can both create a majority-minority district and avoid a racial gerrymander is by drawing ... within the 'limited degree of leeway' granted by the Court ... the precise compact district that a court would impose in a successful §

2 challenge"). If the Court were to say that a district drawn to avoid dilution must respond to the dilution threat in some geographically exact way, but see *Shaw II,* 517 U.S., at 916, n. 8, 116 S.Ct., at 1906, n. 8 (suggesting that States may have flexibility in complying with § 2 of the Voting Rights Act); *ante,* at 1990 (sTEVENS, J., dissenting) (noting that States traditionally have enjoyed a broader discretion in drawing district lines), then presumably a district drawn in a race-conscious fashion could survive only if it was as compact as the *Gingles* district hypothesized for purposes of stating a vote-dilution claim, and positioned where the hypothetical district would be.

If the Court ultimately were to reach such a conclusion, it would in one respect be taking a step back toward *Shaw I* and its suggestion that a district's shape might play an important, if not determinative role in establishing a cause of action. Such a step would, however, do much more than return to *Shaw I,* which suggested that a compact district would be a safe haven, but not that the district hypothesized under *Gingles* was the only haven. See, *e.g., Shaw I,* 509 U.S., at 646, 113 S.Ct., at 2826 ("The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions")

I refer to this step as a "possibility" deliberately. The Court in *Shaw II* does not go beyond an intimation to this effect, and *Bush* raises doubt that the Court would go so far. See *ante,* at 1960–1961 (rejecting the argument made by Justice STEVENS); see also *ante,* at 1961 ("[T]he States retain a flexibility that federal courts enforcing § 2 lack.... And nothing that we say today should be read as limiting 'a State's discretion to apply traditional districting principles' ***1068** ; but see *ante,* at 1970 (O'CONNOR, JJ., concurring) ("[I]f a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored" (citations omitted)); but see also *ante,* at 1960 ("We also ****2009** reaffirm that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests.... We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria' " (citation omitted)). Indeed, *Bush* leaves open the possibility that a State could create a majority-minority district that does not coincide with the *Gingles* shape so long as racial data are not overused, *ante,* at 1953, 1962, and it does not suggest that a *Shaw* claim could be premised solely on a deviation from a *Gingles* district.

Suffice it to say for now that if the Court were to try to render *Shaw* more definite by imposing any such limitations on shape and placement, the added measure of clarity would either be elusive or it would come at an exorbitant price from States seeking to comply with the Voting Rights Act and the Fourteenth and Fifteenth Amendments. It would be elusive if the Court meant that race could be considered in alleviating racial dilution but not in applying any traditional districting principle: we have already seen that race is inextricably intertwined with some common districting principles when applied in a multiracial society. See *supra,* at 2005–2006. Or it would come at an exorbitant price, because no other districting principle would be allowed to affect the compactness or placement that would be required for purposes of *Gingles.* The Court would thus be cutting back on a State's power to vary district shape through its application of the very districting principles that are supposed to predominate ***1069** in importance over racial consideration. That is, the Court would be reducing the discretion of a State seeking to avoid or correct dilution to the scope of a federal court's discretion when devising a remedy for dilution. There could, of course, be no justification for taking any such step. While there is good reason to limit a federal court's discretion to interfere in a State's political process when it employs its remedial power in dilution cases, cf. *Voinovich v. Quilter,* 507 U.S., at 156, 113 S.Ct., at 1156–1157 ("Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States ... to conduct apportionment"), there is no apparent reason to impose the same limitations upon the discretion accorded to a State subject to an independent constitutional duty to make apportionment decisions, see *ibid.* ("Because the States ... derive their reapportionment authority ... from independent provisions of state and federal law, ... the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements") (internal quotation marks omitted). The principles of federalism that we have tried to follow strongly counsel against imposing any such limitations.

D

In sum, the three steps the Court takes today toward a more definite cause of action either fail to answer the objections to *Shaw I* or prompt objections of their own. Recognition of a State's interest in complying with the Voting Rights Act does not address the practical impossibility courts will encounter in identifying a predominant use of race, as distinguished from some lesser, reasonable consideration of it, when a State applies its customary districting principles. The limitation on the use of racial data is unlikely to make much difference in practice except to jeopardize minority incumbency protection. And the possibility that the Court will require *Gingles* districts (or districts substantially close ***1070** to them) when compliance with § 2 of the Voting Rights Act is an object of districting would render a State's districting obligation more definite only by eliminating its ability to apply the very districting principles traditionally considered to be important enough to furnish a theoretical baseline of reasonable districting practices.

IV

If today's developments fall short of curing *Shaw* 's unworkability, it must be said that options for addressing them are few. Assuming that *Shaw* is not to be overruled as a flawed experiment, the Court may select from two alternatives, depending on whether its weightier concern is to preserve traditional ****2010** districting principles or to cure the anomalies created by *Miller* 's "predominant purpose" criterion.

If the Court's first choice is to preserve *Shaw* in some guise with the least revolutionary effect on districting principles and practice, the Court could give primacy to the principle of compactness and define the limits of tolerance for unorthodox district shape by imposing a measurable limitation on the bizarre, presumably chosen by reference to historical practice (adjusted to eliminate the influence of any dilution that very practice may have caused in the past, cf. Pildes & Niemi, 92 Mich. L.Rev., at 573–574, n. 246 (discussing the egregious racial gerrymanders of the 19th century)) and calculated on the basis of a district's dispersion, perimeter, and population. See *id.,* at 553–575. This alternative would be true to *Shaw I* in maintaining that a point can be reached when the initially lawful consideration of race becomes unreasonable and in identifying appearance as the expression of undue consideration; and it would eliminate *Miller* 's impossible obligation to untangle racial considerations from so-called "race-neutral" objectives (such as according respect to community integrity and protecting the seats of ***1071** incumbents) when the racial composition of a district and voter behavior bar any practical chance of separating them. The incongruities of *Shaw* 's concept of injury when considered in light of our customary equal protection analysis, our remedial practice, and traditional respect for state districting discretion would, of course, persist, but if *Shaw* were defined by measures that identified forbidden shape as the manifestation of unreasonable racial emphasis, we would at least provide the notice and guidance that are missing from the law today.

The other alternative for retaining a *Shaw* cause of action in some guise would be to accept the fact that, in the kind of polarized multiracial societies that will generate *Shaw* actions as presently understood, racial considerations are inseparable from many traditional districting objectives, making it impossible to speak of race as predominating. The consequence of facing this reality is that if some consideration of race is to be forbidden as supposedly unreasonable in degree, then the use of districting principles that implicate the use of race must be forbidden. That is, traditional districting practices must be eliminated. Such a result would, of course, be consistent with *Shaw I* 's concept of injury as affecting voters of whatever race. But cf. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 489, 102 S.Ct. 752, 767–768, 70 L.Ed.2d 700 (1982) (fact that some expressive harms are insufficient to satisfy Article III standing requirements does not allow for relaxation of those requirements). The result, in short, would be colorblindness in determining the manner of choosing representatives, either by eliminating the practice of districting entirely, or by replacing it with districting on some principle of randomness that would not account for race in any way.

While such is the direction in which *Shaw* and *Miller* together point, the objections to following any such course seem insurmountable. The first is the irony that the price ***1072** of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect, precisely the problem that necessitated our recognition of vote dilution as a constitutional violation in the first place. Eliminating districting in the name of colorblindness would produce total submersion; random submersion (or packing) would result from districting by some computerized process of colorblind randomness. Thus, unless the attitudes that produce racial-bloc voting

were eliminated along with traditional districting principles, dilution would once again become the norm. While dilution as an intentional constitutional violation would be eliminated by a randomly districted system, this theoretical nicety would be overshadowed by the concrete reality that the result of such a decision would almost inevitably be a so-called "representative" Congress with something like 17 black members. See *supra,* at 2000. In any event, the submergence would violate the prohibition of even non-intentional dilution found in § 2 of the Voting Rights Act. The only way to avoid this conflict would be to declare the Voting ****2011** Rights Act unconstitutional, a prospect hardly in harmony with the Court's readiness to assume today that compliance with the Voting Rights Act qualifies as a compelling state interest for purposes of litigating a *Shaw* claim.

The second objection is equally clear. Whatever may be the implications of what I have called *Shaw* 's failings, the Court has repeatedly made it plain that *Shaw* was in no way intended to effect a revolution by eliminating traditional districting practice for the sake of colorblindness. *Shaw I,* 509 U.S., at 642, 113 S.Ct., at 2824 ("Despite their invocation of the ideal of a 'color-blind' Constitution, see *Plessy v. Ferguson,* 163 U.S. 537, 559 [16 S.Ct. 1138, 1146, 41 L.Ed. 256] (1896) (Harlan, J., dissenting), appellants appear to concede that race-conscious districting is not always unconstitutional.... That concession is wise: This Court ***1073** never has held that race-conscious state decisionmaking is impermissible in *all* circumstances"); cf. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 520–521, 109 S.Ct. 706, 735–736, 102 L.Ed.2d 854 (1989) (sCALIA, J., concurring in judgment) (criticizing the majority for rejecting a strict principle of colorblindness). Indeed, the very fear that led to the creation of the *Shaw* cause of action was that racial concerns were taking too heavy a toll on districting practices that had evolved over the years through the political process. *Shaw I,* 509 U.S., at 644–649, 113 S.Ct., at 2825–2828. Justice O'CONNOR, moreover, has made it obvious that race has a legitimate place in districting, *id.,* at 642, 113 S.Ct., at 2823 ("[R]ace-conscious redistricting is not always unconstitutional"); *Miller,* 515 U.S., at 928–929, 115 S.Ct., at 2497 (o'CONNOR, J., concurring); *ante,* at 1969 (o'CONNOR, J., concurring), that the intentional creation of majority-minority districts is not forbidden by *Shaw, Miller, supra,* at 928, 115 S.Ct., at 2497 (o'CONNOR, J., concurring) (districts may be permissible "even though race may well have been considered in the redistricting process"); *ante,* at 1968–1969 (o'CONNOR, J., concurring), and that *Shaw* was aimed at only the exceptional district, 515 U.S., at 928–929, 115 S.Ct., at 2497 ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts"). Of the present Court majority, only Justices SCALIA and tHOMAS are on record as concluding that any intentional creation of a majority-minority district is a forbidden racial gerrymander. *Ante,* at 1973 (tHOMAS, J., concurring in judgment).

Since a radical transformation of the political selection process in the name of colorblindness is out of the question, the Court's options for dealing with *Shaw* 's unworkability are in truth only these: to confine the cause of action by adopting a quantifiable shape test or to eliminate the cause of action entirely. Because even a truncated *Shaw* would rest on the untenable foundation I have described, and the supposed, expressive harm *Shaw* seeks to remedy is unlikely ***1074** to justify the disruption that even a modified *Shaw* would invite, there is presently no good reason that the Court's withdrawal from the presently untenable state of the law should not be complete. While I take the commands of *stare decisis* very seriously, the problems with *Shaw* and its progeny are themselves very serious. The Court has been unable to provide workable standards, the chronic uncertainty has begotten no discernible reliance, and the costs of persisting doubt about the limits of state discretion and state responsibility are high.

There is, indeed, an added reason to admit *Shaw* 's failure in providing a manageable constitutional standard and to allow for some faith in the political process. That process not only evolved the very traditional districting principles that the Court has pledged to preserve, but has applied them in the past to deal with ethnicity in a way that should influence our thinking about the prospects for race. It is difficult to see how the consideration of race that *Shaw* condemns (but cannot avoid) is essentially different from the consideration of ethnicity that entered American politics from the moment that immigration began to temper regional homogeneity. Recognition of the ethnic character of neighborhoods and incumbents, through the application of just those districting principles we now view as traditional, allowed ethnically identified voters and their preferred candidates ****2012** to enter the mainstream of American politics, see *Miller, supra,* at 944–945, 115 S.Ct., at 2504–2505 (gINSBURG, J., dissenting); D. Judd, The Politics of American Cities: Private Power and Public Policy 70 (3d ed.1988); see generally S. Erie, Rainbow's End: Irish–Americans and the Dilemmas of Urban Machine Politics, 1840–1985 (1988), and to attain a level of political power in American democracy. The result has been not a state regime of ethnic apartheid, but ethnic

participation and even a moderation of ethnicity's divisive effect in political practice. For although consciousness of ethnicity has not disappeared from the ***1075** American electorate, its talismanic force does appear to have cooled over time.[9] It took Boston Irish voters, for example, to elect Thomas Menino mayor in 1993.[10]

***1076** There is, then, some reason to hope that if vote dilution is attacked at the same time that race is given the recognition that ethnicity has historically received in American politics, the force of race in politics will also moderate in time. There are even signs that such hope may be vindicated, even if the evidence is necessarily tentative as yet. See U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, p. 155 (Jan.1975) ("In many areas the great increase in minority registration and voting since the passage of the Voting Rights Act in 1965 has meant that politicians can no longer afford to ignore minority voters. This has brought about a significant decline in racial appeals by candidates and has made incumbents and candidates more responsive to minority needs"); Carsey, The Contextual Effects of Race on White Voter Behavior: The 1989 New York City Mayoral Election, 57 J. of Politics 221, 228 (1995) (reporting, in 1994, that "the contextual effects of race may not be so different from the contextual effects of factors like partisanship, ethnicity, or social class as we might have believed"); Sigelman, Sigelman, Walkosz, & Nitz, Black Candidates, White Voters: Understanding Racial Bias in Political Perceptions, 39 Am. J. of Political Science 243, 244 (1995) ("Over the years, white Americans have expressed increasing willingness to vote for black candidates"); Peirce, Fresh Air in City Hall, Baltimore Sun, Nov. 8, 1993, p. 7A ("In contest after contest, victory has gone to mayoral candidates who eschew talk of race"); see ****2013** also *Gingles,* 478 U.S., at 56, 106 S.Ct., at 2769 (noting that crossover voting in favor of minority candidates is more common when minority incumbents stand for reelection); *Collins v. Norfolk,* 883 F.2d 1232, 1243 (C.A.4 1989) (same). This possibility that racial politics, too, may grow wiser so long as minority votes are rescued from submergence should be considered in determining how far the Fourteenth and Fifteenth Amendments require us to devise constitutional common law to supplant ***1077** the democratic process with litigation in federal courts. It counsels against accepting the profession that *Shaw* has yet evolved into a manageable constitutional standard, and from that case's invocation again today I respectfully dissent.

All Citations

517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248, 64 USLW 4452, 96 Cal. Daily Op. Serv. 4238, 96 Daily Journal D.A.R. 6810

Footnotes

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

* In the application of our precedents to District 30, our disagreement with Justice STEVENS' dissent, *post,* at 1979–1988, is largely factual. In reviewing the District Court's findings of primary fact, we cannot ignore the reality that the District Court heard several days of testimony and argument and became significantly more familiar with the factual details of this suit than this Court can be. We therefore believe that the dissent errs in second-guessing the District Court's assessment of the witnesses' testimony, see *post,* at 1985, n. 24, and in dismissing as mere "fine tuning," *post,* at 1987, the practice of using race as a proxy that the District Court found, based on ample evidence, to be pervasive, see *Vera v. Richards,* 861 F.Supp. 1304, 1322 (S.D.Tex.1994).

For the same reason, we decline to debate the dissent on every factual nuance on which it diverges from the District Court's, and our, view. But two of its specific claims about District 30 merit a response. First, the dissent asserts that "[a] comparison of the *1992* precinct results with a depiction of the proportion of black population in each census block reveals that Democratic-leaning precincts cover a far greater area [of District 30] than majority-black census blocks." *Post,* at 1987 (emphasis added). While that may be true, the dissent's reliance on *1992* election results is misplaced. Those results were not before the legislature when it drew the district lines in 1991, and may well reflect the popularity and campaign success of Representative Johnson more than the party political predispositions of the district's residents. (The same error infects the dissent's discussion of the Collin County hook, *post,* at 1982–1983, n. 19 (relying on 1992 election results).) And looking at totals, rather than at the difference between areas just inside and just outside the district lines, is misleading: Race may predominate in the drawing of district lines because those

lines are finely drawn to maximize the minority composition of the district, notwithstanding that in an overwhelmingly Democratic area, the total of Democrats in the district far exceeds its total minority population.

Second, the dissent suggests that strict scrutiny should not apply because District 30's compact core has a higher African–American population percentage than its wayward tentacles. *Post,* at 1983–1984. In doing so, it again ignores the necessity of determining whether race predominated in the redistricters' actions *in light of what they had to work with.* Once various adjacent majority-minority populations had been carved away from it by the use of race as a proxy to enhance the electoral chances of neighboring incumbents, the core of District 30 was substantially too small to form an entire district. The principal question faced by the redistricters was, therefore, what territory to add to the core out of the remainder of the Dallas area, which remainder has an average African–American population substantially below the 21% county average. In answering that question, as the District Court explained and the maps bear witness, the redistricters created bizarre, far-reaching tentacles that intricately and consistently maximize the available remaining African–American population.

1 In *Adarand,* we overruled *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), and held that strict scrutiny applies to racial classifications by the Federal Government as well as to those by the States. For quite some time, however, we have consistently held that race-based classifications by the States must be strictly scrutinized. See, *e. g., Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493–494, 109 S.Ct. 706, 721–722, 102 L.Ed.2d 854 (1989) (plurality opinion); *id.,* at 520, 109 S.Ct., at 735–736 (sCALIA, J., concurring in judgment); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273, 106 S.Ct. 1842, 1846–1847, 90 L.Ed.2d 260 (1986) (plurality opinion); *id.,* at 285, 106 S.Ct., at 1852–1853 (o'CONNOR, J., concurring in part and concurring in judgment).

2 It is unnecessary to parse in detail the contours of each challenged district. See *ante,* at 1954–1960. I agree that the geographic evidence is itself sufficient to invoke strict scrutiny, but once the State directly conceded that it intentionally used racial classifications to create majority-minority districts, there was no need to rely on circumstantial evidence.

1 The District Court recognized, but erroneously ignored, the overwhelming weight of evidence demonstrating that political considerations dominated the shaping of Texas' congressional districts. See *Vera v. Richards,* 861 F.Supp. 1304, 1331, 1334–1336 (S.D.Tex.1994); *infra,* at 1986–1987.

2 Because I believe that political gerrymanders are more objectionable than the “racial gerrymanders” perceived by the Court in recent cases, see *Karcher v. Daggett,* 462 U.S. 725, 748, 103 S.Ct. 2653, 2668, 77 L.Ed.2d 133 (1983) (sTEVENS, J., concurring); *Davis v. Bandemer,* 478 U.S. 109, 161–162, 166, 106 S.Ct. 2797, 2825–2826, 2827, 92 L.Ed.2d 85 (1986) (Powell, J., concurring in part and dissenting in part), I am not entirely unsympathetic to the Court's holding. I believe, however, that the evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years. See also *infra,* at 1992.

3 In elections since 1980, the State has elected a Democrat in only two of four gubernatorial races, and in only two of six races for the United States Senate. America Votes 21: A Handbook of Contemporary American Election Statistics 417 (R. Scammon & A. McGillivray eds. 1995). Furthermore, in 1994, Republican candidates received a total of 550,000 more votes than Democratic candidates in Texas' 30 races for the United States House of Representatives, *id.,* at 4, while in 1992, Democratic House candidates outpolled Republicans by only 147,000 votes (despite winning 27 of 30 districts). America Votes 20: A Handbook of Contemporary American Election Statistics 474 (R. Scammon & A. McGillivray eds.1993).

4 Then–State Senator from Dallas, Eddie Bernice Johnson, who was chair of the Senate Subcommittee on Congressional Districts, maneuvered to construct District 30 in a manner that would ensure her election. 861 F.Supp., at 1313; Politics in America 1994: The 103rd Congress 1536 (1993) (“This is the District Eddie Bernice Johnson drew”). Vice chair of the same committee, Frank Tejeda, also “attempted to draw a district [District 28] that would facilitate his potential candidacy.” 861 F.Supp., at 1326. And State Senator Gene Green and State Representative Roman Martinez, both Houston-area officials with designs on Congress, competed in an effort to design District 29 in a way that would guarantee their own election. *Id.,* at 1324, n. 27. (Martinez later dropped out of the congressional race to run for State Senate.) Because the role that these legislators played in the redistricting process was largely identical to that played by sitting incumbents, my references to the role of “incumbents” in the redistricting process generally refer to these individuals as well.

5 As did many other States, Texas kept track of the shapes of its post–1990 districts with a computer districting program loaded with 1990 census information and geographic information at scales ranging from statewide to that of a city block. See generally *Shaw v. Hunt,* 861 F.Supp. 408, 457 (E.D.N.C.1994) (describing computer programs); 861 F.Supp., at 1318–1319. The dramatic increase in bizarrely shaped districts after 1990 can be traced, at least in part, to the fact that computers allowed legislators to achieve their political goals geographically in a manner far more precise than heretofore possible. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After *Shaw v. Reno,* 92 Mich. L.Rev. 483, 574 (1993); Note, The Illegitimacy of the Incumbent Gerrymander, 74 Texas L.Rev. 913, 924 (1996).

6 The State added District 28 (a majority-Hispanic district in south Texas), District 29 (a majority-Hispanic district in Houston), and District 30 (a majority-black district in Dallas). In addition, the State reconfigured Houston's District 18. That district had elected African–American Representatives to Congress since the early 1970's and remained majority-minority in 1990, although a plurality of its population was by then Hispanic. To create District 29, the legislature altered the shape of District 18 to move parts of its Hispanic population into that neighboring district while retaining a majority-black population.

> To the extent that the precise shape of these districts relied on race rather than other factors, that racial gerrymandering was somewhat less effective than the political gerrymandering had been: District 29, created as a majority-Hispanic district, elected an Anglo, former State Senator Green, in 1992, and reelected him in 1994. America Votes 21, at 437. Given his substantial role in crafting the district to meet his electoral needs, see n. 4, *supra,* Green's success suggests the power of incumbency over race.

7 I do not agree with the Court's approach to these cases. Nonetheless, given that the Court seems settled in its conclusion that racial gerrymandering claims such as these may be pursued, I endorse this proposition.

8 Though expressly reserving the issue in *Shaw I,* we noted there that appellants wisely conceded that while "race-conscious redistricting is not always unconstitutional.... This Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances." 509 U.S., at 642, 113 S.Ct., at 2824 (emphasis in original). The threshold test for the application of strict scrutiny as set forth in *Miller v. Johnson,* 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), implicitly accepts this as true, concluding that strict scrutiny applies not when race merely *influences* the districting process, but only when "the legislature *subordinated* traditional race-neutral districting principles ... to racial considerations." *Id.,* at 916, 115 S.Ct., at 2488 (emphasis added); see also *id.,* at 928–929, 115 S.Ct., at 2497 (O'CONNOR, J., concurring) (test does not "throw into doubt the vast majority of the Nation's 435 congressional districts ... even though race may well have been considered in the redistricting process"). *Shaw II* similarly recognizes that intent does not trigger strict scrutiny: Although the District Court concluded that the State "deliberately drew" the district in question to ensure that it included a majority of African–American citizens, see *Shaw,* 861 F.Supp., at 473; *Shaw II,* at 905, 116 S.Ct., at 900, the Court reviews the District Court's findings regarding the demographics of the district to determine whether the strict scrutiny was appropriately applied. See 517 U.S., at 905–906, 116 S.Ct., at 1900–1901; cf. *ante,* at 1972 (THOMAS, J., concurring in judgment) (where State intends to create majority-minority district, application of strict scrutiny not even a "close question").

> Justice THOMAS takes a strong view on this matter, arguing that a majority-minority district should escape strict scrutiny only when it is created "in spite of," not "because of," the race of its population. *Ante,* at 1973. But because minorities are, by definition, minorities in the population, it will be rare indeed for a State to stumble across a district in which the minority population is both large enough and segregated enough to allow majority-minority districts to be created with at most a "mere awareness" that the placement of the lines will create such a district. See *ibid.* Indeed, I doubt that any such district exists in the entire Nation; the creation of even the most compact majority-minority district will generally require a conscious decision to draw its lines "just so" to ensure that the group is not a minority in the district population. It appears, however, that even when a district is placed "just so" in order to include a traditional community in which race does correlate with community interests (consider, for example, New York District 15, which is centered on Harlem), Justice THOMAS would review that district with the same presumption of invidiousness with which we viewed the district in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). Cf. *Miller,* 515 U.S., at 944, 115 S.Ct., at 2504 (GINSBURG, J ., dissenting) (noting that "ethnicity itself can tie people together" in communities

of interest). Because the creation of such a district threatens neither the harms of *Gomillion* nor, I believe, any harms against which the Fourteenth Amendment was intended to protect, I cannot accept his conclusion.

9 Because the Court's approach to cases of this kind seeks to identify the "predominant" motive of the legislature, it is worth pointing out, as we have on so many prior occasions, that it is often "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." *Palmer v. Thompson,* 403 U.S. 217, 225, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971). As in every other legislative body, each of the members of Texas' Legislature has his or her own agenda and interests—particularly in the "complicated process" of redistricting, in which every decision "inevitably has sharp political impact." *White v. Weiser,* 412 U.S. 783, 795–796, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973). In these circumstances, "[r]arely can it be said that a legislature ... operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators ... are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); (footnote omitted); see also *Edwards v. Aguillard,* 482 U.S. 578, 636–639, 107 S.Ct. 2573, 2605–2606, 96 L.Ed.2d 510 (1987) (SCALIA, J., dissenting); *Shaw II,* 517 U.S., at 940, 116 S.Ct., at 1917–1918 (STEVENS, J., dissenting).

Not only is this a case in which a legislature is operating under a "broad mandate," but other factors weigh in favor of deference as well. First, the inherently political process of redistricting is as much at the core of state sovereignty as any other. Second, the "motive" with which we are concerned is not *per se* impermissible. (For that reason, this litigation is very different from *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), in which the plaintiffs alleged that the defendant's action was motivated by an intent to harm individuals because of their status as members of a particular group. Where there is "proof that a discriminatory purpose has been a motivating factor in the decision," the "judicial deference" due to the legislative process is no longer justified. *Id.,* at 265–266, 97 S.Ct., at 563.) Finally, those that are injured by the allegedly discriminatory districts can alleviate their injury through the democratic process: Those in the district could elect a representative who is not a part of their racial group, while the population at large could elect a legislature that refused to rely on racial considerations in the drawing of districts. In such circumstances we should take particular care in questioning the legislature's motives and, if in doubt, presume that the legislature has acted appropriately. See *post,* at 2004–2006 (SOUTER, J., dissenting).

10 We require state legislatures to ensure that populations, from district to district, are "as mathematically equal as reasonably possible," with *de minimis* exceptions permissible only in "unavoidable" instances. *White v. Weiser,* 412 U.S., at 790, 93 S.Ct., at 2352; see also *Karcher,* 462 U.S., at 734–735, 103 S.Ct., at 2660–2661. Population variances are not permissible even " 'if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing ... political subdivision boundaries.' " *White,* 412 U.S., at 791, 93 S.Ct., at 2352 (citing *Kirkpatrick v. Preisler,* 394 U.S. 526, 533–534, 89 S.Ct. 1225, 1230–1231, 22 L.Ed.2d 519 (1969)). The legislature, therefore, understandably felt compelled to achieve mathematical equality regardless of other concerns. Rather surprisingly, they were able to do so: Every one of Texas' 30 congressional districts contains precisely 566,217 persons. Of course, this precision could not have been accomplished without breaking apart counties, cities, neighborhoods, and even pre-existing voting precincts.

11 This phenomenon is not unique to Dallas County: Throughout the State, "incumbent residences repeatedly fall just along district lines." 861 F.Supp., at 1318 (giving examples); see State's Exhs. 10A and 10B (showing incumbent residences). District 6, for instance, changed from a rural district stretching far to the southeast of Dallas to a more suburban district wrapping around Fort Worth. As it did so, however, the district pivoted around the home of incumbent Representative Joe Barton, whose residence sits at the extreme southeastern end of a district stretching in a 100–mile–long loop around Fort Worth. See Appendix D, *infra.*

12 The plurality suggests that these communities were shed from District 30 in a "suspect use of race as a proxy to further neighboring incumbents' interests." *Ante,* at 1961; see also *ante,* at 1957, n. I had thought, however, that the Court's concern in these cases was the "resemblance to political apartheid" involved in the creation of majority-minority districts. *Shaw I,* 509 U.S. 630, 647, 113 S.Ct. 2816, 2827, 125 L.Ed.2d 511 (1993). I do not see how the decision to *include* minority communities in a neighboring majority-White district bears any resemblance to such "apartheid" or, for that matter, how it

has any relevance to the validity of the creation of a district from which those minority communities have been excluded. See also *infra,* at 1963–1965.

13 See, *e.g.,* 3 Tr. 187 (testimony of Christopher Sharman: "[A]ny time you took part of a district away on one end, you would usually squeeze or push the district out on another end; and in this case, most of the time the district would get pushed to the north").

14 The author of the District Court opinion was herself aware of these political realities. See *id.,* at 194 (Jones, J., noting that Johnson did not want anything to do with the Park Cities because she "[d]idn't want competition from Ross Perot"). In light of this recognition, it is difficult to understand why the District Court described District 30's efforts to avoid that community as a contributing factor to the allegedly race-based bizarreness of the district borders. See 861 F.Supp., at 1337; *ante,* at 1955.

15 Because political boundaries are more closely packed in urban than in rural areas, drawing lines based on such boundaries will almost always require tighter twists and turns in urban districts than in rural districts. Significantly, the three districts struck down by the District Court are the only three districts in the entire State with population densities of over 2,000 persons per square mile. See U.S. Dept. of Commerce, Bureau of the Census, Population and Housing Characteristics for Congressional Districts of the 103d Congress: Texas 40–44 (Feb.1993). If enough empty land were added to these districts that they matched the sparse densities of rural districts (such as District 28, which was upheld by the District Court), their turns would not appear so sharp, and the open space, without its demographic implications, could smooth the deepest of the districts' notches.

16 As Democratic communities were identified, they had to be connected with the core of the district. Although Texas has no state statutory or constitutional requirement to that effect, state legislators agreed that each of the 30 districts should be entirely contiguous, permitting any candidate, map in hand, to visit every residence in her district without leaving it.

17 Incumbents influenced the shape of districts in other ways. Both District 30 and District 29, for instance, detoured to include portions of the state legislative districts that were being represented by the state legislators who hoped to run for Congress. See, *e.g.,* State's Exh. 31 (showing that portion of Tarrant County included in District 30 had been part of Johnson's State Senate district). In some cases, legislators drew districts to avoid the residences of potential primary challengers. See 3 Tr. 192–193; 4 *id.,* at 46. Incumbents also sought to include communities that they expected (or knew) to contain particularly active supporters; this interest in "active" voters often trumped any desire to ensure a particular racial makeup. See 3 *id.,* at 190; 4 *id.,* at 40–41; 861 F.Supp., at 1320.

18 While two extremely noncompact majority-Anglo districts in Texas (Districts 3 and 25) might be able to blame part (though by no means all) of their contortions on their contiguity with the majority-minority districts, District 6 has little excuse. Although it shares a border with District 30 for a short distance, that stretch is one of the straightest in either of the districts, running almost entirely along the county line through the Dallas–Fort Worth International Airport. See Appendix D, *infra.*

> As for the obligatory florid description: District 6 has far less of an identifiable core than any of the majority-minority districts struck down by the District Court. To the extent that it "begins" anywhere, it is probably near the home of incumbent Rep. Barton in Ennis, located almost 40 miles southwest of downtown Dallas. From there, the district winds across predominantly rural sections of Ellis County, finally crossing into Tarrant County, the home of Fort Worth. It skips across two arms of Joe Pool Lake, noses its way into Dallas County, and then travels through predominantly Republican suburbs of Fort Worth. Nearing the central city, the borders dart into the downtown area, then retreat to curl around the city's northern edge, picking up the airport and growing suburbs north of town. Worn from its travels into the far northwestern corner of the county (almost 70 miles, as the crow flies, from Ennis), the district lines plunge south into Eagle Mountain Lake, traveling along the waterline for miles, with occasional detours to collect voters that have built homes along its shores. Refreshed, the district rediscovers its roots in rural Parker County, then flows back toward Fort Worth from the southwest for another bite at Republican voters near the heart of that city. As it does so, the district narrows in places to not much more than a football field in width. Finally, it heads back into the rural regions of its fifth county—Johnson—where it finally exhausts itself only 50 miles from its origin, but hundreds of "miles apart in distance and worlds apart in culture." *Miller,* 515 U.S., at 908, 115 S.Ct., at 2484 (describing a similar combined rural/urban district).

19 Seeking specific examples, the plurality makes much hay over a portion of Collin County located just over the county line north of Dallas. See *ante,* at 1954–1955, 1957. There, District 30 excludes a portion of a precinct that voted Democratic in 1990, and maps "*exactly* onto the only area in the southern half of th[e] county with a [minority] percentage population in excess of 50%." *Ante,* at 1955.

The map to which the plurality refers, however, groups the minority percentage by precinct, and since precincts are defined by the district boundaries, it is no surprise that the district maps "exactly" onto the precinct. See App. 153. (One might similarly argue that "District 30 maps *exactly* onto the only area in all of north Texas that is 50% black," but such a statement reveals little about the underlying demographics of specific sections of the district.) The more telling maps are the census block maps, which demonstrate that the Collin County section of District 30 contains many more *census blocks* of less than 25% minority population than it does blocks that are more than 50% minority. See State's Exh. 45 and 46 (Exh. 45 is reproduced, in part, as Appendix D, *infra*). Even if those majority-white blocks have relatively small populations, they were nonetheless included, suggesting that the creation of the district was not as single-mindedly focused on race as the Court and the District Court assume.

Even more significant is the fact that the new precinct leaned overwhelmingly Democratic in the 1992 election, while the portion of the precinct that was not included in District 30 voted overwhelmingly Republican. See State's Exh. 9B (Collin County). While the excluded portion of the 1990 precinct may have been dropped, in part, to help comply with the State's goals under the Voting Rights Act, it also involved a successful effort to maximize Democratic votes while avoiding Republican votes.

20 See 861 F.Supp., at 1312 (black population in Dallas County is 362,130); Bureau of Census, Population and Housing Unit Counts 185 (Oct.1993) (total population of Dallas County is 1,852,810).

21 Several responses to the plurality's specific examples are worth making, however. In Collin County, the plurality relies on the fact that the "combined African–American and Hispanic" population in the Collin County extremity of the northern appendage to District 30 is in excess of 50%. *Ante,* at 1957. But District 30 was created with an eye to a majority-*black* population, rather than a majority-minority population, so the more relevant facts are that (i) African–Americans make up only 19.8% of the Collin County appendage, App. 331, (ii) those African–Americans consist of only two-tenths of 1% of the entire population in the district, *ibid.,* and (iii) this appendage contains more *majority-white* census blocks than it does majority-minority census blocks, see State's Exh. 45.

The plurality also points out that a small portion of one of the tentacles—the one that extends west into Tarrant County—contains an African–American majority. *Ante,* at 1954. It would be implausible to claim, however, that race was the "predominant" reason that this community was included in District 30. First, the community had been part of Senator Johnson's state legislative district, see n. 17, *supra;* second, it also includes majority-white census blocks; and third, the *total* population in that portion of the district is less than 2,000 people. App. 331. Finally, and more important, the population of the entire western tentacle (at the tip of which is the Tarrant County community) is only 29% black, see State's Exh. 33—less than half the proportion of minorities in the core of the district.

22 Indeed, if the "appendages" to District 30 reaching into neighboring counties were cut off, the proportion of African–Americans in the resulting district would actually *increase.* See App. 331. As presently constituted, district 30 includes 566,217 people, of which 283,225 (or 50.02%) are African–American. If the Tarrant County and Collin County portions of the district were removed, the resulting district would have 557,218 people, of which 280,620 (or 50.36%) would be African–American. While the resulting district would not include the "zero deviation" necessary under *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny, see n. 10, *supra,* the missing population could easily be acquired in majority-black census blocks adjacent to District 30's southern and eastern edge, thereby increasing the proportion of black population still further. Because the alleged racial goals of the district could be achieved *more* effectively by making the district *more* compact, I simply do not comprehend how the plurality can conclude that the effort to create a majority-minority district "predominated" over other, race-neutral goals.

23 Testimony by individuals is relevant, but hardly dispositive evidence of collective motivations. See n. 9, *supra.* It may be true that the most important concern motivating Senator Johnson, the Chairman of the Senate Districting Committee, was her desire to create the first Congressional District in the history of the State in which African–Americans were in the majority. Johnson never testified, however, that racial considerations were the *sole* concern motivating the changes

to the shapes of the districts. See, *e.g.,* App. 454–456 (certain areas that were minority communities were assigned to Anglo incumbents because of incumbent power), *id.,* at 459 ("[J]ust as 30 went looking for friendly territory regardless of color, [the incumbents] went looking for friendly territory as well regardless of color"). Since this testimony was not only irrelevant to the § 2 proceedings but arguably harmful to her claim there that racial considerations had been taken into account, these admissions are particularly telling.

> To the extent that testimony of individual legislators is relevant, the following statements from the floor of the Texas House confirm that many legislators viewed these districts as political, not racial, gerrymanders: "This plan was drawn to protect incumbents....
>
> "[I]n order to protect an incumbent Dallas congressman and an incumbent Houston congressman, county lines were not respected, urban boundaries were not respected, precinct boundaries were not respected." *Id.,* at 374–375 (statement of Rep. Ogden).
>
> "With the adoption of this plan, you will have 8 Republican Congressmen out of 30. That's de facto regression and provides for less Republican representation in Washington, D.C.
>
> "Communities throughout the State are surgically split in what appears to be illogical, irrational and erratic pattern[s]. But if you look at election result data throughout the State, you'll find that these lines are very logical and very rational. The lines have been drawn, dissecting communities very creatively in order to pack Republicans and maximize Democratic representation." *Id.,* at 376 (statement of Rep. Gusendorf).
>
> See also *id.,* at 377–380 (statement of Rep. Gusendorf illustrating the gerrymandering process by reference to District 6, not a majority-minority district).
>
> These gerrymanders "d[o] not have to happen. It has nothing to do with fairness. It has nothing to do with minority representation because if we were really concerned about minority representation, we would have drawn this map in such a way that the minorities were considered and not simply to elect Democrats." *Id.,* at 384 (statement of Rep. Hill).

24 It is ironic and slightly unfair for the plurality and District Court to use the State's § 5 submission and Congresswoman Johnson's testimony in a § 2 challenge to the congressional district as evidence against them in these cases. See, *e.g.,* 861 F.Supp., at 1319–1321, 1338–1339; *ante,* at 1956–1957. Both of those proceedings required the State to assure the Attorney General and a federal court, respectively, that the State had adequately considered the interests of minority voters in the 1991 redistricting process. Under such circumstances, it is not at all surprising that the relevant declarant would limit his or her comments to the role that race played in the redistricting process, for other considerations were largely irrelevant (the District Court's opinion to the contrary notwithstanding, see 861 F.Supp., at 1339).

25 As Justice GINSBURG noted in her dissent in *Miller,* "ethnicity itself can tie people together" in communities of interest. 515 U.S., at 944, 115 S.Ct., at 2504; see also *Rogers v. Lodge,* 458 U.S. 613, 651, 102 S.Ct. 3272, 3293, 73 L.Ed.2d 1012 (1982) (STEVENS, J., dissenting) ("Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a 'bloc' "). Furthermore, it may be that the very fact of racial bloc voting, a prerequisite to § 2 liability, see *Thornburg v. Gingles,* 478 U.S. 30, 51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986) (and, under the Court's recent jurisprudence, to the voluntary formation of a majority-minority district), demonstrates the presence of a minority community. While communities based on race may merit a more skeptical review to ensure that a bond, rather than mere stereotyping, ties the community, see 861 F.Supp., at 1338, recognition of such a community in an electoral district certainly could, in certain circumstances, serve as a legitimate race-neutral explanation for particularly odd district shapes. By suggesting the contrary, I believe that the District Court erred. See *ibid.; post,* at 2005–2006 (SOUTER, J., dissenting).

26 The District Court's legal analysis was probably flawed in part because its decision was issued before this Court announced its opinion in *Miller.*

27 While it may be that the political gerrymandering in this case is "different in degree" from that previously recognized, 861 F.Supp., at 1334, I do not believe that the reference in *Shaw I* and *Miller* to "traditional" districting principles, see *Shaw*

I, 509 U.S., at 642, 113 S.Ct., at 2824; *Miller,* 515 U.S., at 916, 115 S.Ct., at 2488, was intended to prohibit a State from changing the process or policies underlying the complex negotiating process that is modern redistricting.

28 The plurality expresses particular concern over the use of computer programs, particularly the availability of block-by-block racial data, and argues that the State's effort to "compil[e] detailed racial data," *ante,* at 1955, is evidence of the controlling role of race in the computer-dominated process of redistricting. See *ante,* at 1952–1953; 861 F.Supp., at 1318–1319. It is worth noting, however, that the State made no particular "effort" to gather these data; it was included, along with similarly detailed information about sex, age, and income levels, in the data set provided by the Census Bureau and imported wholesale into the State's redistricting computers. Cf. *Shaw,* 861 F.Supp., at 457. Furthermore, even if the computer was used to fine tune the district lines to ensure that minority communities were included in District 30 (rather than individualized requests from candidates and their staffers on the basis of block-level data, see *supra,* at 1981), such a technique amounts to little more than the use of a particularly efficient and accurate means of ensuring that the intended nature of the district was not undermined as incumbency protection forced it out of a compact district. I do not suggest that the end can always justify the means, but if those means are no more invidious than the end itself, I do not understand why their use should affect the analysis. I would not condemn state legislation merely because it was based on accurate information.

29 "A prediction based on racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics. In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders." *Mobile v. Bolden,* 446 U.S. 55, 88, 100 S.Ct. 1490, 1510, 64 L.Ed.2d 47 (1980) (STEVENS, J., concurring in judgment) (footnote omitted).

> To the extent that a political prediction based on race is incorrect, the voters have an entirely obvious way to ensure that such irrationality is not relied upon in the future: Vote for a different party. A legislator relying on racial demographics to ensure his or her election will learn a swift lesson if the presumptions upon which that reliance was based are incorrect.

30 I find it particularly ironic that the Court considers the use of race *verboten* in this benign context, while the Court just recently, on the basis of evidence that, *inter alia,* "[m]ore than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black," dismissed out of hand the Ninth Circuit's assumption that "people of *all* races commit *all* types of crimes." *United States v. Armstrong,* 517 U.S. 456, 469, 116 S.Ct. 1480, 1488, 134 L.Ed.2d 687 (1996). The Ninth Circuit's conclusion, it seems to me, is a model of the sort of race-neutral decisionmaking that this Court insists should be a part of constitutional decisionmaking processes.

31 Although I conclude that no reasonable interpretation of the record would require the application of strict scrutiny to District 30, I believe for the reasons that follow that it, too, would survive strict scrutiny if it were to be subject to that level of review.

32 While I believe that the evidence supporting the State's conclusions in this regard is stronger than that suggested by the plurality or Justice KENNEDY in his concurring opinion, I will simply assume, *arguendo,* as the plurality does, that the State had a reasonable fear of liability under § 2. See also *supra,* at 1976.

33 Even if the Court in *Shaw II* is correct in asserting that North Carolina's District 12 would not have allowed the State to avoid liability under § 2, see *supra,* at 916–918, 116 S.Ct., at 1905–1906, no such plausible argument could be made in these cases. The core of District 30, for instance, contains more than half of all the African–American population in the district, and coincides precisely with the heart of the compact community that the State reasonably believes would give rise to a § 2 violation were it not placed in a majority-minority district. The same facts are true with respect to the Houston districts.

34 The difficulty of balancing between these competing legal requirements will only be exacerbated by the ability of litigants (and courts) to use evidence proffered in defense by the State or its actors in one context as evidence *against* the State in another. See n. 24, *supra.* While there is nothing wrong with using prior inconsistent statements (to the extent that they really are inconsistent), States will be all the more unwilling to enter into the process at all given the certainty that they will be subject to suits in which evidence offered in one as defense will be fodder for the plaintiffs in another.

35 The contrary is also possible, of course. Perhaps the burgeoning role of federal courts in this process, along with their relative isolation from the political pressures that motivate legislatures to bend district lines, will mean that there will actually be fewer politically gerrymandered districts. Regardless of whether political gerrymanders are more or less prevalent after our decisions today, my point is the same: The Court has its hierarchy of values upside down.

36 My view that a State may act unconstitutionally by gerrymandering to minimize the influence of a group on the political process is consistent with the belief that there is no constitutional error in the drawing of district lines based on benign racial considerations. As Justice Powell noted in his opinion in *Davis v. Bandemer,* 478 U.S., at 165, 106 S.Ct., at 2827, there is a sharp distinction between "gerrymandering in the 'loose' sense" (*i.e.,* the drawing of district lines to advance general political and social goals), and "gerrymandering that amounts to unconstitutional discrimination" (*i.e.,* the drawing of district lines for the sole purpose of " 'occupy[ing] a position of strength at a particular time, or to disadvantage a politically weak segment of the community,' " *id.,* at 164, 106 S.Ct., at 2827 (citing *Karcher,* 462 U.S., at 748, 103 S.Ct., at 2668 (STEVENS, J., concurring)). See also 478 U.S., at 125, n. 9, 106 S.Ct., at 2807, n. 9 ("[A] preference for nonpartisan as opposed to partisan gerrymanders ... merely recognizes that nonpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing fair group representation"). While I believe that allegations of discriminatory intent and impact, if proved, should give rise to a constitutional violation, *Shaw, Miller,* and these cases all involve allegations of both impact and intent that are far more diffuse than the allegations to which we have traditionally directed our most rigorous review. See *Shaw II,* 517 U.S., at 921–923, 116 S.Ct., at 1908–1909 (STEVENS, J., dissenting); cf. *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). Limiting the constitutional ban on gerrymandering to those claims alleging that a specific group (as opposed to every group) has been harmed would be far more consistent with prior precedent than the Court's still-developing jurisprudence of racial gerrymandering.

37 Compare 51 Congressional Quarterly 10 (1993) (list of African–Americans who have served in Congress through the end of 1992) and Supplement to 52 Congressional Quarterly 10 (Nov. 12, 1994) (listing minorities in the 104th Congress) with biyearly publications of The Almanac of American Politics (published 1975–present).

38 D. Bositis, Joint Center for Political and Economic Studies, African–Americans & the 1994 Midterms 22 (rev. May 1995). Fifteen black candidates ran for office in majority-white districts. *Ibid.*

1 See, *e.g., Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts") (citing U.S. Const., Art. I, § 2); *Voinovich v. Quilter,* 507 U.S. 146, 156, 113 S.Ct. 1149, 1156, 122 L.Ed.2d 500 (1993); *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506 (1964).

2 Even in the no longer controversial instance of the one-person, one-vote rule, the adequacy of justification and standard was subject to sharp dispute, and some of the Court's best minds expressed principled hesitation to go even this far into what has been called the political thicket, see *id.,* at 615, 84 S.Ct., at 1409 (Harlan, J., dissenting) ("The Court's elaboration of its new 'constitutional' doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States"); *Baker v. Carr,* 369 U.S. 186, 267, 82 S.Ct. 691, 737–738, 7 L.Ed.2d 663 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements").

3 As Professor Issacharoff notes, our vote-dilution cases acknowledged that "the right to cast an effective ballot implied more than simply the equal weighting of all votes.... To be effective, a voter's ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results. For this reason, any sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right...." Issacharoff, Groups and the Right to Vote, 44 Emory L.J. 869, 883 (1995); see also Davidson, The Recent Revolution in Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, p. 23 (C. Davidson & B. Grofman eds. 1994) ("Ethnic or racial vote dilution takes place when

a majority of voters, by bloc voting for its candidates in a series of elections, systematically prevents an ethnic minority from electing most or all of its preferred candidates.... Vote dilution not only can deprive minority voters of the important symbolic achievement of being represented by preferred members of their own group, it can deprive them of a committed advocate in councils of government ... [and] of the substantial benefits that government bestows ...").

4 See Pildes, The Politics of Race, 108 Harv. L.Rev. 1359, 1369 (1995) (reviewing Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990 (C. Davidson & B. Grofman eds.1994)) (noting that studies of Southern States demonstrate that, as a result of racial-bloc voting, "the probability of a district's electing a Black representative was less than 1% regardless of a district's median family income, its percentage of high school graduates; its proportion of residents who were elderly, urban, foreign-born, or who had been residents of the state for more than five years; or the region of the country in which the district was located"); *id.,* at 1375 (finding similar results nationwide). There is, of course, reason to hope that conditions are improving. See *infra,* at 2012–2013 (discussing elections in which crossover voting favors minority incumbents and in which racial issues have not played a significant role in the outcome). As I discuss in detail in Part IV, *infra,* I believe that these improvements may be attributed in large part to the effect of the Voting Rights Act, and thus to our willingness to allow race-conscious districting in certain situations.

5 I recognize, of course, that elsewhere we have imposed prohibitions on the consideration of race, but contexts are crucial in determining how we define "equal opportunity." Consider our decisions on peremptory jury challenges. There, as in politics, one race may not have had a fair shake from the other. But the differences between jury decisionmaking and political decisionmaking are, I believe, important ones. Politics includes choices between different sets of social values, choices that may ultimately turn on the ability of a particular group to enforce its demands through the ballot box. Jury decisionmaking is defined as a neutral process, the impartial application of law to a set of objectively discovered facts. To require racial balance in jury selection would risk redefining the jury's role. Without denying the possibility that race, especially as an imperfect proxy for experience, makes a difference in jury decisionmaking (and, in some cases, legitimately so), it seems to me that the better course is to ensure a fair shake by denying each side the right to make race-based selections. The cost of the alternative is simply too great. It is an entirely different matter, however, to recognize that racial groups, like all other groups, play a real and legitimate role in political decisionmaking. It involves nothing more than an acknowledgment of the reality that our concepts of common interest, geography, and personal allegiances are in many places simply too bound up with race to deny some room for a theory of representative democracy allowing for the consideration of racially conceived interests. A majority of the Court has never disagreed in principle with this position. See, *e.g., Shaw I,* 509 U.S. 630, 642, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993) (noting that race-conscious redistricting is not always unconstitutional); *Miller v. Johnson,* 515 U.S. 900, 928–929, 115 S.Ct. 2475, 2497, 132 L.Ed.2d 762 (1995) (o'CONNOR, J., concurring) (consideration of race in the redistricting process does not always violate the Constitution); *ante,* at 1951 (opinion of O'CONNOR, J.) (noting that strict scrutiny does "not apply merely because redistricting is performed with consciousness of race").

6 Leaving aside the question whether such a catholic injury can be a violation of the Equal Protection Clause, there still might be a use of race that harms all district voters because it is used to an unreasonable degree. But see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 489, 102 S.Ct. 752, 767, 70 L.Ed.2d 700 (1982). But the Court has never succeeded in identifying how much is too much, having adopted a "predominant purpose" test that amounts to a practical repudiation of any hope of devising a workable standard. See Part I–C, *infra.*

7 See *Cannon v. North Carolina State Bd. of Ed.,* 917 F.Supp. 387, 391 (E.D.N.C.1996) (describing this "difficult area of the law" and predicting that it will "gain better definition by reason of an imminent decision by the Supreme Court of the United States [in *Shaw II*]"); Briffault, Race and Representation After *Miller v. Johnson,* 1995 U. Chi. Legal Forum 23, 50 (1995) ("[I]t is unclear what work the adjectives 'predominant' and 'overriding' do in the Supreme Court's test"); Karlan, Post-*Shaw* Era 287 (*Miller* "further unsettled the already unclear roadmap" of *Shaw I*); Issacharoff, Constitutional Contours 60 ("[T]he Court's facile reliance on standards of causation vaguely reminiscent of tort law does nothing to defer confronting the hard issue of acceptable standards of conduct").

8 Even in areas where there is no racial-bloc voting, the application of certain traditional districting principles may involve a legitimate consideration of race.

9 See Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L.Rev. 303, 347, 350 (1986) ("[T]he surest path to assimilation is participation in the larger society's activities and institutions. Voting is not just an expression of political preferences; it is an assertion of belonging to a political community...." "When legislative districts are defined in ways that exclude the possibility of significant minority representation, potential minority voters see that their votes are not worth casting. Yet electoral mobilization is vital ... to the group members' perceptions that they belong to the community"); Walzer, Pluralism in Political Perspective, in The Politics of Ethnicity 1, 18 (S. Thernstrom, A. Orlov, & O. Handlin eds.1982) ("[P]olitical life is in principle open, and this openness has served to diffuse the most radical forms of ethnic competition"); Kantowicz, Voting and Parties, in The Politics of Ethnicity, *supra,* at 29, 45 (noting that political successes and recognition made members of an ethnic group "feel that it belonged in the wider society ... [and brought] them inside the political system"); Mintz, Ethnicity and Leadership: An Afterword, in Ethnic Leadership in America 198 (J. Higham ed.1978) (concluding after reviewing several studies of ethnic politics that "we ignore at our peril the need to understand those processes by which being shortchanged ... politically can become any group's motto or battle standard"); cf. Karlan, Our Separatism 102 ("two generations of communist suppression and ethnic and religious tension in Yugoslavia did little to ensure stability, tolerance, or integration").

10 See, *e.g.,* Nolan, Boston Mayoral Race Could Break Dominance of Ethnicity, Boston Globe, Apr. 9, 1993, p. 40 ("When Boston finishes choosing a new mayor, the city may discover that after centuries of immigration, ethnicity is no longer the dominant factor in its politics"); Black, Once–Solid Voting Blocks are Splitting in Boston, Boston Globe, Nov. 1, 1993, p. 1 (commenting that voters consider Menino's Italian descent "little more than a historical footnote" and observing that "ethnic voting has faded ... [a]s various groups enter the American economic and social mainstream ... [and] gain some semblance of [political] power"); D'Innocenzo, Gulotta Can't Count on Ethnicity, Newsday, Oct. 19, 1993, p. 97 (noting that "[t]he vowel at the end of Tom Gulotta's name may not matter in this year's county executive election as it once did" because "Italian–Americans in Nassau County are likely to go to the polls with more than ethnic favoritism in mind"; attributing the decline in ethnicity-based voting to the fact that "Nassau Italian–Americans feel less marginali [zed] as an ethnic group").

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113 S.Ct. 2217
Supreme Court of the United States

CHURCH OF the LUKUMI BABALU AYE, INC. and Ernesto Pichardo, Petitioners,
v.
CITY OF HIALEAH.

No. 91–948
|
Argued Nov. 4, 1992.
|
Decided June 11, 1993.

Synopsis
Church brought action challenging city ordinances dealing with ritual slaughter of animals. The United States District Court for the Southern District of Florida denied relief, 723 F.Supp. 1467, and church appealed. The Court of Appeals for the Eleventh Circuit affirmed, 936 F.2d 586. On certiorari, the Supreme Court, Justice Kennedy, held that: (1) ordinances were not neutral; (2) ordinances were not of general applicability; and (3) governmental interest assertedly advanced by the ordinances did not justify the targeting of religious activity.

Reversed.

Justice Scalia filed an opinion concurring in part and concurring in the judgment in which Chief Justice Rehnquist joined.

Justice Souter filed an opinion concurring in part and concurring in the judgment.

Justice Blackmun filed an opinion concurring in the judgment in which Justice O'Connor joined.

West Headnotes (18)

[1] Constitutional Law Neutrality

Law that is neutral and of general applicability need not be justified by compelling government interest even if law has incidental effect of burdening particular religious practice. U.S.C.A. Const.Amend. 1.

428 Cases that cite this headnote

[2] Constitutional Law Neutrality

Law which is not neutral and of general applicability must be justified by compelling governmental interest and must be narrowly tailored to advance that interest if it burdens religious practice. U.S.C.A. Const.Amend. 1.

535 Cases that cite this headnote

[3] Constitutional Law Free Exercise of Religion

Protections of free exercise clause pertain if law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. U.S.C.A. Const.Amend. 1.

308 Cases that cite this headnote

[4] Constitutional Law Neutrality

If object of law is to infringe upon or restrict practices because of their religious motivation, law is not neutral and is invalid unless justified by compelling interest and narrowly tailored to advance that interest. U.S.C.A. Const.Amend. 1.

408 Cases that cite this headnote

[5] Constitutional Law Neutrality

To determine object of law which burdens religion, court must begin with its text, for minimum requirement of neutrality is that law not discriminate on its face; law lacks facial neutrality if it refers to religious practice without secular meaning discernible from the language or context. U.S.C.A. Const.Amend. 1.

125 Cases that cite this headnote

[6] **Constitutional Law** Neutrality; general applicability

Facial neutrality is not determinative of whether law violates free exercise clause, as that clause extends beyond facial discrimination and forbids subtle departures from neutrality and covert suppression of particular religious beliefs. U.S.C.A. Const.Amend. 1.

230 Cases that cite this headnote

[7] **Constitutional Law** Neutrality; general applicability

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with requirement of facial neutrality, as free exercise clause protects against governmental hostility which is masked as well as overt. U.S.C.A. Const.Amend. 1.

243 Cases that cite this headnote

[8] **Constitutional Law** Religious Organizations in General

Ordinances regulating ritual animal sacrifice were not religiously neutral as they used the words "sacrifice" and "ritual," resolutions recited that residents and citizens of the city had expressed their concern that certain religions might propose to engage in practices which were inconsistent with public morals and reiterated the city's commitment to prohibit any and all such acts of any and all religious groups, ordinances defined "sacrifice" so as to exclude almost all killings of animals except for religious sacrifice, ordinances reached few if any killings other than those performed as religious sacrifice by particular church, and ordinances did not deal with hunting, slaughter of animals for foods, eradication of insects and pests, or euthanasia.

75 Cases that cite this headnote

[9] **Constitutional Law** Freedom of Religion and Conscience

Adverse impact will not always lead to finding of impermissible targeting of religion, as social harm may have been legitimate concern of government for reasons quite apart from discrimination. U.S.C.A. Const.Amend. 1.

15 Cases that cite this headnote

[10] **Constitutional Law** First Amendment in General

Neutrality of law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[11] **Animals** Regulation of slaughtering

Constitutional Law Religious Organizations in General

Although city ordinance governing slaughterhouses appeared to apply to substantial nonreligious conduct and not be overbroad, it was invalid on First Amendment grounds where it was part of a group of four ordinances which were passed for the purpose of suppressing animal sacrifices performed by church. U.S.C.A. Const.Amend. 1.

41 Cases that cite this headnote

[12] **Constitutional Law** Freedom of Religion and Conscience

All laws are selective to some extent, but categories of selection are of paramount concern when law has incidental effect of burdening religious practices, and inequality results when legislature decides that government interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation. U.S.C.A. Const.Amend. 1.

81 Cases that cite this headnote

[13] **Constitutional Law** Burden on religion

Principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to protection of rights

guaranteed by free exercise clause. U.S.C.A. Const.Amend. 1.

153 Cases that cite this headnote

[14] **Animals** Regulation of slaughtering
Constitutional Law Particular Issues and Applications

Ordinances dealing with ritual slaughter of animals were not of general applicability despite claim that they prevented cruelty to animals where they were underinclusive for those ends and failed to prohibit nonreligious conduct endangering the interests in a similar or greater degree than did religious ritual sacrifice. U.S.C.A. Const.Amend. 1.

79 Cases that cite this headnote

[15] **Animals** Regulation of slaughtering
Constitutional Law Particular Issues and Applications

Ordinances intended to prohibit ritual slaughter of animals were not of general applicability despite claim that they were related to city's interest in public health which was threatened by disposal of animal carcasses in open public places and the consumption of uninspected meat, where they were underinclusive with respect to that interest as they did not deal with consumption of meat or disposal of carcasses by hunters and fishers. U.S.C.A. Const.Amend. 1.

14 Cases that cite this headnote

[16] **Constitutional Law** Neutrality

Law burdening religious practice, not neutral or of general application, must undergo the most rigorous of scrutiny. U.S.C.A. Const.Amend. 1.

122 Cases that cite this headnote

[17] **Constitutional Law** Freedom of Religion and Conscience

Law that targets religious conduct for distinctive treatment or advances legitimate governmental interest only against conduct with religious motivation survives strict scrutiny only in rare cases. U.S.C.A. Const.Amend. 1.

116 Cases that cite this headnote

[18] **Animals** Regulation of slaughtering
Constitutional Law Particular Issues and Applications

Ordinances dealing with ritual slaughter of animals did not have compelling governmental interest which would justify their targeting of religious activity despite claims that they dealt with the city's interest in public health and the protection of cruelty to animals. U.S.C.A. Const.Amend. 1.

54 Cases that cite this headnote

****2219** *Syllabus*[*]

Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries and are cooked and eaten following all Santeria rituals except ****2220** healing and death rites. After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments, Resolution 87–66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87–40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever ... unnecessarily or cruelly ... kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87–52, which defines "sacrifice" as "to unnecessarily kill ... an animal in a ... ritual ... not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law; Ordinance 87–71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87–52; and Ordinance 87–72, which defines "slaughter" as "the killing of animals for food" and prohibits

slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law. Petitioners filed this suit under 42 U.S.C. § 1983, alleging violations of their rights under, *inter alia,* the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest because any more narrow restrictions would ***521** be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed.

Held: The judgment is reversed.

936 F.2d 586, (CA 11 1991) reversed.

Justice KENNEDY delivered the opinion of the Court with respect to Parts I, II–A–1, II–A–3, II–B, III, and IV, concluding that the laws in question were enacted contrary to free exercise principles, and they are void. Pp. 2225–30, 2231–34.

(a) Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. Pp. 2225–26.

(b) The ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice. That this religious exercise has been targeted is evidenced by Resolution 87–66's statements of "concern" and "commitment," and by the use of the words "sacrifice" and "ritual" in Ordinances 87–40, 87–52, and 87–71. Moreover, the latter ordinances' various prohibitions, definitions, and exemptions demonstrate that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. They also suppress much more religious conduct than is necessary to achieve their stated ends. The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as ****2221** general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter. Although Ordinance 87–72 appears to apply to substantial nonreligious conduct and not to be overbroad, it must also be invalidated because it functions in tandem with the other ordinances to suppress Santeria religious worship. Pp. 2227–30.

(c) Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief and thereby violates the requirement that laws burdening religious practice must be of general applicability. Ordinances 87–40, 87–52, and 87–71 are substantially underinclusive with regard to the city's interest in preventing crueltyto ***522** animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. The city's assertions that it is "self-evident" that killing for food is "important," that the eradication of insects and pests is "obviously justified," and that euthanasia of excess animals "makes sense" do not explain why religion alone must bear the burden of the ordinances. These ordinances are also substantially underinclusive with regard to the city's public health interests in preventing the disposal of animal carcasses in open public places and the consumption of uninspected meat, since neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. Ordinance 87–72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner, and respondent has not explained why the commercial slaughter of "small numbers" of cattle and hogs does not implicate its professed desire to prevent cruelty to animals and preserve the public health. Pp. 2231–33.

(d) The ordinances cannot withstand the strict scrutiny that is required upon their failure to meet the *Smith* standard. They are not narrowly tailored to accomplish the asserted governmental interests. All four are overbroad or underinclusive in substantial respects because the proffered objectives are not pursued with respect to analogous nonreligious conduct and those interests could be achieved

by narrower ordinances that burdened religion to a far lesser degree. Moreover, where, as here, government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling. Pp. 2233–34.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined, the opinion of the Court with respect to Part II–B, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Parts II–A–1 and II–A–3, in which REHNQUIST, C.J., and STEVENS, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part II–A–2, in which STEVENS, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C.J., joined, *post,* p. ——. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. ——. BLACKMUN, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post,* p. ——.

Attorneys and Law Firms

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Opinion

****2222** Justice KENNEDY delivered the opinion of the Court, except as to Part II–A–2.[*]

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari. 503 U.S. 935, 112 S.Ct. 1472, 117 L.Ed.2d 616 (1992).

***524** Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas,* through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments. 723 F.Supp. 1467, 1469–1470 (SD Fla.1989); 13 Encyclopedia of Religion 66 (M. Eliade ed. 1987); 1 Encyclopedia of the American Religious Experience 183 (C. Lippy & P. Williams eds. 1988).

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas.* The basis of the Santeria religion is the nurture of a personal relation with the *orishas,* and one of the principal forms of devotion is an animal sacrifice. 13 Encyclopedia of Religion, *supra,* at 66. The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 *id.,* at 554–556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600–605 ***525** (1971), and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see *id.,* at 605–612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glassé, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, *supra,* at 456.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed

in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. See 723 F.Supp., at 1471–1472; 13 Encyclopedia of Religion, *supra,* at 66; M. González–Wippler, The Santeria Experience 105 (1982).

Santeria adherents faced widespread persecution in Cuba, so the religion and its ****2223** rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. See 723 F.Supp., at 1470; 13 Encyclopedia of Religion, *supra,* at 67; M. González–Wippler, Santería: The Religion 3–4 (1989). The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today. See 723 F.Supp., at 1470.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero,* the second highest in the Santeria faith. In April 1987, the Church leased land in ***526** the City of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, see 723 F.Supp., at 1477–1478, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. The resolutions and ordinances passed at that and later meetings are set forth in the Appendix following this opinion.

A summary suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87–66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87–40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. Fla.Stat. ch. 828 (1987). Among other things, the incorporated state law subjected to criminal punishment "[w]hoever ... unnecessarily or cruelly ... kills any animal." § 828.12.

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with ***527** state law. § 828.27(4). To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida as to whether § 828.12 prohibited "a religious group from sacrificing an animal in a religious ritual or practice" and whether the city could enact ordinances "making religious animal sacrifice unlawful." The attorney general responded in mid-July. He concluded that the "ritual sacrifice of animals for purposes other than food consumption" was not a "necessary" killing and so was prohibited by § 828.12. Fla.Op.Atty.Gen. 87–56, Annual Report of the Atty.Gen. 146, 147, 149 (1988). The attorney general appeared to define "unnecessary" as "done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal." *Id.,* at 149, n. 11. He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict. *Id.,* at 151.

The city council responded at first with a hortatory enactment, Resolution 87–90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices" ****2224** and the state-law prohibition. The resolution declared the city policy "to oppose the ritual sacrifices of animals" within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of

food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance ***528** contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87–71. That ordinance defined sacrifice as had Ordinance 87–52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87–72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, *inter alia,* the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief. The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners. 688 F.Supp. 1522 (SD Fla.1988).

After a 9–day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petitioners' ***529** rights under the Free Exercise Clause. 723 F.Supp. 1467 (SD Fla.1989). (The court rejected as well petitioners' other claims, which are not at issue here.) Although acknowledging that "the ordinances are not religiously neutral," *id.,* at 1476, and that the city's concern about animal sacrifice was "prompted" by the establishment of the Church in the city, *id.,* at 1479, the District Court concluded that the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced, *id.,* at 1479, 1483. The court also found that the ordinances did not target religious conduct "on their face," though it noted that in any event "specifically regulating [religious] conduct" does not violate the First Amendment "when [the conduct] is deemed inconsistent with public health and welfare." *Id.,* at 1483–1484. Thus, the court concluded that, at most, the ordinances' effect on petitioners' religious conduct was "incidental to [their] secular purpose and effect." *Id.,* at 1484.

The District Court proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if ****2225** so, to balance the "governmental and religious interests." The court noted that "[t]his 'balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.' " *Ibid.,* quoting *Grosz v. City of Miami Beach,* 721 F.2d 729, 734 (CA 11 1983), cert. denied, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984). The court found four compelling interests. First, the court found that animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. 723 F.Supp., at 1474–1475, 1485. Second, the court found emotional injury to children who witness the sacrifice of animals. *Id.,* at 1475–1476, 1485–1486. Third, the court found compelling the city's interest ***530** in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." *Id.,* at 1472–1473, 1486. Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use. *Id.,* at 1486. This legal determination was not accompanied by factual findings.

Balancing the competing governmental and religious interests, the District Court concluded the compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. *Id.,* at 1487. The court also concluded that an exception to the

sacrifice prohibition for religious conduct would " 'unduly interfere with fulfillment of the governmental interest' " because any more narrow restrictions—*e.g.,* regulation of disposal of animal carcasses—would be unenforceable as a result of the secret nature of the Santeria religion. *Id.,* at 1486–1487, and nn. 57–59. A religious exemption from the city's ordinances, concluded the court, would defeat the city's compelling interests in enforcing the prohibition. *Id.,* at 1487.

The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion. Judgt. order reported at 936 F.2d 586 (1991). Choosing not to rely on the District Court's recitation of a compelling interest in promoting the welfare of children, the Court of Appeals stated simply that it concluded the ordinances were consistent with the Constitution. App. to Pet. for Cert. A2. It declined to address the effect of *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), decided after the District Court's opinion, because the District Court "employed an arguably stricter standard" than that applied in *Smith.* App. to Pet. for Cert. A2, n. 1.

***531** II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*...." (Emphasis added). The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981). Given the historical association between animal sacrifice and religious worship, see *supra,* at 2, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be ****2226** deemed bizarre or incredible." *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 834, n. 2, 109 S.Ct. 1514, 1518, n. 2, 103 L.Ed.2d 914 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

[1] **[2]** In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore. v. Smith, supra.* Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance ***532** that interest. These ordinances fail to satisfy the *Smith* requirements. We begin by discussing neutrality.

A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. See, *e.g., Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 248, 110 S.Ct. 2356, 2370–71, 110 L.Ed.2d 191 (1990) (plurality opinion); *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 389, 105 S.Ct. 3216, 3225–26, 87 L.Ed.2d 267 (1985); *Wallace v. Jaffree,* 472 U.S. 38, 56, 105 S.Ct. 2479, 2489–90, 86 L.Ed.2d 29 (1985); *Epperson v. Arkansas,* 393 U.S. 97, 106–107, 89 S.Ct. 266, 271–72, 21 L.Ed.2d 228 (1968); *School Dist. of Abington v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963); *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 15–16, 67 S.Ct. 504, 511–12, 91 L.Ed. 711 (1947). These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

[3] At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. See, *e.g., Braunfeld v. Brown,* 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961) (plurality opinion); *Fowler v. Rhode Island,* 345 U.S. 67, 69–70, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953).

Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy,* 476 U.S. 693, 703, 106 S.Ct. 2147, 2154, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.). See J. Story, Commentaries on the Constitution of the United States §§ 991–992 (abridged ed. 1833) (reprint 1987); T. Cooley, Constitutional Limitations 467 (1868) (reprint 1972); *McGowan v. Maryland,* 366 U.S. 420, 464, and n. 2, 81 S.Ct. 1153, 1156, and n. 2, 6 L.Ed.2d 393 (1961) (opinion of Frankfurter, J.); *Douglas v. Jeannette,* 319 U.S. 157, 179, 63 S.Ct. 882, 888, 87 L.Ed. 1324 (1943) (Jackson, J., concurring in result); ***533** *Davis v. Beason,* 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978), for example, we invalidated a State law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of ... religious status," *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 877, 110 S.Ct., at 1599. On the ****2227** same principle, in *Fowler v. Rhode Island, supra,* we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service. See also *Niemotko v. Maryland,* 340 U.S. 268, 272–273, 71 S.Ct. 325, 327–28, 95 L.Ed. 267 (1951). Cf. *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (state statute that treated some religious denominations more favorably than others violated the Establishment Clause).

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[4] **[5]** Although a law targeting religious beliefs as such is never permissible, *McDaniel v. Paty, supra,* 435 U.S., at 626, 98 S.Ct., at 1327–28 (plurality opinion); *Cantwell v. Connecticut, supra,* 310 U.S., at 303–304, 60 S.Ct., at 903 if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Oregon v. Smith, supra,* 494 U.S., at 878–879, 110 S.Ct., at 1599–1600; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words ***534** "sacrifice" and "ritual," words with strong religious connotations. Brief for Petitioners 16–17. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. See Webster's Third New International Dictionary 1961, 1996 (1971). See also 12 Encyclopedia of Religion, at 556 ("[T]he word *sacrifice* ultimately became very much a secular term in common usage"). The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

[6] **[7]** We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States,* 401 U.S. 437, 452, 91 S.Ct. 828, 837, 28 L.Ed.2d 168 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy, supra,* 476 U.S., at 703, 106 S.Ct., at 2154 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 696, 90 S.Ct. 1409, 1425, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring).

[8] The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria. ***535** Resolution 87–66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern ****2228** that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all

[such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

[9] It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan v. Maryland,* 366 U.S., at 442, 81 S.Ct., at 1113–14. See, *e.g., Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879); *Davis v. Beason,* 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890). See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1319 (1970). The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," *Walz v. Tax Comm'n of New York City, supra,* 397 U.S., at 696, 90 S.Ct., at 1425 (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill ... an animal in a public or private ritual or ceremony not for the ***536** primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter, see 723 F.Supp., at 1480. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. Cf. *Larson v. Valente,* 456 U.S., at 244–246, 102 S.Ct., at 1683–84. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas,* not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the "possess [ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the ****2229** course of "any type of ritual," it again falls outside the prohibition; and if ***537** the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87–40 incorporates the Florida animal cruelty statute, Fla.Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing "[w]hoever ... unnecessarily ... kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13–14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. See *id.,* at 22. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. See *Kiper v. State,* 310 So.2d 42 (Fla.App.), cert. denied, 328 So.2d 845 (Fla.1975). Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized

governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 884, 110 S.Ct., at 1603. As we noted in *Smith,* in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.,* quoting *Bowen v. Roy,* 476 U.S., at 708, 106 S.Ct., at 2156 (opinion of Burger, C.J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious ***538** reasons. Thus, religious practice is being singled out for discriminatory treatment. *Bowen v. Roy,* 476 U.S., at 722, and n. 17, 106 S.Ct., at 2164, and n. 17 (STEVENS, J., concurring in part and concurring in result); *id.,* at 708, 106 S.Ct. 2156 (opinion of Burger, C.J.); *United States v. Lee,* 455 U.S. 252, 264, n. 3, 102 S.Ct. 1051, 1059, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment).

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, *McGowan v. Maryland,* 366 U.S., at 520, 81 S.Ct., at 1186 (opinion of Frankfurter, J.), seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

[10] The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.[*] If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation ****2230** on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Tr. of Oral Arg. 45. See also *id.,* at 42, 48. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city'sinterest ***539** in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. See 723 F.Supp., at 1486–1487, and nn. 58–59. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. See, *e.g., Schneider v. State,* 308 U.S. 147, 162, 60 S.Ct. 146, 151–52, 84 L.Ed. 155 (1939).

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87–40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"—the method used in kosher slaughter—is approved as humane. See 7 U.S.C. § 1902(b); Fla.Stat. § 828.23(7)(b) (1991); Ordinance 87–40, § 1. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. See 723 F.Supp., at 1472–1473. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

[11] Ordinance 87–72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and ***540** not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87–72 was passed the same day as Ordinance 87–71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87–72, had as their object the suppression of religion. We need not decide whether the Ordinance 87–72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n of New York City,* 397 U.S., at 696, 90 S.Ct., at 1425 (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 563–64, 50 L.Ed.2d 450 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous ****2231** statements made by members of the decisionmaking body. *Id.,* at 267–268, 97 S.Ct., at 564–65. These objective factors bear on the question of discriminatory object. *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, n. 24, 99 S.Ct. 2282, 2296, n. 24, 60 L.Ed.2d 870 (1979).

That the ordinances were enacted " 'because of,' not merely 'in spite of,' " their suppression of Santeria religious practice, *id.,* at 279, 99 S.Ct., at 2296 is revealed by the events preceding their enactment. Although respondent claimed at oral argument ***541** that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, Tr. of Oral Arg. 27, 46, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. Taped excerpts of Hialeah City Council Meeting, June 9, 1987.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised ***542** the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you ... not to permit this Church to exist." The city attorney commented that Resolution 87–66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens...." *Ibid.* Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

B

[12] We turn next to a second requirement of the Free Exercise Clause, the rule ****2232** that laws burdening religious practice must be of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 879–881, 110 S.Ct., at 1600–1601. All

laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 148, 107 S.Ct. 1046, 1053, 94 L.Ed.2d 190 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that ***543** the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

[13] The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. See, *e.g., Cohen v. Cowles Media Co.,* 501 U.S. 663, 669–670, 111 S.Ct. 2513, 2518–2519, 115 L.Ed.2d 586 (1991); *University of Pennsylvania v. EEOC,* 493 U.S. 182, 201, 110 S.Ct. 577, 588–89, 107 L.Ed.2d 571 (1990); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 1371–72, 75 L.Ed.2d 295 (1983); *Larson v. Valente,* 456 U.S., at 245–246, 102 S.Ct., at 1683–84; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969). In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

[14] Respondent claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah, see A. Khedouri & F. Khedouri, South Florida Inside Out 57 (1991)—is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87–40 sanctions ***544** euthanasia of "stray, neglected, abandoned, or unwanted animals," Fla.Stat. § 828.058 (1987); destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," § 828.073(4)(c)(2); the infliction of pain or suffering "in the interest of medical science," § 828.02; the placing of poison in one's yard or enclosure, § 828.08; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," § 828.122(6)(b), and "to hunt wild hogs," § 828.122(6)(e).

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." Brief for Respondent 21. It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. *Ibid.* According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." *Id.,* at 22. These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

****2233** **[15]** The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat, see Brief for Respondent 32, citing 723 F.Supp., at 1474–1475, 1485. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, see 11 Record 566, ***545** 590–591, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, 723 F.Supp., at 1485, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use

of the owner and "members of his household and nonpaying guests and employees." Fla.Stat. § 585.88(1)(a) (1991). The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87–72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." See Fla.Stat. § 828.24(3) (1991). Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." *Florida Star v. B.J.F.,* 491 U.S. 524, 542, 109 S.Ct. 2603, 2614, 105 L.Ed.2d 443 (1989) (SCALIA, J., concurring in part and concurring in judgment). This ***546** precise evil is what the requirement of general applicability is designed to prevent.

III

[16] **[17]** **[18]** A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty,* 435 U.S., at 628, 98 S.Ct., at 1328, quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] ... down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S., at 888, 110 S.Ct., at 1605. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

****2234** First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, see *supra,* at 16–18, 21–24, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. See *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 232, 107 S.Ct. 1722, 1729, 95 L.Ed.2d 209 (1987).

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible ***547** measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F., supra,* 491 U.S., at 541–542, 109 S.Ct., at 2613–14 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 119–120, 112 S.Ct. 501, 510–11, 116 L.Ed.2d 476 (1991). Cf. *Florida Star v. B.J.F., supra,* at 540–541, 109 S.Ct., at 2612–13; *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 104–105, 99 S.Ct. 2667, 2671–72, 61 L.Ed.2d 399 (1979); *id.,* at 110, 99 S.Ct., at 2674–75 (REHNQUIST, J., concurring in judgment). As we show above, see *supra,* at 21–24, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to

religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

***548** APPENDIX TO OPINION OF THE COURT

City of Hialeah, Florida, Resolution No. 87–66, adopted June 9, 1987, provides:

> "WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and
>
> "WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.
>
> "NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
>
> "1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are ****2235** inconsistent with public morals, peace or safety."

City of Hialeah, Florida, Ordinance No. 87–40, adopted June 9, 1987, provides:

> "WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and
>
> "WHEREAS, Section 828.27, Florida Statutes, provides that 'nothing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty to animals which is identical to the provisions of this Chapter ... except as to penalty.'
>
> "NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
>
> ***549** "*Section 1.* The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828—'Cruelty to Animals' (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.
>
> "*Section 2.* Repeal of Ordinances in Conflict.
>
> "All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.
>
> "*Section 3.* Penalties.
>
> "Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.
>
> "*Section 4.* Inclusion in Code.
>
> "The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.
>
> "*Section 5.* Severability Clause.
>
> "If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judge or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.
>
> "*Section 6.* Effective Date.
>
> "This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah Resolution No. 87–90, adopted August 11, 1987, provides:

> "WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding ***550** the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida; and

"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifices is *[sic]* a violation of the Florida State Statute on Cruelty to Animals; and

"WHEREAS, the Attorney General further held that the sacrificial killing of animals other than for the primary purpose of food consumption is prohibited under state law; and

"WHEREAS, the City of Hialeah, Florida, has enacted an ordinance mirroring state law prohibiting cruelty to animals.

"NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, FLorida *[sic]*. Any individual or organization ****2236** that seeks to practice animal sacrifice in violation of state and local law will be prosecuted."

City of Hialeah, Florida, Ordinance No. 87–52, adopted September 8, 1987, provides:

"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida; and

"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifice, other than for the primary purpose of food consumption, is a violation of state law; and

***551** "WHEREAS, the City of Hialeah, Florida, has enacted an ordinance (Ordinance No. 87–40), mirroring the state law prohibiting cruelty to animals.

"WHEREAS, the City of Hialeah, Florida, now wishes to specifically prohibit the possession of animals for slaughter or sacrifice within the City of Hialeah, Florida.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6–8 'Definitions' and 6–9 'Prohibition Against Possession Of Animals For Slaughter Or Sacrifice', which is to read as follows:

"Section 6–8. Definitions

"1. Animal—any living dumb creature.

"2. Sacrifice—to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

"3. Slaughter—the killing of animals for food.

"Section 6–9. Prohibition Against Possession of Animals for Slaughter Or Sacrifice.

"1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.

"2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.

"3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically ***552** raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

"*Section 2.* Repeal of Ordinance in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 3.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 4.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 5.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgement or decree of a court of competent jurisdiction, such invalidity or unconstitutionality ****2237** shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 6.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah, Florida, Ordinance No. 87–71, adopted September 22, 1987, provides:

"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals ***553** within the city limits is contrary to the public health, safety, welfare and morals of the community; and

"WHEREAS, the City Council of the City of Hialeah, Florida, desires to have qualified societies or corporations organized under the laws of the State of Florida, to be authorized to investigate and prosecute any violation(s) of the ordinance herein after set forth, and for the registration of the agents of said societies.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

"*Section 2.* For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violation of this Ordinance.

***554** "*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

"*Section 6.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 7.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 8.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 9.* Severability Clause.

****2238** "If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid

or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance.

"*Section 10.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

***555** City of Hialeah, Florida, Ordinance No. 87–72, adopted September 22, 1987, provides:

"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.

"*Section 2.* For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.

"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i.e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violations of this Ordinance.

***556** "*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

"*Section 6.* This Ordinance shall not apply to any person, group or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

"*Section 7.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 8.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 9.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of ****2239** this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 10.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

***557** "*Section 11.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

Justice SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes the "neutrality" and the "general applicability" of the Hialeah ordinances in separate sections (Parts II–A and II–B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," *ante,* 2226, but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law ... prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.,* a law excluding members of a certain sect from public benefits, cf. *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978)), see *Bowen v. Roy,* 476 U.S. 693, 703–704, 106 S.Ct. 2147, 2153–54, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment, see *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). But certainly a law that is not of general applicability (in the sense I ***558** have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II–A, or "general applicability," Part II–B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II–A.

I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers, i.e.,* whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, see, *e.g., Edwards v. Aguillard,* 482 U.S. 578, 636–639, 107 S.Ct. 2573, 2605–07, 96 L.Ed.2d 510 (1987) (dissenting opinion), and this Court has a long tradition of refraining from such inquiries, see, *e.g., Fletcher v. Peck,* 6 Cranch 87, 130–131, 3 L.Ed. 162 (1810) (Marshall, C.J.); ****2240** *United States v. O'Brien,* 391 U.S. 367, 383–384, 88 S.Ct. 1673, 1682–83, 20 L.Ed.2d 672 (1968).

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. See, *e.g., United States v. Lovett,* 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). See *Edwards v. Aguillard, supra,* 482 U.S., at 639, 107 S.Ct., at 2607 (SCALIA, J., dissenting). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law ... prohibiting the free exercise [of religion]...." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of ***559** religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

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

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule

in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should re-examine the rule *Smith* declared.

I

According to *Smith,* if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not been offended. *Id.,* at 878–880, 110 S.Ct., at 1599–1601. I call this the *Smith* rule to distinguish it from the noncontroversial principle, also expressed in *Smith* though ***560** established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of *Smith* to this case, it will help to get the terms in order, for the significance of the *Smith* rule is not only in its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but also in its adoption of a particular, narrow conception of free-exercise neutrality.

That the Free Exercise Clause contains a "requirement for governmental neutrality," *Wisconsin v. Yoder,* 406 U.S. 205, 220, 92 S.Ct. 1526, 1535–36, 32 L.Ed.2d 15 (1972), is hardly a novel proposition; though the term does not appear in the First Amendment, our cases have used it as shorthand to describe, at least in part, what the Clause commands. ****2241** See, *e.g., Jimmy Swaggart Ministries v. Board of Equalization of Cal.,* 493 U.S. 378, 384, 110 S.Ct. 688, 693, 107 L.Ed.2d 796 (1990); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 717, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1981); *Yoder, supra,* 406 U.S., at 220, 92 S.Ct., at 1535; *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 792–793, 93 S.Ct. 2955, 2975, 37 L.Ed.2d 948 (1973); *School Dist. of Abington v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 1571, 10 L.Ed.2d 844 (1963); see also *McDaniel v. Paty,* 435 U.S. 618, 627–629, 98 S.Ct. 1322, 1328–1329, 55 L.Ed.2d 593 (1978) (plurality opinion) (invalidating a nonneutral law without using the term). Nor is there anything unusual about the notion that the Free Exercise Clause requires general applicability, though the Court, until today, has not used exactly that term in stating a reason for invalidation. See *Fowler v. Rhode Island,* 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953); cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 1372, 75 L.Ed.2d 295 (1983); *Larson v. Valente,* 456 U.S. 228, 245–246, 102 S.Ct. 1673, 1683–1684, 72 L.Ed.2d 33 (1982).[1]

***561** While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. Cf. *Lee v. Weisman,* 505 U.S. 577, 627, 112 S.Ct. 2649, 2676, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring) (considering Establishment Clause neutrality). A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. Cf. McConnell & Posner, An Economic Approach to Issues of Religious Freedom, 56 U.Chi.L.Rev. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities"). A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[2]

It does not necessarily follow from that observation, of course, that the First Amendment requires an exemption from Prohibition; that depends on the meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement ***562** would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. See generally Laycock, Formal, Substantive, and Disaggregated ****2242** Neutrality Toward Religion, 39 DePaul L.Rev. 993 (1990). If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.[3]

Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application. 494 U.S., at 878, 110 S.Ct., at 1599. The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law "neutral on its face," they said, may "nonetheless offend [the Free Exercise Clause's] requirement ***563** for government neutrality if it unduly burdens the free exercise of religion." *Id.,* at 896, 110 S.Ct., at 1609 (opinion of O'CONNOR, J., joined by Brennan, Marshall, and BLACKMUN, JJ.) (internal quotation marks and citations omitted). The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the *Smith* rule, "requir[es] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.,* at 894, 110 S.Ct., at 1608 (emphasis added).

The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable. This case, rather, involves the noncontroversial principle repeated in *Smith,* that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality. It is only "this fundamental nonpersecution principle of the First Amendment [that is] implicated here," *ante,* at 2222, and it is to that principle that the Court adverts when it holds that Hialeah's ordinances "fail to satisfy the *Smith* requirements," *ante,* at 2226. In applying that principle the Court does not tread on troublesome ground.

In considering, for example, whether Hialeah's animal-sacrifice laws violate free-exercise neutrality, the Court rightly observes that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *ibid.,* and correctly finds Hialeah's laws to fail those standards. The question whether the protections of the Free Exercise Clause also pertain if the law at issue, though nondiscriminatory in its object, has the effect nonetheless of placing a burden on religious exercise is not before the Court ***564** today, and the Court's intimations on the matter are therefore dicta.

The Court also rightly finds Hialeah's laws to fail the test of general applicability, and as ****2243** the Court "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights," *ante,* at 2232, it need not discuss the rules that apply to prohibitions found to be generally applicable. The question whether "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," *Yoder,* 406 U.S., at 220, 92 S.Ct., at 1535, is not before the Court in this case, and, again, suggestions on that score are dicta.

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," *ante,* at 2222, this is far from a representative free-exercise case. While, as the Court observes, the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *ibid., Smith* was typical of our free-exercise cases, involving as it did a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application.

A

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed ***565** the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality:

> "In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' " *Thomas,* 450 U.S., at 717 [101 S.Ct., at 1431] (quoting *Yoder,* 406 U.S., at 220 [92 S.Ct., at 1535]).
>
> "[T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Ibid.*

Not long before the *Smith* decision, indeed, the Court specifically rejected the argument that "neutral and uniform" requirements for governmental benefits need satisfy only a reasonableness standard, in part because "[s]uch a test has no basis in precedent." *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (internal quotation marks omitted). Rather, we have said, "[o]ur cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.' " *Swaggart Ministries,* 493 U.S., at 384–385, 110 S.Ct., at 692–693 (quoting *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 (1989)).

Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise: ***566** " 'only those interests ****2244** of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' " *McDaniel v. Paty,* 435 U.S., at 628, 98 S.Ct., at 1328 (plurality opinion) (quoting *Yoder, supra,* 406 U.S., at 215, 92 S.Ct., at 1533). Compare *McDaniel, supra,* 435 U.S., at 628–629, 98 S.Ct., at 1328–1329 (plurality opinion) (applying that test to a law aimed at religious conduct) with *Yoder, supra,* 406 U.S., at 215–229, 92 S.Ct., at 1533–1540 (applying that test to a formally neutral, general law). Other cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez v. Commissioner, supra,* 490 U.S., at 699, 109 S.Ct., at 2149; *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 835, 109 S.Ct. 1514, 1518, 103 L.Ed.2d 914 (1989); *Hobbie v. Unemployment Appeals Comm'n, supra,* 480 U.S., at 141, 107 S.Ct., at 1049; *Bob Jones Univ. v. United States,* 461 U.S. 574, 604, 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983); *United States v. Lee,* 455 U.S. 252, 257–258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *Thomas, supra,* 450 U.S., at 718, 101 S.Ct., at 1432; *Sherbert v. Verner,* 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963); and *Cantwell v. Connecticut,* 310 U.S. 296, 304–307, 60 S.Ct. 900, 903–904, 84 L.Ed. 1213 (1940).

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, see 494 U.S., at 881–885, 110 S.Ct., at 1601–1603, I am not persuaded. *Wisconsin v. Yoder,* and *Cantwell v. Connecticut,* according to *Smith,* were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents ... to direct the education of their children." *Smith, supra,* 494 U.S., at 881, 882, 110 S.Ct., at 1601, 1602. Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake." *Yoder, supra,* 406 U.S., at 221, 92 S.Ct., at 1536. See also *Cantwell, supra,* 310 U.S., at 303–307, 60 S.Ct., at 903–905.[4] ***567** And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid ****2245** exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith,* since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensation ***568** systems, see *Frazee, supra; Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1125, 67 L.Ed.2d 624 (1981); and *Sherbert, supra,* "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S., at 884, 110 S.Ct., at 1603. But prior to *Smith* the Court had already refused to accept

that explanation of the unemployment compensation cases. See *Hobbie, supra,* 480 U.S., at 142, n. 7, 107 S.Ct., at 1049, n. 7; *Bowen v. Roy,* 476 U.S. 693, 715–716, 106 S.Ct. 2147, 2160–2161, 90 L.Ed.2d 735 (1986) (opinion of BLACKMUN, J.); *id.,* at 727–732, 106 S.Ct., at 2166–2169 (opinion of O'CONNOR, J., joined by Brennan and Marshall, JJ.); *id.,* at 733, 106 S.Ct., at 2169 (WHITE, J., dissenting). And, again, the distinction fails to exclude *Smith:* "If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial." McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U.Chi.L.Rev. 1109, 1124 (1990). *Smith* also distinguished the unemployment compensation cases on the ground that they did not involve "an across-the-board criminal prohibition on a particular form of conduct." 494 U.S., at 884, 110 S.Ct., at 1603. But even Chief Justice Burger's plurality opinion in *Bowen v. Roy,* on which *Smith* drew for its analysis of the unemployment compensation cases, would have applied its reasonableness test only to "denial of government benefits" and not to "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons," *Bowen v. Roy, supra,* 476 U.S., at 706, 106 S.Ct., at 2155 (opinion of Burger, C.J., joined by Powell and REHNQUIST, JJ.); to the latter category of governmental action, it would have applied the test employed in *Yoder,* which involved an across-the-board criminal prohibition and which Chief Justice Burger's opinion treated as an ordinary free-exercise ***569** case. See *Bowen v. Roy,* 476 U.S., at 706–707, 106 S.Ct., at 2155–2156; *id.,* at 705, n. 15, 106 S.Ct., at 2155, n. 15; *Yoder,* 406 U.S., at 218, 92 S.Ct., at 1534; see also *McDaniel v. Paty,* 435 U.S., at 628, n. 8, 98 S.Ct., at 1328, n. 8 (noting cases in which courts considered claims for exemptions from general criminal prohibitions, cases the Court thought were "illustrative of the general nature of free-exercise protections and the delicate balancing required by our decisions in [*Sherbert* and *Yoder,*] when an important state interest is shown").

As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879), and *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), see *Smith, supra,* 494 U.S., at 879, 110 S.Ct., at 1600, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds,* which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy, see 98 U.S., at 166 ("polygamy leads to the patriarchal principle, and ... fetters the people in stationary despotism"); *id.,* at 165, 168, has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order." ****2246** *Sherbert v. Verner,* 374 U.S., at 403, 83 S.Ct., at 1793; see also *United States v. Lee,* 455 U.S., at 257–258, 102 S.Ct., at 1055–1056; *Bob Jones University,* 461 U.S., at 603, 103 S.Ct., at 2034; *Yoder, supra,* 406 U.S., at 230, 92 S.Ct., at 1540. And *Gobitis,* after three Justices who originally joined the opinion renounced it for disregarding the government's constitutional obligation "to accommodate itself to the religious views of minorities," *Jones v. Opelika,* 316 U.S. 584, 624, 62 S.Ct. 1231, 1251, 86 L.Ed. 1691 (1942) (opinion of Black, Douglas, and Murphy, JJ.), was explicitly overruled in *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943); see also *id.,* at 643–644, 63 S.Ct., at 1187–1188 (Black and Douglas, JJ., concurring).

Since holding in 1940 that the Free Exercise Clause applies to the States, see *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated ***570** effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said, detecting in at least the most recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. *Smith, supra,* 494 U.S., at 884–885, 110 S.Ct., at 1603. But even if the Court's commitment were that palid, it would argue only for moderating the language of the test, not for eliminating constitutional scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when in the same period it repeatedly applied the compelling-interest test to require exemptions, even in a case decided the year before *Smith.* See *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989).[5] In sum, it seems to me difficult to escape the conclusion ***571** that, whatever *Smith's* virtues, ****2247** they do not include a comfortable fit with settled law.

B

The *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis.* To begin with, the *Smith*

rule was not subject to "full-dress argument" prior to its announcement. *Mapp v. Ohio,* 367 U.S. 643, 676–677, 81 S.Ct. 1684, 1703, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). The State of Oregon in *Smith* contended that its refusal to exempt religious peyote use survived the strict scrutiny required by "settled free exercise principles," inasmuch as the State had "a compelling interest in regulating" the practice of peyote use and could not "accommodate the religious practice without compromising ***572** its interest." Brief for Petitioners in *Smith,* O.T. 1989, No. 88–1213, p. 5; see also *id.,* at 5–36; Reply Brief for Petitioners in *Smith,* pp. 6–20. Respondents joined issue on the outcome of strict scrutiny on the facts before the Court, see Brief for Respondents in *Smith,* pp. 14–41, and neither party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute. Sound judicial decisionmaking requires "both a vigorous prosecution and a vigorous defense" of the issues in dispute, *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 419, 98 S.Ct. 694, 699, 54 L.Ed.2d 648 (1978), and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument. Cf. *Ladner v. United States,* 358 U.S. 169, 173, 79 S.Ct. 209, 211, 3 L.Ed.2d 199 (1958) (declining to address "an important and complex" issue concerning the scope of collateral attack upon criminal sentences because it had received "only meagre argument" from the parties, and the Court thought it "should have the benefit of a full argument before dealing with the question").

The *Smith* rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case. Justice O'CONNOR reached the same result as the majority by applying, as the parties had requested, "our established free exercise jurisprudence," 494 U.S., at 903, 110 S.Ct., at 1613, and the majority never determined that the case could not be resolved on the narrower ground, going instead straight to the broader constitutional rule. But the Court's better practice, one supported by the same principles of restraint that underlie the rule of *stare decisis,* is not to " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)). While I am not suggesting that the *Smith* Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put ***573** into play by the parties, approaches without more the sort of "*dicta* ... which may be followed if sufficiently persuasive but which are not controlling." *Humphrey's Executor v. United States,* 295 U.S. 602, 627, 55 S.Ct. 869, 873, 79 L.Ed. 1611 (1935); see also ****2248** *Kastigar v. United States,* 406 U.S. 441, 454–455, 92 S.Ct. 1653, 1661–1662, 32 L.Ed.2d 212 (1972).

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing and argument necessarily lacks precedential weight. Over time, such a decision may become "part of the tissue of the law," *Radovich v. National Football League,* 352 U.S. 445, 455, 77 S.Ct. 390, 395, 1 L.Ed.2d 456 (1957) (Frankfurter, J., dissenting), and may be subject to reliance in a way that new and unexpected decisions are not. Cf. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 854–855, 112 S.Ct. 2791, 2808, 120 L.Ed.2d 674 (1992). *Smith,* however, is not such a case. By the same token, by pointing out *Smith's* recent vintage I do not mean to suggest that novelty alone is enough to justify reconsideration. "*[S]tare decisis,*" as Justice Frankfurter wrote, "is a principle of policy and not a mechanical formula," *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940), and the decision whether to adhere to a prior decision, particularly a constitutional decision, is a complex and difficult one that does not lend itself to resolution by application of simple, categorical rules, but that must account for a variety of often competing considerations.

The considerations of full briefing, necessity, and novelty thus do not exhaust the legitimate reasons for reexamining prior decisions, or even for reexamining the *Smith* rule. One important further consideration warrants mention here, however, because it demands the reexamination I have in mind. *Smith* presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared. *Smith,* indeed, announced its rule by relying squarely upon ***574** the precedent of prior cases. See 494 U.S., at 878, 110 S.Ct., at 1600 ("Our decisions reveal that the ... reading" of the Free Exercise Clause contained in the *Smith* rule "is the correct one"). Since that precedent is nonetheless at odds with the *Smith* rule, as I have discussed above, the result is an intolerable tension in free-exercise law which may be resolved, consistently with principles of *stare*

decisis, in a case in which the tension is presented and its resolution pivotal.

While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the *Smith* rule, which should be reviewed in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its origins. As for text, *Smith* did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was "a permissible reading" of the Clause. *Ibid.* Suffice it to say that a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced. "[T]he Free Exercise Clause ..., by its terms, gives special protection to the exercise of religion," *Thomas,* 450 U.S., at 713, 101 S.Ct., at 1429, specifying an activity and then flatly protecting it against government prohibition. The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both.

Nor did *Smith* consider the original meaning of the Free Exercise Clause, though overlooking the opportunity was no unique transgression. Save in a handful of passing remarks, the Court has not explored the history of the Clause since its early attempts in 1879 and 1890, see *Reynolds v. United States,* 98 U.S., at 162–166, and *Davis v. Beason,* 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890), attempts that recent scholarship makes clear were incomplete. See generally McConnell, ****2249 *575** The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv.L.Rev. 1409 (1990).[6] The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent.[7]

This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, *supra;* Durham, Religious Liberty and the Call of Conscience, 42 DePaul L.Rev. 71, 79–85 (1992); see also Office of Legal Policy, U.S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 38–42 (1986) (predating *Smith*). There appears to be a strong argument from the ***576** Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. of Abington v. Schempp,* 374 U.S., at 223, 83 S.Ct., at 1572, then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith.*[8]

****2250 *577** The scholarship on the original understanding of the Free Exercise Clause is, to be sure, not uniform. See, *e.g.,* Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo.Wash.L.Rev. 915 (1992); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L.Rev. 245 (1991). And there are differences of opinion as to the weight appropriately accorded original meaning. But whether or not one considers the original designs of the Clause binding, the interpretive significance of those designs surely ranks in the hierarchy of issues to be explored in resolving the tension inherent in free-exercise law as it stands today.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly

decided without resolving the existing tension, which remains for another day when it may be squarely faced.

Justice BLACKMUN, with whom Justice O'CONNOR joins, concurring in the judgment.

The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practice. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) ***578** for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 907, 110 S.Ct. 1595, 1615, 108 L.Ed.2d 876 (1990) (dissenting opinion). The Court, however, applies a different test. It applies the test announced in *Smith,* under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Ante,* at 2226. I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. See 494 U.S., at 908–909, 110 S.Ct., at 1616. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981). See also *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). A State may no more create an underinclusive statute, one ****2251** that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance, the broad scope of the statute is unnecessary to serve the interest, and the statute fails for that reason. In the former situation, the fact that allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest "of the highest order." *Ibid.* If the State's goal is important enough to prohibit religiously motivated activity, it ***579** will not and must not stop at religiously motivated activity. Cf. *Zablocki v. Redhail,* 434 U.S. 374, 390, 98 S.Ct. 673, 683, 54 L.Ed.2d 618 (1978) (invalidating certain restrictions on marriage as "grossly underinclusive with respect to [their] purpose"); *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 285, n. 19, 105 S.Ct. 1272, 1279, n. 19, 84 L.Ed.2d 205 (1985) (a rule excluding nonresidents from the bar of New Hampshire "is underinclusive ... because it permits lawyers who move away from the State to retain their membership in the bar").

In this case, the ordinances at issue are both overinclusive and underinclusive in relation to the state interests they purportedly serve. They are overinclusive, as the majority correctly explains, because the "legitimate govern mental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice." *Ante,* at 2229. They are underinclusive as well, because "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." *Ante,* at 2232. Moreover, the "ordinances are also underinclusive with regard to the city's interest in public health...." *Ante,* at 2233.

When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert v. Verner,* 374 U.S. 398, 402–403, 407, 83 S.Ct. 1790, 1793, 1795, 10 L.Ed.2d 965 (1963) (holding that governmental regulation that imposes a burden upon religious practice must be narrowly tailored to advance a compelling state interest). This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.

Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Ante,* at 2233. In my view, regulation that targets religion in this way, *ipso facto,* fails strict scrutiny. It is for this reason ***580** that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, "[t]he First Amendment ... does not distinguish between laws that are generally applicable and laws that target particular

religious practices." *Smith,* 494 U.S., at 894, 110 S.Ct., at 1608 (opinion concurring in judgment).

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. See *ibid.* Because respondent here does single out religion in this way, the present case is an easy one to decide.

A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed *amicus* briefs ****2252** on behalf of this interest,[*] however, demonstrates that it is not a concern to be treated lightly.

All Citations

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Footnotes

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

* THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join all but Part II–A–2 of this opinion. Justice WHITE joins all but Part II–A of this opinion. Justice SOUTER joins only Parts I, III, and IV of this opinion.

* Respondent advances the additional governmental interest in prohibiting the slaughter or sacrifice of animals in areas of the city not zoned for slaughterhouses, see Brief for Respondent 28–31, and the District Court found this interest to be compelling, see 723 F.Supp. 1467, 1486 (SD Fla.1989). This interest cannot justify Ordinances 87–40, 87–52, and 87–71, for they apply to conduct without regard to where it occurs. Ordinance 87–72 does impose a locational restriction, but this asserted governmental interest is a mere restatement of the prohibition itself, not a justification for it. In our discussion, therefore, we put aside this asserted interest.

1 A law that is not generally applicable according to the Court's definition (one that "selective[ly] impose[s] burdens only on conduct motivated by religious belief," *ante,* at 2232) would, it seems to me, fail almost any test for neutrality. Accordingly, the cases stating that the Free Exercise Clause requires neutrality are also fairly read for the proposition that the Clause requires general applicability.

2 Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] 'reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences.' " *Wisconsin v. Yoder,* 406 U.S. 205, 235, n. 22, 92 S.Ct. 1526, 1543, n. 22, 32 L.Ed.2d 15 (1972) (quoting *Sherbert v. Verner,* 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963)); see also *Lee v. Weisman,* 505 U.S. 577, 627, 112 S.Ct. 2649, 2677, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring). The prohibition law in place earlier this century did in fact exempt "wine for sacramental purposes." National Prohibition Act, Title II, § 3, 41 Stat. 308.

3 One might further distinguish between formal neutrality and facial neutrality. While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law. Compare *ante,* at 2230–31 (opinion of KENNEDY, J., joined by STEVENS, J.) with *ante,* at 2239–40 (opinion of SCALIA, J., joined by REHNQUIST, C.J.). For present purposes, the distinction between formal and facial neutrality is less important than the distinction between those conceptions of neutrality and substantive neutrality.

4 *Yoder,* which involved a challenge by Amish parents to the enforcement against them of a compulsory school attendance law, mentioned the parental rights recognized in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), as *Smith* pointed out. See *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 881, n. 1, 110 S.Ct. 1595, 1601, n. 1, 108 L.Ed.2d 876 (1990) (citing *Yoder,* 406 U.S., at 233, 92 S.Ct., at 1542). But *Yoder* did

so only to distinguish *Pierce,* which involved a substantive due process challenge to a compulsory school attendance law and which required merely a showing of " 'reasonable[ness].' " *Wisconsin v. Yoder,* 406 U.S. 205, 233, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972) (quoting *Pierce, supra,* 268 U.S., at 535, 45 S.Ct., at 573). Where parents make a "free exercise claim," the *Yoder* Court said, the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause and discussed at length earlier in the opinion. See 406 U.S., at 233, 92 S.Ct., at 1542; *id.,* at 213–229, 92 S.Ct., at 1532–1540. Quickly after the reference to parental rights, the *Yoder* opinion makes clear that the case involves "the central values underlying the Religion Clauses." *Id.,* at 234, 92 S.Ct., at 1542. The Yoders raised only a free-exercise defense to their prosecution under the school-attendance law, *id.,* at 209, and n. 4, 92 S.Ct., at 1530, and n. 4; certiorari was granted only on the free-exercise issue, *id.,* at 207, 92 S.Ct., at 1529; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause" even against enforcement of a "regulatio[n] of general applicability," *id.,* at 220, 92 S.Ct., at 1535.

As for *Cantwell, Smith* pointed out that the case explicitly mentions freedom of speech. See 494 U.S., at 881, n. 1, 110 S.Ct., at 1601, n. 1 (citing *Cantwell v. Connecticut,* 310 U.S. 296, 307, 60 S.Ct. 900, 905, 84 L.Ed. 1213 (1940)). But the quote to which *Smith* refers occurs in a portion of the *Cantwell* opinion (titled: "*[s]econd,*" and dealing with a breach-of-peace conviction for playing phonograph records, see 310 U.S., at 307, 60 S.Ct., at 905) that discusses an entirely different issue from the section of *Cantwell* that *Smith* cites as involving a "neutral, generally applicable law" (titled: "*[f]irst,*" and dealing with a licensing system for solicitations, see *Cantwell, supra,* 310 U.S., at 303–307, 60 S.Ct., at 903–905). See *Smith, supra,* 494 U.S., at 881, 110 S.Ct., at 1601.

5 Though *Smith* implied that the Court, in considering claims for exemptions from formally neutral, generally applicable laws, has applied a "water[ed] down" version of strict scrutiny, 494 U.S., at 888, 110 S.Ct., at 1605, that appraisal confuses the cases in which we purported to apply strict scrutiny with the cases in which we did not. We did not purport to apply strict scrutiny in several cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches, and the opinions in those cases said in no uncertain terms that traditional heightened scrutiny applies outside those categories. See *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 107 S.Ct. 2400, 2404, 96 L.Ed.2d 282 (1987) ("[P]rison regulations ... are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"); *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); see also *Johnson v. Robison,* 415 U.S. 361, 385–386, 94 S.Ct. 1160, 1174–1175, 39 L.Ed.2d 389 (1974); *Gillette v. United States,* 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971). We also did not purport to apply strict scrutiny in several cases in which the claimants failed to establish a constitutionally cognizable burden on religious exercise, and again the opinions in those cases left no doubt that heightened scrutiny applies to the enforcement of formally neutral, general laws that do burden free exercise. See *Jimmy Swaggart Ministries v. Board of Equalization of Cal.,* 493 U.S. 378, 384–385, 110 S.Ct. 688, 692–693, 107 L.Ed.2d 796 (1990) ("Our cases have established that [t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden") (internal quotation marks and citation omitted); *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 450, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny" employed in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)); see also *Braunfeld v. Brown,* 366 U.S. 599, 606–607, 81 S.Ct. 1144, 1147–1148, 6 L.Ed.2d 563 (1961) (plurality opinion). Among the cases in which we have purported to apply strict scrutiny, we have required free-exercise exemptions more often than we have denied them. Compare *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.2d 1213 (1940), with *Hernandez v. Commissioner,* 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989); *Bob Jones University v. United States,* 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983); *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). And of the three cases in which we found that denial of an exemption survived strict scrutiny (all tax cases), one involved the government's "fundamental, overriding interest in eradicating racial discrimination in education," *Bob Jones Univ., supra,* 461 U.S., at 604, 103 S.Ct., at 2035; in a second the Court "doubt[ed] whether the alleged burden ... [was] a substantial one," *Hernandez, supra,* 490 U.S., at 699, 109 S.Ct., at 2149; and the Court seemed to be of the same view in the third, see *Lee, supra,* 455

U.S., at 261, n. 12, 102 S.Ct., at 1057, n. 12. These cases, I think, provide slim grounds for concluding that the Court has not been true to its word.

6 *Reynolds* denied the free-exercise claim of a Mormon convicted of polygamy, and *Davis v. Beason* upheld against a free-exercise challenge a law denying the right to vote or hold public office to members of organizations that practice or encourage polygamy. Exactly what the two cases took from the Free Exercise Clause's origins is unclear. The cases are open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws, see *supra,* at 2245–46 (citing cases); that the Clause never protects religious conduct from the enforcement of generally applicable laws, see *Smith,* 494 U.S., at 879, 110 S.Ct., at 1600; or that the Clause does not protect religious conduct at all, see *Yoder,* 406 U.S., at 247, 92 S.Ct., at 1549 (Douglas, J., dissenting in part); McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv.L.Rev. 1409, 1488, and n. 404 (1990).

7 See *Engel v. Vitale,* 370 U.S. 421, 425–436, 82 S.Ct. 1261, 1264–1270, 8 L.Ed.2d 601 (1962); *McGowan v. Maryland,* 366 U.S. 420, 431–443, 81 S.Ct. 1101, 1108–1114, 6 L.Ed.2d 393 (1961); *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 8–16, 67 S.Ct. 504, 508–511, 91 L.Ed. 711 (1947); see also *Lee v. Weisman,* 505 U.S. 577, 612–616, 622–626, 112 S.Ct. 2649, 2667, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring); *Wallace v. Jaffree,* 472 U.S. 38, 91–107, 105 S.Ct. 2479, 2507–2516, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting); *School Dist. of Abington v. Schempp,* 374 U.S. 203, 232–239, 83 S.Ct. 1560, 1576–1581, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring); *McGowan v. Maryland, supra,* 366 U.S., at 459–495, 81 S.Ct., at 1153–1172 (Frankfurter, J., concurring); *Everson, supra,* 330 U.S., at 31–43, 67 S.Ct., at 519–525 (Rutledge, J., dissenting).

8 The Court today observes that "historical instances of religious persecution and intolerance ... gave concern to those who drafted the Free Exercise Clause." *Ante,* at 2226 (internal quotation marks and citations omitted). That is no doubt true, and of course it supports the proposition for which it was summoned, that the Free Exercise Clause forbids religious persecution. But the Court's remark merits this observation: the fact that the Framers were concerned about victims of religious persecution by no means demonstrates that the Framers intended the Free Exercise Clause to forbid only persecution, the inference the *Smith* rule requires. On the contrary, the eradication of persecution would mean precious little to a member of a formerly persecuted sect who was nevertheless prevented from practicing his religion by the enforcement of "neutral, generally applicable" laws. If what drove the Framers was a desire to protect an activity they deemed special, and if "the [Framers] were well aware of potential conflicts between religious conviction and social duties," A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 61 (1990), they may well have hoped to bar not only prohibitions of religious exercise fueled by the hostility of the majority, but prohibitions flowing from the indifference or ignorance of the majority as well.

* See Brief for Washington Humane Society in support of Respondent; Brief for People for the Ethical Treatment of Animals, New Jersey Animal Rights Alliance, and Foundation for Animal Rights Advocacy in support of Respondent; Brief for Humane Society of the United States, American Humane Association, American Society for the Prevention of Cruelty to Animals, Animal Legal Defense Fund, Inc., and Massachusetts Society for the Prevention of Cruelty to Animals in support of Respondent; Brief for the International Society for Animal Rights, Citizens for Animals, Farm Animal Reform Movement, In Defense of Animals, Performing Animal Welfare Society, and Student Action Corps for Animals in support of Respondent; and Brief for the Institute for Animal Rights Law, American Fund for Alternatives to Animal Research, Farm Sanctuary, Jews for Animal Rights, United Animal Nations, and United Poultry Concerns in support of Respondent.

100 S.Ct. 1519
Supreme Court of the United States

CITY OF MOBILE, ALABAMA, et al., Applicants,

v.

Wiley L. BOLDEN et al.

Robert R. WILLIAMS et al., Applicants,

v.

Leila G. BROWN et al.

Nos. 77–1844, 78–357.
|
April 22, 1980.

Opinion

****1519** For opinions of the Court, see 100 S.Ct. 1490, 1519.

***94** Mr. Justice BRENNAN, dissenting.

I dissent because I agree with Mr. Justice MARSHALL that proof of discriminatory impact is sufficient in these cases. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with Mr. Justice MARSHALL and Mr. Justice WHITE that the appellees have clearly met that burden.

***103** Mr. Justice MARSHALL, dissenting.

The American ideal of political equality, conceived in the earliest days of our colonial existence and fostered by the ***104** egalitarian language of the Declaration of Independence, could not forever tolerate the limitation of the right to vote to white propertied males. Our Constitution has been amended six times in the movement toward a democracy ****1520** for more than the few,[1] and this Court has interpreted the Fourteenth Amendment to provide that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 1000, 31 L.Ed.2d 274 (1972). The Court's decision today is in a different spirit. Indeed, a plurality of the Court concludes that, in the absence of proof of intentional discrimination by the State, the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots.

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally diluted the Negro vote. These factual findings were upheld by the Court of Appeals, and the plurality does not question them. Instead, the plurality concludes that districting schemes do not violate the Equal Protection Clause unless it is proved that they were enacted or maintained for the purpose of minimizing or canceling out the voting potential of a racial minority. The plurality would require plaintiffs in vote-dilution cases to meet the stringent burden of establishing discriminatory intent within the meaning of *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In my view, our vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington v. Davis, supra*, and its progeny. Furthermore, an intent requirementis ***105** inconsistent with the protection against denial or abridgment of the vote on account of race embodied in the Fifteenth Amendment and in § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973.[2] Even if, however, proof of discriminatory intent were necessary to support a vote-dilution claim, I would impose upon the plaintiffs a standard of proof less rigid than that provided by *Personnel Administrator of Mass. v. Feeney, supra*.

I

The Court does not dispute the proposition that multimember districting can have the effect of submerging electoral minorities and overrepresenting electoral majorities.[3] It is ***106** for this reason that we developed a strong preference for single-member ****1521** districting in court-ordered reapportionment plans. See *ante*, at 66, n. 12, 100 S.Ct. at 1499, n. 12. Furthermore, and more important for present purposes, we decided a series of vote-dilution cases under the Fourteenth Amendment that were designed to

protect electoral minorities from precisely the combination of electoral laws and historical and social factors found in the present cases.[4] In my view, the plurality's **1522 treatment of *107 these cases is fanciful. Although we have held that multimember districts are not unconstitutional *per se,* see*ante*, at 66, 100 S.Ct. at 1499, there is simply no basis for the plurality's conclusion that *108 under our prior cases proof of discriminatory intent is a necessary condition for the invalidation of multimember districting.

A

In *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), the first vote-dilution case to reach this Court, we stated explicitly that such a claim could rest on either discriminatory purpose or effect:

> "It might well be that, *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would *operate* to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.*, at 439, 85 S.Ct., at 501 (emphasis added).

We reiterated these words in *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), interpreted them as the correct test to apply to vote-dilution claims, and described the standard as one involving "invidious effect," *id.*, at 88, 86 S.Ct., at 1294. We then held that the plaintiffs had failed to meet their burden of proof:

> "[T]he demonstration that a particular multi-member scheme *effects an invidious result* must appear from evidence in the record. . . . That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting *was designed to have or had* the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.*, at 88–89, 86 S.Ct., at 1294–1295 (emphasis added) (footnote omitted).

It could not be plainer that the Court in *Burns* considered *109 discriminatory effect a sufficient condition for invalidating a multimember districting plan.

In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), we again repeated and applied the *Fortson* standard, 403 U.S., at 143, 144, 91 S.Ct., at 1869, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. *Id.*, at 150–155, 91 S.Ct., at 1872–1875. The Court stressed that both the Democratic and Republican Parties had nominated Negroes, and several had been elected. Negro candidates lost only when their entire party slate went down to defeat. *Id.*, at 150, nn. 29–30, 91 S.Ct., at 1872, nn. 29–30, 152–153, 91 S.Ct., at 1873. In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns. *Id.*, at 152, n. 32, 155, 91 S.Ct., at 1875, n. 32.[5]

**1523 More recently, in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), we invalidated the challenged multimember districting plans because their characteristics, when combined with historical and social factors, had the discriminatory effect of denying *110 the plaintiff Negroes and Mexican-Americans equal access to the political process. *Id.*, at 765–770, 93 S.Ct., at 2339–2341. We stated that

> "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 765–766, 93 S.Ct., at 2339.

We held that the three-judge District Court had properly applied this standard in invalidating the multimember districting schemes in the Texas counties of Dallas and Bexar. The District Court had determined that the characteristics of the challenged electoral systems—multimember districts, a majority-vote requirement for nomination in a primary election, and a rule mandating that a candidate running for a position in a multimember district must run for a specified "place" on the ticket—though "neither in themselves improper nor invidious," reduced the electoral influence of Negroes and Mexican-Americans. *Id.*, at 766, 93 S.Ct., at 2340.[6] The District Court identified a number of social and historical factors that, when combined with the Texas electoral structure, resulted in vote dilution: (1) a history of official racial discrimination in Texas, including discrimination inhibiting the registration, casting of ballots, and political participation of Negroes; (2) proof

that minorities were still suffering the effects of past discrimination; (3) a history of gross underrepresentation of minority interests; (4) proof of official insensitivity to the needs of minority citizens, whose votes were not needed by those in power; (5) the recent use of racial campaign tactics; and (6) a cultural and language barrier inhibiting the participation of ***111** Mexican-Americans. *Id.*, at 766–770, 93 S.Ct., at 2339–2341. Based "on the totality of the circumstances," we affirmed the District Court's conclusion that the use of multimember districts excluded the plaintiffs "from effective participation in political life." *Id.*, at 769, 93 S.Ct., at 2341.[7]

***112** It is apparent that a showing of discriminatory intent in the creation or maintenance ****1524** of multimember districts is as unnecessary after *White* as it was under our earlier vote-dilution decisions. Under this line of cases, an electoral districting plan is invalid if it has the effect of affording an electoral minority "less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice," *id.*, at 766, 93 S.Ct., at 2339. It is also apparent that the Court in *White* considered equal access to the political process as meaning more than merely allowing the minority the opportunity to vote. *White* stands for the proposition that an electoral system may not relegate an electoral minority to political impotence by diminishing the importance of its vote. The plurality's approach requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to *White* and its predecessors.[8]

B

The plurality fails to apply the discriminatory-effect standard of *White v. Regester* because that approach conflicts with what the plurality takes to be an elementary principle of law. "[O]nly if there is purposeful discrimination," announces the ***113** plurality, "can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Ante*, at 66, 100 S.Ct., at 1499. That proposition is plainly overbroad. It fails to distinguish between two distinct lines of equal protection decisions: those involving suspect classifications, and those involving fundamental rights.

We have long recognized that under the Equal Protection Clause classifications based on race are "constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954), and are subject to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944), regardless of whether they infringe on an independently protected constitutional right. Cf. *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Under *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), a showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications having a racially discriminatory impact. Perhaps because the plaintiffs in the present cases are Negro, the plurality assumes that their vote-dilution claims are premised on the suspect-classification branch of our equal protection cases, and that under *Washington v. Davis, supra*, they are required to prove discriminatory intent. That assumption fails to recognize that our vote-dilution decisions are rooted in a different strand of equal protection jurisprudence.

Under the Equal Protection Clause, if a classification "impinges upon a fundamental ****1525** right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny" is required, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), regardless of whether the infringement was intentional.[9] As I will explain, our cases ***114** recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution.[10] The plurality's erroneous conclusion to the contrary is the result of a failure to recognize the central distinction between *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Washington v. Davis, supra* : the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement.[11]

***115** Nearly a century ago, the Court recognized the elementary proposition upon ****1526** which our structure of civil rights is based: "[T]he political franchise of voting is . . . a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886). We reiterated that theme in our landmark decision in *Reynolds v. Sims*, 377 U.S. 533, 561–562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964), and stated that, because "the right of suffrage is a fundamental matter in a free and democratic society[,] . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid*. We realized that "the right of suffrage can

be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555, 84 S.Ct., at 1378. Accordingly, we recognized that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.*, at 576, 84 S.Ct., at 1389. See also *Wesberryv.* ***116** *Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964); *Gray v. Sanders*, 372 U.S. 368, 379–380, 83 S.Ct. 801, 807–808, 9 L.Ed.2d 821 (1963).[12]

Reynolds v. Sims and its progeny[13] focused solely on the discriminatory *effects* of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds*, each citizen must have an "equally effective voice" in the election of representatives. *Reynolds v. Sims, supra*, 377 U.S., at 565, 84 S.Ct., at 1383. In the present cases, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgment of a fundamental right.[14] It follows, then, that a showing of discriminatory ***117** intent is just as unnecessary under the vote-dilution approach adopted in *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 1401 (1965), and applied in *White v. Regester,* ****1527** *supra*, as it is under our reapportionment cases.[15]

***118** Indeed, our vote-dilution cases have explicitly acknowledged that they are premised on the infringement of a fundamental right, not on the Equal Protection Clause's prohibition of racial discrimination. Our first vote-dilution decision, *Fortson v. Dorsey, supra*, involved a 1962 Georgia reapportionment statute that allocated the 54 seats of the Georgia Senate among the State's 159 counties. Thirty-three of the senatorial districts were made up of from one to eight counties each, and were single-member districts. The remaining 21 districts were allotted among the 7 most populous counties, with each county containing at least 2 districts and electing all of its senators by countywide vote. The plaintiffs, who were registered voters residing in two of the multidistrict counties,[16] argued that the apportionment plan on its face violated the Equal Protection Clause because countywide voting in the seven multidistrict counties denied their residents a vote equal to that of voters residing in single-member constituencies. ***119** [17] We were unconvinced that the plan operated to dilute any Georgian's vote, and therefore upheld the facial validity of the scheme. We cautioned, however, that the Equal Protection Clause would not tolerate a multimember districting plan that "designedly or otherwise, ****1528** . . . operate[d] to minimize or cancel out the voting strength of racial or *political* elements of the voting population." 379 U.S., at 439, 85 S.Ct., at 501 (emphasis added).

The approach to vote dilution adopted in *Fortson* plainly consisted of a fundamental-rights analysis. If the Court had believed that the equal protection problem with alleged vote dilution was one of racial discrimination and not abridgment of the right to vote, it would not have accorded standing to the plaintiffs, who were simply registered voters of Georgia alleging that the state apportionment plan, as a theoretical matter, diluted their voting strength because of where they lived. To the contrary, we did not question their standing, and held against them solely because we found unpersuasive their claim on the merits. The Court did not reach this result by inadvertence; rather, we explicitly recognized that we had adopted a fundamental-rights approach when we stated that the Equal Protection Clause protected the voting strength of political as well as racial groups.

Until today, this Court had never deviated from this principle. We reiterated that our vote-dilution doctrine protects political groups in addition to racial groups in *Burns v. Richardson*, 384 U.S., at 88, 86 S.Ct., at 1294, where we allowed a general class of qualified voters to assert such a vote-dilution claim. In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), we again explicitly recognized that political groups could raise such claims, *id.*, at 143, 144, 91 S.Ct., at 1869. In *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), ***120** the plaintiffs were Negroes and Mexican-Americans, and accordingly the Court had no reason to discuss whether non-minority plaintiffs could assert claims of vote dilution.[18] In a companion case to *White*, however, we again recognized that "political elements" were protected against vote dilution. *Gaffney v. Cummings*, 412 U.S. 735, 751, 93 S.Ct. 2321, 2330, 37 L.Ed.2d 298 (1973). Two years later, in *Dallas County v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975) (*per curiam*), we accorded standing to urban dwellers alleging vote dilution as to the election of the county commission and stated that multimember districting is unconstitutional if it "in fact operates impermissibly to dilute the voting strength of an *identifiable element* of the voting population." *Id.*, at 480, 95 S.Ct., at 1708 (emphasis

added). And in *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), the plurality opinion of Mr. Justice WHITE stated that districting plans were subject to attack if they diluted the vote of "*racial or political groups*." *Id.*, at 167, 97 S.Ct., at 1010 (emphasis in original).[19]

Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the antidiscrimination branch, of our jurisprudence under the Equal Protection Clause. They recognize a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification. They are premised on a rationale wholly apart from that underlying *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). That decision involved application of a different equal protection principle, the prohibition on racial discrimination in the governmental distribution of interests ***121** to which citizens have no constitutional entitlement.[20] Whatever ****1529** may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest.[21]

***122** *Washington v. Davis*, then, in no way alters the discriminatory-impact test developed in *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), and applied in *White v. Regester, supra*, to evaluate claims of dilution of the fundamental right to vote. In my view, that test is now, and always has been, the proper method of safeguarding against inequitable distribution of political influence.

The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. See *ante*, at 75–80, 100 S.Ct., at 1504–1507. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. See n. 7, *supra*. The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to elect representatives in proportion to its share of the population. To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process. See *ibid*. Typical of the plurality's mischaracterization of my position is its assertion that I would provide protection against vote dilution for "every 'political group,' or at least every such group that is in the minority." *Ante*, at 75, 100 S.Ct., at 1504. The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them. See nn. 7 and 19, *supra*. In short, the distinction between a requirement of proportional representation and the discriminatory-effect test I espouse is by no means a difficult one, and it is hard for me to understand why the plurality insists on ignoring it.

The plaintiffs in No. 77–1844 proved that no Negro had ever been elected to the Mobile City Commission, despite the fact that ****1530** Negroes constitute about one-third of the electorate, and that the persistence of severe racial bloc voting made it highly ***123** unlikely that any Negro could be elected at large in the foreseeable future. 423 F.Supp. 384, 387–389 (SD Ala.1976). Contrary to the plurality's contention, see *ante*, at 75–76, 100 S.Ct., at 1504, however, I do not find unconstitutional vote dilution in this case simply because of that showing. The plaintiffs convinced the District Court that Mobile Negroes were unable to use alternative avenues of political influence. They showed that Mobile Negroes still suffered pervasive present effects of massive historical, official and private discrimination, and that the City Commission had been quite unresponsive to the needs of the minority community. The City of Mobile has been guilty of such pervasive racial discrimination in hiring employees that extensive intervention by the Federal District Court has been required. 423 F.Supp., at 389, 400. Negroes are grossly underrepresented on city boards and committees. *Id.*, at 389–390. The city's distribution of public services is racially discriminatory. *Id.*, at 390–391. City officials and police were largely unmoved by Negro complaints about police brutality and a "mock lynching." *Id.*, at 392. The District Court concluded that "[t]his sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the [commissioners'] political fear of a white backlash vote when black citizens' needs are at stake." *Ibid.* See also the dissenting opinion of my Brother WHITE, *ante*, p. 94, 100 S.Ct., p. 1514.

A requirement of proportional representation would indeed transform this Court into a "super-legislature," *ante*, at 76, 100 S.Ct., at 1505, and would create the risk that some groups would receive an undeserved windfall of political influence. In contrast, the protection against vote dilution recognized by our prior cases serves as a minimally intrusive guarantee of political survival for a discrete political minority that is effectively locked out of governmental decisionmaking

processes.[22] So understood,the ***124** doctrine hardly " 'create[s] substantive constitutional rights in the name of guaranteeing equal protection of the laws,' " *ibid.*, p. 76, 100 S.Ct., at 1504, quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S., at 33, 93 S.Ct., at 1296. Rather, the doctrine is a simple reflection of the basic principle that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds v. Sims*, 377 U.S., at 576, 84 S.Ct., at 1389.[23]

***125** ****1531** II

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Today the plurality gives short shrift to the argument that proof of discriminatory intent is not a necessary condition to relief under this Amendment. See *ante*, at 61–65, 100 S.Ct., at 1497–1499.[24] I have examined this issue in another context and reached the contrary result. *Beer v. United States*, 425 U.S. 130, 146–149, and nn. 3–5, 96 S.Ct. 1357, 1366, 1367, and nn. 3–5, 47 L.Ed.2d 629 (1976) (dissenting opinion). I continue to believe ***126** that "a showing of purpose or of effect is alone sufficient to demonstrate unconstitutionality," *id.*, at 149, n. 5, 96 S.Ct., at 1368, n. 5 and wish to explicate further why I find this standard appropriate for Fifteenth Amendment claims. First, however, it is necessary to address the plurality's apparent suggestion that the Fifteenth Amendment protects against only denial, and not dilution, of the vote.[25]

A

The Fifteenth Amendment does not confer an absolute right to vote. See *ante*, at 62, 100 S.Ct., at 1497. By providing that the right to vote cannot be discriminatorily "denied *or* abridged," however, the Amendment assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise. An interpretation holding that the Amendment reaches only complete abrogation of the vote would render the Amendment essentially useless, since it is no difficult task to imagine schemes in which the Negro's marking of the ballot is a meaningless exercise.

The Court has long understood that the right to vote encompasses protection against vote dilution. "[T]he right to have one's vote counted" is of the same importance as "the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 905, 59 L.Ed. 1355 (1915). See *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Swafford* ****1532** *v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); *Wiley v. Sinkler*, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900); *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884). The right to vote is protected against the diluting effect of ballot-box stuffing. *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944); *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880). Indeed, this Court has explicitly recognized that the Fifteenth Amendment protects against vote dilution. In *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), and ***127** *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), the Negro plaintiffs did not question their access to the ballot for general elections. Instead they argued, and the Court recognized, that the value of their votes had been diluted by their exclusion from participation in primary elections and in the slating of candidates by political parties. The Court's struggles with the concept of "state action" in those decisions were necessarily premised on the understanding that vote dilution was a claim cognizable under the Fifteenth Amendment.

Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), recognized that an allegation of vote dilution resulting from the drawing of district lines stated a claim under the Fifteenth Amendment. The plaintiffs in that case argued that congressional districting in New York violated the Fifteenth Amendment because district lines had been drawn in a racially discriminatory fashion. Each plaintiff had access to the ballot; their complaint was that because of intentional discrimination they resided in a district with population characteristics that had the effect of diluting the weight of their votes. The Court treated this claim as cognizable under the Fifteenth Amendment. More recently, in *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), we again treated an allegation of vote dilution arising from a redistricting scheme as stating a claim under the Fifteenth Amendment. See *id.*, at 155, 161–162, 165–168, 97 S.Ct., at 1007, 1008, 1009–1011 (opinion of WHITE, J.). Indeed, in that case Mr. Justice STEWART found no Fifteenth Amendment violation in part

because the plaintiffs had failed to prove "that the redistricting scheme was employed . . . to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.*, at 179, 97 S.Ct., at 1017 (STEWART, J., joined by POWELL, J., concurring in judgment) (citing, *e. g., White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965); *Wright v. Rockefeller, supra*. See also *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

***128** It is plain, then, that the Fifteenth Amendment shares the concept of vote dilution developed in such Fourteenth Amendment decisions as *Reynolds v. Sims*, 377 U.S 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and *Fortson v. Dorsey, supra*. In fact, under the Court's unified view of the protections of the right to vote accorded by disparate portions of the Constitution, the concept of vote dilution is a core principle of the Seventeenth and Nineteenth Amendments as well as the Fourteenth and Fifteenth:

> "The Fifteenth amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry v. Adams*, 345 U.S. 461 [73 S.Ct. 809, 97 L.Ed. 1152]. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in ****1533** that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.
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> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray v. Sanders*, 372 U.S., at 379, 381, 83 S.Ct., at 808, 809.

The plurality's suggestion that the Fifteenth Amendment reaches only outright denial of the ballot is wholly inconsistent not only with our prior decisions, but also with the gloss the plurality would place upon the Fourteenth Amendment's protection against vote dilution. As I explained in Part I, *supra*, I strongly disagree with the plurality's conclusion that our ***129** Fourteenth Amendment vote-dilution decisions have been based upon the Equal Protection Clause's prohibition of racial discrimination. Be that as it may, the plurality at least does not dispute that the Fourteenth Amendment's language—that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—protects against dilution, as well as outright denial, of the right to vote on racial grounds, even though the Amendment does not mention any right to vote and speaks only of the denial, and not the diminution, of rights. Yet, when the plurality construes the language of the Fifteenth Amendment—which explicitly acknowledges the right to vote and prohibits its denial *or* abridgment on account of race—it seemingly would accord protection against only the absolute abrogation of the ballot.

An interpretation of the Fifteenth Amendment limiting its prohibitions to the outright denial of the ballot would convert the words of the Amendment into language illusory in symbol and hollow in substance. Surely today's decision should not be read as endorsing that interpretation.[26]

B

The plurality concludes that our prior decisions establish the principle that proof of discriminatory intent is a necessary element of a Fifteenth Amendment claim.[27] In contrast, I ***130** continue to adhere to my conclusion in *Beer v. United States*, 425 U.S. 148, n. 4, 96 S.Ct., at 1367, n. 4 (dissenting opinion), that "[t]he Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web." As I there explained, at various times the Court's decisions have seemed to adopt three inconsistent approaches: (1) that purpose alone is the test for unconstitutionality; (2) that effect alone is the test; and (3) that purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. *Ibid.* In my view, our Fifteenth Amendment jurisprudence on the necessity of proof of discriminatory purpose is no less unsettled than was our approach to the importance of such proof in Fourteenth Amendment racial discrimination cases prior to *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). What is called for in the present cases is a fresh consideration—similar to our inquiry ****1534** in *Washington v. Davis, supra*, with regard to Fourteenth Amendment

discrimination claims—of whether proof of discriminatory purpose is necessary to establish a claim under the Fifteenth Amendment. I will first justify my conclusion that our Fifteenth Amendment precedents do not control the outcome of this issue, and then turn to an examination of how the question should be resolved.

1

The plurality cites *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964); *Lassiter v. Northampton Election Bd.*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); and *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939), as holding that proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim. To me, these decisions indicate confusion, not resolution of this issue. As the plurality suggests, *ante*, at 62, 100 S.Ct., at 1497, the Court in *Guinn v. United States, supra*, did examine the purpose of a "grandfather clause" in the course of invalidating it. Yet 24 years later, in *Lane v. Wilson, supra*, at 277, 59 S.Ct., at 876, the Court ***131** struck down a more sophisticated exclusionary scheme because it "operated unfairly" against Negroes. In accord with the prevailing doctrine of the time, see *Arizona v. California*, 283 U.S. 423, 455, and n. 7, 51 S.Ct. 522, and n. 7, 75 L.Ed. 1154 (1931), the Court in *Lane* seemingly did not question the motives of public officials.

In upholding the use of a literacy test for voters in *Lassiter v. Northampton Election Bd., supra*, the Court apparently concluded that the plaintiff had failed to prove either discriminatory purpose or effect. *Gomillion v. Lightfoot, supra*, can be read as turning on proof of discriminatory motive, but the Court also stressed that the challenged redrawing of municipal boundaries had the "essential inevitable effect" of removing Negro voters from the city, *id.*, 364 U.S., at 341, 81 S.Ct., at 127, and that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," *id.*, at 347, 81 S.Ct., at 130. Finally, in *Wright v. Rockefeller, supra*, the plaintiffs alleged only purposeful discriminatory redistricting, and therefore the Court had no reason to consider whether proof of discriminatory effect would satisfy the Fifteenth Amendment.[28]

The plurality ignores cases suggesting that discriminatory purpose is not necessary to support a Fifteenth Amendment claim. In *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), a case in which no majority opinion was issued, three Justices approvingly discussed two decisions of the United States Court of Appeals for the Fourth Circuit[29] holding "that no election machinery could be sustained if its purpose *or* effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.*, at 466, 73 S.Ct., at 812 (opinion of Black, J., joined by Douglas and Burton, JJ.) (emphasis added). More recently, in rejecting a First Amendment challenge to a federal statute providing ***132** criminal penalties for knowing destruction of a Selective Service registration certificate, the Court in *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968), stated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The Court in *O'Brien, supra*, at 385, 88 S.Ct., at 1683, interpreted *Gomillion v. Lightfoot, supra*, as turning on the discriminatory effect, and not the alleged discriminatory purpose, of the challenged redrawing of municipal ****1535** boundaries. Three years later, in *Palmer v. Thompson*, 403 U.S. 217, 224–225, 91 S.Ct. 1940, 1944–1945, 29 L.Ed.2d 438 (1971), the Court relied on *O'Brien* to support its refusal to inquire whether a city had closed its swimming pools to avoid racial integration. As in *O'Brien*, the Court in *Palmer, supra*, at 225, 91 S.Ct., at 1945, interpreted *Gomillion v. Lightfoot* as focusing "on the actual effect" of the municipal boundary change, and not upon what motivated the city to redraw its borders. See also *Wright v. Council of City of Emporia*, 407 U.S. 451, 461–462, 92 S.Ct. 2196, 2202, 2203, 33 L.Ed.2d 51 (1972).

In holding that racial discrimination claims under the Equal Protection Clause must be supported by proof of discriminatory intent, the Court in *Washington v. Davis, supra*, signaled some movement away from the doctrine that such proof is irrelevant to constitutional adjudication. Although the Court, 426 U.S., at 242–244 and n. 11, 96 S.Ct., at 2048–2050, and n. 11, attempted mightily to distinguish *Palmer v. Thompson, supra*, its decision was in fact based upon a judgment that, in light of modern circumstances, the Equal Protection Clause's ban on racial discrimination in the distribution of constitutional gratuities should be interpreted as prohibiting only intentional official discrimination.[30]

These vacillations in our approach to the relevance of discriminatory purpose belie the plurality's determination that our prior decisions require such proof to support Fifteenth Amendment claims. To the contrary, the Court today is in ***133** the same unsettled position with regard to the Fifteenth Amendment as it was four years ago in *Washington v. Davis, supra*, regarding the Fourteenth Amendment's prohibition of racial discrimination. The absence of old answers mandates a new inquiry.

2

The Court in *Washington v. Davis* required a showing of discriminatory purpose to support racial discrimination claims largely because it feared that a standard based solely on disproportionate impact would unduly interfere with the far ranging governmental distribution of constitutional gratuities.[31] Underlying the Court's decision was a determination that, since the Constitution does not entitle any person to such governmental benefits, courts should accord discretion to those officials who decide how the government shall allocate its scarce resources. If the plaintiff proved only that governmental distribution of constitutional gratuities had a disproportionate effect on a racial minority, the Court was willing to presume that the officials who approved the allocation scheme either had made an honest error or had foreseen that the decision would have a discriminatory impact and had found persuasive, legitimate reasons for imposing it nonetheless. These assumptions about the good faith of officials allowed the Court to conclude that, standing alone, a showing that a governmental policy had a racially discriminatory impact did not indicate that the affected minority had suffered the stigma, frustration, and unjust treatment prohibited ***134** under the suspect-classification branch of our equal protection jurisprudence.

Such judicial deference to official decisionmaking has no place under the Fifteenth Amendment. Section 1 of that Amendment differs from the Fourteenth Amendment's prohibition on racial discrimination in two crucial respects: it explicitly recognizes the right to vote free of hindrances related to race, and it sweeps no ****1536** further. In my view, these distinctions justify the conclusion that proof of racially discriminatory impact should be sufficient to support a claim under the Fifteenth Amendment. The right to vote is of such fundamental importance in the constitutional scheme that the Fifteenth Amendment's command that it shall not be "abridged" on account of race must be interpreted as providing that the votes of citizens of all races shall be of substantially equal weight. Furthermore, a disproportionate-impact test under the Fifteenth Amendment would not lead to constant judicial intrusion into the process of official decisionmaking. Rather, the standard would reach only those decisions having a discriminatory effect upon the minority's vote. The Fifteenth Amendment cannot tolerate that kind of decision, even if made in good faith, because the Amendment grants racial minorities the full enjoyment of the right to vote, not simply protection against the unfairness of intentional vote dilution along racial lines.[32]

In addition, it is beyond dispute that a standard based solely upon the motives of official decision-makers creates significant problems of proof for plaintiffs and forces the inquiring court to undertake an unguided, tortious look into the minds of officials in the hope of guessing why certain policies were adopted and others rejected. See ***135** *Palmer v. Thomp son*, 403 U.S., at 224–225, 91 S.Ct., at 1944–1945; *United States v. O'Brien*, 391 U.S., at 382–386, 88 S.Ct., at 1681–1684; cf. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 224, 227, 93 S.Ct. 2686, 2705, 2706, 37 L.Ed.2d 548 (1973) (POWELL, J., concurring in part and dissenting in part). An approach based on motivation creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion. *Washington v. Davis* is premised on the notion that this risk is insufficient to overcome the deference the judiciary must accord to governmental decisions about the distribution of constitutional gratuities. That risk becomes intolerable, however, when the precious right to vote protected by the Fifteenth Amendment is concerned.

I continue to believe, then, that under the Fifteenth Amendment an "[e]valuation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. . . . [A] demonstration of effect ordinarily should suffice. If, of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality." *Beer v. United States*, 425 U.S., at 149–150, n. 5, 96 S.Ct., at 1368, n. 5 (MARSHALL, J., dissenting). The plurality's refusal in this case even to consider this approach bespeaks an indifference to the plight of minorities who, through no fault of their own, have suffered diminution of the right preservative of all other rights.[33]

***136** ****1537** III

If it is assumed that proof of discriminatory intent is necessary to support the vote-dilution claims in these cases, the question becomes what evidence will satisfy this requirement.[34]

The plurality assumes, without any analysis, that these cases are appropriate for the application of the rigid test developed in *Personnel Administrator of Mass. v. Feeney*, 442 U.S., at 279, 99 S.Ct., at 2296, requiring that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." In my view, the *Feeney* standard creates a burden of proof far too extreme to apply in vote-dilution cases.[35]

***137** This Court has acknowledged that the evidentiary inquiry involving discriminatory intent must necessarily vary depending upon the factual context. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 264–268, 97 S.Ct., at 562–565; *Washington v. Davis*, 426 U.S., at 253, 96 S.Ct., at 2054 (STEVENS, J., concurring). One useful evidentiary tool, long recognized by the common law, is the presumption that "[e]very man must be taken to contemplate the probable consequences of the act he does." *Townsend v. Wathen*, 9 East. 277, 280, 103 Eng.Rep. 579, 580–581 (K.B.1808). The Court in *Feeney, supra*, at 279, n. 25, 99 S.Ct., at 2296, n. 25, acknowledged that proof of foreseeability of discriminatory consequences could raise a "strong inference that the adverse effects were desired," but refused to treat this presumption as conclusive in cases alleging discriminatory distribution of constitutional gratuities.

I would apply the common-law foreseeability presumption to the present cases. The plaintiffs surely proved that maintenance of the challenged multimember districting would have the foreseeable effect of perpetuating the submerged electoral influence of Negroes, and that this discriminatory effect could be corrected by implementation of a single-member districting plan.[36] Because the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants, and they should have been required to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect. See *Feeney, supra*, at 284, 99 S.Ct., at 2299 (MARSHALL, J., dissenting). Reallocation of the burden of proof is especially appropriate in these cases, where the challenged state action ****1538** infringes the exercise of a fundamental right. The defendants would carry their burden of proof only if they showed that they considered submergence ***138** of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Arlington Heights v. Metropolitan Housing Dev. Corp., supra*, at 270–271, n. 21, 97 S.Ct., at 566, n. 21.

This approach recognizes that

> "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington v. Davis, supra*, 426 U.S., at 253, 96 S.Ct., at 2054 (STEVENS, J., concurring).

Furthermore, if proof of discriminatory purpose is to be required in these cases, this standard would comport with my view that the degree to which the government must justify a decision depends upon the importance of the interests infringed by it. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S., at 109–110, 93 S.Ct., at 1335, 1336 (MARSHALL, J., dissenting).[37]

***139** The plurality also fails to recognize that the maintenance of multimember districts in the face of foreseeable discriminatory consequences strongly suggests that officials are blinded by "racially selective sympathy and indifference."[38] Like outright racial hostility, selective racial indifference reflects a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites. When an interest as fundamental as voting is diminished along racial lines, a requirement that discriminatory purpose must be proved should be satisfied by a showing that official action was produced by this type of pervasive bias. In the present cases, the plaintiffs presented strong evidence of such bias: they showed that Mobile officials historically discriminated against Negroes, that there are pervasive present effects of this past discrimination, and that officials have not been responsive to the needs of the minority community. It

takes only the smallest of inferential leaps to conclude that the decisions to maintain multimember districting having obvious discriminatory effects represent, at the very least, selective racial ****1539** sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of inhumanity.[39]

***140** IV

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote, ***141** public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights. The theoretical foundations for these approaches are shattered where, as in the present cases, the right to vote is granted in form, but denied in substance.

It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S., at 275, 59 S.Ct., at 876, it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.

All Citations

446 U.S. 55, 100 S.Ct. 1519 (Mem), 64 L.Ed.2d 47

Footnotes

1 U.S.Const., Amdts. 15, 17, 19, 23, 24, 26.

2 I agree with the plurality, see *ante*, at 60–61, 100 S.Ct. at 1496–1497, that the prohibition on denial or infringement of the right to vote contained in § 2 of the Voting Rights Act, 42 U.S.C. § 1973, contains the same standard as the Fifteenth Amendment. I disagree with the plurality's construction of that Amendment, however. See Part II, *infra*.

3 The Court does not quarrel with the generalization that in many instances an electoral minority will fare worse under multimember districting than under single-member districting. Multimember districting greatly enhances the opportunity of the majority political faction to elect all representatives of the district. In contrast, if the multimember district is divided into several single-member districts, an electoral minority will have a better chance to elect a candidate of its choice, or at least to exert greater political influence. It is obvious that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting. See E. Banfield & J. Wilson, City Politics 91–96, 303–308 (1963); R. Dixon, Jr., Democratic Representation 12, 476–484, 503–527 (1968); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga.L.Rev. 353, 358–360 (1976); Derfner, Racial Discrimination and the Right to Vote, 26 Vand.L.Rev. 523, 553–555 (1973); Comment, Effective Representation and Multimember Districts, 68 Mich.L.Rev. 1577, 1577–1579 (1970). Recent empirical studies have documented the validity of this generalization. See Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla.St.U.L.Rev. 85, 113–122 (1979); Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb.Aff.Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J.Pol. 134 (1979); Karnig, Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors, 12 Urb.Aff.Q. 223 (1976); Sloan, "Good Government" and the Politics of Race, 17 Soc.Prob. 161 (1969); The Impact of Municipal Reformism: A Symposium, 59 Soc.Sci.Q. 117 (1978).

The electoral schemes in these cases involve majority-vote, numbered-post, and staggered-term requirements. See *Bolden v. City of Mobile*, 423 F.Supp. 384, 386–387 (SD Ala.1976); *Brown v. Moore*, 428 F.Supp. 1123, 1126–1127 (SD Ala.1976). These electoral rules exacerbate the vote-dilutive effects of multimember districting. A requirement that a candidate must win by a majority of the vote forces a minority candidate who wins a plurality of votes in the general

election to engage in a run off election with his nearest competitor. If the competitor is a member of the dominant political faction, the minority candidate stands little chance of winning in the second election. A requirement that each candidate must run for a particular "place" or "post" creates head-to-head contests that minority candidates cannot survive. When a number of positions on a governmental body are to be chosen in the same election, members of a minority will increase the likelihood of election of a favorite candidate by voting only for him. If the remainder of the electorate splits its votes among the other candidates, the minority's candidate might well be elected by the minority's "single-shot voting." If the terms of officeholders are staggered, the opportunity for single-shot voting is decreased. See *City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (CA5 1973) (en banc), aff'd on other grounds, *sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (*per curiam*); Bonapfel, *supra* ; Derfner, *supra*.

4 The plurality notes that at-large elections were instituted in cities as a reform measure to correct corruption and inefficiency in municipal government, and suggests that it "may be a rash assumption" to apply vote-dilution concepts to a municipal government elected in that fashion. See *ante*, at 70, and n. 15, 100 S.Ct. at 1502, and n. 15. To the contrary, local governments are not exempt from the constitutional requirement to adopt representational districting ensuring that the votes of each citizen will have equal weight. *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). Indeed, in *Beer v. United States*, 425 U.S. 130, 142, n. 14, 96 S.Ct. 1357, 1364, n. 14, 47 L.Ed.2d 629 (1976), and *Abate v. Mundt*, 403 U.S. 182, 184, n. 2, 91 S.Ct. 1904, 1906, n. 2, 29 L.Ed.2d 399 (1971), we assumed that our vote-dilution doctrine applied to local governments.

Furthermore, though municipalities must be accorded some discretion in arranging their affairs, see *Abate v. Mundt, supra*, there is all the more reason to scrutinize assertions that municipal, rather than state, multi-member districting dilutes the vote of an electoral minority:

"In statewide elections, it is possible that a large minority group in one multi-member district will be unable to elect any legislators, while in another multi-member district where the same group is a slight majority, they will elect the entire slate of legislators. Thus, the multi-member electoral system may hinder a group in one district but prove an advantage in another. In at-large elections in cities this is not possible. There is no way to balance out the discrimination against a particular minority group because the entire city is one huge election district. The minority's loss is absolute." Berry & Dye, *supra* n. 3, at 87.

That at-large elections were instituted as part of a "reform" movement in no way ameliorates these harsh effects. Moreover, in some instances the efficiency and breadth of perspective supposedly resulting from a reform structure of municipal government are achieved at a high cost. In a white-majority city in which severe racial bloc voting is common, the citywide view allegedly inculcated in city commissioners by at-large elections need not extend beyond the white community, and the efficiency of the commission form of government can be achieved simply by ignoring the concerns of the powerless minority.

It would be a mistake, then, to conclude that municipal at-large elections provide an inherently superior representational scheme. See also n. 3, *supra; Chapman v. Meier*, 372 F.Supp. 371, 388–392 (ND 1974) (three-judge court) (Bright, J., dissenting), rev'd, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). It goes without saying that a municipality has the freedom to design its own governance system. When that system is subjected to constitutional attack, however, the question is whether it was enacted or maintained with a discriminatory purpose or has a discriminatory effect, not whether it comports with one or another of the competing notions about "good government."

5 As the plurality notes, see *ante*, at 66, 100 S.Ct., at 1499, we indicated in *Whitcomb v. Chavis*, 403 U.S., at 149, 91 S.Ct., at 1872, that multimember districts were unconstitutional if they were "conceived or operated as purposeful devices to further racial or economic discrimination." The Court in *Whitcomb* did not, however, suggest that discriminatory purpose was a necessary condition for the invalidation of multimember districting. Our decision in *Whitcomb, supra*, at 143, 91 S.Ct., at 1869, acknowledged the continuing validity of the discriminatory-impact test adopted in *Fortson v. Dorsey*, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965), and restated it as requiring plaintiffs to prove that "multi-member districts unconstitutionally *operate* to dilute or cancel the voting strength of racial or political elements." *Whitcomb, supra*, 403 U.S., at 144, 91 S.Ct., at 1869 (emphasis added).

Abate v. Mundt, supra, decided the same day as *Whitcomb*, provides further evidence that *Whitcomb* did not alter the discriminatory-effects standard developed in earlier cases. In *Abate, supra*, at 184, n. 2, 91 S.Ct., at 1906, n. 2, we rejected the argument that a multimember districting scheme had a vote-dilutive effect because "[p]etitioners . . . have not shown that these multi-member districts, by themselves, operate to impair the voting strength of particular racial or political elements . . ., see *Burns v. Richardson*, 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966)."

6 See n. 3, *supra*.

7 *White v. Regester*, makes clear the distinction between the concepts of vote dilution and proportional representation. We have held that, in order to prove an allegation of vote dilution, the plaintiffs must show more than simply that they have been unable to elect candidates of their choice. See 412 U.S., at 765–766, 93 S.Ct., at 2339; *Whitcomb v. Chavis, supra*, at 149–150, 153, 91 S.Ct., at 1872, 1873. The Constitution, therefore, does not contain any requirement of proportional representation. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 966, 51 L.Ed.2d 229 (1977); *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials. In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.

Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. See n. 19, *infra*. In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.

The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors. At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.

We have also spoken of dilution of voting power in cases arising under the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* Under § 5 of that Act, 42 U.S.C. § 1973c, a state or local government covered by the Act may not enact new electoral procedures having the purpose or effect of denying or abridging the right to vote on account of race or color. We have interpreted this provision as prohibiting *any* retrogression in Negro voting power. *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976). In some cases, we have labeled such retrogression a "dilution" of the minority vote. See, *e. g., City of Rome v. United States*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Vote dilution under § 5, then, involves a standard different from that applied in cases such as *White v. Regester, supra*, in which diminution of the vote violating the Fourteenth or Fifteenth Amendment is alleged.

8 The plurality's approach is also inconsistent with our statement in *Dallas County v. Reese*, 421 U.S. 477, 480, 95 S.Ct. 1706, 1707, 44 L.Ed.2d 312 (1975) (*per curiam*), that multimember districting violates the Equal Protection Clause if it "in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." See also *Chapman v. Meier*, 420 U.S., at 17, 95 S.Ct., at 761.

9 See *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (right to vote); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); and *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (right to fair access to criminal process). Under the rubric of the fundamental right of privacy, we have recognized that individuals have freedom from unjustified governmental interference with personal decisions involving marriage, *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); contraception, *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Eisenstadt v. Baird*, 405 U.S.

438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 328, 13 L.Ed.2d 339 (1965); abortion, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). See also *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 675 (1977).

10 As the present cases illustrate, a requirement of proof of discriminatory intent seriously jeopardizes the free exercise of the fundamental right to vote. Although the right to vote is indistinguishable for present purposes from the other fundamental rights our cases have recognized, see n. 9, *supra*, surely the plurality would not require proof of discriminatory purpose in those cases. The plurality fails to articulate why the right to vote should receive such singular treatment. Furthermore, the plurality refuses to recognize the disutility of requiring proof of discriminatory purpose in fundamental rights cases. For example, it would make no sense to require such a showing when the question is whether a state statute regulating abortion violates the right of personal choice recognized in *Roe v. Wade, supra*. The only logical inquiry is whether, regardless of the legislature's motive, the statute has the effect of infringing that right. See, *e. g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

11 Judge Wisdom of the Court of Appeals below recognized this distinction in a companion case, see *Nevett v. Sides*, 571 F.2d 209, 231–234 (CA5 1978) (specially concurring opinion). See also Comment, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington v. Davis, Arlington Heights, Mt. Healthy*, and *Williamsburgh*, 12 Harv.Civ.Rights-Civ.Lib.L.Rev. 725, 758, n. 175 (1977); Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington v. Davis*, 76 Mich.L.Rev. 694, 722–726 (1978); Comment, Constitutional Challenges to Gerrymanders, 45 U.Chi.L.Rev. 845, 869–877 (1978).

> *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), involved alleged racial discrimination in public employment. By describing interests such as public employment as constitutional gratuities, I do not, of course, mean to suggest that their deprivation is immune from constitutional scrutiny. Indeed, our decisions have referred to the importance of employment, see *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116, 96 S.Ct. 1895, 1911, 48 L.Ed.2d 495 (1976); *Meyer v. Nebraska, supra*, 43 S.Ct., at 626; *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915), and we have explicitly recognized that in some circumstances public employment falls within the categories of liberty and property protected by the Fifth and Fourteenth Amendments, see, *e. g., Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The Court has not held, however, that a citizen has a constitutional right to public employment.

12 We have not, however, held that the Fourteenth Amendment contains an absolute right to vote. As we explained in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972):

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [Citing cases.] This 'equal right to vote' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. . . . But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' " *Id.*, at 336, 92 S.Ct., at 1000 (quoting *Evans v. Cornman*, 398 U.S. 419, 426, 422, 90 S.Ct. 1752, 1756, 1754, 26 L.Ed.2d 370 (1970)).

13 *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), applied the equal-representation standard of *Reynolds v. Sims*, to local governments. See also, *e. g., Connor v. Finch*, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 97 S.Ct. 1047, 51 L.Ed.2d 313 (1977); *Hadley v. Junior College Dist.*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970).

14 In attempting to limit *Reynolds v. Sims* to its facts, see *ante*, at 77–79, 100 S.Ct., at 1505–1506, the plurality confuses the nature of the constitutional right recognized in that decision with the means by which that right can be violated. *Reynolds* held that under the Equal Protection Clause each citizen must be accorded an essentially equal voice in the election of representatives. The Court determined that unequal population distribution in a multi-district representational scheme was one readily ascertainable means by which this right was abridged. The Court certainly did not suggest, however, that violations of the right to effective political participation mattered only if they were caused by malapportionment.

The plurality's assertion to the contrary in this case apparently would require it to read *Reynolds* as recognizing fair apportionment as an end in itself, rather than as simply a means to protect against vote dilution.

15 Proof of discriminatory purpose has been equally unnecessary in our decisions assessing whether various impediments to electoral participation are inconsistent with the fundamental interest in voting. In the seminal case, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), we invalidated a $1.50 poll tax imposed as a precondition to voting. Relying on our decision two years earlier in *Reynolds v. Sims*, see *Harper, supra*, at 667–668, 670, 86 S.Ct., at 1083, we determined that "the right to vote is too precious, too fundamental to be so burdened or conditioned," 383 U.S., at 670, 86 S.Ct., at 1083. We analyzed the right to vote under the familiar standard that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Ibid*. In accord with *Harper*, we have applied heightened scrutiny in assessing the imposition of filing fees, *e. g., Lubin v. Panish*, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); limitations on who may participate in elections involving specialized governmental entities, *e. g., Kramer v. Union School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); durational residency requirements, *e. g., Dunn v. Blumstein, supra*; enrollment time limitations for voting in party primary elections, *e. g., Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); and restrictions on candidate access to the ballot, *e. g., Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979).

To be sure, we have approved some limitations on the right to vote. Compare, *e. g., Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973), with *Kramer v. Union School District, supra*. We have never, however, required a showing of discriminatory purpose to support a claim of infringement of this fundamental interest. To the contrary, the Court has accepted at face value the purposes articulated for a qualification of this right, and has invalidated such a limitation under the Equal Protection Clause only if its purpose either lacked sufficient substantiality when compared to the individual interests affected or could have been achieved by less restrictive means. See, *e. g., Dunn v. Blumstein, supra*, at 335, 337, 343–360, 92 S.Ct., at 999, 1000, 1003–1012.

The approach adopted in this line of cases has been synthesized with the one-person, one-vote doctrine of *Reynolds v. Sims*, in the following fashion: "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 59, n. 2, 93 S.Ct. 1278, 1310, n. 2, 36 L.Ed.2d 16 (1973) (STEWART, J., concurring) (citing *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Kramer v. Union School District, supra; Dunn v. Blumstein, supra*). It is plain that this standard requires no showing of discriminatory purpose to trigger strict scrutiny of state interference with the right to vote.

16 See *Dorsey v. Fortson*, 228 F.Supp. 259, 261 (ND Ga.1964) (three-judge court), rev'd, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 629 (1965).

17 Specifically, the plaintiffs contended that countywide voting in the multidistrict counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of one district. *Fortson v. Dorsey*, 379 U.S., at 436–437, 85 S.Ct., at 499–500.

18 The same is true of our most recent case discussing vote dilution, *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978).

19 In contrast to a racial group, however, a political group will bear a rather substantial burden of showing that it is sufficiently discrete to suffer vote dilution. See *Dallas County v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975) (*per curiam*) (allowing city dwellers to attack a countywide multimember district). See generally Comment, Effective Representation and Multimember Districts, 68 Mich.L.Rev. 1577, 1594–1596 (1970).

20 The dispute in *Washington v. Davis*, concerned alleged racial discrimination in public employment, an interest to which no one has a constitutional right, see n. 11, *supra*. In that decision, the Court held only that "the invidious quality of a law *claimed to be racially discriminatory* must ultimately be traced to a racially discriminatory purpose." 426 U.S., at 240, 96 S.Ct., at 2048 (emphasis added). The Court's decisions following *Washington v. Davis* have also involved alleged discrimination in the allocation of interests falling short of constitutional rights. *Personnel Administrator of Mass. v. Feeney*,

442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (alleged sex discrimination in public employment); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (alleged racial discrimination in zoning). As explained in *Feeney, supra*, "[w]hen some other independent right is not at stake . . . and when there is no 'reason to infer antipathy,' . . . it is presumed that 'even improvident decisions will eventually be rectified by the democratic process.' " 442 U.S., at 272, 97 S.Ct., at 567 (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979)).

21 Professor Ely has recognized this distinction:

> "The danger I see is . . . that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). . . . However, *where what is denied is something to which the complainant has a substantive constitutional right* —either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant*. It may become important in court what justifications counsel for the state can *articulate* in support of its denial or nonprovision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L.Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

22 It is at this point that my view most diverges from the position expressed by my Brother STEVENS, *ante*, p. 83, 100 S.Ct., p. 1508. He would strictly scrutinize state action having an adverse impact on an individual's right to vote. In contrast, he would apply a less stringent standard to state action diluting the political influence of a group. See *ante*, at 83–85, 100 S.Ct., at 1508–1509. The facts of the present cases, however, demonstrate that severe and persistent racial bloc voting, when coupled with the inability of the minority effectively to participate in the political arena by alternative means, can effectively disable the individual Negro as well as the minority community as a whole. In these circumstances, Mr. Justice STEVENS' distinction between the rights of individuals and the political strength of groups becomes illusory.

23 The foregoing disposes of any contention that, merely by citing *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), the Court in *Washington v. Davis*, 426 U.S., at 240, 96 S.Ct., at 2047, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 264, 97 S.Ct., at 562, intended to bring vote-dilution cases within the discriminatory-purpose requirement. *Wright v. Rockefeller, supra*, was a racial gerrymander case, and the plaintiffs had alleged only that they were the victims of an intentional scheme to draw districting lines discriminatorily. In focusing solely on whether the plaintiffs had proved intentional discrimination, the Court in *Wright v. Rockefeller* was merely limiting the scope of its inquiry to the issue raised by the plaintiffs. If *Wright v. Rockefeller* had been brought after this Court had decided our vote-dilution decisions, the plaintiffs perhaps would have recognized that, in addition to a claim of intentional racial gerrymandering, they could allege an equally sufficient cause of action under the Equal Protection Clause—that the districting lines had the effect of diluting their vote.

> *Wright v. Rockefeller*, then, treated proof of discriminatory purpose as a sufficient condition to trigger strict scrutiny of a districting scheme, but had no occasion to consider whether such proof was necessary to invoke that standard. Its citations in *Washington v. Davis, supra*, and *Arlington Heights, supra*, were useful to show the relevancy, but not the necessity, of evidence of discriminatory intent. These citations are in no way inconsistent with my view that proof of discriminatory purpose is not a necessary condition to the invalidation of multimember districts that dilute the vote of racial or political elements.
>
> In addition, any argument that, merely by citing *Wright v. Rockefeller*, the Court in *Washington v. Davis* and *Arlington Heights* intended to apply the discriminatory-intent requirement to vote-dilution claims is premised on two unpalatable assumptions. First, because the discussion of *Wright v. Rockefeller* was unnecessary to the resolution of the issues in both of those decisions, the argument assumes that the Court in both cases decided important issues in brief dicta. Second, the argument assumes that the Court twice intended covertly to overrule the discriminatory-effects test applied

in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), without even citing *White*. Neither assumption is tenable.

24 It is important to recognize that only the four Members of the plurality are committed to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that proof of discriminatory effect can be a sufficient condition to support the invalidation of districting, see *ante*, at 90, 100 S.Ct., at 1512. My Brother WHITE finds the proof of discriminatory purpose in these cases sufficient to support the decisions of the Courts of Appeals, and accordingly he does not reach the issue whether proof of discriminatory impact, standing alone, would suffice under the Fifteenth Amendment. By Brother BLACKMUN also expresses no view on this issue, since he too finds the proof of discriminatory intent sufficient to support the findings of violations of the Constitution.

25 The plurality states that "[h]aving found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Ante*, at 65, 100 S.Ct., at 1499.

26 Indeed, five Members of the Court decline the opportunity to ascribe to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that the Fifteenth Amendment protects against diminution as well as denial of the ballot, see *ante*, at 84, and n. 3, 100 S.Ct., at 1509, and n. 3. The dissenting opinion of my Brother WHITE and the separate opinion of my Brother BLACKMUN indicate that they share this view.

27 The plurality does not attempt to support this proposition by relying on the history surrounding the adoption of the Fifteenth Amendment. I agree that we should resolved the issue of the relevancy of proof of discriminatory purpose and effect by examining our prior decisions and by considering the appropriateness of alternative standards in light of contemporary circumstances. That was, of course, the approach used in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), to evaluate that issue with regard to Fourteenth Amendment racial discrimination claims.

28 See n. 23, *supra*.

29 *Rice v. Elmore*, 165 F.2d 387 (1947), cert. denied, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151 (1948), and *Baskin v. Brown*, 174 F.2d 391 (1949).

30 See nn. 20, 21, *supra*, and accompanying text.

31 The Court stated:

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S., at 248, 96 S.Ct., at 2051.

See n. 20, *supra*.

32 Even if a municipal policy is shown to dilute the right to vote, however, the policy will not be struck down if the city shows that it serves highly important local interests and is closely tailored to effectuate only those interests. See *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Cf. *Abate v. Mundt*, 403 U.S. 182, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1971).

33 In my view, the standard of *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), see n. 7, *supra*, and accompanying text, is the proper test under both the Fourteenth and Fifteenth Amendments for determining whether a districting scheme has the unconstitutional effect of diluting the Negro vote. It is plain that the District Court in both of the cases before us made the "intensely local appraisal" necessary under *White, supra*, at 769, 93 S.Ct., at 2341, and correctly decided that the at-large electoral schemes for the Mobile City Commission and County School Board violated the *White* standard. As I earlier note with respect to No. 77–1844, see *supra*, at 122–123, 100 S.Ct., at 1530, the District Court determined: (1) that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination; (2) that the City Commission and County School Board had been quite unresponsive to the needs of the minority community; (3) that no Negro had ever been elected to either body, despite the fact that Negroes constitute about

one-third of the electorate; (4) that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at large to either body in the foreseeable future; and (5) that no state policy favored at-large elections, and the local preference for that scheme was outweighed by the fact that the unconstitutional vote dilution could be corrected only by the imposition of single-member districts. *Bolden v. City of Mobile*, 423 F.Supp. 384 (SD Ala.1976); *Brown v. Moore*, 428 F.Supp. 1123 (SD Ala.1976). The Court of Appeals affirmed these findings in all respects. *Bolden v. City of Mobile*, 571 F.2d 238 (CA5 1978); *Brown v. Moore*, 575 F.2d 298 (CA5 1978). See also the dissenting opinion of my Brother WHITE, *ante*, p. 94, 100 S.Ct., p. 1514.

34 The statutes providing for at-large election of the members of the two governmental bodies involved in these cases, see n. 33, *supra*, have been in effect since the days when Mobile Negroes were totally disenfranchised by the Alabama Constitution of 1901. The District Court in both cases found, therefore, that the at-large schemes could not have been adopted for discriminatory purposes. *Bolden v. City of Mobile*, 423 F.Supp., at 386, 397; *Brown v. Moore*, 428 F.Supp., at 1126–1127, 1138. The issue is, then, whether officials have maintained these electoral systems for discriminatory purposes. Cf. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 257–258, 267–271, and n. 17, 97 S.Ct., at 559, 564–566, and n. 17.

35 As the dissenting opinion of my Brother WHITE demonstrates, however, the facts of these cases compel a finding of unconstitutional vote dilution even under the plurality's standard.

36 Indeed, the District Court in the present cases concluded that the evidence supported the plaintiffs' position that unconstitutional vote dilution was the natural and foreseeable consequence of the maintenance of the challenged multimember districting. *Brown v. Moore*, 428 F.Supp., at 1138; *Bolden v. City of Mobile*, 423 F.Supp., at 397–398.

37 Mr. Justice STEVENS acknowledges that both discriminatory intent and discriminatory effect are present in No. 77–1844. See *ante*, at 92–94, 100 S.Ct. at 1513–1514. Nonetheless, he finds no constitutional violation, apparently because he believes that the electoral structure of Mobile conforms to a commonly used scheme, the discriminatory impact is in his view not extraordinary, and the structure is supported by sufficient noninvidious justifications so that it is neither wholly irrational nor entirely motivated by discriminatory animus. To him, racially motivated decisions in this setting are an inherent part of the political process and do not involve invidious discrimination.

> The facts of the present cases, however, indicate that in Mobile considerations of race are far more powerful and pernicious than are considerations of other divisive aspects of the electorate. See at 1530, *supra*. In Mobile, as elsewhere, "the experience of Negroes . . . has been different in kind, not just in degree, from that of other ethnic groups." *University of California Regents v. Bakke*, 438 U.S. 265, 400, 98 S.Ct. 2733, 2805, 57 L.Ed.2d 750 (1978) (opinion of MARSHALL, J.). An approach that accepts intentional discrimination against Negroes as merely an aspect of "politics as usual" strikes at the very hearts of the Fourteenth and Fifteenth Amendments.

38 Brest, The Supreme Court, 1975 Term—Forword: In Defense of the Antidiscrimination Principle, 90 Harv.L.Rev. 1, 7 (1976). See also Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington v. Davis*, 76 Mich.L.Rev. 694, 716–719 (1978).

39 The plurality, *ante*, at 74–75, n. 21, 100 S.Ct., at 1504, n. 21, indicates that on remand the lower courts are to examine the evidence in these cases under the discriminatory-intent standard of *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), and may conclude that this test is met by proof of the refusal of Mobile's state-legislative delegation to stimulate the passage of legislation changing Mobile's city government into a mayor-council system in which council members are elected from single-member districts. The plurality concludes, then, only that the District Court and the Court of Appeals in each of the present cases evaluated the evidence under an improper legal standard, and not that the evidence fails to support a claim under *Feeney, supra*. When the lower courts examine these cases under the *Feeney* standard, they should, of course, recognize the relevancy of the plaintiffs' evidence that vote dilution was a foreseeable and natural consequence of the maintenance of the challenged multimember districting, and that officials have apparently exhibited selective racial sympathy and indifference. Cf. *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979).

Finally, it is important not to confuse the differing views the plurality and I have on the elements of proving unconstitutional vote dilution. The plurality concludes that proof of intentional discrimination, as defined in *Feeney, supra*, is necessary to support such a claim. The plurality finds this requirement consistent with the statement in *White v. Regester*, 412 U.S., at 766, 93 S.Ct., at 2339, that unconstitutional vote dilution does not occur simply because a minority has not been able to elect representatives in proportion to its voting potential. The extra necessary element, according to the plurality, is a showing of discriminatory intent. In the plurality's view, the evidence presented in *White* going beyond mere proof of under-representation of the minority properly supported an inference that the multimember districting scheme in question was tainted with a discriminatory purpose.

The plurality's approach should be satisfied, then, by proof that an electoral scheme enacted with a discriminatory purpose effected a retrogression in the minority's voting power. Cf. *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976). The standard should also be satisfied by proof that a scheme maintained for a discriminatory purpose has the effect of submerging minority electoral influence below the level it would have under a reasonable alternative scheme.

The plurality does not address the question whether proof of discriminatory-effect is necessary to support a vote-dilution claim. It is clear from the above, however, that if the Court at some point creates such a requirement, it would be satisfied by proof of mere disproportionate impact. Such a requirement would be far less stringent than the burden of proof required under the rather rigid discriminatory effects test I find in *White v. Regester, supra*. See n. 7, *supra*, and accompanying text.

New York Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Andrews, Pusateri, Brandt, Shoemaker & Roberson, P.C. v. Niagara County Sewer District No. 1, N.Y.A.D. 4 Dept., March 19, 2010

86 N.Y.2d 286, 655 N.E.2d 649, 631
N.Y.S.2d 553, 103 Ed. Law Rep. 1146

City of New York et al., Appellants,

v.

State of New York et al., Respondents.

Court of Appeals of New York
117B
Argued February 16, 1995;

Decided June 15, 1995

CITE TITLE AS: City of New York v State of New York

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 15, 1994, which modified, on the law, and, as modified, affirmed an order of the Supreme Court (Leland DeGrasse, J.; opn 162 Misc 2d 493), entered in New York County, granting a motion by defendants State of New York, Ralph J. Marino as Majority Leader and Temporary President of the Senate, and Clarence D. Rappleyea, Jr., as Minority Leader of the Assembly, to dismiss the complaint to the extent of dismissing the entire complaint on the ground plaintiffs lack the legal capacity to sue and dismissing plaintiffs' second cause of action and so much of the third cause of action as was based solely upon a statutory violation of the Civil Rights Act of 1964 for failure to state a cause of action. The modification consisted of fully granting defendants' motion to dismiss to the extent of dismissing the first cause of action and the remainder of the third cause of action for the additional reason of failure to state a cause of action.

City of New York v State of New York, 205 AD2d 272, affirmed.

HEADNOTES

Schools
State Aid to School Districts
Capacity of Municipalities to Challenge Constitutionality of State's School Funding Scheme

(1) The City of New York, Board of Education of the City, its Mayor and Chancellor of the City School District (municipal plaintiffs) lack capacity to bring an action against the State and various State officials challenging the constitutionality of the present State statutory scheme for funding public education. Municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State. Municipal corporate bodies--counties, towns and school districts--are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. As purely creatures or agents of the State, municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or ***287** as representatives of their inhabitants. The only recognized exceptions to the general rule barring local governmental challenges to State legislation are: an express statutory authorization to bring such a suit; where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution; and where the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription. Here, however, the municipal plaintiffs have failed to bring their claims within any recognized exception to the general rule that municipalities lack capacity to sue the State and their action must be dismissed.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 98, 99.

NY Jur 2d, Counties, Towns, and Municipal Corporations, §§ 107, 213.

ANNOTATION REFERENCES

See ALR Index under Municipal Corporations.

POINTS OF COUNSEL

Paul A. Crotty, Corporation Counsel of New York City *(Leonard Koerner, Lorna B. Goodman, Pamela Seider Dolgow, David B. Goldin, Elizabeth S. Natrella, Florence A. Hutner* and *Shari M. Goodstein* of counsel), and *Cleary, Gottlieb, Steen & Hamilton,* New York City *(Evan A. Davis, Lawrence T. Gresser, Denise C. Morgan* and *Marcia L. Narine* of counsel), for appellants.

I. In accord with controlling precedent on this issue *(see, Board of Educ. v Nyquist,* 57 NY2d 27 [1982], *appeal dismissed* 459 US 1138 [1983]), the municipal plaintiffs have capacity to bring this action.

II. The complaint states a valid cause of action, sufficient to withstand a motion to dismiss, under the Education Article of the New York Constitution. *(People v New York City Tr. Auth.,* 59 NY2d 343; *Gertler v Goodgold,* 107 AD2d 481, 66 NY2d 946; ***288** *Cohn v Lionel Corp.,* 21 NY2d 559; *Kober v Kober,* 16 NY2d 191; *Board of Educ. v Nyquist,* 57 NY2d 27, 459 US 1138; *People v Bing,* 76 NY2d 331; *People v Ryan,* 274 NY 149; *Ware v Valley Stream High School Dist.,* 75 NY2d 114.)

Manes v Goldin, 400 F Supp 23, 423 n, 400 F Supp 23, 423 US 1068; *Davis v Rosenblatt,* 159 AD2d 163, 79 NY2d 822; *Maresca v Cuomo,* 64 NY2d 242, 474 US 802.)

Dennis C. Vacco, Attorney-General, New York City *(Mark G. Peters, Victoria A. Graffeo, Andrea Green, Harvey J. Golubock, Jeffrey I. Slonim* and *Clement J. Colucci* of counsel), for respondents.

I. Plaintiffs are creations of the State and therefore lack capacity to sue their creator. *(Community Bd. 7 v Schaffer,* 84 NY2d 148; *Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283; *Village of Herkimer v Axelrod,* 58 NY2d 1069; *Town of Black Brook v State of New York,* 41 NY2d 486; *Board of Educ. v Regan,* 87 AD2d 1001, 58 NY2d 1005; *Matter of Town of Moreau v County of Saratoga,* 142 AD2d 864; *Grumet v Board of Educ.,* 187 AD2d 16, 81 NY2d 705; *Caruso v State of New York,* 188 AD2d 874; *Coleman v Miller,* 307 US 433; *Williams v Mayor,* 289 US 36.)

II. Under the Federal Civil Rights Act, plaintiffs cannot challenge the State's education funding system. *(United States v State of Alabama,* 791 F2d 1450, *cert denied sub nom. Board of Trustees v Alabama State Bd. of Educ.,* 479 US 1085; *Community Bd. 7 v Schaffer,* 84 NY2d 148; *Hudson Val. Freedom Theatre v Heimbach,* 671 F2d 702, 459 US 857; *Town of Riverhead v New York State Dept. of Envtl. Conservation,* 193 AD2d 667; *City of New York v Heckler,* 578 F Supp 1109, 742 F2d 729, *affd sub nom. Bowen v City of New York,* 476 US 467; *Town of Brookline v Operation Rescue,* 762 F Supp 1521.)

III. Plaintiffs' underlying complaint fails to state a cause of action.

Stroock & Stroock & Lavan, New York City *(Alan M. Klinger* and *Adam S. Grace* of counsel), *Rhonda Weingarten* and *Frederick K. Reich* for United Federation of Teachers, *amicus curiae.*

I. The amended complaint states a cause of action under the Education Article of the New York Constitution. ***289** *(Board of Educ. v Nyquist,* 57 NY2d 27; *Campaign for Fiscal Equity v State of New York,* 205 AD2d 272; *Plyler v Doe,* 457 US 202; *Wisconsin v Yoder,* 406 US 205.)

II. Appellants have the capacity to bring this action because the State's actions are forcing them to violate the Education Article. *(Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283; *Campaign for Fiscal Equity v State of New York,* 162 Misc 2d 493; *Matter of Wiltwyck School for Boys v Hill,* 11 NY2d 182; *Herman v Board of Educ.,* 234 NY 196; *Matter of Board of Educ. v City of Buffalo,* 32 AD2d 98; *Union Free School Dist. v Jackson,* 93 Misc 2d 53; *Matter of Brown v Union Free School Dist. No. 8,* 88 Misc 2d 755, 59 AD2d 761.)

OPINION OF THE COURT

Levine, J.

The City of New York, Board of Education of the City, its Mayor and Chancellor of the City School District (hereinafter the municipal plaintiffs) have brought this action against the State and various State officials seeking declaratory and injunctive relief. They allege three causes of action in their amended complaint: (1) that the present State statutory scheme for funding public education denies the school children of New York City their educational rights guaranteed by the Education Article of the State Constitution (NY Const, art XI, § 1); (2) that the State's funding of public schools provides separate and unequal treatment for the public schools of New York City in violation of the Equal Protection Clauses of the Federal and State Constitutions (US Const 14th Amend; NY Const, art I, § 11); and (3) that the disparate impact of the State's funding scheme for public education on members of racial and ethnic minority groups

in New York City violates title VI of the Federal Civil Rights Act of 1964 (42 USC § 2000d *et seq.)* as amended and its implementing regulations.

We agree with the courts below that the municipal plaintiffs lack the legal capacity to bring this suit against the State. Despite their contrary claims, the traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State. Constitutionally as well as a matter of historical fact, municipal ***290** corporate bodies--counties, towns and school districts--are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants. Thus, the United States Supreme Court has held:

" 'A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State.' " *(Trenton v New Jersey,* 262 US 182, 189-190, quoting *Worcester v Street Ry. Co.,* 196 US 539, 548.)

"The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations" *(id.,* at 191 [challenge to New Jersey statute under Due Process and Contract Clauses of the US Constitution]).

"A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator" *(Williams v Mayor,* 289 US 36, 40 [Cardozo, J.] [Equal Protection Clause challenge to Maryland statute]).

New York has long followed the Federal rationale for finding that municipalities lack the capacity to bring suit to invalidate State legislation *(see, County of Albany v Hooker,* 204 NY 1; *City of New York v Village of Lawrence,* 250 NY 429; *Robertson v Zimmermann,* 268 NY 52). As stated in *Black Riv. Regulating Dist. v Adirondack League Club* (307 NY 475, *appeal dismissed* 351 US 922): ***291**

"The courts of this State from very early times have consistently applied the Federal rule in holding that political power conferred by the Legislature confers no vested right as against the government itself. ... The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions." *(Id.,* at 488.)

The rationale was succinctly described in *Matter of County of Cayuga v McHugh* (4 NY2d 609):

"Counties, as civil divisions of a State, had their origin in England and were formed to aid in the more convenient administration of government .... So it is today that counties are mere political subdivisions of the State, created by the State Legislature and possessing no more power save that deputed to them by that body." *(Id.,* at 614.)

Moreover, our Court has extended the doctrine of no capacity to sue by municipal corporate bodies to a wide variety of challenges based as well upon claimed violations of the State Constitution *(see, Black Riv. Regulating Dist. v Adirondack League Club, supra; City of New York v Village of Lawrence, supra; County of Albany v Hooker, supra).*

Municipal officials and members of municipal administrative or legislative boards suffer the same lack of capacity to sue the State with the municipal corporate bodies they represent *(see, Williams v Mayor,* 289 US 36, *supra).* As we held in *Black Riv. Regulating Dist. v Adirondack League Club* (307 NY, at 489, *supra):*

"As we have pointed out, the district board has no special character different from that of the State. Its only purpose is to construct reservoirs and that, concededly, is a State purpose in the interest of public health, safety and welfare (Conservation Law, § 431). *Not only as a board, but also as individuals,* the plaintiffs are without power to challenge the validity of the act or the Constitution" (emphasis supplied).

The only exceptions to the general rule barring local governmental challenges to State legislation which have been identified in the case law are: (1) an express statutory authorization to bring such a suit *(County of Albany v Hooker,* 204 NY, at 9, *supra);* (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fundof ***292** moneys *(County of Rensselaer v Regan,* 173 AD2d 37, *affd* 80 NY2d 988; *Matter of Town of Moreau v County of Saratoga,* 142 AD2d 864); (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution *(Town of Black Brook v State of New York,* 41 NY2d 486); and (4) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" *(Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287 [citing *Board of Educ. v Allen,* 20 NY2d 109, *affd* 392 US 236]).

The arguments by the municipal plaintiffs favoring their capacity to sue are unpersuasive. First, they contend that our decision in *Levittown (Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27) constitutes controlling precedent in favor of their capacity to sue. As the municipal plaintiffs have virtually conceded, however, when *Levittown* reached the Court of Appeals, the State did not appeal on the capacity to sue issue. The issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the plaintiffs lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived (CPLR 3211 [a] [3]; [e]). It follows, then, that if the defense of lack of capacity to sue can be waived by merely failing to raise it, it may also be abandoned on appeal and, in fact, was abandoned by the State when its appeal in *Levittown* reached our Court. Therefore, the *Levittown* decision is not precedent for the municipal plaintiffs' capacity to sue in this case.

Alternatively, the municipal plaintiffs argue that our decision in *Community Bd. 7 v Schaffer* (84 NY2d 148) supports their capacity to sue in this case. To be sure, *Community Bd. 7* held that a municipal body's capacity to sue may arise by necessary implication. However, *Community Bd. 7* unequivocally holds that, in the absence of express authority to bring the specific action in question the plaintiff must establish a legislative intent to confer such capacity to sue by inference. "Governmental entities created by legislative enactment present similar capacity problems. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, the right to sue, if it exists at all, *must be derived from the relevant enabling legislation or some other concrete statutory predicate" (id.,* at 155-156 [emphasis ***293** supplied]). Thus, in *Community Bd. 7,* even though the plaintiff had an identifiable functional responsibility in the subject matter of the lawsuit, this Court concluded it lacked capacity to bring the suit because various inclusions or omissions in the enabling legislation negated any inference of a legislative intent to confer that power *(id.,* at 157-158).

The municipal plaintiffs have not pointed to any express statutory language or legislative history which would necessarily imply that the Legislature intended to confer upon them the capacity to bring a suit challenging State legislation. The fact that the Legislature has expressly conferred the power to sue upon the City or the City School District in furtherance of their general statutory municipal or educational responsibilities is clearly insufficient from which to imply authority to bring suit against the State itself to declare that the public school funding scheme enacted by the Legislature is unconstitutional *(see, County of Albany v Hooker,* 204 NY 1, *supra* [discussing extensively the difference between the general power to sue by a municipal corporation, and the same municipality's lack of capacity to sue its creator, the State]). Indeed, from early times municipalities have had the statutory general power to sue and be sued in their own name *(see, People v Ingersoll,* 58 NY 1, 28-31; *see also,* County Law § 51 [current authority for counties to sue in their own name]), but that power has always been limited "[i]n political and governmental matters [because] municipalities are the representatives of the sovereignty of the State, and auxiliary to it" *(People v Ingersoll,* 58 NY, at 29, *supra).* Moreover, in view of the manifest improbability that the Legislature would have intended to authorize the municipal plaintiffs to challenge the constitutionality of its own public school funding allocation formula, the evidence from "necessary implication" would have to be particularly strong to support capacity to sue here, and it certainly is not. Hence, *Community Bd. 7 v Schaffer* does not provide a precedential basis for capacity to sue here.

Next, the municipal plaintiffs argue that the lack of capacity to sue doctrine only applies to (1) statutory restrictions on a municipality's power; and (2) State-mandated compulsion to make expenditures. This contention ignores our precedents in which lack of capacity to sue has applied to block challenges to a far wider variety of State actions having differing adverse impacts on local governmental bodies and their

constituents *(see, Matter of County of Cayuga v McHugh, supra; Black Riv. Regulating Dist. v Adirondack League Club, supra;* ***294** *Robertson v Zimmermann, supra;* and *County of Albany v Hooker, supra). County of Albany v Hooker* is particularly instructive because it involved a claim quite analogous to the claims of the municipal plaintiffs in the instant case. Albany County relied upon a 1905 Amendment to the State Constitution authorizing the State to incur debts of up to $50 million for improvements to State highways (204 NY 1, 5, *supra)*. To pay the principal and interest on such debts, the amendment provided for the creation of a sinking fund made up of at least half State moneys and the remainder from counties and towns where the improvements were located. The amendment guaranteed that enabling statutes would equitably apportion the highway improvements among the counties *(id.)*. Not unlike the claim here of an unfair allocation of educational funding violating the State Constitution, in *County of Albany v Hooker,* the county challenged 1911 State legislation providing for highway improvements elsewhere in the State, as violating the constitutional mandate for equitable apportionment of highway improvements. This Court determined that the County of Albany lacked the capacity to bring the suit. We recognized that the underlying purpose of the action was to vindicate the interests and rights of the inhabitants of the county to a fair apportionment of the public moneys devoted to highway improvement *(id.,* at 17). We held in *Hooker,* however, that counties lack the capacity to sue the State to protect such rights of or redress such wrongs or injuries to their citizens *(id.,* at 14). The holding in *County of Albany v Hooker* is directly on point regarding the lack of capacity of the municipal plaintiffs to sue in the instant case.

"With no fund or property in existence, the title to which is in the county, and no funds or property in the possession of another to which the county is entitled to possession, and the entire subject being one of governmental and public policy, independent of the corporate rights of the county, the action cannot be maintained by the plaintiff, and the wrong, if any, created and existing by the acts of the legislature, must be corrected by the legislature, or by an action where the people, as distinguished from a municipal corporate body, are before the court" *(id.,* at 18-19).

The only remaining argument made by the municipal plaintiffs in favor of their capacity to sue is that they are challenging legislation which adversely affects the City's proprietary ***295** interests. Clearly, however, they fail to point to any specific fund in which they are entitled to a proprietary interest. Their claim is merely to a greater portion of the general State funds which the Legislature chooses to appropriate for public education. Accordingly, they lack a proprietary interest in a fund or property to which their claims relate and cannot ground capacity to sue on that basis *(see, County of Albany v Hooker, supra)* under the criteria set in *Matter of Town of Moreau v County of Saratoga* (142 AD2d 864, *supra)* and *County of Rensselaer v Regan* (173 AD2d 37, *supra)*. Finding a proprietary interest of the City of New York sufficient to confer capacity to sue without regard to a cognizable right in a specific fund would create a municipal power to sue the State in any dispute over the appropriate amount of State aid to a governmental subdivision or the appropriate State/local mix of shared governmental expenses. The narrow proprietary interest exception would then ultimately swallow up the general rule barring suit against the State by local governments.

Although not a point advanced by the municipal plaintiffs on this appeal, the dissent seeks to bring this case within the already noted exception to the lack of capacity to sue rule, where municipal officials contend that " 'if they are obliged to comply with the State statute they will by that very compliance be forced to *violate a constitutional proscription' "* (dissenting opn, at 298-299 [quoting *Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287, *supra]* [emphasis supplied]). The dissent fails to cite to any specific constitutional proscription", that is, *prohibition,* that the State school funding formula forces the municipal officials to violate. Surely, it cannot be persuasively argued that the City officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control *(see, Athanson v Grasso,* 411 F Supp 1153).

Thus, the municipal plaintiffs have failed to bring their claims within any recognized exception to the general rule that municipalities lack capacity to sue the State and their action must be dismissed. We decline the invitation to erode that general rule. Our adherence to that rule is not, as suggested by the dissent "a regression into formalism and rigidity" (dissenting opn, at 303). The lack of capacity of municipalities to sue the State is a necessary outgrowth of separation ***296** of powers doctrine: it expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions.

The order of the Appellate Division should be affirmed, with costs.

Ciparick, J.

(Dissenting). I respectfully dissent. If our complex, collaborative system of education is to work, and if local control and autonomy at the school district and Board of Education level is to have real meaning, the Legislature and other governmental officials responsible for maintaining the educational system cannot be immunized from accountability in a suit of this nature. The Legislature has delegated virtually all of the day-to-day responsibilities involving the provision of education and the management of educational affairs to local authorities. When these local entities are unable to fulfill their constitutional and statutory obligations because of the State's failure to carry out its own constitutional obligations, a substantive right to sue has been and must continue to be recognized *(see, Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287; *Board of Educ. v Allen,* 20 NY2d 109, 118; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 83 AD2d 217, 234, *mod* 57 NY2d 27). Accordingly, we would hold that the New York City Board of Education and the Chancellor of the City School District (school plaintiffs) have the capacity to bring this action. We also would hold that New York City and its Mayor (city plaintiffs) have capacity to bring this suit for reasons we discuss below.

This is a declaratory judgment action challenging the constitutionality and legality of New York State's current statutory methodology for financing public education. Supreme Court dismissed plaintiffs' complaint in its entirety for lack of capacity to sue. The Appellate Division agreed, reasoning that "units of municipal government, as political subdivisions created by the State, lack the capacity (with very limited exceptions not applicable here) to challenge in a lawsuit the constitutionality of State legislative enactments affecting them *(Town of Black Brook v State of New York,* 41 NY2d 486, 488; *Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287)" (205 AD2d 272, 277-278).

I.

Although courts often use the terms interchangeably, the concepts of capacity to sue and standing are distinct *(see,* ***297** *Community Bd. 7 v Schaffer,* 84 NY2d 148, 155). Capacity to sue "concerns a litigant's power to appear and bring its grievance before the court" *(id.,* at 155). Standing is "designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome" so as to cast the controversy "' "in a form traditionally capable of judicial resolution" ' " *(id.,* at 154-155 [quoting *Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761, 772]). "Capacity, or the lack thereof, sometimes depends purely upon a litigant's status" *(Community Bd. 7, supra,* at 155). For instance, an infant or an individual adjudicated incompetent may be disqualified from seeking relief in court *(id.)*.

The question of capacity to sue often arises when governmental entities, which are creatures of statute, attempt to sue. In that context, the right to sue, " if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*id.,* at 156 [citing *Matter of Pooler v Public Serv. Commn.,* 58 AD2d 940, *affd on mem below* 43 NY2d 750; *Matter of Flacke v Freshwater Wetlands Appeals Bd.,* 53 NY2d 537]).

We first address the capacity of the school plaintiffs. Plaintiff Board of Education's authority to sue is well recognized in case law. This Court has observed that the Board of Education of the City of New York is not a mere department of government, but "an independent corporate body" which "may sue and be sued in its corporate name" *(Matter of Divisich v Marshall,* 281 NY 170, 173) "in all matters relating to the control and management of the schools " *(Gunnison v Board of Educ.,* 176 NY 11, 17; *see also, Matter of Fleischmann v Graves,* 235 NY 84). As to whether the City Board of Education can sue the *State* in matters relating to the control and management of the schools, we conclude that the answer is yes based on our examination of relevant authority.

In *Board of Educ. v Allen* (20 NY2d 109), several local Boards of Education challenged the constitutionality of a State statute permitting school authorities to loan textbooks free of charge to children enrolled in parochial schools. This Court stated: "The cases holding that a public body has no standing to challenge a State statute restricting its governmental powers are not in point (e.g., *City of Buffalo v. State Bd. of Equalization,* 26 A D 2d 213; *County of Albany v. Hooker,* 204 N. Y. 1, 9-10; *Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N. Y. 475, 487; *St. Clair v.* ***298** *Yonkers Raceway,* 13 N Y 2d 72, 76, cert. den. 375 U. S. 970) " (*id.,* at 118). The reason for our conclusion, we stated, was adequately set forth in the opinion by Special Term:

"Granted there is apparent substantial authority prohibiting a municipality or agency of the State from challenging a State statute *(Black Riv. Regulating Dist. v. Adirondack League Club,* 307 N. Y. 475), but the rule could be subject to some conditions and limitations, which appear particularly appropriate in the pending matter. *A school district and its Board of Education is more than a mere agent of the State.* It is an entity performing a State purpose pursuant to the mandate of the People as directed by their Constitution. (N. Y. Const., art. XI, § 1; Education Law, § 2, subd. 14; *Matter of Divisich v. Marshall,* 281 N. Y. 170.)" *(Board of Educ. v Allen,* 51 Misc 2d 297, 299 [emphasis added].)

We further noted in *Allen* that the plaintiffs were not seeking to augment their powers, but were "asking for a court determination (in the form of a declaratory judgment) concerning whether they are legally authorized to spend public money for purposes purporting to be authorized by [the] statute", and that "[t]he right of a local Board of Education to sue the State Commissioner of Education has frequently been upheld including actions involving the question of constitutionality of State statutes. *(Matter of Board of Educ. of Cent. School Dist. No. 2 v. Allen,* 14 A D 2d 429; *Matter of Bethlehem Union Free School Dist. v. Wilson,* 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 3 v. Allen,* 6 A D 2d 316, affd. 6 N Y 2d 871.)" (20 NY2d, at 118.)

Here, as in *Allen,* school plaintiffs are not attempting to augment their powers, but instead seek a determination in the form of a declaratory judgment that the State is not in compliance with its constitutional obligations. School plaintiffs complain that the statutory scheme for funding public education fails to provide them with sufficient resources to enable them to discharge their obligations under the Education Article of the State Constitution. This case thus falls squarely within a well-defined exception to the general rule of lack of capacity to sue which arises where "municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a ***299** constitutional proscription" *(see, Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287; *Allen, supra).*

A more recent recognition of the right of local school authorities to sue the State occurred in *Levittown* (83 AD2d 217, 234, *mod* 57 NY2d 27, *supra).* The plaintiffs there were the City of New York and the Boards of Education of various property-poor school districts, including New York City, Buffalo, Rochester, and Syracuse. The State defendants challenged the plaintiffs' capacity to sue in the lower courts. The Appellate Division ruled in favor of the plaintiffs, stating:

"Two of defendants' threshold contentions--both fastening upon aspects of justiciability ... --merit summary dispatch. The various boards of education have standing to make the current challenge (see *Board of Educ. v Allen,* 20 NY2d 109, *affd* 392 US 236), and, in view of the 'expanding scope of standing' ... the school children represented by their parents have similar status" *(Levittown,* 83 AD2d 217, 233-234 [citations omitted]).

Although the *Levittown* Appellate Division used the term standing, as courts often do, the Court was clearly addressing the capacity issue as evidenced by its citation to *Allen.*

On appeal, this Court reached the merits, stating that it was our responsibility "to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches" (57 NY2d, at 39). Although the *Levittown* defendants did not argue lack of capacity before this Court, there is no question in my mind that the Appellate Division's decision, which stands for the proposition that the State can be sued in a declaratory judgment action challenging the constitutionality of the public school funding scheme, was correct and should be followed here.

In our view, the majority's extremely limited application of the general rule of lack of capacity is inappropriate here because it undermines the power and autonomy of local Boards of Education. Public education in New York is a complex, collaborative enterprise between a decentralized State authority and autonomous local districts endowed with broad powers and responsibilities for the management and control of day-to-day educational affairs:

"Our State Constitution mandates that the 'legislature shall provide for the maintenance and support ***300** of a system of free common schools, wherein *all* the children of this state may be educated' (N. Y. Const., art. XI, § 1; emphasis supplied). *The Legislature has imposed this duty in cities upon local boards of education* (Education Law, § 2554)." *(Matter of Wiltwyck School for Boys v Hill,* 11 NY2d 182, 191 [emphasis added]; *see also, Herman v Board of Educ.,* 234 NY 196, 202 ["The board of education is the agency to which the state delegates the power and duty of controlling the schools in the district"].)

The right to sue logically and necessarily derives from this statutory state of affairs. Indeed, how are local school districts to discharge their many duties if they are powerless to hold the State responsible where, as here, it is claimed that the State is failing to carry out its own constitutional mandate with respect to funding public education? For our system of education to work, there must be accountability.

Contrary to the majority's view, local school districts and Boards of Education are not mere "artificial creatures of statute" (majority opn, at 292); rather, they are substantially autonomous entities entrusted with carrying out a State purpose, and they possess broad powers and duties delegated to them by the State through Education Law § 2554. The City Board of Education is charged with the general administration and control of all aspects of educational affairs. Among other powers, duties, and responsibilities, it is empowered to create, abolish, and maintain positions, divisions, boards, bureaus, etc. (Education Law § 2554 [2]); appoint superintendents, examiners, directors, principals, teachers, nurses, etc. *(id.);* take care, custody, control and safekeeping of all school property and dispose of and sell all property (Education Law § 2554 [4], [5]); lease property for school accommodations (Education Law § 2554 [6]); purchase and furnish equipment, books, textbooks, furniture, and other supplies as may be necessary for the use of children (Education Law § 2554 [7]); establish, maintain and equip libraries and playgrounds (Education Law § 2554 [10]); and, authorize the general courses of study in schools and approve the content of such courses (Education Law § 2554 [11]). The powers and duties delegated to plaintiff Board of Education have also been delegated to plaintiff Chancellor through Education Law § 2590-h (17).

The majority's reliance on several older United States SupremeCourt ***301** decisions which merely state the general rule that municipal corporations are but agents of the State have little persuasive value in the specific context of this modern-day challenge to the constitutionality of the State's public school financing scheme *(see,* majority opn, at 290).[1] The cases cited by the majority fail to reflect the Supreme Court's more recently expressed view that local school districts are not mere arms of the State, but actually possess a significant degree of independence and autonomy which must be recognized and respected.

In *Milliken v Bradley* (418 US 717), the Supreme Court rejected interdistrict busing as a remedy for unconstitutional segregation in the Detroit, Michigan, public school system. The District Court in *Milliken,* as does the majority here, took a narrow view of local school districts as mere political subdivisions established for administrative convenience *(see, id.,* at 741). The Supreme Court soundly rejected this analytical approach as "contrary to the history of public education in our country" *(id.,* at 741). The Supreme Court noted that in Michigan, as in this State, school districts are formally considered "instrumentalities of the State and subordinate to its State Board of Education and its legislature" *(id.,* at 726, n 5). Nonetheless, while Michigan school districts were instrumentalities of the State in theory, in practice the Michigan educational structure actually endowed them with "a large measure of local control" *(id.,* at 742) over day-to-day educational affairs, as evidenced by their statutory powers to acquire real and personal property, hire and contract with personnel, borrow money, determine the length of school terms, determine courses of study, make rules and regulations for operating schools, and so on *(id.,* at 742, n 20). Thus, although school districts are, in theory, creatures of the State, the State's theoretical supremacy must sometimes give way to the realities of local control and autonomy, most especially in the area of education:

"No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community ***302** concern and support for public schools and to [the] quality of the educational process. See *Wright v. Council of the City of Emporia,* 407 U. S., at 469. Thus, in *San Antonio School District v. Rodriguez,* 411 U. S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' " *(Id.,* at 741-742.)

In *Washington v Seattle School Dist. No. 1* (458 US 457), the Supreme Court permitted a local school district to assert the Fourteenth Amendment to invalidate a State initiative aimed at banning the use of mandatory busing as a means of promoting integration in Washington's public schools. The Court acknowledged the State's formal authority over local school districts, but found it highly significant that "Washington has chosen to meet its educational responsibilities primarily through 'state and local officials, boards, and committees,' ... and the responsibility to devise and tailor educational programs to suit local needs has

emphatically been vested in the local school boards" *(id.,* at 477-478 [citations omitted]; *see also, Lawrence County v Lead-Deadwood School Dist.,* 469 US 256 [Supreme Court permitted a South Dakota county to assert the Supremacy Clause to preempt State law limiting discretion to use Federal funds]).

The Supreme Court of Kentucky has addressed the precise issue before us today, holding that local school districts have capacity to sue the legislature in the context of a constitutional challenge to the public school financing scheme *(see, Rose v Council for Better Educ.,* 790 SW2d 186, 201, n 16). Notably, the court rejected the same "sterile logic" the majority resurrects today--that local Boards of Education are creatures of the State who cannot sue the State *(id.,* at 200). We agree with the Kentucky court's reasoning that such a rule would be illogical in light of the many broad and specific powers conferred upon school districts by the legislature and the absence of any statutory restriction on the right of local boards to sue *(id.)*. The Kentucky court stated, in words that could not be more fitting here:

"The subject matter of this lawsuit is whether the General Assembly has complied with its constitutional ***303** duty to provide an 'efficient' system of common schools in Kentucky. Who is better qualified, who is more knowledgeable, who is more duty-bound, than the local school boards to raise the question? If the General Assembly is not adequately meeting its responsibility, how can the local boards meet theirs?" *(Id.,* at 200.)

As the Kentucky Supreme Court stated, "a lawsuit to declare an education system unconstitutional falls within the authority, if not the duty, of local school boards to fulfill their statutory responsibilities, no matter who the defendants are" *(id.,* at 201).

The majority's extensive quotation of *Black Riv.* (307 NY 475, *supra)* reflects a regression into formalism and rigidity (majority opn, at 291). As the majority notes, we held in that case that the plaintiff river regulating district " 'has no special character different from that of the State.' " *(Id.,* at 291 [quoting *Black Riv., supra,* at 489].) Just the opposite is true here. Local school districts and their Boards of Education have a "special character" and place in our State; they cannot be equated with the purely governmental subdivisions at issue in the cases the majority relies upon. As we stated in *Levittown:*

" 'For all of the nearly two centuries that New York has had public schools, it has utilized a statutory system whereby citizens at the local level, acting as part of school district units containing people with a community of interest and a tradition of acting together to govern themselves, have made the basic decisions on funding and operating their own schools. Through the years, the people of this State have remained true to the concept that the maximum support of the public schools and the most informed, intelligent and responsive decision-making as to the financing and operation of those schools is generated by giving citizens direct and meaningful control over the schools that their children attend' " *(Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27, 46, *supra).*

In our view, the majority's refusal to infer capacity to sue on the part of the school plaintiffs rests on a foundational premise--the State's legal supremacy--that simply cannot be reconciled with reality and actual practice. Local school districts ***304** and Boards of Education possess substantial independence and control, the significance of which must be recognized and respected rather than ignored.

II.

A governmental entity's capacity to bring suit may be inferred as a necessary incident of its powers and responsibilities, provided that no clear legislative intent negates review *(see, Matter of City of New York v City Civ. Serv. Commn.,* 60 NY2d 436, 444-445). We have stated that the authority to bring a particular claim may be inferred when the agency in question has "functional responsibility within the zone of interest to be protected" *(id.,* at 445). In *Community Bd. 7 (supra),* we concluded that the petitioner community board had such functional responsibility. The petitioner was challenging a City agency's decision denying it "access to certain documents which, arguably, might be useful *in carrying out its statutorily mandated responsibility* to study the land use proposal and to make appropriate recommendations to the Borough President and Planning Department" (84 NY2d, at 157 [emphasis added]).[2] The inquiry did not end there, however, and we ultimately concluded that even though petitioner had functional responsibilities within the "zone of interest", other factors negated the inference of capacity, including the actual "terms and history of [petitioner's] own enabling legislation" and its "limited role in the land use planning process" *(id.,* at 157).

Nonetheless, applying this inferred authority standard here, it is clear that the school plaintiffs' authority to sue defendants must be inferred as a necessary incident of their broad powers and responsibilities in all matters relating to the control and management of the schools and in light of the State's decentralized role in our educational structure. School plaintiffs satisfy the "zone of interest" test, as they possess the requisite "policy-making authority and functional responsibility" from which the capacity to sue may be inferred *(see, City of New York,* 60 NY2d, at 442; *Community Bd. 7, supra; cf., Matter of Bradford Cent. School Dist. v Ambach,* 56 NY2d 158, 163-164). Moreover, neither the majority nor defendants ***305** point to anything negating the inference of capacity on the part of the school plaintiffs in this case. To the contrary, the comprehensive nature of the school plaintiffs' powers and duties unequivocally supports a finding of capacity to sue here.

In conclusion, the City Board of Education is responsible for providing a constitutionally adequate education to the students in its charge. If, as alleged in this case, the current statutory public school financing scheme is so flawed that it effectively prevents the Board from carrying out its responsibilities within its "zone of interest", then the right to seek a declaratory judgment aimed at correcting those flaws must be inferred *(see, Community Bd. 7, supra; City of New York, supra; Board of Educ. v Allen, supra; Board of Educ., Levittown Union Free School Dist. v Nyquist,* 83 AD2d 217, *supra; Rose v Council for Better Educ., supra).*

Accordingly, we would hold that the school plaintiffs have capacity to bring this declaratory judgment action challenging the constitutionality of the public school financing system.

III.

Finally, we address the city plaintiffs' capacity to sue. The New York City Charter expressly authorizes the City to sue and be sued, and states in pertinent part:

"Except as otherwise provided in this chapter or other law, the corporation counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof" (NY City Charter § 394 [c]).

Thus, New York City, through its Corporation Counsel, may bring suit to protect and vindicate the rights, property, and revenues of the City and its citizens.

The city plaintiffs are responsible for the maintenance and support of public schools in the City School District and have distinct functional responsibilities within the zone of interest to be protected. The City is under a statutory obligation to provide substantial financial support for its school children *(see,* Education Law § 2576), and if the educational financing ***306** system is constitutionally infirm, as is alleged here, the City is obviously affected, as it is saddled with, among other things, an increased financial burden. Moreover, the New York City Charter imposes significant responsibilities on the City with respect to education *(see,* NY City Charter §§ 520-523). The city plaintiffs' capacity to bring this suit in order to protect the rights, property and revenue of the City must be inferred from these responsibilities and from its financial obligations *(see, Community Bd. 7, supra; City of New York, supra).*

Accordingly, we would reverse the order of the Appellate Division and reinstate plaintiffs' complaint in its entirety.

Judges Simons, Titone and Bellacosa concur with Judge Levine; Judge Ciparick dissents in a separate opinion in which Judge Smith concurs; Chief Judge Kaye taking no part.
Order affirmed, with costs. ***307**

Footnotes

1 We consider the majority's heavy reliance on *County of Albany v Hooker* (204 NY 1) even less persuasive. That case was decided in 1912, well before *Allen* and other cases which developed the exceptions to the general rule of lack of capacity to sue were decided, and did not even involve educational issues or school entities as plaintiffs.

2 In *Community Bd. 7* we noted that the "zone of interest" test, as used in the capacity context, "is related but not identical to the 'zone of interest' analysis that is traditionally applied in the allied area of standing" (84 NY2d, at 156).

655 N.E.2d 649, 631 N.Y.S.2d 553, 103 Ed. Law Rep. 1146

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984 F.3d 213
United States Court of Appeals, Second Circuit.

Julio CLERVEAUX, Chevon Dos Reis, Eric Goodwin, Jose Vitelio Gregorio, Dorothy Miller, Hillary Moreau, National Association for the Advancement of Colored People, Spring Valley Branch, Plaintiffs-Appellees,

v.

EAST RAMAPO CENTRAL SCHOOL DISTRICT, Defendant-Appellant.[1]

Docket No. 20-1668
|
August Term, 2020
|
Argued: August 19, 2020
|
Decided: January 6, 2021

Synopsis

Background: Interest group and minority registered voters brought action against school district, alleging that the at-large election system to elect members of the board of education resulted in minority vote dilution in violation of the Voting Rights Act. After a bench trial, the United States District Court for the Southern District of New York, Cathy Seibel, J., 462 F.Supp.3d 368, concluded that the Voting Rights Act was violated. School district appealed.

Holdings: The Court of Appeals, Pooler, Circuit Judge, held that:

[1] vote-dilution claims do not require a showing of racial causation;

[2] political science professor's methodology for estimating voter race was admissible expert testimony;

[3] the District Court was not required to give more weight to school district's expert than political science professor; and

[4] various factors in totality-of-the-circumstances analysis supported vote-dilution claim.

Affirmed.

West Headnotes (35)

[1] **Federal Courts** Questions of Law in General

The Court of Appeals is required to see to the proper application of governing legal principles under a de novo standard of review.

[2] **Federal Courts** Definite and firm conviction of mistake

A finding is clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been committed.

6 Cases that cite this headnote

[3] **Federal Courts** "Clearly erroneous" standard of review in general

The question under the "clearly erroneous" standard is not whether the reviewing court would reach the same findings from the same record.

2 Cases that cite this headnote

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

An amendment to the Voting Rights Act was enacted to make clear that a violation based on vote dilution could be proved by showing discriminatory effect alone and to adopt a "results test" as opposed to the intent test. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

If a plaintiff successfully shows that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district, (2) that it is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, the court must next assess whether the totality of the circumstances supports the plaintiff's vote-dilution claim under the Voting Rights Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The factors relevant to determining whether a totality of the circumstances supports a Voting Rights Act violation based on vote dilution include: the history of voting-related discrimination, the extent to which voting in the elections is racially polarized, the extent to which voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group are used, the exclusion of members of the minority group from candidate slating processes, the extent to which minority group members bear the effects of past discrimination, the use of overt or subtle racial appeals in political campaigns, and the extent to which members of the minority group have been elected to public office in the jurisdiction. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Two factors that are probative in some vote-dilution cases to determining whether a totality of the circumstances supports a Voting Rights Act violation are: (1) evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group, and (2) evidence that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The factors for determining whether a totality of the circumstances supports a Voting Rights Act violation based on vote dilution are neither exclusive nor comprehensive; no specified number of factors need be proved, and it is not necessary for a majority of the factors to favor one position or another. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The only facts that must be proven without exception for a vote-dilution claim under the Voting Rights Act are the following preconditions: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single member district, (2) that it is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The factors considered under the totality-of-the-circumstances stage of the analysis for whether there is a Voting Rights Act violation based on vote dilution are not strict requirements; the factors on the whole must support a vote-dilution finding, but no single specific factor or definite number of factors must be proven. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Vote-dilution claims under the Voting Rights Act do not rise or fall on racial causation; still, racial causation may be sufficient—though not necessary—to find a Voting Rights Act violation.

Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

Vote-dilution claims under the Voting Rights Act do not require a showing of racial causation; racial causation is one factor, of many, to be considered when assessing the totality of the circumstances. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[13] **Federal Courts** Expert evidence and witnesses

A district court's decision to admit expert testimony is reviewed for abuse of discretion.

1 Case that cites this headnote

[14] **Evidence** Expert Evidence

Federal Courts Expert evidence and witnesses

The question of what weight to accord expert opinion is a matter committed to the sound discretion of the factfinder, and the reviewing court will not second guess that decision on appeal absent a basis in the record to think that discretion has been abused.

1 Case that cites this headnote

[15] **Evidence** Daubert and Frye tests as to reliability in general

There is no requirement that an inquiry into reliability of expert testimony under *Daubert* take any specific form. Fed. R. Evid. 702.

[16] **Evidence** Daubert and Frye tests as to reliability in general

In assessing reliability of expert testimony, the district court may consider, in addition to the factors listed in the rule of evidence, factors enumerated in *Daubert*, some or all of which might prove helpful in determining the reliability of a particular scientific theory or technique; these factors are: (1) whether the methodology or theory has been or can be tested, (2) whether the methodology or theory has been subjected to peer review and publication, (3) the methodology's error rate, and (4) whether the methodology or technique has gained general acceptance in the relevant scientific community. Fed. R. Evid. 702.

8 Cases that cite this headnote

[17] **Evidence** Particular Experiments, Tests, and Studies

Political science professor's methodology for estimating voter race for precinct-level populations, used to determine how racial groups voted in board of education elections, could be tested, which supported admission of expert testimony in vote-dilution case, despite contention that professor failed to preserve spreadsheet needed to replicate analysis; school district's expert began replicating analysis and was able to reproduce results, and professor credibly testified that no interim spreadsheet existed. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 702.

[18] **Evidence** Particular Experiments, Tests, and Studies

Political science professor's methodology for estimating voter race for precinct-level populations, used to determine how racial groups voted in board of education elections, was subjected to peer review, which supported admission of expert testimony in vote-dilution case; there were several peer-reviewed articles, including one that proposed use of methodology for voting-rights litigation, and another article authored by one of school district's experts supported conclusion that methodology could assign race to registrants in a voter file where quantity was not present and then aggregate individuals by geographic unit such as voting

precinct. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 702.

[19] **Evidence** Particular Experiments, Tests, and Studies

Political science professor's methodology for estimating voter race for precinct-level populations, used to determine how racial groups voted in board of education elections, did not have high potential rate of error, which supported admission of expert testimony in vote-dilution case, despite contention that professor was required to generate error rates for his analysis; two studies found that self-reported race matched with race estimates over 90% of the time, and error rates were not necessary to calculate separately because methodology provided racial probabilities, and thus error rates were built into the model. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 702.

[20] **Evidence** Particular Experiments, Tests, and Studies

Political science professor's methodology for estimating voter race for precinct-level populations, used to determine how racial groups voted in board of education elections, had been generally accepted by scientific or academic community, and thus expert testimony was admissible in vote-dilution case; even if methodology was novel in voting-rights litigation, it was not otherwise novel, as there were numerous studies validating use of methodology, and case was uniquely suited for use of methodology based on fact that school district was very diverse and highly segregated. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 702.

[21] **Education** Redistricting; Voting Rights Act

Evidence Conflicts with Other Evidence

District court was not required to give more weight to school district's expert than it did to political science professor in determining best methodology for estimating voter race for precinct-level populations, used to determine how racial groups voted in board of education elections for purposes of vote-dilution case; school district's expert's data was less precise than professor's data, which was pulled from actual voter file and used information on actual voters in precinct, and school district's expert's data was overinclusive, reflecting information on all eligible voters rather than actual voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[22] **Education** Redistricting; Voting Rights Act

Voting in school district elections was racially polarized, which was factor that supported vote-dilution claim in totality-of-the-circumstances analysis, despite contention that public-private school divide, rather than race, was primary driver of election results; there was a near-perfect correlation between race and school type, such that public-school community could be viewed as vehicle for advancing distinctively minority interests, candidates did not campaign on specific policies, and only minority candidates put forward by organization, which precluded minority-preferred candidates, were those private-school community believed would be easy to control. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

A finding of vote dilution depends upon a searching practical evaluation of the past and present reality. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

A finding of racial animus on the part of individuals or communities is not necessary for a Voting Rights Act violation based on vote

dilution. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[25] **Education** Redistricting; Voting Rights Act

Leaders from private-school, Orthodox community excluded minority-preferred candidates and minority voices from slating process for candidates for board of education, which was factor that supported vote-dilution claim in totality-of-the-circumstances analysis; even though some minority candidates had appeared on private-school slate, there was no open call for candidates, only candidates with some personal connection to leaders' organization were introduced, vetted, and supported, and white, private-school community leaders found minority candidate acceptable because he would further their interests. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The focus is properly on whether minority-preferred, not simply minority, candidates have been slated in a candidate slating process, as a factor in addressing a vote dilution claim under the Voting Rights Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Consideration of the lack of minority input in a candidate slating process is both appropriate and important, as a factor in addressing a vote dilution claim under the Voting Rights Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

It is not enough that minority candidates were occasionally slated; courts must instead assess whether minorities were permitted to enter into the political process in a reliable and meaningful manner, when addressing vote-dilution claims under the Voting Rights Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Courts focus primarily on the elected office at issue, when addressing the extent to which members of the minority group have been elected to public office in the jurisdiction, as a factor for a vote-dilution claim in the totality-of-the-circumstances analysis. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Courts consider not only whether minority candidates have been elected, but whether minority residents can elect their preferred candidates, as a factor for a vote-dilution claim in the totality-of-the-circumstances analysis. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

The election of a few minority candidates does not necessarily foreclose the possibility of dilution of the Black vote, in violation of the Voting Rights Act, because majority citizens might evade the Act by manipulating the election of a "safe" minority candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[32] **Education** Redistricting; Voting Rights Act

For ten-year period, no minority-preferred candidate won a contested election for school district's board of education, which was factor that supported vote-dilution claim in totality-of-the-circumstances analysis; even though minority candidates had won some

contested races, every candidate of color who won was either considered "safe" by white slating organization or affected by special circumstances, such as need to comply with state-imposed monitor's instructions of having at least one public-school parent on board or attorney's advice that it would be good for case to have minority run. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Minority success may be discounted when it is meant to thwart successful challenges to electoral schemes on dilution grounds under the Voting Rights Act, and there is no requirement that such efforts postdate litigation. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[34] **Education** Redistricting; Voting Rights Act

Evidence Compromise or settlement

District court could rely on board of education members' actions in failing to provide minority members with accurate settlement information, when addressing whether policy underlying school district's use of the challenged practice in elections was tenuous, as a factor that supported vote-dilution claim in totality-of-the-circumstances analysis; evidence from settlement negotiations were admissible to demonstrate bad faith, and bad faith on school district's part was probative of whether school district's reasons for maintaining at-large voting were tenuous. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 408.

1 Case that cites this headnote

[35] **Evidence** Bad faith

Evidence of settlement negotiations may be used to demonstrate bad faith. Fed. R. Evid. 408.

2 Cases that cite this headnote

***218** Appeal from the United States District Court for the Southern District of New York (Seibel, *J.*)

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Before: POOLER, HALL, and CHIN, Circuit Judges.

Opinion

POOLER, Circuit Judge:

Few rights are more sacred than the right to vote. Indeed, the right to vote is preservative of all other rights, *see Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), but historically it has not been granted equally in this country. To rectify this deprivation, Congress passed the Voting Rights Act. Section 2 of that statute prohibits states or political subdivisions from structuring elections "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account ***219** of race or color," such that minority citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. In doing so, the Voting Rights Act fulfills the promise of the Fifteenth Amendment—that no citizen shall be denied the right to vote based on "race, color, or previous condition of servitude." U.S. Const. amend. XV.

East Ramapo Central School District ("District") appeals from the May 25, 2020 decision and order of the United States District Court for the Southern District of New York (Seibel, *J.*), issued following a bench trial, holding that the at-large election system used by the District to elect members

to its Board of Education ("Board") resulted in dilution of black and Latino residents' votes in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. On appeal, the District argues that: Section 2 requires a finding that racial motivations caused the election results; the district court abused its discretion in admitting and relying on Plaintiffs' expert's findings, which used data derived through Bayesian Improved Surname Geocoding ("BISG") rather than the more traditional Citizen Voting Age Population ("CVAP") data; and the totality of the circumstances does not support a finding of impermissible vote dilution.

We reject these arguments. We hold that Section 2 does not require racial causation, though the existence or absence of such causation is a relevant factor for consideration. We further hold that the district court did not err in concluding that the analysis using BISG is reliable and superior to analysis using CVAP. Lastly, we hold that the totality of the circumstances supports the finding of a Section 2 violation given the near-perfect correlation between race and school-type; the scant evidence supporting the District's claim that policy preferences, not race, caused election results; the Board's blatant neglect of minority needs; the lack of minority-preferred success in elections; the exclusive, white-dominated slating organization[2]; and evidence suggesting the District acted in bad faith throughout the litigation.

The order of the district court enjoining Board elections until the District proposes and executes a remedial plan, before us through an interlocutory appeal, is accordingly affirmed. On December 23, 2020, the District moved to stay the district court's injunction pending the resolution of this appeal. As this opinion resolves the appeal and affirms the district court's order, the District's motion is denied as moot.

BACKGROUND

I. Factual Background[3]

A. The District and Board Elections

Plaintiffs-Appellees are the Spring Valley Branch of the National Association for the Advancement of Colored People and Julio Clerveaux, Chevon Dos Reis, Eric Goodwin, and Dorothy Miller, who are minorities and registered voters in the District. Since 2008, every candidate these individuals have voted for has lost. In addition, Dos Reis and Goodwin unsuccessfully ran for the Board in 2017 with the perceived support of the public-school community, a group of residents interested in ***220** improving the conditions of public schools in the District.

The District is a highly segregated political subdivision of New York State located in Rockland County. The population in the District is approximately 65.7% white, 19.1% black, 10.7% Latino, and 3.3% Asian. During the 2017-2018 school year, approximately 8,843 students attended public schools, while 29,279 students attended private schools. The private-school community consists primarily of white Orthodox and Hasidic Jewish residents who educate their children in yeshivas, while the public-school community consists of primarily black and Latino residents whose children attend public schools. The correlation between race and school attended in the District is near perfect: 92% of public-school students are black or Latino, while 98% of private-school students are white.

The District is governed by a Board, which consists of nine members whose responsibilities include selecting the Superintendent of Schools and approving other personnel, setting the budget and levying taxes, establishing policies, and evaluating and communicating the progress and needs of the District to the public and others. As of early 2020, the Board members were: Harry Grossman, president; Sabrina Charles-Pierre, vice president; Mark Berkowitz; Carole Anderson, appointed on an interim basis due to the resignation of Bernard L. Charles, Jr.; Joel Freilich; Ashley Leveille; Yoel T. Trieger; Ephraim Weissmandl; and Yehuda Weissmandl.

Board elections are staggered so that three seats, each carrying a three-year term, are open every year (absent special circumstances, such as death or resignation of a member, in which case an extra seat may be available that year). Candidates run for a specific, individually numbered seat. The elections are at-large, meaning that all eligible voters in the District vote in each race. The following table summarizes the results of Board elections from 2008-2018 (with "W" designating white candidates, "B" designating black candidates, and "L" designating Latino candidates).[4]

***221**

Yr.	Seat 1		Seat 2		Seat 3		Seat 4	TOTAL VOTE COUNT
2008	Aaron Wieder (W) (6,261)*	Steve White (W) (2,415)	Moshe Hopstein (W) (6,543)*		Nathan Rothschild (W) (5,103)*			9,163
2009	Morris Kohn (W) (8,768)*	Leonardo Vera (L) (4,548)	Carolyn Watson (W) (566)	Margaret Hatton (W) (4,216)	Eliyahu Solomon (W) (8,578)*	Emilia White (B) (4,149)	Richard Stone (W) (9,224)*	13,708
2010	Antonio Luciano (W) (7,622)	Moses Freidman (W) (7,926)*	Stephen Price (W) (13,612)*		Suzanne Young-Mercer (B) (13,839)*			16,056
2011	Moshe Hopstein (W) (9,904)*	M. Hatton (W) (7,907)	Yehuda Weissmandl (W) (9,923)*	A. Luciano (W) (7,909)	Daniel Schwartz (W) (9,947)*	Carole Anderson (B) (7,818)	Joanne Thompson (B) (13,958)*	18,206
2012	Hiram Rivera (L) (6,315)	Jacob Lefkowitz (W) (8,474)*	Kim Foskew (W) (6,276)*	E. Solomon (W) (8,460)*	Yonah Rothman (W) (8,521)*	J. Thompson (B) (6,335)		15,091
2013	Maraluz Curado (L) (6,806)*	Margaret Tuck (B) (5,244)	Eustache Clerveaux (B) (5,085)	Pierre Germain (B) (6,899)*	Robert Forrest (B) (5,175)	Bernard Charles (B) (6,833)*		12,317
2014	M. Hopstein (W) (2,388)*		Harry Grossman (W) (2,652)*		Yakov Engel (W) (2,381)*		Y. Weissmandl (W) (2,379)*	4,998
2015	Sabrina Charles-Pierre (B) (4,600)	Jacob Lefkowitz (W) (6,380)*	Alan Jones (B) (408)	Y. Rothman (W) (6,523) *	Natashia Morales (L) (4,864)	S. White (W) (4,615)	Yisroel Eisenbach (W) (556)	Juan Pablo Ramirez (L) (6,293)*	11,694
2016	B. Charles (B) (7,973)*	K. Foskew (W) (5,972)	P. Germain (B) (7,860)*	Juan Fields (B) (4,137)	Y. Weissmandl (W) (7,626)*	N. Morales (L) (4,401))	S. Charles-Pierre (B) (5,014)*	12,311
2017	Alexandra Manigo (W) (4,964)	Mark Berkowitz (W) (9,158)*	Eric Goodwin (B) (4,930)	H. Grossman (W) (9,137)*	Joel Frielich (W) (9,530)*	Chevon Dos Reis (L) (4,503)		14,343
2018	S. Charles-Pierre (B) (9,180)*		Yoel Trieger (W) (7,179)*	Miriam Moster (W) (1,996)	E. Weissmandl (W) (6,977)*	Joselito Cintron (L) (2,308)		9,714

*Key: An * denotes the election winner, Bold denotes the incumbent candidate*

B. The Slating Organization

Influential members of the white, private-school community have an informal slating process by which preferred Board candidates are selected, endorsed, promoted, and elected. Rabbi Yehuda Oshry, an influential Orthodox community leader, selects and approves candidates, controls access to the slating process, and submits petitions on behalf of candidates. Private-school advocate Shaya Glick also helps select candidates and publicizes their candidacy. Yakov Horowitz, a leader in the Orthodox community, connects potential candidates to Rabbi Oshry and approves candidates. The slating organization (the "Organization") has secured victory for the white community's preferred candidate ***222** in each contested election. Although some minority candidates have been slated by the Organization and have won seats on the Board, minority voters did not prefer these candidates.

The Organization does not hold an open call for candidates, and only those with connections to the Organization or its leaders have been introduced, vetted, and selected. When vetted, candidates were not asked about their policy views. Multiple successful private-school candidates did not campaign or spend money to get elected; rather, they simply were approved by Rabbi Rosenfeld, Rabbi Oshry, or Glick.

For instance, Charles, a black man who won multiple Board elections after being slated by the Organization, was connected to Rabbi Rosenfeld through a mutual acquaintance. Rabbi Rosenfeld met with Charles, but he did not ask Charles about his policy platform. Rabbi Rosenfeld did, however, require interviews with Charles's running mates, and Charles needed Rabbi Rosenfeld's approval to add his running mates to his slate.

Charles's situation contrasts with that of public-school candidate and plaintiff Goodwin. Goodwin "genuinely impressed" a former Board member from the private-school community, but he was nonetheless not introduced to anyone in the Orthodox community for endorsement. Supp. App'x at 94. Charles believed that "when it comes to running for the school board ... you're either working with [the] white community or you're working with the other community." Supp. App'x at 146.

C. Minority Board Members

Minority candidates have won seven out of thirty-two contested Board elections in the District from 2005 to 2018. However, from 2008 to 2018, no minority-*preferred* candidate won a contested Board election, and each minority candidate who did win did so with the approval and support of the Organization.

Most notable are Charles and Pierre Germain, both black men who won four of the elections analyzed. Both were vetted and endorsed by the Organization. Neither candidate campaigned in, nor sought to appeal to the public-school community given that they had already secured the Organization's endorsement and with it the support of the white community. Minority voters did not support Charles and Germain. Once elected, Charles and Germain allied with private-school interests and against public-school interests. For example, Charles did not support the appointment of Charles-Pierre, a black woman, to the Board because he believed she was aligned with public-school advocates. Charles testified that Charles-Pierre was "on the opposing side" and "the lamb who will certainly lead to a slaughter of this board." Trial Tr. at 1851:5-8. While Germain supported Charles-Pierre, he told his fellow Board members that "we can have better control of Sabrina than the Spanish girl," a reference to another public-school community candidate who Germain considered "aggressive." Supp. App'x at 96-97. In addition, Charles "went along"

with the decision of other Board members to appoint a less experienced, white individual to the Board over a black retired District principal who held two master's degrees, despite the pervasive spelling and grammatical errors in the white candidate's two-paragraph application. Supp. App'x at 150.

Two other minority candidates, Maraluz Corado and Juan Pablo Ramirez, won with the support of the white community in 2013 and 2015, respectively. Both resigned from the Board shortly thereafter. The Board appointed Grossman to fill Corado's seat, choosing him over a minority candidate who had also applied to fill the seat. ***223** In appointing Grossman, the Board did not interview him publicly, as was required by the District's protocol.

The Board appointed Charles-Pierre to fill Ramirez's seat after a state-appointed monitor pressed the Board to include a public-school parent. Charles-Pierre subsequently won an uncontested election in 2016. Grossman told Charles-Pierre that Yehuda Weissmandl had said, "The only reason [Charles-Pierre] is there and ran unopposed is because the board wants to do what [the state-appointed monitor] said." *NAACP v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 393 (S.D.N.Y. 2020) (alterations in original) (internal quotation marks omitted). Charles-Pierre was reminded repeatedly that her presence on the Board was up to the whims of Grossman and the Orthodox community. For instance, when admonishing Charles-Pierre for supporting a candidate he did not like to fill a Board vacancy, Grossman told Charles-Pierre, "If there really was any desire by anybody to remove you from the [B]oard, all that would need to be done was to run a candidate against you in May .... [The] Orthodox community could just have voted you out in May. WE [sic] told them that you were good and not to run a candidate." Supp. App'x at 248. Charles-Pierre complained that the Board kept her in the dark, made her look stupid, and criticized her. In a message to other Board members, Grossman said that while Charles-Pierre "has a voice," "[r]ealistically, ... she has zero control or influence on direction." Supp. App'x at 169.

In 2019, Ashley Leveille, a black public-school candidate, won a contested race. This occurred after Grossman sent a message to Horowitz in April 2018 regarding this very litigation, saying, "Spoke to David Butler today. He asked me to convey message that it would be good for the case to have a minority to run against Sabrina that the community could support." Supp. App'x at 128. David Butler is counsel for the District in the present litigation. Originally, Leveille ran unopposed. At that time, another candidate, Pastor Jose Cintron, was collecting signatures to run for Yehuda Weissmandl's seat. Yehuda Weissmandl then decided to run again, so Cintron instead ran for the same seat Leveille sought to fill. After Cintron switched seats, Rabbi Oshry collected signatures for his campaign, and Grossman reached out to the Organization members in support of the campaign. Cintron told Leveille that if he ran against her, "they're going to give me the seat." Trial Tr. at 1776:1. Leveille understood "they" to refer to the Jewish community because Cintron told her he had been meeting with the rabbis. Accordingly, Leveille and Cintron both believed Leveille would lose. But on election day and to her surprise, Leveille won because voter turnout among the white population in the District was unusually low.

D. The Board's Favoritism Towards Private-School Interests

In 2014, a state-appointed monitor investigated the Board's activities and made the "[m]ost disturbing" finding that the "Board appears to favor the interests of private schools over public schools." Supp. App'x at 280. "Beginning in 2009[,] [the] Board made draconian spending cuts to public school programs and services in order to balance its budgets." Supp. App'x at 280. Meanwhile, "spending on programs benefitting private schools increased." Supp. App'x at 284. "No meaningful effort [was] made to distribute [the] pain of deep budget cuts fairly among private and public schools." Supp. App'x at 284. The monitor found the problem of private-school bias to be "compounded by the Board's failure to conduct meetings in an open and transparent way." Supp. App'x at 285. The monitor further observed that the District's leaders responded poorly to disapproval, branding critics as "anti-Semitic" ***224** and "political opponents." Supp. App'x at 287.

The Board's actions support the monitor's findings of favoritism towards private schools. For example, the Board closed two public schools over minority opposition and made a sweetheart deal with a yeshiva to sell it one of the closed schools at a discounted price. In addition, the Board increased nonmandated private-school services, such as transportation, without restoring public schools' budgets to pre-cut levels. In fact, from 2017 to 2019, the District paid yeshiva contractors to bus 1,172 more private-school students than were even registered to use private-school transportation services, creating $832,584 in unsubstantiated costs. The Board also made accommodations at Board meetings for Yiddish-speaking parents but did not do so for Spanish-

speaking parents, resulting in New York State issuing a corrective action plan.

The Board also repeatedly failed to respond to public-school concerns. Olivia Castor, a former public-school student now attending law school, attested to the fact that around March 2013, she had gathered and presented responses from her classmates on the quality of their education to the Board during a Board meeting. The Board did not respond, and during the presentation itself, Board members ignored Castor and gave her no attention. When Castor attempted to discuss inadequacies in students' schedules using her classmates' genuine but redacted schedules as examples, the Board accused Castor of falsifying the schedules.

In a hallway during the meeting, the Board's attorney, without provocation, directed profanity and threatening language at a seventeen-year-old black student on the honor roll. The student was distressed by the incident, and Castor informed the Board of the occurrence and requested that the attorney be removed from his position. The Board, however, did not address the incident.

Similarly, the Board failed to act timely after the former District Superintendent, Joel Klein, made derogatory comments about immigrant students. Klein stated that the influx of "illegal" immigrants from "the southern border" would skew the District's graduation rates "because we know everyone [sic] of these kids are dropping out." Supp. App'x at 238-39. Klein proposed flimsy, nonsubstantive programming for the immigrant students because according to him, the students "want to learn the language, they want free lunch, breakfast and whatever else they can get." Supp. App'x at 239. The Board nevertheless left Klein in place for more than a year after the comments were made until state-appointed monitors worked with the Board president to find a replacement.

II. Procedural History

A. Commencement of the Lawsuit

Plaintiffs filed suit on November 16, 2017. Plaintiffs challenged the District's use of at-large voting for Board elections on the ground that it denies black and Latino citizens equal opportunity to participate in the political process and elect candidates of their choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Plaintiffs requested the district court enter an order declaring the at-large method violated Section 2; enjoining the District from conducting further elections using at-large voting; ordering the implementation of a single-member ward election system; and requiring compliance with Section 2 for all future elections.

B. Expert Findings and Admissibility Challenges

1. Plaintiffs' Expert: Dr. Matthew Barreto

Dr. Matthew A. Barreto, a professor of political science at the University of California, ***225** Los Angeles, served as Plaintiffs' expert. Dr. Barreto, working with his colleague Dr. Loren Collingwood, sought "to examine whether evidence of racially polarized voting exists in elections for East Ramapo and to determine if black and Latino eligible voters have their electoral interest blocked by a combination of institutional arrangements and white bloc-voting." Supp. App'x at 351. Dr. Barreto concluded that there was "very strong evidence of racially polarized voting" in Board elections from 2013 to 2018; that minority-preferred candidates had not won a single contested election during that time; and that the electoral system in the District contains many features known to reduce minority voter participation and the opportunities to elect minority-preferred candidates. Supp. App'x at 351-52. Dr. Barreto found that blacks and Latinos voted cohesively and that whites voted in a bloc in favor of the winning candidate in each election.

To determine how groups voted, Dr. Barreto and Dr. Collingwood used ecological inference ("EI") models, which draw an inference of how groups vote based on an analysis of aggregate ecological data, such as precinct vote totals. Dr. Barreto used two EI models. The first is King's Ecological Inference ("King's EI"), and the second is row by column Ecological Inference ("EI:RxC"). Both work by "regressing candidate choice against racial demographics within the aggregate precinct" to find voting patterns by race. Supp. App'x at 409. King's EI does this by running "a 2-by-2 analysis of each candidate and each racial group, in iterations, whereas [EI:RxC] allows multiple rows and multiple columns to be estimated simultaneously." Supp. App'x at 409. Both methods were used "in tandem to provide greater confidence in results." Supp. App'x at 409.

The aggregate ecological data input into King's EI or EI:RxC can come from a few source methodologies. Dr. Barreto used BISG. In broad strokes, BISG can provide

a probability assessment of an individual's race based on the individual's surname and location. BISG does this by using Census Bureau data to determine what percentage of the national population with the individual's surname is black, white, Latino, Asian, or other. That national data is then combined with Census Bureau data pertaining to the individual's geographic "block" (which covers the geographic distance of roughly one city block) to see what percentage of the residents in that block area is black, white, Latino, Asian, or other. Combining these datapoints "provides a probabilistic prediction of individual ethnicity." App'x at 1368. "Concordance between self-reported race/ethnicity and BISG estimates is typically 90 to 96 percent for the four largest racial/ethnic groups." App'x at 1377.

Take the following illustrative example. If we sought to determine the probability that an individual with the surname Smith living in New York City was black, white, Latino, Asian, or other, we would first look at the Census Bureau data to see what percentage of individuals in the United States with the surname Smith fall into one of these groups. We then look at our specific Smith's residential block in New York City to determine what percentage of residents on this block are black, white, Latino, Asian, or other. Cross-referencing these percentages can provide a probability estimate as to whether Smith is black, white, Latino, Asian, or other.

BISG allowed Dr. Barreto to compile and input actual voter data, as opposed to using CVAP data, which is data of all eligible voters.[5] Dr. Barreto started with ***226** each voter's "file," which contains the voter's name and address. Supp. App'x at 44-45. He then used the "Who Are You" or "WRU" software, created by scholars Kosuke Imai and Kabir Khanna, "to estimate the probability that a voter is white, black, Latino, or other, using a combination of surname and geolocation." Supp. App'x at 352. This yielded a reliable estimate of each actual voter's race or ethnicity, which was aggregated at the precinct level to assess the racial composition of each precinct. Once Dr. Barreto estimated the racial composition at the precinct level, Dr. Barreto used both King's EI and EI:RxC to estimate what percentage of the white vote, the black vote, and the Latino vote each candidate in Board elections received.

2. The District's Expert: Dr. John Alford

Dr. John Alford, a professor of political science at Rice University, served as the District's primary expert. Contrary to Dr. Barreto, Dr. Alford concluded that the evidence does not support a finding of minority voter cohesion or legally significant, racially polarized voting in the District. While Dr. Alford also used EI, he used CVAP for the source data. As mentioned above, CVAP data consists of "a precinct-level summary of the racial breakdown of the eligible voter population." App'x at 1073. CVAP data comes from the American Community Survey, which is completed by two percent of the population, for each of five years, creating "what's called a 10 percent sample." Trial Tr. at 256:14-257:2 (internal quotation marks omitted). CVAP data provides racial composition within Census Bureau geographic blocks, but these geographic blocks do not align with precinct boundaries.

3. The District Court's Admissibility Determination

Before trial, the District moved to exclude Dr. Barreto's expert testimony. The district court issued an oral decision finding the testimony admissible and denying the motion. While the District made numerous arguments as to the reliability of BISG data, the district court repeatedly noted that these arguments went to the weight of the evidence as opposed to its admissibility. The district court further informed the parties that it would make its decision as to reliability following trial.

As to admissibility, the district court addressed each of the four factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). With respect to the first factor—whether the theory or technique could be tested—the district court concluded that it could. The District's primary argument was that Dr. Barreto had not turned over all the materials necessary to replicate his analysis. But the district court dismissed this argument, pointing out that "one of the District's experts was able to get the script to run on the 2015 voter data but was never asked to complete the EI analysis." App'x at 896-97; *see also* Supp. App'x at 15-16 (one of the District's experts testifying that he "ran the script" and "got it to run"). The district court also found that Dr. Alford admitted to being able to independently run the analysis.

With respect to the second factor—whether the theory or technique has been subject to peer review—the district court found that the use of BISG on precinct-level voter data had been peer reviewed. It cited to an article authored by scholars Imai and Khanna, which proposed the use of BISG for voting rights litigation. With respect to the third factor—

the error rate of the methodology—the district court found the methodology to be admissible given the strong concordance, from ninety ***227** to ninety-six percent, between self-reported race and BISG estimates.

With respect to the fourth factor—whether the methodology has been generally accepted by the academic or scientific community—the district court did not explicitly address the factor. The district court discussed academic articles involving the use of BISG; the District argued these articles did not support Plaintiffs' use of BISG, but the district court found that the helpfulness of the articles goes to their weight of persuasiveness, not their admissibility.

Ultimately, the district court concluded that there "are indications of scientific reliability supporting the opinions' admissibility," and "Plaintiffs have made a sufficient showing that I should hear the testimony and give it whatever weight I find it deserves." App'x at 893. Accordingly, the district court admitted Dr. Barreto's testimony and determined that it would revisit how much weight to give the testimony following the trial.

C. The Trial

A bench trial was held across the span of seventeen days. The witnesses at trial included the parties' experts, Dr. Barreto and Dr. Alford; members of the public-school community; Plaintiffs; former and current Board members; and influential private-school community leaders involved in slating, such as Hersh Horowitz and Rabbi Oshry.[6]

D. The District Court's Decision

Following the bench trial, the district court ruled in favor of Plaintiffs, holding that the at-large Board elections violated Section 2 and resulted in impermissible vote dilution for black and Latino residents.

In reaching this conclusion, the district court relied on the testimony of Dr. Barreto and discounted the testimony of Dr. Alford, primarily because it considered the analysis using BISG to be superior to that using CVAP. Accordingly, the district court concluded that, as Dr. Barreto found, the District's black and Latino communities were politically cohesive and that the white majority votes as a bloc in Board elections such that no minority-preferred candidate won a contested election since 2008.

The district court also found several Board members and witnesses associated with the private school community not credible. For instance, the district court concluded that Grossman "seems to have no compunction about compromising his legal obligations when it suits his purposes." *NAACP*, 462 F. Supp. 3d at 396. Grossman was impeached at least three times. He also testified that he was not aware of any slating organization in the District, but numerous pieces of testimony indicated that he clearly participated in slating with Horowitz, Oshry, and Glick. In addition, the district court found Yehuda Weissmandl not credible. He denied the existence of a slating organization and testified unconvincingly that a text message he sent saying that he "personally got the blessing for [their] slate" through an influential Rabbi's son was not about the Board slate. Supp. App'x at 85. Weissmandl testified that he "[didn't] know what [he] was referring to." Supp. App'x at 86. Weissmandl similarly testified that, despite having ***228** sent an email with the note, "[P]lease respond ASAP as we discussed" and "one choice" in connection with filling a Board vacancy, he did not know what he meant by "one choice." Trial Tr. at 1125:1-22. Weissmandl was impeached twice.

The district court also found the totality of the circumstances weighed firmly in Plaintiffs' favor. In relevant part, while the district court found no evidence of official discrimination in the District and no overt or subtle racial appeals in campaigning, it concluded that the racially polarized voting in the District was not explained by policy preferences. The district court also found that an exclusive slating process tightly controlled by a few white individuals existed in the District. The district court further concluded that while there had been some minority success in elections, the only minority candidates who had won were those perceived as "safe" by the Organization, while other minority-preferred candidates had not succeeded. *NAACP*, 462 F. Supp. 3d at 409-10. The district court also found that white Board members had lied to minority Board members about settlement negotiations regarding this lawsuit and considered this evidence of some Board members' bad faith in wanting to maintain the at-large voting system.

As a result of Plaintiffs' success in proving a Section 2 violation, the district court enjoined the District from holding any further elections under its at-large system, including the

election that was scheduled to take place in June 2020. The District timely appealed.

DISCUSSION

[1] **[2]** **[3]** "[The] resolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court. And while we are required to see to the proper application of governing legal principles under a *de novo* standard of review, we are constrained to apply a clearly erroneous standard of review to the district court's ultimate findings of vote dilution, thereby preserving the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Goosby v. Town Bd.*, 180 F.3d 476, 492 (2d Cir. 1999) (internal quotation marks, brackets, and citation omitted). A finding is clearly erroneous only if the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Atlantic Specialty Ins. Co. v. Coastal Envt'l Grp., Inc.*, 945 F.3d 53, 63 (2d Cir. 2019) (internal quotation marks omitted). As Chief Justice Roberts recently acknowledged in a concurrence:

> The question is not whether we would reach the same findings from the same record. These District Court findings entailed primarily ... factual work and therefore are reviewed only for clear error. Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts. While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living.

June Med. Servs. L.L.C. v. Russo, —— U.S. ——, 140 S. Ct. 2103, 2141, 207 L.Ed.2d 566 (2020) (Roberts, *C.J.*, concurring) (internal alterations, citations, and quotation marks omitted).

Section 2 of the Voting Rights Act provides in its entirety that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of ***229** the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

[4] Congress amended the Voting Rights Act in 1982 to clarify that plaintiffs need not prove intent to discriminate. *Id.*; *see also Thornburg v. Gingles*, 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). The Supreme Court, in a decision two years before the amendment, held that minority voters must prove that state actors had adopted or maintained the challenged electoral mechanism with discriminatory intent. *See Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Congress acted in 1982 to "make clear that a violation could be proved by showing discriminatory effect alone" and adopting a "results test" as opposed to the intent test used in *Bolden*. *Gingles*, 478 U.S. at 35, 106 S.Ct. 2752; *see also* S. Rep. No. 97-417, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 179, 205 (hereinafter "1982 Senate Report") ("*[T]he specific intent of this amendment* is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose. ... If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section." (emphasis added) (footnotes omitted)).

The Supreme Court set forth the framework for analyzing claims of unlawful vote dilution in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25. There, a majority of the Court held that a plaintiff must establish three "necessary preconditions" when bringing a Section 2 vote dilution claim: (1) "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single member district"; (2) "that it is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S.Ct. 2752.

[5] **[6]** **[7]** If a plaintiff successfully shows the *Gingles* preconditions, the court must next assess whether the totality of the circumstances, based on the following factors, supports the plaintiff's claim:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; ***230** the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 44-45, 106 S.Ct. 2752 (citing 1982 Senate Report at 28-29). These factors (the "Senate Factors") come from the Senate Judiciary Committee Report accompanying the passage of the 1982 amendment. Two other factors in the Senate Judiciary Committee Report (the "Additional Factors") are also probative in some cases: (1) "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group"; and (2) evidence "that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous." *Id.* at 45, 106 S.Ct. 2752.

[8] This list of nine factors is "neither exclusive nor comprehensive." *Goosby*, 180 F.3d at 492. "[N]o specified number of factors need be proved, and [ ] it is not necessary for a majority of the factors to favor one position or another." *Id.* "[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* (internal quotation marks and citation omitted).

In the present case, the District first argues that Section 2 requires a showing that racial motivations caused the election results at issue. Second, the District contends that Plaintiffs have failed to show the second and third *Gingles* preconditions, which includes a challenge to the district court's decision to admit and find reliable Dr. Barreto's expert analysis and testimony. Third, the District argues that Plaintiffs failed to demonstrate that a totality of the circumstances supports their claim because Senate Factors 2, 4, 7, and Additional Factor 9 weigh in favor of the District, not Plaintiffs. We address each argument in turn.

I. There is no requirement that a plaintiff must prove racial animus to establish a Section 2 vote-dilution claim.

Our Circuit considered an argument similar to that the District makes here in *Goosby v. Town Board*, 180 F.3d at 493. There, the defendant Town Board of the Town of Hempstead, New York ("the Town Board") argued that political partisanship, and not race, explained the adverse election results. *Id.* Therefore, the Town Board claimed that the white bloc voting patterns in the elections could not be legally significant under the third *Gingles* precondition. *Id.* Our Circuit acknowledged that the splintered *Gingles* Court left open the issue of what role causation plays in Section 2 analyses following Congress's 1982 amendment. We held that the best reading of the Court's various opinions in *Gingles* counsels for consideration of alternative causal explanations like the Town Board's political-partisanship claim "under the 'totality of the circumstances' analysis rather than as part of the third *Gingles* precondition." *Id.*

The District, however, is not concerned with where in the analysis causation is analyzed. Instead, the District urges us to hold that a plaintiff bringing a Section 2 Voting Rights Act claim must prove, at some point, that racial animus caused the challenged election result. Appellants' Br. at 37 ("There must be evidence that *racial* ***231** *animus is a but-for cause of election results* ...." (emphasis in original)).

[9] **[10]** That is not so. The District's argument rests on a fundamental misunderstanding of our precedent, Supreme Court precedent, and the framework for Section 2 claims. *See Gingles*, 478 U.S. at 47, 106 S.Ct. 2752; *id.* at 100-01, 106 S.Ct. 2752 (O'Connor, *J.*, concurring); *Goosby*, 180 F.3d at 491-92; 1982 Senate Report at 15-16, 27-28, 36-37. The only facts that must be proven without exception for a Section 2 claim are the *Gingles* preconditions; this is why they are termed "preconditions." All three preconditions are necessary, but are not sufficient, for a Section 2 violation. Those factors considered under the totality-of-the-circumstances stage of the analysis, on the other hand, are not strict requirements. The factors on the whole must support a vote-dilution finding. But no single specific factor or definite number of factors must be proven. *See Goosby*, 180 F.3d at

492. Nor must a majority of the factors favor the plaintiff for a Section 2 claim to succeed. *Id.* When combined with the *Gingles* preconditions, any one factor or combination of factors may be sufficient, but are not necessary in whole or part, for a Section 2 violation.

[11] *Goosby* holds that the absence or existence of racial causation is a factor properly considered at the totality-of-the-circumstances step. *Id.* at 493 ("We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions but relevant in the totality of circumstances inquiry." (citation omitted)); *see also Lewis v. Alamance County, N.C.*, 99 F.3d 600, 615 n.12 (4th Cir. 1996) (causation is relevant to the totality of the circumstances inquiry and irrelevant when considering the *Gingles* preconditions); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (non-racial reasons for divergent voting patterns to be considered under totality of circumstances test); *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (courts consider racial and non-racial explanations for community voting patterns under the totality of the circumstances). Causation is just one of many factors courts consider in determining whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. Section 2 claims do not rise or fall on racial causation.[7] Still, racial causation may be sufficient—though not necessary—to find a Section 2 violation.

This understanding is in accordance with the legislative intent as well. A causation ***232** requirement would entail demonstrating that racial animus caused the election results at issue. Indeed, the District's primary argument on appeal is that at-large voting for Board elections does not violate Section 2 because of the absence of " 'racial animus' on the part of Orthodox Jewish voters." Appellant's Br. at 26. But Congress rejected precisely such a showing when it drafted the 1982 amendments. Congress considered "the intent test [to be] unnecessarily divisive because it involves charges of racism on the part of individual officials *or entire communities*." 1982 Senate Report at 36 (emphasis added); *see also* Christopher S. Elmendorf, *Making Sense of Section 2*, 160 U. Pa. L. Rev. 377, 424 (2012) (explaining that the 1982 amendments addressed what Congress "found objectionable in the *Bolden* plurality's intent requirement" and that "[r]elief under Section 2 ought not to require 'brand[ing] individuals as racist' " (quoting 1982 Senate Report at 36)). The legislative record flatly contradicts the District's assertion that Congress only rejected the intent test for officials and still sought to require proof of " 'race-based motivation' on the part of the electorate who exploit the challenged practice." Appellant's Br. at 31 (emphasis omitted). Contrary to the District's claims, requiring a showing of racial causation would contravene Congress's unmistakable intent.

For this reason, the District's reliance on *Bostock v. Clayton County*, —— U.S. ——, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020), is not persuasive. The District focuses on Section 2's language prohibiting the denial or abridgement of the right to vote "on account of race or color" and argues that similar language in Title VII (which prohibits discrimination "because of" sex) was interpreted in *Bostock* to require but-for causation, *see Bostock*, 140 S. Ct. at 1739. As an initial point, the District fails to acknowledge that the Supreme Court has elsewhere interpreted "because of" language to *not* require proof of race-based intent in the Title VII context. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (recognizing that Title VII claims may be proved based on a disparate impact). Regardless, however, the Supreme Court has "not hesitated to give a different reading to the same language—whether appearing in separate statutes or in separate provisions of the same statute—if there is strong evidence that Congress did not intend the language to be used uniformly." *Smith v. City of Jackson*, 544 U.S. 228, 260-61, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, *J.*, concurring in the judgment). Here, the unique context of the Voting Rights Act and Congress's clear desire not to require a showing of racial animus indicate that "on account of race or color" should not be interpreted to require but-for causation.

[12] In sum, our precedent and the legislative history make manifest that Section 2 claims do not require a showing of racial causation. Racial causation is one factor, of many, to be considered when assessing the totality of the circumstances. *Goosby*, 180 F.3d at 493. The existence of such causation may be sufficient for a Section 2 violation, but it is not necessary. *See id.* at 492, 493.

II. The second and third *Gingles* preconditions are met.

The District next contends that Plaintiffs failed to adduce sufficient evidence to satisfy the second and third *Gingles* preconditions of whether black and Latino residents voted cohesively and whether the white majority voted as a bloc

to defeat minority-preferred candidates. Specifically, the District argues that the district court improperly admitted and relied on the testimony ***233** and findings of Dr. Barreto, Plaintiffs' expert, establishing that black and Latino residents were politically cohesive and that white residents voted as a bloc.

[13] **[14]** **[15]** We review the district court's decision to admit Dr. Barreto's expert testimony for abuse of discretion. *See* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Restivo v. Hessemann*, 846 F.3d 547, 575 (2d Cir. 2017).[8] Similarly, "[t]he question of what weight to accord expert opinion is a matter committed to the sound discretion of the factfinder, and we will not second guess that decision on appeal absent a basis in the record to think that discretion has been abused." *Pope v. County of Albany*, 687 F.3d 565, 581 (2d Cir. 2012).

A. The district court did not abuse its discretion in admitting Dr. Barreto's testimony.

[16] "In assessing reliability, the district court should consider the indicia of reliability identified in [Federal Rule of Evidence] 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case." *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007) (internal quotation marks and citation omitted). In addition to these factors, the district court may consider those enumerated in *Daubert*, "some or all of which might prove helpful in determining the reliability of a particular scientific theory or technique." *Kumho*, 526 U.S. at 141, 119 S.Ct. 1167 (internal quotation marks omitted) (citing *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786). These factors are: (1) whether the methodology or theory has been or can be tested; (2) whether the methodology or theory has been subjected to peer review and publication; (3) the methodology's error rate; and (4) whether the methodology or technique has gained general acceptance in the relevant scientific community. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786.

Although the District argues that the BISG methodology fails to satisfy the *Daubert* test, the district court properly considered the *Daubert* factors and did not exceed its discretion by admitting Dr. Barreto's expert testimony.

1. Whether the methodology could be tested

[17] Turning to the first *Daubert* factor, the District argues that Dr. Barreto's analysis "cannot be tested," is "unprecedented," and claims that he "destroyed his bespoke data sets before trial." Appellant's Br. at 56-57. The district court rejected these arguments and correctly concluded that the BISG methodology Dr. Barreto used could be tested. This is borne out by the fact that one of the District's experts, Dr. Stevenson, began replicating the analysis as to the 2015 voter data and was able to get the scripts to run and reproduce the results, *NAACP*, 462 F. Supp. 3d at 391, though he was never asked to complete the full EI analysis. Dr. Alford also indicated that he could have independently run the ***234** BISG model. Additionally, the district court described how Dr. Barreto "validated his analysis using other methodologies," and that all five of these validation methods "supported his conclusions." *Id.* at 385.

Although the District on appeal claims that Dr. Barreto failed to preserve "a spreadsheet whose rows identified voters by surname, address, and race probabilities" needed to replicate his analysis, Appellant's Br. at 55, the district court found that Dr. Barreto credibly testified that no such spreadsheet exists. Dr. Barreto explained that no "interim printout of BISG race estimates" existed because "[t]hose are just generated in the background of the [WRU] program, and as those BISG estimates get generated, they then just get plugged into the precincts and then the precinct analysis is done." Supp. App'x at 54. Dr. Barreto testified that he had "turned over everything that [he] ran and detailed how the script could be used to generate those race estimates." Supp. App'x at 54. Given that the District's experts admitted to being able to replicate the analysis and the absence of evidence as to any requisite interim spreadsheet, the district court properly concluded that the BISG methodology could be tested.

2. Whether the methodology had been peer-reviewed

[18] Turning to the second *Daubert* factor, the district court properly concluded that the use of BISG to estimate voter race for precinct-level populations has been subjected to peer review. The district court supported this finding by referencing several peer-reviewed articles, *see* *NAACP*, 462 F. Supp. 3d at 383, including one written by Imai and Khanna that proposed the use of BISG for voting-rights litigation. As Dr. Barreto explained, the purpose of this article was "to

see if [the BISG methodology] could improve our estimates of race and ethnicity *at the precinct level*." Supp. App'x at 49 (emphasis added); *see also* App'x at 1372 ("We now estimate voter turnout by racial category and validate our estimates against actual turnout by race at the *precinct* and congressional district levels in Florida." (emphasis added)). Imai and Khanna were successful and concluded that BISG "enables academic researchers and litigators to conduct more reliable ecological inference in states where registered voters are not asked to report their race." App'x at 1374. The district court found that Dr. Barreto "applied BISG in the manner proposed in the academic literature." *NAACP*, 462 F. Supp. 3d at 384.

Other evidence, such as a footnote in an article co-authored by one of the District's experts, also supports the conclusion that BISG could "assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by geographic unit *such as a voting precinct*." App'x at 1276 n.21 (emphasis added).[9] Thus, the district court did not err in finding that the BISG methodology as used by Dr. Barreto had been subjected to peer review.

3. The error rate

[19] Turning to the third *Daubert* factor, the District argues that the BISG methodology has a high potential rate of error. This is untrue. The district court discussed two studies finding that "self-reported race matched with ... BISG race estimate[s]" over 90% of the time: one study found that the probability was 95% for Hispanics and 93% for blacks and ***235** whites and the other found a range of 90-96%. *NAACP*, 462 F. Supp. 3d at 383. The District does not challenge this concordance finding but instead argues that Dr. Barreto did not calculate error ranges when using BISG to estimate racial probability of District voters.

The District fails to understand how the BISG methodology works. As the district court recognized, error rates are not necessary to calculate separately in the BISG analysis because BISG provides racial *probabilities*—that is, the likelihood that an individual is black, white, Latino, or other. As such, error rates are "built into the model." App'x at 969.[10] While miscoding (i.e., improperly coding a white person as having a higher probability of being black, or vice versa) can occur, Dr. Barreto said that this had "no impact on the conclusions [he drew] at all" because he followed "the prescribed methodology of aggregating those probabilities down to a precinct." Supp. App'x at 56. In other words, Dr. Barreto was "not attempting to look at one individual on the file and say this person is black, white, or Hispanic. ... So where there might be an error, the literature suggests that those things often cancel out and that's why you aggregate the probabilities and then your estimates are extremely accurate." Supp. App'x at 56. Accordingly, the District's assertion that Dr. Barreto was required to generate error rates for his analysis is unfounded. The district court properly found that the strong concordance between BISG results and self-reported race or ethnicity supports the reliability of Dr. Barreto's methodology.

4. Whether the methodology has been generally accepted by the scientific or academic community

[20] Finally, while the use of BISG may be novel in voting-rights litigation, it certainly is not otherwise novel. The record is replete with studies validating the use of BISG, which the district court cited in finding the methodology reliable. The district court found that BISG "has been extensively validated by experts," and that "[m]any respected scholars have used and validated BISG in the political science context and across a variety of disciplines." *NAACP*, 462 F. Supp. 3d at 383**;** *see also id.* at 392 ("The method has been endorsed by respected social scientists in leading publications."). Although the district court acknowledged "[t]his may be the first time that voter-preference estimates based on BISG have been admitted into evidence at a VRA trial," *id.* at 392, the court thoughtfully considered how this case was uniquely suited for the use of BISG data based on the fact that the District was very diverse and highly segregated: "BISG is particularly reliable for use in the District because of its unique characteristics," *id.* at 384. While this may indeed be the first time that the BISG methodology was admitted at a VRA trial,[11] as the district court aptly explained, "[t]here must always be a first time." *Id.* at 392. This is especially true when the new method is superior to ***236** the old method with respect to the case at hand. *See id.* at 387 ("[G]iven the unique characteristics of the District, BISG is a better data set than CVAP for use as an input for ecological inference, and Dr. Barreto therefore used the superior methodology."). There is more than enough evidence indicating the acceptance of the BISG methodology in the scientific or academic community.

In conclusion, because the district court has significant latitude in deciding how to determine reliability, *see Restivo*, 846 F.3d at 575-56, and because the district court conducted a thorough review of the *Daubert* factors, *see NAACP*, 462

F. Supp. 3d at 382-92; *see also* App'x at 885-903 (district court's oral ruling on *Daubert* motions), the district court did not abuse its discretion in admitting Dr. Barreto's expert testimony.

B. The district court did not abuse its discretion by according more weight to Dr. Barreto's expert testimony than it did to Dr. Alford's expert testimony.

[21] The district court ultimately relied on Dr. Barreto's testimony and discounted Dr. Alford's, finding that "given the unique characteristics of the District, BISG is a better data set than CVAP for use as an input for ecological inference, and Dr. Barreto therefore used the superior methodology." *NAACP*, 462 F. Supp. 3d at 387. As discussed above, we review for abuse of discretion the weight a district court assigns to expert testimony. *Pope*, 687 F.3d at 581.

Here, the district court's ultimate decision to give greater weight to Dr. Barreto's testimony was not an abuse of discretion, and the factual findings underpinning its determination were not clearly erroneous. As the district court explained, it found the BISG data set more reliable than CVAP for three main reasons. *NAACP*, 462 F. Supp. 3d at 387-88.

First, CVAP data is less precise than BISG data because CVAP data comes from the American Community Survey which contains all eligible voters in a district, whereas BISG data is pulled from the actual voter file. CVAP data is derived from a sample of only approximately ten percent of the population, *see* Trial Tr. 256:14-257:2, thus, applying that data to the entire district population requires extrapolation. That may yield inaccurate results. Dr. Barreto's BISG methodology uses data as to the actual voters in the District, so no such extrapolation would be required. This makes BISG a more reliable and precise data set.

Second, CVAP data is less precise than BISG data because of geographic misalignment between CVAP data and the data needed for analyzing voting patterns in a precinct. CVAP data provides racial proportions within census block groups, but census blocks are smaller geographically than precincts, *see* Brian Amos, Michael P. McDonald, Russell Watkins, *When Boundaries Collide*, 81 Pub. Opinion Q. 385, 387 (2017), thereby causing a misalignment. Because BISG data, however, uses information on actual voters in the precinct, the BISG methodology generates racial probabilities at the precinct level, making it superior for analyzing voting patterns in a precinct.

Finally, CVAP data is overinclusive. Because CVAP data reflects information on all *eligible* voters, rather than *actual* voters like BISG does, CVAP data overestimates voter turnout. Even Dr. Alford acknowledged flaws with using CVAP data as a proxy for voter turnout. Dr. Alford cited Dr. Barreto's research on the turnout-estimation issues with CVAP data and explained that using some form of double equation regression or double equation EI ***237** could have addressed those issues. However, there is no evidence that Dr. Alford applied any such double equation regression or EI. Even if he had, Dr. Barreto testified that CVAP "still start[s] with an incorrect input variable" of "all citizen adults," so that issue would not have been cured. Supp. App'x at 175.

Any one of these three reasons, which are all supported by sound factual findings drawn from sufficient record evidence, suffices to support the district court's conclusion that BISG is the superior data set, at least in this case. Therefore, the district court did not abuse its discretion by concluding Dr. Barreto's expert testimony and analysis was more reliable than that of Dr. Alford.

In sum, because Dr. Barreto's expert findings of political cohesion amongst black and Latino voters and of a white voting bloc are admissible and reliable and were afforded greater weight than those of Dr. Alford, the district court did not clearly err in concluding that Plaintiffs have adduced sufficient evidence to establish the second and third *Gingles* preconditions.

III. Senate Factors 2, 4, 7, and Additional Factor 9 weigh in favor of Plaintiffs.

The District's final contention is that Plaintiffs failed to demonstrate that a totality of the circumstances supports their vote-dilution claim. On appeal, the District does not challenge the district court's findings as to Senate Factors 1, 3, 5, 6, and Additional Factor 8. Those findings, in any event, are fully supported in the record. The District challenges only the district court's findings that Senate Factors 2, 4, 7, and Additional Factor 9 weigh in Plaintiffs' favor.

A. Senate Factor 2

[22] Senate Factor 2 requires courts to consider "the extent to which voting in the elections of the State or political subdivisions is racially polarized." *Goosby*, 180 F.3d at 491 (quoting *Gingles*, 478 U.S. at 44-45, 106 S.Ct. 2752). It is under this factor that racial causation or alternative explanations, such as partisanship, are properly considered. *Id.* at 493.

The District argues, as it did before the district court, that the primary driver of election results is not race, but rather, the public-private school divide. The District claims that a majority of voters prefer policies, such as lower property taxes and increased benefits to private-school students, that private-school candidates support.

[23] The district court did not clearly err when it found that the Board election results were caused by race and not policy preferences. There is a near-perfect correlation between race and schooltype. While correlation is not necessarily causation, the circumstances indicate that schooltype is a proxy for race. Those policies favorable to the private-school community come at the cost of the public-school community. This is apparent from facts in the record, including the Board's closure of two public schools over minority opposition; the Board's subsequent attempt to sell one of the school's buildings to a yeshiva at a deep discount; and the increase in nonmandated private-school transportation while public school cuts were left unrestored. It defies reality to say that those who vote for private-school-friendly policies would be ignorant that the brunt of these policies is borne by minority children. And a finding of vote dilution "depends upon a searching practical evaluation of the past and present *reality*." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (emphasis added) (internal quotation marks and citation omitted). ***238** Given this evidence, the public-school community "can be viewed as a vehicle for advancing distinctively minority interests." *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 861 (5th Cir. 1993).

In addition, as the district court found, there is scant—if any—evidence that Board candidates campaigned on specific policies, a fact that seriously undermines the District's policy-preferences argument. There is no evidence in the record to suggest that private-school candidates campaigned on specific pro-private-school policies, to the extent that they campaigned at all, and there is no evidence that public-school candidates advocated for raising taxes or cutting private-school services. The District does not dispute the absence of this evidence and instead argues that campaigning on particular policies was unnecessary because the voters knew what policies the private-school candidates supported. Even if the voters assumed what the private-school candidates stood for, the leaders who slated these candidates did not ensure that candidates aligned with their policy views. Multiple candidates slated by the Organization testified that they were not asked about their policy positions; the Organization essentially selects election winners by virtue of adding them to the private-school slate. The fact that candidates were not asked about policy positions casts serious doubt on the argument that policy preferences drove election results.

More broadly, the existence of an organization that has precluded minority-preferred candidates itself supports the finding that Factor 2 weighs in favor of Plaintiffs.[12] In *Goosby*, we found it probative that "blacks simply are unable to have any preferred candidate elected to the Town Board, given the historical success of the Republican party in all Town Board elections" because no black candidate, besides a "black crony" of the County Chairman, had been slated by the Republican party. 180 F.3d at 496. Here, too, the only minority candidates put forward by the Organization are those the private-school community believed would be easy to control. *See*, *e.g.*, Supp. App'x at 96 (Germain reading an email he wrote in which he indicated he would support Charles-Pierre because "we can have better control of Sabrina than the Spanish girl"); Supp. App'x at 248 (Grossman telling Charles-Pierre that "[i]f there really was any desire by anybody to remove you from the [B]oard, all that would need to be done was to run a candidate against you in May").

Furthermore, the record is replete with evidence that the private-school-run Board was chronically unresponsive to public-school concerns. When a public-school student approached the Board about deficiencies in public-school students' schedules, she was accused of lying and ignored. Supp. App'x at 474-78. The Board also neglected to act after its attorney threatened an innocent student. It likewise dilly-dallied when the former District Superintendent made seemingly derisive comments about immigrant students, leaving the Superintendent in place for over a year despite condemnation from the public-school community and taking action only when the monitor intervened. Moreover, the Board routinely favored private-school students over public-school students. And though the Board cut public-school services in the name of budget balancing, it paid yeshiva contractors to bus 1,172 more ***239** students than registered, yielding unsubstantiated expenses to the tune of $832,584. We must agree with the state-imposed monitor that such blatant

favoritism on the part of the Board is "[m]ost disturbing." Supp. App'x at 280. The Board's lack of responsiveness further supports rejecting the policy-preferences argument. *See* *Goosby*, 180 F.3d at 497.

[24] When taken together, the evidence supports the district court's finding in favor of Plaintiffs on Senate Factor 2. The near-perfect correlation between race and school-type, along with the political realities in the District, suggest that "the majority is voting against candidates for reasons of race." *See* *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 (2d Cir. 1995).[13] Additionally, the dearth of evidence that candidates campaigned on specific policies, the Organization's slating process that excludes minority-preferred candidates, and the Board's unresponsiveness to public school concerns all support the conclusion of the district court that the election results are "not best explained by" policy preferences. *Goosby*, 180 F.3d at 497 (internal quotation marks omitted).[14]

B. Senate Factor 4

[25] The fourth Senate Factor assesses, "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752. The district court found that leaders from the private-school, Orthodox community run an exclusive slating process with no input from minorities. There is no open call for candidates, and only candidates with some personal connection to the Organization are introduced, vetted, and supported by it. Even public-school candidates considered impressive by private-school community members were denied an opportunity to be slated. And to the extent any minority candidates were slated, they were either not minority-preferred, perceived to be "safe," or the result of unusual circumstances, as discussed with respect to Senate Factor 7. The slated candidates always prevailed in contested elections. As a result, the district court concluded that "blacks and Latinos did not have the opportunity to participate in the private school slating process, which was tightly controlled by a few white individuals." *NAACP*, 462 F. Supp. 3d at 406.

The District does not challenge the existence of the slating process on appeal. Instead, the District argues that minority candidates have appeared on the private-school slate, and that this is all that is required. According to the District, the district court's focus on the lack of input from minorities and the failure to slate minority-preferred candidates was erroneous. ***240** The District points to Bernard Charles as evidence that minority candidates were actively involved in the slating process, and it reiterates its policy-preferences argument to justify the failure to slate minority-preferred candidates.

[26] We first take up the District's argument that the lack of minority input and the failure to slate minority-preferred candidates are irrelevant facts. In light of the governing precedent, this argument falls flat. Our Circuit made clear in *Goosby* that the focus is properly on whether minority-preferred, not simply minority, candidates have been slated. *See* 180 F.3d at 496 (stressing that the failure to slate black candidates meant that "blacks simply are unable to have any *preferred* candidate elected to the Town Board" (emphasis added)).

[27] **[28]** Additionally, Supreme Court precedent indicates that consideration of the lack of minority input is both appropriate and important. In *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), the Court focused on evidence showing that black residents were "generally not permitted to enter into the political process in a reliable and meaningful manner" such that a finding of vote dilution was proper. *Id.* at 767, 93 S.Ct. 2332. And the *Gingles* Court emphasized that courts reviewing vote-dilution claims must take a functional view of the political process. *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752. For these reasons, it is not enough that minority candidates were occasionally slated. Courts must instead assess, as the district court did in this case, whether minorities were "permitted to enter into the political process in a *reliable* and *meaningful* manner." *White*, 412 U.S. at 767, 93 S.Ct. 2332 (emphases added).

Here, the largely uncontested facts that the district court relied on, such as the failure to conduct open calls for candidates, the inside connections necessary to be slated, the vetting process, and the use of only "safe" or politically or legally expedient minority candidates, all support the finding that minority candidates and residents were denied meaningful access to the slating process. These facts underscore the significant control of the white private-school leaders over the slating process, which worked to exclude minority interests and viewpoints from the slate and ultimately the Board.

Bernard Charles's situation does not alter this conclusion. Although Charles was accepted by the Organization after being vetted, Charles testified that Rabbi Rosenfeld's approval to add running mates to the slate was required. Thus,

Charles's involvement in slating was nominal. Regardless, however, any say Charles had in the selection of his running mates is a slender reed upon which to lean. The evidence suggests that the white, private-school community leaders found Charles acceptable because he would further *their* interests. Charles's situation thus does not undermine the finding that minorities were effectively excluded from the slating process. In *Goosby* as well, we discounted the slating of a black candidate because he was selected over a minority-preferred candidate and was a "crony" of the chairman. *Goosby*, 180 F.3d at 496; *cf. Velasquez v. City of Abilene*, 725 F.2d 1017, 1022-23 (5th Cir. 1984) (considering "relevant and substantial" any evidence "that the minority candidates slated by [an organization] were not true representatives of the minority population in the city of Abilene").

As for the District's claim that policy preferences explain why minority-preferred candidates were not slated, we reject this argument for the same reasons given with respect to Senate Factor 2. The candidates approved for the private-school slate, such as Charles, were not asked ***241** about any specific policy platforms before being slated, and there is no evidence that public-school candidates advocated for increasing taxes or decreasing private-school services while campaigning.

For these reasons, the district court did not err in concluding that the Organization excludes minority-preferred candidates and minority voices from the slating process. Senate Factor 4 weighs in favor of Plaintiffs.

C. Senate Factor 7

[29] **[30]** **[31]** Senate Factor 7 considers "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752. We focus primarily on the elected office at issue. *See Goosby*, 180 F.3d at 497. We consider not only whether minority candidates have been elected, but whether minority residents can "elect *their preferred candidates*." *Id.* at 495-97 (emphases added) (discounting the placement of a black attorney on Town Board and minority success in exogenous elections because the candidates were not preferred by black residents). Similarly, "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote, in violation of this section," because "majority citizens might evade the section ... by manipulating the election of a 'safe' minority candidate." 1982 Senate Report at 29 n.115 (internal quotation marks and citation omitted). The Senate Report cites favorably to *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973), which held that minority success may be discounted if it results from "politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election" or efforts to "thwart successful challenges to electoral schemes on dilution grounds."

[32] The district court concluded that this factor weighs in favor of Plaintiffs because, although minority candidates have won some contested races, between 2008 and 2018, no minority-preferred candidate won a contested election. The court held that "every candidate of color who won was either perceived as 'safe' by the white slating [O]rganization or affected by special circumstances." *NAACP*, 462 F. Supp. 3d at 409.

The District challenges this conclusion on two grounds. First, the District argues that the district court erroneously focused on whether minority-preferred candidates, as opposed to minority candidates, have succeeded. Second, it argues that the district court misapplied the safe-candidate doctrine. We reject both grounds.

The District's belief that the subject of our inquiry is minority candidates, not minority-preferred candidates, is wrong as a matter of law. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution." *Zimmer*, 485 F.2d at 1307. And contrary to the District's assertion, the text of Section 2 expressly focuses on whether "members have less opportunity than other members of the electorate to participate in the political process and to elect representatives *of their choice*." 52 U.S.C. § 10301(b) (emphasis added). Consistent with this language, our Circuit in *Goosby* discounted election results when minority, but not minority-preferred, candidates prevailed. 180 F.3d at 495-97. Therefore, the district court properly focused on whether minority-preferred candidates were successful.

The district court also did not err in finding that the successful minority candidates have been perceived as "safe" or ***242** otherwise resulted from unusual circumstances. The district court primarily discussed four candidates in its analysis: Charles, Germain, Charles-Pierre, and Leveille.

Charles and Germain, two black men who won four of six contested elections, were heavily vetted and slated by the Organization. They were not minority-preferred candidates. Once elected, they aligned with the white majority and took positions counter to minority interests. For instance, Charles did not support the appointment of Charles-Pierre because she was "on the opposing side," Trial Tr. at 1851:5-8, and Germain only supported her because he thought the Board could maintain "better control" of Charles-Pierre than the other public-school candidate, whom he dubbed "the Spanish girl," Supp. App'x at 96-97. In addition, Charles went along with Board members' choice to appoint a less qualified white applicant with an error-riddled application over a black candidate with two master's degrees and extensive experience. The district court thus properly discounted Charles and Germain's election, just as the *Goosby* Court discounted the election of a slated black candidate not preferred by the black community who then failed to respond to the community's needs.

Charles-Pierre was selected after Board members recognized that they needed to follow the state-imposed monitor's instructions of having at least one public-school parent on the Board. After her election, Grossman constantly reminded Charles-Pierre that she could be removed at the Orthodox community's will, and he believed she had "zero control or influence." Supp. App'x at 169. Because this evidence indicates that Charles-Pierre was selected to assuage the state monitor, it was appropriate to discount her election as well. *See Zimmer*, 485 F.2d at 1307 (explaining that minority success attributable to politicians who support minority candidates because it is "politically expedient" would not undermine a vote-dilution finding).

The latest successful minority candidate, Leveille, was elected in 2019. The district court found that her election was "engineered," *NAACP*, 462 F. Supp. 3d at 406, a finding supported by the record. In 2018, counsel for the District suggested that "it would be good for th[is] case to have a minority to run against [Charles-Pierre] that the community could support." Supp. App'x at 128.[15] Originally, Leveille and another minority candidate, Pastor Cintron, were running unopposed for different seats. When Yehuda Weissmandl decided to run again for the seat Cintron was running for, Cintron switched to run against Leveille. The Organization purported to support Cintron. Cintron told Leveille that the rabbis promised him the election if he ran against Leveille, and both he and Leveille believed he would win. But because voter turnout was unusually low at polling places in white areas, Leveille won. These facts more than adequately support the district court's finding that the victory was engineered.

[33] The District does not challenge these facts in arguing that the district court erred. Instead, it argues that the district court misapplied the safe-candidate doctrine, which it says "allows courts to discount suspicious elections of a minority candidate *after a Section 2 case has been* ***243** *filed*." Appellant's Br. at 42. But this assertion has no basis in the case law. *Zimmer*, the precedent upon which Congress and the Supreme Court relied for the safe-candidate doctrine, contains no such requirement. *Zimmer* states that minority success may be discounted when it is meant to "thwart successful challenges to electoral schemes on dilution grounds" without any requirement that such efforts postdate litigation. *See Zimmer*, 485 F.2d at 1307.

For these reasons, the district court did not err in focusing on minority-preferred candidates' success and in finding that the successful minority candidates were perceived as safe. Thus, Senate Factor 7 weighs in favor of Plaintiffs.

D. Additional Factor 9

The final factor at issue is Additional Factor 9, which asks "whether the policy underlying the ... political subdivision's use of ... [the challenged] practice or procedure is tenuous." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752. The district court held that this factor favors Plaintiffs because, although the District reasonably believed that it was required by state law to use at-large voting, "there is evidence that the dominant Board members and the Organization have a desire to adhere to the current system despite its discriminatory effect and went to extraordinary lengths to preserve that system to maintain political power." *NAACP*, 462 F. Supp. 3d at 416. The district court relied on facts such as the District's witnesses' disingenuity, the apparent engineering of Leveille's victory, and Board members' failure to give the Board's public-school representatives accurate settlement information. *Id.* at 416-17. As to the settlement discussions, Grossman affirmatively misled minority Board members such as Charles-Pierre and Leveille. When asked why Board members needed to go to court, Grossman said it was because "Judge [Seibel] wants to talk/yell at us" and that the district court "wants to force us to do what the NAACP wants," when in fact it was to attend a settlement conference. D. Ct. Dkt. No. 553-1 ¶ 9. Leveille was also left off emails and other communications pertaining to settlement proposals. D. Ct. Dkt. No. 551-3 ¶¶ 6-8.

[34] The District does not challenge the district court's credibility findings or reliance on Leveille's election, facts which in any event are substantiated in the record. Nor does the District challenge the factual finding that Board members were affirmatively misled about settlement negotiations. The District's only argument as to Additional Factor 9 is that the district court improperly relied on out-of-court settlement negotiations to reach speculative presumptions about Board members' motivations.

[35] There was nothing improper about the district court's reliance on the Board members' actions in failing to provide minority Board members with accurate settlement information. Evidence pertaining to settlement negotiations may be used when "offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim." Fed. R. Evid. 408 advisory committee's note to 2006 amendment. Accordingly, evidence of settlement negotiations may be used to demonstrate bad faith. *Id.* (citing *Athey v. Farmer's Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000)). And bad faith on the District's part is probative of whether the District's reasons for maintaining at-large voting are tenuous. The district court thus appropriately relied on this evidence and correctly concluded that Additional Factor ***244** 9 favors Plaintiffs.[16]

CONCLUSION

For the foregoing reasons, the order of the district court is affirmed. As mentioned above, the District's motion for a stay of the district court's injunction is dismissed as moot.

All Citations

984 F.3d 213, 385 Ed. Law Rep. 83, 114 Fed. R. Evid. Serv. 679

Footnotes

1 The Clerk of Court is directed to amend the caption to the above.

2 A slate is a list of candidates for nomination or election. We use the term "slating organization" to refer to a group that designates candidates for a slate.

3 These facts are drawn from the district court's decision and order, supplemented as necessary by the record.

4 The summary table was referenced in the district court's decision and order.

5 Barreto did, however, use CVAP data to cross-check his BISG analysis.

6 According to the district court, "leading up to and during trial, Rabbi Oshry went to great lengths to avoid testifying." *NAACP*, 462 F. Supp. 3d at 404 n.49. In fact, the district court initially found Oshry in contempt for his failure to appear and testify at trial as instructed. *Id.* The district court purged the contempt order and vacated the warrant when Oshry finally appeared. *Id.*

7 Some of our sister circuits have similarly expressed that courts may consider evidence of racial causation in resolving Section 2 claims but that such causation is not required to succeed on Section 2 claims. *See Lewis*, 99 F.3d at 615 n.12 (explaining that causation is "relevant" to the totality of the circumstances inquiry); *Nipper*, 39 F.3d at 1524 (explaining that "a violation of Section 2 may be established ... without proof of discriminatory intent" but that an inquiry into causation may be relevant when the record suggests that "disparate electoral results [are] principally caused by a factor other than race" (footnote omitted)). Legal scholars have categorized our Circuit as one of the many that permit, but do not require, consideration of racial causation. *See* Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 614-15 (2016) (explaining that, in many circuits, racial causation "is only one consideration among many to be weighed, either as part of the *Gingles* analysis or at the totality-of-the-circumstances stage." (footnotes omitted)).

8 The District argues that we should apply de novo review because the district court did not analyze the *Daubert* factors. The District mischaracterizes the record. Although it did not explicitly cite *Daubert* by name, the district court did in fact address the *Daubert* factors when it rendered an oral decision on the District's pretrial motion to exclude Dr. Barreto's

expert testimony. To the extent the District considers this oral decision insufficient to satisfy the district court's gatekeeping role, we disagree. There is no requirement that an inquiry into reliability take any specific form. *See* *Restivo*, 846 F.3d at 576 (explaining the *Daubert* inquiry is a "flexible one" (internal quotation marks omitted)).

9 Although the author of this footnote testified at trial that it was aspirational, the district court did not credit this testimony because it contradicted his published work. This determination was not an abuse of discretion. *See* *Pope*, 687 F.3d at 581.

10 The District points to the Imai and Khanna article as evidence that BISG studies in the literature include error rates. But the Imai and Khanna study was meant to validate whether BISG gave accurate predictions, and it was for this end that error rates were generated in that study.

11 At least one other court has found such evidence reliable enough to be admitted in a case involving a Section 2 challenge to an at-large voting system. *See* *United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 612-13 (E.D. Mich. 2019). This case, however, was resolved by consent decree before trial, *see* No. 17-CV-10079, 2019 WL 2647355 (E.D. Mich. June 26, 2019), *motion for relief from judgment denied*, 2020 WL 127953, at *1 (E.D. Mich. Jan. 10, 2020).

12 Although consideration of slating organizations is the focus of Senate Factor 4, discussed below, the presence of a well-established slating organization can be probative of racial polarization.

13 We note, as the district court explicitly did, that this finding does not suggest "that the white bloc voters harbor conscious racial animus." *NAACP*, 462 F. Supp. 3d at 400. As we explained previously, a finding of racial animus on the part of individuals or communities is not necessary for a Section 2 violation. Accordingly, to the extent the District argues that its "Jewish residents are not White supremacists," Appellant's Br. at 81, that fact has no bearing on our analysis.

14 We also reject the District's suggestion that purportedly anti-Semitic comments made by Plaintiff Goodwin and public-school candidate Steven White explain why voters rejected public-school candidates. While the state-imposed monitor found it typical of the Board to brand critics as anti-Semitic, we pass no judgment on whether that is what the District is doing in making this argument here. Even assuming arguendo their comments could be interpreted as anti-Semitic, Goodwin ran for a Board seat once and White ran twice. At most, then, these comments contributed to the defeat of minority-preferred candidates in three out of thirty-two contested races analyzed.

15 The fact that the District's counsel purportedly gave this "advice" to the District is deeply troubling. Considering Section 2 case law directs courts to look past such disingenuous ploys, it is bad legal advice. More disturbing, however, is that the advice appears to be directed at aiding the District in flouting the well-established and clear intent of the Voting Rights Act. Such deceptive posturing has no place in the legal profession.

16 To the extent the District argues that its reasons are not tenuous because it has a legitimate basis for at-large elections, that argument is meritless. In *Goosby*, there was no evidence that at-large voting was implemented for discriminatory purposes, and some legitimate bases for maintaining that system were offered at trial. 180 F.3d at 488, 490. But we nonetheless agreed with the district court that the Town Board sought to "cling" to at-large voting for improper reasons. *Id.* at 497.

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New York Official Reports

94 N.Y.2d 1, 720 N.E.2d 850, 698
N.Y.S.2d 574, 1999 N.Y. Slip Op. 08345

Michael Cohen et al., as Members of the New York State Legislature, Respondents,

v.

State of New York, Appellant.

Court of Appeals of New York
145
Argued August 24, 1999;

Decided October 14, 1999

CITE TITLE AS: Cohen v State of New York

SUMMARY

Appeal, on constitutional grounds, from a judgment of the Supreme Court (Richard D. Huttner, J.), entered May 24, 1999 in Kings County, declaring chapter 635 of the Laws of 1998 unconstitutional as violative of the separation of powers doctrine and article III, § 6 of the New York State Constitution.

Cohen v State of New York, 180 Misc 2d 643, reversed.

HEADNOTES

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Prospective Alteration of Salaries

(1) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, is not facially unconstitutional, does not violate article III, § 6 of the State Constitution, and does not breach the governmental separation of powers doctrine. In seeking facial nullification, plaintiffs, legislators who were in office and voted against chapter 635 and others who were not yet in office, bear the burden of demonstrating that in any degree and in every conceivable application, the challenged law suffers ***2** wholesale constitutional impairment; however, the Constitution lays no constraint on the authority of one Legislature by enactment of general law to make provision prospectively for allowances to be received by the officers and members of the two houses during a succeeding legislative term, and the withholding-of-salary protocol is general, purely prospective, and does not suffer from the potentiality that legislators' votes might be manipulated by promises of reward or threats of punishment effectuated through changes in salaries or allowances. Moreover, the statutorily authorized temporary withholding of net payments of legislative salaries operates by force of law and off a neutral pivot.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Fixing of Salaries by Law

(2) By chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, the Legislature prospectively "fixed by law" an annual salary for its members (*see,* NY Const, art III, § 6). The law imposes a discipline within the Legislative branch itself regarding the timing and method of only its own net compensation, and does not interject an all-or-nothing infirmity, because the "contingent" nature of its adopted timing-of-payment formula does not "un-fix" the salary, in constitutional terms. The Legislature holds the constitutional key prospectively to authorize that legislators' salaries be paid in one final lump sum at the end of a legislative session--after the work of that branch has concluded and all its responsibilities discharged. Since it may do that, it surely could do what chapter 635 prescribes, which is a lesser of the greater power. This is particularly so since the release of net checks and realization of payment is accomplished simply by passage of an annual State budget, a principal constitutional duty prescribed for each legislative session. Thus, chapter 635 can in no way be viewed as a facial abridgement of the protections and specifications of article III, § 6 of the State Constitution; on the contrary, it satisfies the constitutional payment mandate, and serves as an

incentive to complete constitutional budget obligations in a timely fashion.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Separation of Powers

(3) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, does not violate the principle of separation of powers; rather, it adds procedural oil to the delicately calibrated mechanism by which a budget is enacted. The Legislature, as a branch of government, must have "finally acted on" the appropriations submitted by the Governor before individual legislators may be paid, and that inducement does not require that the Legislature pass the Governor's budget; only that it pass some budget. The plaintiffs in this case, legislators who were in office and voted against chapter 635 and others who were not yet in office, sue as individuals, not as the Legislative branch of government; however, it is the correlative oversight of each lawmaking branch over one another--in essence a dependency, rather than a separation--that balances the overall ***3** power to protect the public's interests, not those individuals who occupy the offices of those branches at varying times. Although chapter 635 pinpoints a particular interdependence of the Legislature and Executive with respect to the budget-making process, it does not impermissibly merge or shift the powers between those two branches. In the end, the Legislature always does the legislating. It is institutional interdependence, rather than functional independence that best summarizes the idea of protecting liberty by fragmenting power.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Separation of Powers

(4) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, does not violate the principle of separation of powers, and even assuming that the law does recalibrate some of the negotiating leverage between the Legislative and Executive branches of government, that shift has occurred as a direct result of the Legislature's own bicameral action. Its official work was done qua branch of the government, and the Legislature has decided to restrict itself and discipline its own work and power in this fashion; that is not a cognizable separation of powers problem. Without a State budget or without messages of necessity and interim authorizations or continuing concurrent resolutions, no State expenditures could be made to anyone, including legislators. Thus, after a fiscal year concludes, and until a new budget is passed for the following year, the payment of compensation to legislators is inescapably contingent and dependent upon the extant Executive's discretionary powers. Chapter 635 does not create or result in "extortionate economic pressure," since there is no substantially different economic duress created by chapter 635 than that which is inherent in the ordinary lawmaking process, budget-related and otherwise. When the plaintiffs, legislators who were in office and voted against chapter 635 and others who were not yet in office, object to "economic pressure," they are essentially attacking the fundamental, albeit rambunctious, realities of the political structure and process, including how public monies shall be allocated; however, no basis within the judicial review function supports the extraordinary superintendence and judicial nullification of chapter 635 that plaintiffs facially seek.

Constitutional Law
Validity of Statute
Statute Withholding Legislators' Salaries until State Budget is Passed-- Role of State Comptroller

(5) Chapter 635 of the Laws of 1998, which provides that if the Legislature has not passed a State budget by the first day of any fiscal year, then the salaries of its members shall be withheld and not paid until legislative passage of a State budget has occurred, whereupon the legislators shall receive the pay which had been withheld, does not inject an unconstitutional delegation of power to the State Comptroller, who is authorized to determine if the budget is "sufficient for the ongoing operation and support of state government and local assistance," since the Comptroller's

defined involvement fits within and fulfills his independent fiscal role as a vital part of the constitutional machinery for assuring accountability in the expenditure of State funds. By chapter 635, the Legislature has plainly confirmed the Comptroller's customary responsibility for ensuring the availability of ***4** revenues that would be expended through the enacted appropriations bills, and this reinforcement in no way authorizes the Comptroller to "determine" when legislators shall be paid. Rather, that determination remains exclusively within the control, timing and power of the bicameral Legislature itself, acting as a branch of government when it enacts a timely budget, as is its constitutional duty.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Constitutional Law, §§ 109, 112, 113, 123, 246, 250, 258-260, 264-266, 270, 275, 288, 289, 293; States, Territories, and Dependencies, §§ 62, 64.

McKinney's, NY Const, art III, § 6.

NY Jur 2d, Constitutional Law, §§ 42, 43, 151, 155, 160, 162-164, 175, 176, 186; State of New York, §§ 19, 21, 22, 131.

ANNOTATION REFERENCES

See ALR Index under Legislature; Separation of Powers; States.

POINTS OF COUNSEL

Eliot Spitzer, Attorney General, Albany (*Preeta D. Bansal, Peter H. Schiff, Victor Paladino* and *Julie M. Sheridan* of counsel), for appellant.

I. Chapter 635 of the Laws of 1998 complies with article III, § 6 of the State Constitution. (*Dunlea v Anderson,* 66 NY2d 265; *New York Pub. Interest Research Group v Steingut,* 40 NY2d 250; *Finn v City of New York,* 282 NY 153; *Civil Serv. Empls. Assn. v Regan,* 71 NY2d 653; *United Cerebral Palsy Assns. v Cuomo,* 966 F2d 743, 506 US 999; *McGowan v Burstein,* 71 NY2d 729; *Caplin & Drysdale v United States,* 491 US 617; *Matter of Altamore v Barrios-Paoli,* 90 NY2d 378; *Matter of Roske v Keyes,* 46 AD2d 366; *National Assn. of Ind. Insurers v State of New York,* 89 NY2d 950.) II. Chapter 635 is consistent with the doctrine of separation of powers and does not interfere with the Legislature's deliberative process. (*Bourquin v Cuomo,* 85 NY2d 781; *Matter of Nicholas v Kahn,* 47 NY2d 24; *Rapp v Carey,* 44 NY2d 157; *People ex rel. Burby v Howland,* 155 NY 270; *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo,* 64 NY2d 233; *Loving v United States,* 517 US 748; *Boreali v Axelrod,* 71 NY2d 1; *Matter of County of Oneida v Berle,* 49 NY2d 515; *Saxton v Carey,* 44 NY2d 545; *Matter of Broidrick v Lindsay,* 39 NY2d 641.) III. Chapter 635 does not interfere ***5** with respondents' First Amendment rights. (*Clarke v United States,* 886 F2d 404, 915 F2d 699; *Bond v Floyd,* 385 US 116; *Miller v Town of Hull,* 878 F2d 523, 493 US 976.) IV. Chapter 635 does not impair any contractual right to be paid in violation of article I, § 10 of the United States Constitution. (*Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 940 F2d 766, 502 US 1058; *Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 79 NY2d 39; *Dodge v Board of Educ.,* 302 US 74; *Cook v City of Binghamton,* 48 NY2d 323; *Matter of Handy v County of Schoharie,* 244 AD2d 842; *Pennsylvania R. R. Co. v State of New York,* 11 NY2d 504; *People ex rel. City of New York v Nixon,* 229 NY 356; *Levy Leasing Co. v Siegel,* 258 US 242; *Kinney v Connecticut Judicial Dept.,* 974 F2d 313; *Condell v Bress,* 983 F2d 415, 507 US 1032.) V. The Comptroller's limited role under chapter 635 does not violate the State Constitution or the separation of powers of doctrine. (*Matter of McCall v Barrios-Paoli,* 93 NY2d 99; *Blue Cross & Blue Shield v McCall,* 89 NY2d 160; *Matter of Crosson v Regan,* 192 AD2d 109; *Matter of New York Cent. R. R. Co. v Tremaine,* 243 App Div 181; *City of New York v State of New York,* 40 NY2d 659; *People ex rel. Grannis v Roberts,* 163 NY 70; *County of Rensselaer v Regan,* 151 Misc 2d 552, 173 AD2d 37, 80 NY2d 988; *Wein v State of New York,* 39 NY2d 136; *Wein v Carey,* 41 NY2d 498; *Matter of Altamore v Barrios-Paoli,* 90 NY2d 378.) VI. Respondents are not denied property without due process. (*Alliance of Am. Insurers v Chu,* 77 NY2d 573; *Board of Regents of State Colls. v Roth,* 408 US 564.)

Kaye, Scholer, Fierman, Hays & Handler, L. L. P., New York City (*James D. Herschlein* and *Phillip A. Geraci* of counsel), and *Wolfson & Carroll (John W. Carroll* of counsel), for respondents.

I. Chapter 635 of the Laws of 1998 violates article III, § 6 of the State Constitution. (*New York Pub. Interest Research Group v Steingut,* 40 NY2d 250.) II. Chapter 635 violates the separation of powers doctrine. (*Matter of County of Oneida v Berle,* 49 NY2d 515; *Matter of King v Cuomo,* 81 NY2d 247.) III. Chapter 635 unconstitutionally delegates authority to the Comptroller. (*County of Rensselaer v Regan,* 151 Misc 2d 552, 173 AD2d 37, 80 NY2d 988; *Matter of Big Apple Food Vendors' Assn. v Street Vendor Review Panel,* 90 NY2d 402; *Matter of Levine v Whalen,* 39 NY2d 510; *Matter*

of Chemical Specialties Mfrs. Assn. v Jorling, 85 NY2d 382.) IV. Chapter 635 punishes the legislators for expression protected by the First Amendment. (*Bond v Floyd,* 385 US 116; *Clarke v United* ***6** *States,* 886 F2d 404, 915 F2d 699.) V. Chapter 635 violates the legislators' rights against impairment of contracts under article I, § 10 of the United States Constitution. (*Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 79 NY2d 39; *United States Trust Co. v New Jersey,* 431 US 1; *Fisk v Jefferson Police Jury,* 116 US 131; *People ex rel. City of New York v Nixon,* 229 NY 356; *Haley v Pataki,* 883 F Supp 816; *Association of Surrogates & Supreme Ct. Reporters within City of N. Y. v State of New York,* 940 F2d 766, 502 US 1058.) VI. Chapter 635 deprives the legislators of their property in violation of the Due Process Clauses of the Federal and State Constitutions. (*Board of Regents of State Colls. v Roth,* 408 US 564; *Sniadach v Family Fin. Corp.,* 395 US 337; *Toney v Burris,* 829 F2d 622; *Lynch v United States,* 292 US 571.)

OPINION OF THE COURT

Bellacosa, J.

(1) This appeal by the State comes directly to this Court (CPLR 5601 [b] [2]) from a Supreme Court judgment of unconstitutionality of chapter 635 of the Laws of 1998. The Act is challenged solely on a facial basis. We reverse and declare the statute constitutional. It does not violate article III, § 6 of the State Constitution, nor does it breach the governmental separation of powers doctrine. Also, it does not impinge on other constitutional protections asserted by plaintiffs.

I.

On December 18, 1998, the Legislature passed and the Governor approved chapter 635. It states in pertinent part:

"1. ... if legislative passage of the budget as defined in subdivision three of this section has not occurred prior to the first day of any fiscal year, the net amount of any such bi-weekly *salary installment payments to be paid on or after such day shall be withheld and not paid until such legislative passage of the budget has occurred* ....

"3. 'Legislative passage of the budget', solely for the purposes of this section ... shall mean that the appropriation bill or bills submitted by the governor ... have been finally acted on by both houses of the legislature in accordance with article seven of the state constitution and the state comptroller has ***7** determined that such appropriation bill or bills that have been finally acted on by the legislature are sufficient for the ongoing operation and support of state government and local assistance for the ensuing fiscal year" (L 1998, ch 635, §§ 1, 2, amending Legislative Law § 5 [emphasis added]).

Plaintiffs include individuals who were in office and voted against passage of chapter 635, and others who were not yet in office at the time of its passage. These 14 individuals started a hybrid CPLR article 78/declaratory judgment lawsuit in April 1999 seeking: (1) a declaration of unconstitutionality of chapter 635; (2) a declaration of the unconstitutional nature of certain of the Governor's actions; and (3) a permanent injunction against the withholding of legislative salaries. During the course of the litigation in the nisi prius court, plaintiffs limited their case to a pure declaratory judgment action, with requested relief directed solely at the constitutionality of the statute. The submissions of the respective parties were treated accordingly as cross motions for summary judgment.

Supreme Court held that chapter 635 violated the separation of powers doctrine and article III, § 6 of the New York State Constitution, but did not identify any particular constitutional provision as the flaw in its separation of powers conclusion.

The State defendants answer with six appellate arguments. They demonstrate cogently that: (1) chapter 635 complies with article III, § 6 of the New York State Constitution; (2) it conforms to separation of powers principles; (3) the specified role given to the Comptroller does not constitute an unconstitutional delegation of responsibility; (4) the statute does not interfere with plaintiffs' First Amendment rights; (5) it does not impair their Federal Contracts Clause rights; and (6) it does not violate plaintiffs' due process rights.

At this appeal stage of the controversy, we take judicial notice that the 1999-2000 budget negotiations concluded in early August 1999 with Legislative concordance and Gubernatorial acquiescence; Comptroller certification that the appropriations bills were sufficient to cover the State's approved expenditures followed, within hours after enactment.

II.

This Court's well-established review power with respect to matters of this kind marks the boundaries of the analysis required to decide this appeal. Because the plaintiffs seek facial ***8** invalidation of chapter 635, they must initially

overcome the presumption of constitutionality accorded to all enactments of a co-equal Branch of government (*see, Dunlea v Anderson,* 66 NY2d 265, 267-268; *see generally, City of New York v State of New York,* 76 NY2d 479; *Hotel Dorset Co. v Trust for Cultural Resources,* 46 NY2d 358; *see also, National Assn. of Ind. Insurers v State of New York,* 89 NY2d 950, 952 [quoting *Alliance of Am. Insurers v Chu,* 77 NY2d 573, 585]). In seeking facial nullification, plaintiffs bear the burden to demonstrate that "in any degree and in every conceivable application," the law suffers wholesale constitutional impairment (*McGowan v Burstein,* 71 NY2d 729, 733).

Statutes are quintessentially the product of the democratic lawmaking process. These threshold hurdles are, therefore, erected in the public interest to provide a prudent set of procedural safeguards for enactors and defenders of statutes. They are set in place doctrinally and precedentially because of a fundamental premise that "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature ..., the elective representatives of the people" (*Matter of Wolpoff v Cuomo,* 80 NY2d 70, 79).

This Court's application of these principles, within standard constitutional review perspectives, convinces us that Supreme Court's decision fails to adhere to these rigorous considerations.

III.

Our analysis examines first a threshold component affecting this case-- article III, § 6 of the State Constitution. It provides in pertinent part:

"Each member of the legislature shall receive for his services a like annual salary, to be fixed by law ... Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation."

This Court has examined the constitutionality of earlier legislative salary arrangements in relation to this fixed star. In *New York Pub. Interest Research Group v Steingut* (40 NY2d 250), the Court invalidated the system of awarding allowances to legislators for varied services in a particular fiscal year, as part of the budget process in that same year. This Court recognized that: ***9**

"the *prohibition against increases and decreases* in legislators' compensation and emoluments *during their terms of office* would serve two salutary purposes-- (1) to avoid a conflict of interest by removing from legislators the authority to vote themselves financial benefits at the expense of the public treasury, and (2) to forestall the possibility of manipulation of legislators' votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances" (*New York Pub. Interest Research Group v Steingut, supra,* at 258 [emphasis added]).

Significantly, the Court held that "the Constitution lays no constraint on the authority of one Legislature by enactment of general law to make provision *prospectively* for allowances to be received by the officers and members of the two houses during a succeeding legislative term or terms" (*New York Pub. Interest Research Group v Steingut, supra,* at 261 [emphasis added]).

Later, in *Dunlea v Anderson* (66 NY2d 265, *supra*), this Court upheld the salary increase for legislators in the 1985-1986 fiscal year, authorized by the Laws of 1984. The Court reaffirmed that article III, § 6 "does not prohibit one Legislature ... from increasing the salaries of the next term's members. Neither its language nor the intention of its drafters compel a contrary interpretation" (*Dunlea v Anderson, supra,* at 268). Indeed, the Court noted that when the current article III, § 6 was approved, the Constitution was specifically amended to provide the flexibility of allowing a salary to be fixed by legislators themselves:

"The purpose of empowering the Legislature to determine its own compensation ... was to avoid 'repeat[ing] the error of inflexibility' that had resulted from 'fixing the compensation of legislators and legislative leaders in the Constitution, and thus fail[ing] to provide for changing conditions and circumstances' " (*Dunlea v Anderson, supra,* at 268; *see also, Finn v City of New York,* 282 NY 153, 157).

Dunlea built on *Steingut*'s holding that constitutional constraints do not generally prohibit prospective adjustments. It then distinguished *Steingut* by emphasizing that the judicially stricken allowances in the latter case were effective ***10** during the *same* fiscal year in which they were appropriated. The Court also observed that the selective awards could be directly tied to votes on particular bills and were within the unilateral control of one legislative house leader, not the Legislature itself as a bicameral Branch of the government (*see, Dunlea v Anderson, supra,* at 268; *see also,*

New York Pub. Interest Research Group v Steingut, supra, at 260).

We likewise adhere to *Steingut's* definitive holding and guidance, while acknowledging its key distinguishing features. Demonstrably, the "manipulation" potentiality cautioned against in *Steingut* is not present at all in this case. Here, the withholding-of-salary protocol is general and purely prospective (*see, New York Pub. Interest Research Group v Steingut, supra,* at 258). Moreover, the statutorily authorized temporary withholding of net payments of legislative salaries operates by force of law and off a neutral pivot. The statutory consequence does not occur by selective whim, or as a constitutionally questionable *quid pro quo* within the enactment year.

(2) By chapter 635 of the Laws of 1998, the Legislature prospectively "fixed by law" an annual salary for its members (NY Const, art III, § 6). The law imposes a discipline within the Legislative Branch itself regarding the timing and method of only its own net compensation (*see, Finn v City of New York, supra,* at 157). This mechanism does not interject an all-or-nothing infirmity because the "contingent" nature of its adopted timing-of-payment formula does not "un-fix" the salary, in constitutional terms.

Until 1948, legislative salaries were primarily "fixed" on a constitutionally permissible per diem basis, conditioned upon service; payment was made from time to time during the legislative session and the balance paid on final adjournment (*see, Dunlea v Anderson, supra,* at 268; *see also,* "The Compensation of Public Officials: Judges and Legislators", Report of Temporary State Commn to Review the Compensation Received by Members of the Legislature and Judiciary [1972]).

The Legislature, even now, holds the constitutional key prospectively to authorize that legislators' salaries be paid in one final lump sum at the end of a legislative session--after the work of that Branch has concluded and all its responsibilities discharged. Since it may do that, it surely could do what chapter 635 prescribes which is a lesser of the greater power. This is particularly so since the release of net checks and realization of payment is accomplished simply by passage of an ***11** annual State budget, a principal constitutional duty prescribed for each legislative session (NY Const, art VII, § 4).

Thus, chapter 635 of the Laws of 1998 can in no way be viewed as a facial abridgement of the protections and specifications of article III, § 6 of the State Constitution. On the contrary, it satisfies the constitutional payment mandate, as delineated by this Court's controlling precedents and guideposts, and serves as an incentive to complete constitutional budget obligations in a timely fashion.

IV.

The separation of powers question asserted by plaintiffs and adopted by the Supreme Court must next be considered. The trial court reached its conclusion that chapter 635 breached this principle with daunting words and images:

"The law impermissibly tips the fragile balance of powers that is the keystone of our system of government by threatening to impose on the Legislature a budget that is not the product of thoughtful deliberation and debate. To place any legislator or anyone in any branch of government under undue economic pressure in exercising his or her judgment, while expecting that person to act in accordance with his or her oath of office is illogical, unsound, and unconstitutional" (180 Misc 2d 643, 647-648).

These flourishes are no substitute for an analytically justified basis to invalidate chapter 635 of the Laws of 1998.

The doctrine has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government (*see,* NY Const, art III, § 1; art IV, § 1; art VI, § 1; *Clark v Cuomo,* 66 NY2d 185, 189). Article III, § 1, plainly declares: "The legislative power of this state shall be vested in the senate and assembly," which traditionally requires "that the Legislature make the critical policy decisions" (*Bourquin v Cuomo,* 85 NY2d 781, 784; *see,* Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 776).

The courts are vested with a unique role and review power over the constitutionality of legislation (*see, Marbury v Madison,* 1 Cranch [5 US] 137 [1803]) which includes being the final arbiter of true separation of powers disputes (*compare, Matter of King v Cuomo,* 81 NY2d 247; *Matter of Wolpoff v Cuomo, supra; Clark v Cuomo, supra; Bourquin v Cuomo, supra*). But, ***12** as our precedents demonstrate, the courts have their limitations, too, either doctrinally imposed or self-imposed. The restraints have evolved for prudential reasons, from an appreciation of the prescribed and proportioned role of the Judiciary, and out of an

acknowledged interdependency in the fulfillment of plenary governmental responsibility.

Here, the process affected by chapter 635 is " '[l]egislative passage of the [annual] budget' " in a timely fashion (L 1998, ch 635, § 2, adding Legislative Law § 5 [3]), a paramount State interest and goal (NY Const, art VII, § 4). The give-and-take compromises between the two essential lawmaking bodies over public revenues and their expenditures, by virtue of respective constitutional mandates to them, inextricably intertwines the Legislative and Executive Branches in a system of checks and balances. The objective of this specific constitutional investiture of power in those two Branches clearly contemplates a dynamic process and, ultimately, a joint venture designed to serve the common good.

The Governor proposes a budget, recommending appropriations (NY Const, art VII, § 3), and the Legislature may strike out or reduce items, as well as propose its own additions (NY Const, art VII, § 4). The Governor's proposals, if enacted by the Legislature (both Houses acting in harmony), shall become law without further Executive action; appropriations for the Legislature and Judiciary and any proposed additional appropriations, however, are subject to the Governor's further action (NY Const, art VII, § 4).

(3) Chapter 635 of the Laws of 1998 adds procedural oil to this delicately calibrated mechanism. The Legislature, as a Branch of government, must have "finally acted on" the appropriations submitted by the Governor before individual legislators may be paid. The inducement does not require that the Legislature pass the Governor's budget; only that it pass *a* budget (*see,* Senate Debate Transcripts, at 6622-6629, 6625-6626, Bill Jacket, L 1998, ch 635).

We further examine and now apply these principles to this lawsuit. The plaintiffs sue in this case as individuals, *not* as *the* Legislative Branch of government. They object to chapter 635 because, they say, it "permits the Governor to maximize his constitutional powers at the expense of the Legislature's." They hypothesize a situation where the Governor could submit a budget as late as possible and thus minimize debate and deliberation on the Executive proposals, in view of the ***13** potentiality that legislators' paychecks might be withheld should the debate continue, as occurred this year, without timely resolution by a legislative budget enactment. The plaintiffs complain that such a strategic initiative or thrust might hurry or dictate acquiescence by some legislators, and thus might constitute a violation of the separation of powers principle. They view this potentiality as a legally cognizable and constitutionally impermissible transfer of power from the Legislature to the Executive. We disagree and conclude that their arguments fail for various reasons.

First, all the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with and fulfillment of their oaths of office. We fully accord them that presumption and respect. Next, one of the plain purposes of the separation of powers theory is to guard against one Branch seeking to maximize power (*see,* Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 798). It is the correlative oversight of each lawmaking Branch over one another--in essence a dependency, rather than a separation--that balances the overall power to protect the *public's* interests, not those individuals who occupy the offices of those Branches at varying times (*see, e.g., Matter of King v Cuomo,* 81 NY2d 247, 254, *supra; see generally,* The Federalist, Nos. 47, 48 [Madison]).

Although chapter 635 of the Laws of 1998 pinpoints a particular interdependence of the Legislature and Executive with respect to the budget-making process, it does not impermissibly merge or shift the powers between those two Branches. The leverage of negotiating positions is not the theoretical or functional equivalent of lawfully allocated governmental authority. In the end, the Legislature always does the legislating (*see,* Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 779). This enduring role is highlighted by the fact that, despite the purported "sledgehammer" of chapter 635 (*see,* Senate Debate Transcripts, at 6622-6629, 6626, Bill Jacket, *op. cit.*), the 1999-2000 budget negotiations were concluded only after the second longest budget delay in the State's history.

The balance wheels of the system are delicate, since the ultimate goal is to avoid the "*whole* power of one department [being] exercised by the same hands which possess the *whole* power of another" (The Federalist, No. 47 [Madison] [emphasis in original]; *see also, Plaut v Spendthrift Farm,* 514 US 211). Yet, "it is *institutional interdependence* rather than *functional* ***14** *independence* that best summarizes the American idea of protecting liberty by fragmenting power" (Tribe, American Constitutional Law, at 20 [2d ed] [emphasis in original]; *see also,* 4 Lincoln, The Constitutional History of New York, at 494, 497). The genius of the system is synergy and not "separation," in the common connotation of that latter word.

(4) Furthermore, assuming that the law does recalibrate some of the negotiating leverage, that shift has occurred as a direct result of the Legislature's own bicameral action. Its official work was done qua Branch of the government, and the approved Act enjoys the ordinarily presumed validity of law, especially against a facial attack. The Legislature has decided to restrict itself and discipline its own work and power in this fashion. That is not a cognizable separation of powers problem in these circumstances, contrary to the novel restriction that the dissent would place on the Legislative Branch prospectively regulating its own affairs and proceedings. Rather, we view the adopted control mechanism as a credit to the Legislative Branch's internal management practices, not a mark of some ultra vires surrender of power to any other Branch. Moreover, it should not be overlooked that, by this statutory change, both Houses came together with an identical bill in an effort and as an incentive to fulfill in a timely fashion their prescribed budget-related duties to the People of the State.

Another aspect of the motive behind the legislation is noteworthy. The self-imposed prod to attain the paramount State interest in achieving a timely budget is highly significant because achievement of that goal would guarantee salaries of all public employees being paid on time. Other entities, such as school districts, would also receive their State funds on time, thus avoiding the heavy interim borrowing burdens that are otherwise incurred. The argument of those who attack the statute does not come to grips with the unassailable fact that without a State budget or without messages of necessity and interim authorizations or continuing concurrent resolutions, *no* State expenditures could be made to anyone, including legislators. Thus, after a fiscal year concludes, and until a new budget is passed for the following year, the payment of compensation to legislators is inescapably contingent and dependent upon the extant Executive's discretionary powers (*see,* NY Const, art VII, § 5).

We have elsewhere declared that it is unwise for the courts "to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on ***15** our own," for it "is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard" (*Matter of Wolpoff v Cuomo,* 80 NY2d 70, 79, *supra*). That wisdom remains a compelling injunction for this Court to honor and be guided by in this instance. There should be no misunderstanding, however, that when and where the Constitution requires the courts to act within prescribed authority, we do not hesitate to decide even the most sensitive governmental disputes (*see, e.g., New York Pub. Interest Research Group v Steingut, supra; Matter of King v Cuomo, supra*).

Just as the plaintiffs theorize about scenarios where the Governor may "force" legislators into budgetary submission, competing hypotheses may be composed. For example, the Legislature could simply have stricken some of the Governor's proposed appropriations and offered no additions of its own. The State would then have had an instant budget over which the Governor would have had no subsequent, separate, constitutionally assigned role. The mere potentiality of this--and other--alternative hypotheses defeats the plaintiffs' facial challenge, and answers the dissent's conclusory assertion in this regard. We note that plaintiffs have adverted emphatically to *Matter of King v Cuomo* (*supra*), as a justification for the courts to intervene in this dispute. They miss a critical distinction, however, in the analysis and application of that case. The instant case is about whether the challenged statute is intrinsically a constitutional affront to the separation of powers doctrine. *Matter of King v Cuomo,* on the other hand, was a dispute about the very process itself of how enactments become law. There, the explicitly prescribed method of making law was at issue and at stake, and this Court found a fundamental deviation from the constitutional prescriptions. That decision is not at all apt here.

Finally, contrary to the assertion of those who would invalidate chapter 635 of the Laws of 1998, the Act does not create or result in "extortionate economic pressure." We discern no substantially different economic duress created by chapter 635 than that which is inherent in the ordinary lawmaking process, budget-related and otherwise. Indeed, "the legislative process is *deliberately* exposed to the buffeting and the pressures of outside interests. This lends a responsiveness to the needs of the community as expressed by those interested" (Breitel, *The Lawmakers,* in 2 Benjamin N. Cardozo Memorial Lectures, at 777 [emphasis added]). A fortiori, the adoption of ***16** a regimen and incentive predicated upon one Branch's own resonance to a more efficacious discharge of its allocated and collective constitutional duties should not be disturbed by this Court.

Neither external nor internal pressures carry an inherent constitutional virus. We are satisfied that this rhetorical argument cannot justify this Court's substitution of its preferences for how the Legislature should handle efforts that

seek to affect its work (*see, Matter of Wolpoff v Cuomo, supra,* at 79). When the plaintiffs object to "economic pressure," they are essentially attacking the fundamental, albeit rambunctious, realities of the political structure and process, including how public monies shall be allocated.

In the end, this issue and aspect of the lawsuit boil down to a debate about the constitutional calibration and allocation of lawmaking powers that underpin the prevailing system of governance in this State. No basis within the judicial review function supports the extraordinary superintendence and judicial nullification of chapter 635 that plaintiffs facially seek. This is not a case where a losing faction of legislators can secure from the courts the very result they failed to achieve in their one House of the Legislature, through legitimate debate and political persuasion (*see generally,* The Federalist No. 10 [Madison]).

V.

(5) The plaintiffs further complain that chapter 635's provision for the Comptroller to determine whether the budget is "sufficient for the ongoing operation and support of state government and local assistance" injects an unconstitutional delegation or power into the lawmaking process. We view this aspect of the case with the requisite "commonsense perspective" (*Bourquin v Cuomo, supra,* at 785; *see also, National Assn. of Ind. Insurers v State of New York, supra,* 89 NY2d, at 952 [quoting *Alliance of Am. Insurers v Chu,* 77 NY2d 573, 585]). That approach supports the conclusion that the Comptroller's defined involvement fits within and fulfills his independent fiscal role as "a vital part of the constitutional machinery for assuring accountability in the expenditure of [State] funds" (*Matter of McCall v Barrios-Paoli,* 93 NY2d 99, 104).

Indeed, the State Constitution requires that the Comptroller "audit all vouchers before payment and all official accounts" (art V, § 1). "The payment of any money of the state, or of any money under its control ... except upon audit by the ***17** comptroller, shall be void" (*id.*), and the Legislature may assign duties "incidental to the performance of these functions" (*id.*). Thus, the Comptroller is required to "[s]uperintend the fiscal concerns of the state" (State Finance Law § 8 [1]) and "[k]eep, audit and state all accounts in which the state is interested" (State Finance Law § 8 [2]). By chapter 635 of the Laws of 1998, the Legislature has plainly confirmed the Comptroller's customary responsibility for ensuring the availability of revenues that would be expended through the enacted appropriations bills. This reinforcement in no way authorizes the Comptroller to "determine" when legislators shall be paid. That determination remains exclusively within the control, timing and power of the bicameral Legislature itself, acting as a Branch of Government when it enacts a timely budget, as is its constitutional duty.

Realistically, the Comptroller's virtually immediate certification following the legislatively enacted budget in August refutes, in any event, plaintiffs' theoretical and facially invoked constitutional concerns. His actions demonstrate the non-substantive nature--in the lawmaking sense--of the formal pre-audit imprimatur by that independent State officer.

VI.

Additional arguments from all sides have been considered, and we find them to be without constitutional import in this case. The manner of enactment and the content and effect of chapter 635 of the Laws of 1998 neither violate nor implicate plaintiffs' First Amendment, Contracts Clause, or due process rights.

Accordingly, the judgment of Supreme Court should be reversed, without costs, and chapter 635 of the Laws of 1998 should be declared constitutional.

Smith, J.

(Dissenting). Because I believe that chapter 635 of the Laws of 1998 violates the State constitutional guarantee that "[e]ach member of the legislature shall receive for his services a like annual salary, to be fixed by law" (NY Const, art III, § 6), I dissent and vote to affirm the order of the Supreme Court (180 Misc 2d 643).

On December 1, 1998, the New York State Assembly passed legislation (Assembly Bill A 11464) to amend ***18** Legislative Law § 5 to raise the salaries of the members of the Legislature.[1] The bill raised the annual legislative salary by 38%, from $57,500 to $79,500. It passed the State Senate the following day. Although passed by the Legislature and delivered to the Governor, the Governor withheld signature of the bill until the Legislature also passed and delivered to him Senate Bill S 7880. This latter bill provided that if the State's budget was not enacted and approved by the State Comptroller by the start of each fiscal year (April 1), the net salaries of the Legislature would be withheld by the Comptroller until a budget was enacted.

On December 18, 1998, the Legislature passed Senate Bill S 7880, and, on that same day, the Governor signed both bills into law (L 1998, ch 630; L 1998, ch 635 [hereinafter collectively referred to as "Chapter 635"]). The 38% legislative salary increase went into effect on January 1, 1999, the first day of the succeeding legislative term.

Prior to the enactment of Chapter 635, Legislative Law § 5 (1) made Legislators' salaries unconditionally payable in 26 bi-weekly installments. Chapter 635 amended Legislative Law § 5 (1) to currently provide that Legislators' salaries:

"shall be payable in twenty-six bi-weekly installments provided, however, that if legislative passage of the budget as defined in [Legislative Law § 5 (3)] has not occurred prior to the first day of any fiscal year, the net amount of any such bi-weekly salary installment payments to be paid on or after such day shall be withheld and not paid until such legislative passage of the budget has occurred whereupon bi-weekly salary installment payments shall resume and an amount equal to the accrued, withheld and unpaid installments shall be promptly paid to each member" (L 1998, ch 635, § 1).

Chapter 635 similarly provides for the withholding of legislative allowances (L 1998, ch 635, § 3).

To avoid dispute in the event that Chapter 635's withholding provision is triggered, Chapter 635 (2) defines "legislative passage of the budget" as the point in time when the appropriation bill(s) submitted by the Governor:

"have been finally acted on by both houses of the ***19** legislature in accordance with article seven of the state constitution and the state comptroller has determined that such appropriation bill or bills that have been finally acted on by the legislature are sufficient for the ongoing operation and support of state government and local assistance for the ensuing fiscal year. In addition, legislation submitted by the governor pursuant to section three of article seven of the state constitution determined necessary by the legislature for the effective implementation of such appropriation bill or bills shall have been acted on" (L 1998, ch 635, § 2, adding Legislative Law § 5 [3]).

In January 1999, the Governor, as required by article VII of the Constitution, presented for legislative approval his proposed budget for fiscal year 1999-2000. Because the Legislature was unable to reach a consensus on the Governor's budget bill by April 1, 1999, the withholding provision of Chapter 635 was triggered and the Legislature's pay withheld.[2]

On April 19, 1999, a group of 14 Legislators, 11 of whom had voted against the passage of Chapter 635 and three of whom were newly elected members, commenced this CPLR article 78 proceeding in Supreme Court, Kings County, naming as respondents the Governor, the State Comptroller and the State. In their petition, the Legislators set forth six causes of action challenging the constitutionality of Chapter 635 under the State and Federal Constitutions. The Legislators also moved for preliminary and permanent injunctive relief, as well as final judgment on the merits. In support, each submitted affidavits setting forth the personal financial hardships that they and their families had and would suffer from the State's continued withholding of their annual pay.

On May 21, 1999, Supreme Court agreed with the Legislators and declared Chapter 635 to be unconstitutional. The court concluded that Chapter 635' s intentional infliction of personal financial hardship upon some Legislators encroached upon the institutional independence of the Legislature as a whole. Because of Chapter 635's potential effect on the balance of governmental power, Supreme Court concluded that it violates the doctrine of separation of powers and the State constitutional ***20** guarantee that Legislators' salaries remain fixed (NY Const, art III, § 6; *see,* 180 Misc 2d 643, 647). The State respondents then brought the instant appeal directly to this Court (*see,* CPLR 5601 [b] [2]).

The 1777 Constitution, the State's first, made no provision for the salary of Legislators. Since the Constitution of 1821, however, the Constitution has provided for legislative compensation. The 1821 Constitution provided that Legislators should receive compensation, to be paid out of the public treasury, but with no increase to take effect during the year in which the compensation was made and with no increase beyond the sum of $3 per day.

The 1777 Constitution also required that Legislators meet property qualifications. An 1845 amendment eliminated all property qualifications for holding public office.

The Constitution of 1846 provided that Legislators receive a sum not exceeding $3 per day for their services and an aggregate compensation not exceeding $300, except in cases of impeachment. Until 1947, legislative salaries were

set by the People in the Constitution. Following 1947, the Legislature itself, with the approval of the Governor, set its own salary.

Throughout New York State's history, there has been a struggle over legislative compensation. Some have felt that members of the Legislature should serve with minimum or no compensation. Those favoring this view have felt that Legislators should have some other means of supporting themselves. Other persons have felt that without adequate compensation, those without independent resources could not stand for election or become members of the Legislature, thus excluding a great number of people from public service.[3]

In 1946, the Final Report of the New York State Joint Legislative Committee on Legislative Methods, Practices, Procedures and Expenditures recommended that the salaries of the Legislators be increased from $2,500 to a figure more ***21** commensurate with the work required.[4] The report also recommended that the inflexibility of setting legislative salaries in the Constitution be eliminated and that, instead, the authority to raise legislative salaries be placed with the Legislature, and checked by gubernatorial consent.[5] The report concluded, "In revising legislative salaries the Legislature and the Governor would necessarily always be guided by public opinion."[6] When, in 1947, the People authorized the Legislature to set its own salary with the approval of the Governor, it was with the recognition that the Legislature needed to be able to adequately compensate itself and that this right would not be abused in view of the force of public opinion.

The individual Legislators represent the People of the State of New York. In return, the State Constitution provides that each member of the Legislature shall be compensated for his or her services (NY Const, art III, § 6). By placing legislative compensation beyond the political fray, the People of this State have expressed their interest in achieving legislative pay stability. To that end, article III, § 6 of the New York State Constitution provides, in pertinent part, "Each member of the legislature shall receive for his services a like annual salary, to be fixed by law."[7]

By its plain and unambiguous terms, article III, § 6 mandates that legislative salaries be "fixed by law" in like amount (NY Const, art III, § 6). This same provision also provides, in equally unambiguous terms, that once fixed, legislative salaries be "receive[d]" (*id.*).

Like its counterpart in the Federal Constitution (US Const, art I, § 6), article III, § 6 of the State Constitution provides a critical element of governmental stability by prescribing stability ***22** in legislative salaries and emoluments. Just as the Federal Constitution places receipt of congressional compensation beyond the reach of the political fray (*see,* US Const, art I, § 6 ["The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law"]), article III, § 6 requires that the legislative salary be received (*see, Dunlea v Anderson,* 66 NY2d 265, 268, citing NY Const, art III, § 6 ["With the amendment of section 6, a legislator now 'receive(s) for his services a like annual salary, to be fixed by law' "]). When triggered, Chapter 635, on its face, violates this State constitutional prescription by rendering the receipt of the legislative salary conditional upon the passage of an April 1 budget.

Since 1928, the Constitution has given to the Governor primary authority in preparing a budget. Thus, article VII, § 1 requires the Governor to obtain from the Executive Branch an estimate of expenses. The Governor then prepares a budget which he submits to the Legislature (NY Const, art VII, § 2). That budget must contain "a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year" (NY Const, art VII, § 2). In addition to this plan, the Governor must submit appropriation bills and proposed legislation (NY Const, art VII, § 3). The Legislature may not consider any other appropriation bill until all of the Governor's bills have been disposed (NY Const, art VII, § 5). While the Legislature may add to, strike out, or reduce items in the Governor's appropriation bills, the revisions are subject to the Governor's veto (NY Const, art VII, §§ 3, 6).

The budgetary process mandated by the Constitution requires that the Governor submit appropriation bills and proposed legislation for an entire fiscal year. The budgetary process itself requires the making of political choices. To the extent that a Legislator's salary depends on agreement regarding what monies should be spent and for what purposes, Chapter 635 introduces an improper mixture of legislative salaries with the merits of un-passed legislation.

Moreover, when one Legislature increases the salary of the next, but then withholds it after a term begins because of the failure to pass legislation, it, in effect, decreases that salary. This also renders Chapter 635 unconstitutional on its face. In my view, no Legislature can exercise this type of control over another. The Constitution permits one Legislature to

increase the salary given to the next, but not to make that salary dependent on any passage of legislation, including the State's budget. ***23**

This Court has previously described two salutary purposes underlying article III, § 6. In *New York Pub. Interest Research Group v Steingut* (40 NY2d 250, 258), this Court stated:

"Here, it may be assumed that the prohibition against increases and decreases in legislators' compensation and emoluments during their terms of office would serve two salutary purposes--(1) to avoid a conflict of interest by removing from legislators the authority to vote themselves financial benefits at the expense of the public treasury, and (2) to forestall the possibility of manipulation of legislators' votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances."

In The Federalist, No. 73, Alexander Hamilton argued that the President of the United States should receive a salary that could neither be increased nor diminished during his term of office, thus freeing him to perform his duties without regard to financial considerations. He stated:

"The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. ... There are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man's support is a power over his will. ...

"The legislature, on the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice."

The reasoning applied by Alexander Hamilton to the President's compensation applies with equal force to legislative salaries here.

Article III, § 6 is violated by this non-constitutional enactment that thwarts its purpose of removing personal financial ***24** considerations from legislative proposals. It is not an answer to say that the Legislature can determine the time when to pay salaries to its members. That is not the issue before us. The issue is whether the receipt of salaries may be tied to the passage of specific legislation. In my view, it cannot. To that end, article III, § 6 requires both that legislative salaries be fixed and received.

As for the argument that this Court should refrain from deciding this issue that involves a dispute between the executive and legislative branches of government and between elements within the legislative branch, it is precisely the constitutional role of the judiciary to resolve such disputes.[8] The Court of Appeals has in the past been called upon to resolve conflicts between the Governor and the Legislature. One such conflict occurred in 1928 between Governor Franklin D. Roosevelt and the Legislature over the budget. In 1928, the executive budget had become a part of the State Constitution. In 1929, however, the Legislature adopted an amended budget which required the spending of certain lump sums that could not be changed without the consent of the Chairmen of the Senate Finance and Assembly Ways and Means Committees. When the bill was passed again over the Governor's veto, the Governor sued. This Court upheld the position of the Governor and concluded that the legislative action was unconstitutional.[9]

In sum, Chapter 635, on its face, is unconstitutional because it authorizes one Legislature to decrease the salary paid to another Legislature during its term of office by first giving and then withholding compensation. It also reverses the historical will of the People, expressed by constitutional amendments in 1845 and 1947, that there be neither property qualifications nor financial incentives provided to the members of the Legislature when deciding issues on the merits in accordance with the democratic process.

For these reasons, I dissent and vote to affirm the order of the Supreme Court.

Chief Judge Kaye and Judges Levine, Ciparick, Wesley ***25** and Rosenblatt concur with Judge Bellacosa; Judge Smith dissents and votes to affirm in a separate opinion.

Judgment reversed, without costs, and judgment granted declaring chapter 635 of the Laws of 1998 constitutional. ***26**

Footnotes

1 Chapter 630 of the Laws of 1998.

2 Passage of the New York State budget did not occur until August 4, 1999, whereupon, in accordance with Chapter 635's formula, the net salaries of the Legislators were finally received.

3 Reports of the Proceedings and Debates of the Constitutional Convention of 1821, Assembled for the Purpose of Amending the Constitution, at 419-424.

Proceedings and Debates of New York State Constitutional Convention held in 1867 and 1868, vol I, at 761; vol V, at 3456-3457, 3591-3593.

Revised Record of New York State Constitutional Convention of 1915, vol II, at 1203-1245; vol III, at 2353-2366 (Apr. 6 to Sept. 10, 1915).

Final Report of New York State Joint Legislative Committee on Legislative Methods, Practices, Procedures and Expenditures, 1946 NY Legis Doc No. 31, at 169-171.

4 1946 NY Legis Doc No. 31, at 169-170.

5 *Id.,* at 169-170.

6 *Id.,* at 171.

7 The relevant portion of article III, § 6 states: “Each member of the legislature shall receive for his services a like annual salary, to be fixed by law. He shall also be reimbursed for his actual traveling expenses in going to and returning from the place in which the legislature meets, not more than once each week while the legislature is in session. ... Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation. The provisions of this section and laws enacted in compliance therewith shall govern and be exclusively controlling, according to their terms. Members shall continue to receive such salary and additional allowance as heretofore fixed and provided in this section, until changed by law pursuant to this section.”

8 *See generally,* The Federalist, No. 78; *Marbury v Madison,* 1 Cranch [5 US] 137.

9 *See, People v Tremaine,* 252 NY 27, 45.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Alexander v. South Carolina State Conference of the NAACP, U.S.S.C., May 23, 2024

137 S.Ct. 1455
Supreme Court of the United States

Roy COOPER, Governor of North Carolina, et al., appellants
v.
David HARRIS, et al.

No. 15–1262
|
Argued Dec. 5, 2016.
|
Decided May 22, 2017.

Synopsis
Background: Registered voters brought action challenging the redistricting of two North Carolina congressional districts as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. After a bench trial, a three-judge panel of the United States District Court for the Middle District of North Carolina, Roger L. Gregory, Circuit Judge, 159 F.Supp.3d 600, ruled in favor of voters. Probable jurisdiction was noted.

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

[1] deference to District Court's findings, under clearly erroneous standard of review, was warranted;

[2] finding that race was predominant factor in drawing one district as majority-minority district was not clearly erroneous;

[3] State lacked strong basis in evidence for believing that it needed a majority-minority district in order to avoid liability under § 2 of Voting Rights Act (VRA) for vote dilution; and

[4] finding that racial gerrymandering rather than political gerrymandering was predominant factor in drawing the other district as majority-minority district was not clearly erroneous.

Affirmed.

Justice Thomas filed a concurring opinion.

Justice Alito filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Roberts and Justice Kennedy joined.

Justice Gorsuch took no part in the consideration or decision of the case.

West Headnotes (22)

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

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans, preventing a State, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race. U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

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

When a voter sues state officials, alleging the race-based drawing of lines in legislative districting plans, in violation of equal protection, a two-step analysis is called for: (1) the voter must prove that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district, and (2) if racial considerations predominated over others, the design of the district must withstand strict scrutiny, and the burden thus shifts to the State to prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end. U.S.C.A. Const.Amend. 14.

62 Cases that cite this headnote

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

Election Law Weight and sufficiency

To show that race was the predominant factor in legislative redistricting, as first step of analysis for equal protection violation, the plaintiff must demonstrate that the legislature subordinated other factors, such as compactness, respect for political subdivisions, and partisan advantage, to racial considerations, and the plaintiff may make the required showing through direct evidence of legislative intent, circumstantial evidence of a district's shape and demographics, or a mix of both. U.S.C.A. Const.Amend. 14.

31 Cases that cite this headnote

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

A plaintiff succeeds in showing that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district, as first step of analysis for an equal protection, even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. U.S.C.A. Const.Amend. 14.

36 Cases that cite this headnote

[5] **Election Law** Vote Dilution

The prohibition, in § 2 of the VRA, of any standard, practice, or procedure that results in a denial or abridgement of the right to vote on account of race, extends to vote dilution brought about by the dispersal of a group's members into legislative districts in which they constitute an ineffective minority of voters. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

17 Cases that cite this headnote

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

When a State invokes the VRA to justify a race-based legislative districting plan, it must show, to meet the narrow tailoring requirement for surviving strict scrutiny for an equal protection violation, that it had a strong basis in evidence for concluding that the VRA required its action, or said otherwise, the State must establish that it had good reasons to think that it would transgress the VRA if it did not draw race-based district lines; that strong basis or good reasons standard gives States breathing room to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, §§ 2(a), 5, 52 U.S.C.A. §§ 10301(a), 10304.

19 Cases that cite this headnote

[7] **Federal Courts** Review of federal district courts

A three-judge District Court's assessment of a State's legislative districting plan, which is challenged as a racial gerrymander that violates equal protection, warrants significant deference on direct appeal to the Supreme Court, and the Supreme Court retains full power to correct the District Court's errors of law, but the District Court's findings of fact, most notably, as to whether racial considerations predominated in drawing district lines, are subject to review only for clear error. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

12 Cases that cite this headnote

[8] **Federal Courts** "Clearly erroneous" standard of review in general

Under the clearly erroneous standard of review for a trial court's findings of fact, the reviewing court cannot reverse just because it would have decided the matter differently, and a finding that is plausible in light of the full record, even if another is equally or more so, must govern. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

45 Cases that cite this headnote

[9] **Judgment** Persons Concluded

Three-judge District Court reasonably determined, in action brought by registered voters asserting that State's congressional redistricting for two districts constituted racial gerrymandering in violation of equal protection, that two voters were not members of civil rights organizations that were plaintiffs in a state court action that challenged the same two districts as racial gerrymanders, so that state court's judgment did not have claim preclusion or issue preclusion effect, assuming that voters' membership in the organizations, if proven, could give rise to preclusive effect; dueling contentions of the two voters and the State turned on intricate issues about organizations' membership policies, and nothing in State's evidence clearly rebutted voters' testimony that they never joined any of the organizations. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[10] **Res Judicata** Persons not parties or privies

Res Judicata Particular Interests of and Relations Between Persons

One person's lawsuit generally does not bar another's based on claim preclusion or issue preclusion, no matter how similar they are in substance, but when plaintiffs in two cases have a special relationship, a judgment against one can indeed bind both.

1 Case that cites this headnote

[11] **Federal Courts** "Clearly erroneous" standard of review in general

The rule that a trial court's factual findings are reviewed for clear error contains no exception for findings that diverge from those made in another court, and whatever findings are under review receive the benefit of deference, without regard to whether a court in a separate suit has seen the matter differently. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

6 Cases that cite this headnote

[12] **Federal Courts** Review of federal district courts

Factual findings of three-judge District Court, which ruled after bench trial that State's congressional redistricting plan for two districts constituted racial gerrymandering in violation of equal protection, would receive deference from Supreme Court under clearly erroneous standard of review, rather than the searching review sought by State as appellant, even if a state court had seen the matter differently in a separate action challenging the same districts; however, state court's decision was not wholly irrelevant, since it was common sense that, all else equal, a finding was more likely to be plainly wrong if some judges disagreed with it. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

7 Cases that cite this headnote

[13] **Federal Courts** Conflicting or undisputed evidence

The very premise of clear error review is that there are often two permissible or plausible views of the evidence. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

14 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Finding of three-judge District Court that race was predominant factor motivating state legislature's decision to place a significant number of African-American voters within a particular district, for congressional redistricting, was not clearly erroneous, and thus, strict scrutiny for equal protection violation was required; State's mapmakers purposefully established a racial target that African-Americans should make up no less than a majority of district's voting-age population so as to comply with VRA's

prohibition of vote dilution, and the announced racial target subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

8 Cases that cite this headnote

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

When race furnishes the overriding reason for choosing one map over others during legislative redistricting, a further showing of inconsistency between the enacted plan and traditional redistricting criteria is unnecessary to a finding of racial predominance, so that strict scrutiny for an equal protection violation is required. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Assuming that complying with the VRA was a compelling interest for racial gerrymandering in legislative redistricting, State did not have a strong basis in evidence for believing that it needed to draw a congressional district as an African-American majority-minority district in order to avoid liability under § 2 of VRA for vote dilution, and thus, there was an equal protection violation under strict scrutiny because such racial gerrymandering was not narrowly tailored to State's objective; electoral history provided no evidence that a § 2 plaintiff could demonstrate effective white block-voting that usually would be sufficient to defeat the preferred candidate of African-Americans, as one of the prerequisites for vote dilution claim, and there was no meaningful legislative inquiry into whether a new district with an enlarged population, that was created without a focus on race, could lead to § 2 liability. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

19 Cases that cite this headnote

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

Election Law Racially polarized or bloc voting

There are three threshold conditions for proving vote dilution under § 2 of the VRA: (1) a minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district; (2) the minority group must be politically cohesive; and (3) a district's white majority must vote sufficiently as a bloc to usually defeat the minority's preferred candidate. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

52 Cases that cite this headnote

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

The ability of a legislature to draw a majority-minority electoral district does not mean that the legislature is required to do so, in order to avoid liability for vote dilution under § 2 of the VRA, where a crossover district would also allow the minority group to elect its favored candidates. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

30 Cases that cite this headnote

[19] **Election Law** Vote Dilution

A state legislature, when redistricting, need not determine precisely what percent minority population § 2 of the VRA demands in order to avoid vote dilution. Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Finding of three-judge District Court that racial gerrymandering rather than political gerrymandering was predominant factor motivating state legislature's decision to place a significant number of African-American voters within a particular district, for congressional redistricting, was not clearly erroneous, and thus, strict scrutiny for equal protection violation was required; district was approximately the right size before redistricting, racial lines were followed in further slimming down district and adding a couple of knobs to its snakelike body, addition of 35,000 African-American voters and subtraction of 50,000 white voters produced sizeable jump in black voting-age population (BVAP) from 43.8% to 50.7%, and architects of redistricting plan repeatedly described the influx of African-American voters into the district as a measure to ensure preclearance under § 5 of VRA, not a side-effect of political gerrymandering. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Voting Rights Act of 1965, § 5, 52 U.S.C.A. § 10304.

15 Cases that cite this headnote

[21] **Federal Courts** Credibility and impeachment

It is a proper for a reviewing court, in applying the clearly erroneous standard of review, to give singular deference to a trial court's judgments about the credibility of witnesses, because the various cues that bear so heavily on the listener's understanding of and belief in what is said are lost on an appellate court later sifting through a paper record. Fed.Rules Civ.Proc.Rule 52(a)(6), 28 U.S.C.A.

27 Cases that cite this headnote

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

Election Law Weight and sufficiency

To establish that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular electoral district, so that strict scrutiny for an equal protection violation is required, the plaintiffs are not required to offer an alternative districting plan that achieves the legislature's claimed political considerations; rather, an alternative map is merely an evidentiary tool to show that an equal protection violation has occurred, and neither its presence nor its absence can itself resolve a racial gerrymandering claim. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

**1459 *Syllabus* [*]

***285** The Equal Protection Clause of the Fourteenth Amendment prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 797, 197 L.Ed.2d 85. When a voter sues state officials for drawing such race-based lines, this Court's decisions call for a two-step analysis. First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762. Second, if racial considerations did predominate, the State must prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end, *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 800. This Court has long assumed that one compelling interest is compliance with the Voting Rights Act of 1965 (VRA or Act). When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "good reasons" for concluding that the statute required its action. *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314. A district court's factual findings made in the course of this two-step inquiry are reviewed only for clear error. See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (*Cromartie II*).

This case concerns North Carolina's redrawing of two congressional districts, District 1 and District 12, after the 2010 census. Prior to that redistricting, neither district

had a majority black voting-age population (BVAP), but both consistently elected the candidates preferred by most African–American voters. The new map significantly altered both District 1 and District 12. The State needed to add almost 100,000 people to District 1 to comply with the one-person-one-vote principle, and it chose to take most of those people from heavily black areas of Durham—increasing the district's BVAP from 48.6% to 52.7%. The State also reconfigured District 12, increasing its BVAP from 43.8% to 50.7%. Registered voters in those districts (here called "the plaintiffs") filed suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. ***286** A three-judge District Court held both districts unconstitutional. It found that racial considerations predominated in the drawing of District 1's lines and rejected the State's claim that this action was justified by the VRA. As for District 12, the court again found that race predominated, and it explained that the State made no attempt to justify its attention to race in designing that district.

Held:

1. North Carolina's victory in a similar state-court lawsuit does not dictate the disposition of this case or alter the applicable standard of review. Before this case was filed, a state trial court rejected a claim by several civil rights groups that ****1460** Districts 1 and 12 were unlawful racial gerrymanders. The North Carolina Supreme Court affirmed that decision under the state-court equivalent of clear error review. The State claims that the plaintiffs are members of the same organizations that brought the earlier case, and thus precluded from raising the same questions anew. But the State never satisfied the District Court that the alleged affiliation really existed. And because the District Court's factual finding was reasonable, it defeats North Carolina's attempt to argue for claim or issue preclusion here.

The State's backup argument about the proper standard of review also falls short. The rule that a trial court's factual findings are reviewed only for clear error contains no exception for findings that diverge from those made in another court. See Fed. Rule Civ. Proc. 52(a)(6). Although the state court's decision is certainly relevant, the premise of clear error review is that there are often "two permissible views of the evidence." *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518. Even assuming that the state court's findings capture one such view, the only question here is whether the District Court's assessment represents another. Pp. 1467 – 1468.

2. The District Court did not err in concluding that race furnished the predominant rationale for District 1's redesign and that the State's interest in complying with the VRA could not justify that consideration of race. Pp. 1468 – 1472.

(a) The record shows that the State purposefully established a racial target for the district and that the target "had a direct and significant impact" on the district's configuration, *Alabama,* 575 U.S., at ——, 135 S.Ct. at 1271 subordinating other districting criteria. Faced with this body of evidence, the District Court did not clearly err in finding that race predominated in drawing District 1; indeed, it could hardly have concluded anything but. Pp. 1468 – 1469.

(b) North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny. The State argues ***287** that it had good reasons to believe that it had to draw a majority-minority district to avoid liability for vote dilution under § 2 of the VRA. *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, identifies three threshold conditions for proving such a vote-dilution claim: (1) A "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district, *id.,* at 50, 106 S.Ct. 2752; (2) the minority group must be "politically cohesive," *id.,* at 51, 106 S.Ct. 2752; and (3) a district's white majority must "vote[ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate," *ibid*. If a State has good reason to think that all three of these conditions are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite. For nearly 20 years before the new plan's adoption, African–Americans made up less than a majority of District 1's voters, but their preferred candidates scored consistent victories. District 1 thus functioned as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plurality opinion). So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that because it needed to substantially increase District ****1461** 1's population, the question facing

the state mapmakers was not whether the *then-existing* District 1 violated § 2, but whether the *future* District 1 would do so if drawn without regard to race. But that reasoning, taken alone, cannot justify the State's race-based redesign of the district. Most important, the State points to no meaningful legislative inquiry into the key issue it identifies: whether a new, enlarged District 1, created without a focus on race, could lead to § 2 liability. To have a strong basis to conclude that § 2 demands race-based measures to augment a district's BVAP, the State must evaluate whether a plaintiff could establish the *Gingles* preconditions in a new district created without those measures. Nothing in the legislative record here fits that description. And that is no accident: The redistricters believed that this Court's decision in *Strickland* mandated a 50%-plus BVAP in District 1. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups meeting *Gingles* ' size condition). But, as this Court's § 2 jurisprudence makes clear, unless *each* of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." *Growe v. Emison,* 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388. North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a ***288** majority-minority district thus rested on a pure error of law. Accordingly, the Court upholds the District Court's conclusion that the State's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny. Pp. 1469 – 1472.

3. The District Court also did not clearly err by finding that race predominated in the redrawing of District 12. Pp. 1472 – 1481.

(a) The district's legality turns solely on which of two possible reasons predominantly explains its reconfiguration. The plaintiffs contended at trial that North Carolina intentionally increased District 12's BVAP in the name of ensuring preclearance under § 5 of the VRA. According to the State, by contrast, the mapmakers moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.

Getting to the bottom of a dispute like this one poses special challenges for a trial court, which must make " 'a sensitive inquiry' " into all " 'circumstantial and direct evidence of intent' " to assess whether the plaintiffs have proved that race, not politics, drove a district's lines. *Hunt v. Cromartie,* 526 U.S. 541, 546, 119 S.Ct. 1545, 143 L.Ed.2d 731 (*Cromartie I*). This Court's job is different—and generally easier. It affirms a trial court's factual finding as to racial predominance so long as the finding is "plausible"; it reverses only when "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S., at 573–574, 105 S.Ct. 1504. In assessing a finding's plausibility, moreover, the Court gives singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). Applying those principles here, the evidence at trial—including live witness testimony subject to credibility determinations—adequately supports the District Court's conclusion that race, not politics, accounted for District 12's reconfiguration. And contrary to the State's view, the court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12. Pp. 1472 – 1474.

(b) By slimming the district and adding a couple of knobs to its snakelike body, ****1462** North Carolina added 35,000 African–Americans and subtracted 50,000 whites, turning District 12 into a majority-minority district. State Senator Robert Rucho and State Representative David Lewis—the chairs of the two committees responsible for preparing the revamped plan—publicly stated that racial considerations lay behind District 12's augmented BVAP. Specifically, Rucho and Lewis explained that because part of Guilford County, a jurisdiction covered by § 5 of the VRA, lay in the district, they had increased the district's BVAP to ensure preclearance of the plan. Dr. Thomas Hofeller, their hired mapmaker, confirmed that intent. The State's preclearance submission ***289** to the Justice Department indicated a similar determination to concentrate black voters in District 12. And, in testimony that the District Court found credible, Congressman Mel Watt testified that Rucho disclosed a majority-minority target to him in 2011. Hofeller testified that he had drawn District 12's lines based on political data, and that he checked the racial data only *after* he drew a politics-based line between adjacent areas in Guilford County. But the District Court disbelieved Hofeller's asserted indifference to the new district's racial composition, pointing to his contrary deposition testimony and a significant contradiction in his trial testimony. Finally, an expert report lent circumstantial support to the plaintiffs' case, showing that, regardless of party, a black voter in the region was three to four times more likely than a white voter to cast a ballot within District 12's borders.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review.

Maybe this Court would have evaluated the testimony differently had it presided over the trial; or then again, maybe it would not have. Either way, the Court is far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design. Pp. 1474 – 1478.

(c) Finally, North Carolina argues that when race and politics are competing explanations of a district's lines, plaintiffs must introduce an alternative map that achieves a State's asserted political goals while improving racial balance. Such a map can serve as key evidence in a race-versus-politics dispute, but it is hardly the *only* means to disprove a State's contention that politics drove a district's lines. In this case, the plaintiffs' introduction of mostly direct and some circumstantial evidence gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question. Although a plaintiff will sometimes need an alternative map, as a practical matter, to make his case, such a map is merely an evidentiary tool to show that an equal protection violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.

North Carolina claims that a passage of this Court's opinion in *Cromartie II* makes an alternative map essential in cases like this one, but the reasoning of *Cromartie II* belies that reading. The Court's opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there, and the entire thrust of the opinion runs counter to an inflexible counter-map requirement. Rightly understood, the passage on which the State relies had a different and narrower point: Given the weak evidence of a racial gerrymander offered in *Cromartie II,* only maps that would *actually* show what the plaintiffs' had not could carry the day. This case, in contrast, turned not on the possibility ***290** of creating more optimally constructed districts, but on direct evidence ****1463** of the General Assembly's intent in creating the actual District 12—including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's politics defense. Pp. 1478 – 1481.

159 F.Supp.3d 600, affirmed.

KAGAN, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a concurring opinion. ALITO, J., filed an opinion concurring in the judgment in part and dissenting in part, in which ROBERTS, C.J., and KENNEDY, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

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Justice KAGAN delivered the opinion of the Court.

***291** The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason. In this case, a three-judge District Court ruled that North Carolina officials violated that bar when they created two districts whose voting-age populations were majority black. Applying a deferential standard of review to the factual findings underlying that decision, we affirm.

I

A

[1] **[2]** The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct.

788, 797, 197 L.Ed.2d 85 (2017) (internal quotation marks and alteration omitted). When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

[3] **[4]** First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). That entails demonstrating ****1464** that the legislature "subordinated" other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to "racial considerations." *Ibid.* The plaintiff may make the required showing through "direct evidence" of legislative intent, "circumstantial evidence of a district's shape and demographics," or a mix of both. *Ibid.*[1]

***292** Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. See *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 800. The burden thus shifts to the State to prove that its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end. *Ibid.* This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 (VRA or Act), 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 915, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*).

[5] Two provisions of the VRA—§ 2 and § 5—are involved in this case. §§ 10301, 10304. Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote on account of race." § 10301(a). We have construed that ban to extend to "vote dilution"—brought about, most relevantly here, by the "dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters." *Thornburg v. Gingles,* 478 U.S. 30, 46, n. 11, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, see *Shelby County v. Holder,* 570 U.S. ——, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), that section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall "retrogression" in the ability of racial minorities to elect their preferred candidates, *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

[6] When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. ***293** *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——, 135 S.Ct. 1257, 1274, 191 L.Ed.2d 314 (2015). Or said otherwise, the State must establish that it had "good reasons" to think that it would transgress the Act if it did *not* draw race-based district lines. *Ibid.* That "strong basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune–Hill,* 580 U.S., at ——, 137 S.Ct., at 802.

[7] **[8]** A district court's assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court.[2] We of course retain full power to ****1465** correct a court's errors of law, at either stage of the analysis. But the court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. See Fed. Rule Civ. Proc. 52(a)(6); *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*); *id.,* at 259, 121 S.Ct. 1452 (THOMAS, J., dissenting). Under that standard, we may not reverse just because we "would have decided the [matter] differently." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). A finding that is "plausible" in light of the full record—even if another is equally or more so—must govern. *Id.,* at 574, 105 S.Ct. 1504.

B

This case concerns North Carolina's most recent redrawing of two congressional districts, both of which have long included substantial populations of black voters. In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much ***294** of the way to the State's northern border. (Maps showing the districts are included in an appendix to this opinion.) Both have quite the history before this Court.

We first encountered the two districts, in their 1992 versions, in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d

511 (1993). There, we held that voters stated an equal protection claim by alleging that Districts 1 and 12 were unwarranted racial gerrymanders. See *id.,* at 642, 649, 113 S.Ct. 2816. After a remand to the District Court, the case arrived back at our door. See *Shaw II,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207. That time, we dismissed the challenge to District 1 for lack of standing, but struck down District 12. The design of that "serpentine" district, we held, was nothing if not race-centric, and could not be justified as a reasonable attempt to comply with the VRA. *Id.,* at 906, 116 S.Ct. 1894; see *id.,* at 911–918, 116 S.Ct. 1894.

The next year, the State responded with a new districting plan, including a new District 12—and residents of that district brought another lawsuit alleging an impermissible racial gerrymander. A District Court sustained the claim twice, but both times this Court reversed. See *Hunt v. Cromartie,* 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*); *Cromartie II,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430. Racial considerations, we held, did not predominate in designing the revised District 12. Rather, that district was the result of a *political* gerrymander—an effort to engineer, mostly "without regard to race," a safe Democratic seat. *Id.,* at 245, 121 S.Ct. 1452.

The State redrew its congressional districts again in 2001, to account for population changes revealed in the prior year's census. Under the 2001 map, which went unchallenged in court, neither District 1 nor District 12 had a black voting-age population (called a "BVAP") that was a majority of the whole: The former had a BVAP of around 48%, the latter a BVAP of around 43%. See App. 312, 503. Nonetheless, in five successive general elections conducted in those reconfigured districts, all the candidates preferred by most African–American voters won their contests—and by some handy margins. In District 1, black voters' candidates of ***295** choice garnered ****1466** as much as 70% of the total vote, and never less than 59%. See 5 Record 636, 638, 641, 645, 647 (Pls. Exh. 112). And in District 12, those candidates won with 72% of the vote at the high end and 64% at the low. See *id.,* at 637, 640, 643, 646, 650.

Another census, in 2010, necessitated yet another congressional map—(finally) the one at issue in this case. State Senator Robert Rucho and State Representative David Lewis, both Republicans, chaired the two committees jointly responsible for preparing the revamped plan. They hired Dr. Thomas Hofeller, a veteran political mapmaker, to assist them in redrawing district lines. Several hearings, drafts, and revisions later, both chambers of the State's General Assembly adopted the scheme the three men proposed.

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. See App. 2690; *Evenwel v. Abbott,* 578 U.S. ——, ——, 136 S.Ct. 1120, 1124, 194 L.Ed.2d 291 (2016) (explaining that "[s]tates must draw congressional districts with populations as close to perfect equality as possible"). Rucho, Lewis, and Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. See Appendix, *infra*. With that addition, District 1's BVAP rose from 48.6% to 52.7%. See App. 312–313. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. See *id*., at 1150. Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end —most relevantly here, in Guilford County. See Appendix, *infra* ; App. 1164. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African–Americans of voting ***296** age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%. See 2 Record 349 (Fourth Affidavit of Dan Frey, Exh. 5); *id.,* at 416 (Exh. 11).

Registered voters in the two districts (David Harris and Christine Bowser, here called "the plaintiffs") brought this suit against North Carolina officials (collectively, "the State" or "North Carolina"), complaining of impermissible racial gerrymanders. After a bench trial, a three-judge District Court held both districts unconstitutional. All the judges agreed that racial considerations predominated in the design of District 1. See *Harris v. McCrory,* 159 F.Supp.3d 600, 611 (M.D.N.C.2016). And in then applying strict scrutiny, all rejected the State's argument that it had a "strong basis" for thinking that the VRA compelled such a race-based drawing of District 1's lines. *Id.,* at 623. As for District 12, a majority of the panel held that "race predominated" over all other factors, including partisanship. *Id.,* at 622. And the court explained that the State had failed to put forward any reason, compelling or otherwise, for its attention to race in designing that district. See *ibid.* Judge Osteen dissented from the conclusion that race, rather than politics, drove

District 12's lines—yet still characterized the majority's view as "[e]minently reasonable." *Id.,* at 640.

The State filed a notice of appeal, and we noted probable jurisdiction. *McCrory v. Harris,* 579 U.S. ——, 136 S.Ct. 2512, 195 L.Ed.2d 838 (2016).

****1467** II

[9] We address at the outset North Carolina's contention that a victory it won in a very similar state-court lawsuit should dictate (or at least influence) our disposition of this case. As the State explains, the North Carolina NAACP and several other civil rights groups challenged Districts 1 and 12 in state court immediately after their enactment, charging that they were unlawful racial gerrymanders. See Brief for Appellants 19–20. By the time the plaintiffs before us filed this action, the state trial court, in *Dickson v. Rucho,* had rejected ***297** those claims—finding that in District 1 the VRA justified the General Assembly's use of race and that in District 12 race was not a factor at all. See App. 1969. The North Carolina Supreme Court then affirmed that decision by a 4–3 vote, applying the state-court equivalent of clear error review. See *Dickson v. Rucho,* 368 N.C. 481, 500, 781 S.E.2d 404, 419 (2015), modified on denial of reh'g, 368 N.C. 673, 789 S.E.2d 436 (2016), cert. pending, No. 16–24. In this Court, North Carolina makes two related arguments based on the *Dickson* litigation: first, that the state trial court's judgment should have barred this case altogether, under familiar principles of claim and issue preclusion; and second, that the state court's conclusions should cause us to conduct a "searching review" of the decision below, rather than deferring (as usual) to its factual findings. Reply Brief 6.

[10] The State's preclusion theory rests on an assertion about how the plaintiffs in the two cases are affiliated. As the State acknowledges, one person's lawsuit generally does not bar another's, no matter how similar they are in substance. See *Taylor v. Sturgell,* 553 U.S. 880, 892–893, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (noting the "deep-rooted historic tradition that everyone should have his own day in court"). But when plaintiffs in two cases have a special relationship, a judgment against one can indeed bind both. See *id.,* at 893–895, 128 S.Ct. 2161 (describing six categories of qualifying relationships). The State contends that Harris and Bowser, the plaintiffs here, are members of organizations that were plaintiffs in *Dickson*. And according to North Carolina, that connection prevents the pair from raising anew the questions that the state court previously resolved against those groups. See Brief for Appellants 20–21.

But North Carolina never satisfied the District Court that the alleged affiliation really existed. When the State argued that its preclusion theory entitled it to summary judgment, Harris and Bowser responded that they were not members of any of the organizations that had brought the ***298** *Dickson* suit. See 3 Record 1577–1582 (Defs. Motion for Summary Judgment); 4 Record 101–106 (Pls. Opposition to Motion for Summary Judgment). The parties' dueling contentions turned on intricate issues about those groups' membership policies (*e.g.,* could Harris's payment of dues to the national NAACP, or Bowser's financial contribution to the Mecklenburg County NAACP, have made either a member of the state branch?). Because of those unresolved "factual disputes," the District Court denied North Carolina's motion for summary judgment. 4 Record 238 (July 29, 2014 Order). And nothing in the subsequent trial supported the State's assertion about Harris's and Bowser's organizational ties: Indeed, the State chose not to present any further evidence relating to the membership issue. Based on the resulting record, the District Court summarily rejected the State's claim that Harris and Bowser were something other than independent plaintiffs. See 159 F.Supp.3d, at 609.

****1468** That conclusion defeats North Carolina's attempt to argue for claim or issue preclusion here. We have no basis for assessing the factual assertions underlying the State's argument any differently than the District Court did. Nothing in the State's evidence clearly rebuts Harris's and Bowser's testimony that they never joined any of the *Dickson* groups. We need not decide whether the alleged memberships would have supported preclusion if they had been proved. It is enough that the District Court reasonably thought they had not.

[11] **[12]** **[13]** The State's back-up argument about our standard of review also falls short. The rule that we review a trial court's factual findings for clear error contains no exception for findings that diverge from those made in another court. See Fed. Rule Civ. Proc. 52(a)(6) ("Findings of fact ... must not be set aside unless clearly erroneous"); see also *Hernandez v. New York,* 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (applying the same standard to a state court's findings). Whatever findings are under review receive the benefit of ***299** deference, without regard to whether a court in a separate suit has seen the matter differently. So here, we must ask not which

court considering Districts 1 and 12 had the better view of the facts, but simply whether the court below's view is clearly wrong. That does not mean the state court's decision is wholly irrelevant: It is common sense that, all else equal, a finding is more likely to be plainly wrong if some judges disagree with it. Cf. *Glossip v. Gross,* 576 U.S. ——, ——, 135 S.Ct. 2726, 2740, 192 L.Ed.2d 761 (2015) (noting that we are even less likely to disturb a factual determination when "multiple trial courts have reached the same finding"). But the very premise of clear error review is that there are often "two permissible"—because two "plausible"—"views of the evidence." *Anderson,* 470 U.S., at 574, 105 S.Ct. 1504; see *supra,* at 1465. Even assuming the state court's findings capture one such view, the District Court's assessment may yet represent another. And the permissibility of the District Court's account is the only question before us.

III

With that out of the way, we turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district's redesign. See *supra,* at 1466 – 1467. And it held that the State's interest in complying with the VRA could not justify that consideration of race. See *supra,* at 1466 – 1467. We uphold both conclusions.

A

[14] Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population. See 159 F.Supp.3d, at 611–614. Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate ***300** debate, for example, Rucho explained that District 1 "must include a sufficient number of African–Americans" to make it "a majority black district." App. 689–690. Similarly, Lewis informed the House and Senate redistricting committees that the district must have "a majority black voting age population." *Id.*, at 606. And that objective was communicated in no uncertain terms to the legislators' consultant. Dr. Hofeller testified multiple times at trial that ****1469** Rucho and Lewis instructed him "to draw [District 1] with a [BVAP] in excess of 50 percent." 159 F.Supp.3d, at 613; see, *e.g., ibid.* ("Once again, my instructions [were] that the district had to be drawn at above 50 percent").

Hofeller followed those directions to the letter, such that the 50%-plus racial target "had a direct and significant impact" on District 1's configuration. *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1271. In particular, Hofeller moved the district's borders to encompass the heavily black parts of Durham (and only those parts), thus taking in tens of thousands of additional African–American voters. That change and similar ones, made (in his words) to ensure that the district's racial composition would "add[ ] up correctly," deviated from the districting practices he otherwise would have followed. App. 2802. Hofeller candidly admitted that point: For example, he testified, he sometimes could not respect county or precinct lines as he wished because "the more important thing" was to create a majority-minority district. *Id.*, at 2807; see *id.*, at 2809. The result is a district with stark racial borders: Within the same counties, the portions that fall inside District 1 have black populations two to three times larger than the portions placed in neighboring districts. See Brief for United States as *Amicus Curiae* 19; cf. *Alabama,* 575 U.S., at —— – ——, 135 S.Ct., at 1271–1272 (relying on similar evidence to find racial predominance).

[15] Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks ***301** and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but. See 159 F.Supp.3d, at 611 (calling District 1 a "textbook example" of race-based districting).[3]

B

[16] The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. As noted earlier, we have long assumed that complying with the VRA is a compelling interest. See *supra,* at 1463 – 1464. And we have held that race-based districting is narrowly tailored to that objective if a State had "good reasons" for thinking that the Act demanded such steps. See *supra,* at 1464. North Carolina argues that District 1 passes muster under that standard: The General Assembly (so says the State) had "good reasons to believe it needed to draw [District 1] as a majority-

minority district to avoid Section 2 liability" for vote dilution. Brief for Appellants 52. We now turn to that defense.

**1470 [17] This Court identified, in *Thornburg v. Gingles,* three threshold conditions for proving vote dilution under § 2 of the VRA. See 478 U.S., at 50–51, 106 S.Ct. 2752. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Id.,* at 50, 106 S.Ct. 2752. Second, the minority *302 group must be "politically cohesive." *Id.,* at 51, 106 S.Ct. 2752. And third, a district's white majority must "vote [ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Ibid*. Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). If a State has good reason to think that all the "*Gingles* preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. See *Bush v. Vera,* 517 U.S. 952, 978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion). But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting.[4] For most of the twenty years prior to the new plan's adoption, African–Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%. See 159 F.Supp.3d, at 606; App. 312. Yet throughout those two decades, as the District Court noted, District 1 was "an extraordinarily safe district for African–American preferred candidates." 159 F.Supp.3d, at 626. In the *closest* election during that period, African–Americans' candidate of choice *303 received 59% of the total vote; in other years, the share of the vote garnered by those candidates rose to as much as 70%. See *supra,* at 1465 – 1466. Those victories (indeed, landslides) occurred because the district's white population did *not* "vote [ ] sufficiently as a bloc" to thwart black voters' preference, *Gingles,* 478 U.S., at 51, 106 S.Ct. 2752; rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion). When voters act in that way, "[i]t is difficult to see how the majority-bloc-voting requirement could be met"—and hence how § 2 liability could be established. *Id.,* at 16, 129 S.Ct. 1231. So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP.

The State counters that, in this context, past performance is no guarantee of future results. See Brief for Appellants 57–58; Reply Brief 19–20. Recall here that the State had to redraw its whole congressional map following the 2010 census. See *supra,* at 1465 – 1466. And in particular, **1471 the State had to add nearly 100,000 new people to District 1 to meet the one-person-one-vote standard. See *supra,* at 1466. That meant about 13% of the voters in the new district would never have voted there before. See App. 2690; Reply Brief 20. So, North Carolina contends, the question facing the state mapmakers was not whether the *then-existing* District 1 violated § 2. Rather, the question was whether the *future* District 1 would do so if drawn without regard to race. And that issue, the State claims, could not be resolved by "focusing myopically on past elections." *Id.,* at 19.

But that reasoning, taken alone, cannot justify North Carolina's race-based redesign of District 1. True enough, a legislature undertaking a redistricting must assess whether *304 the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. See *Gingles,* 478 U.S., at 57, 106 S.Ct. 2752 (noting that longtime voting patterns are highly probative of racial polarization). And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. The prospect of a significant population increase in a district only raises—it does not answer—the question whether § 2 requires deliberate measures to augment the district's BVAP. (Indeed, such population growth could cut in either direction, depending on who comes into the district.) To have a strong basis in evidence to conclude that § 2 demands such race-based steps, the State must carefully

evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures. We see nothing in the legislative record that fits that description.[5]

[18] ***305** And that absence is no accident: Rucho and Lewis proceeded under a wholly different theory—arising not from *Gingles* but from *Bartlett v. Strickland*—of what § 2 demanded in drawing District 1. *Strickland* involved a geographic area in which African–Americans could not form a majority of a reasonably compact district. See 556 U.S., at 8, 129 S.Ct. 1231 (plurality opinion). The African–American ****1472** community, however, was sizable enough to enable the formation of a crossover district, in which a substantial bloc of black voters, if receiving help from some white ones, could elect the candidates of their choice. See *supra,* at 1470 – 1471. A plurality of this Court, invoking the first *Gingles* precondition, held that § 2 did not require creating that district: When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply. See 556 U.S., at 18–20, 129 S.Ct. 1231. Over and over in the legislative record, Rucho and Lewis cited *Strickland* as mandating a 50%-plus BVAP in District 1. See App. 355–356, 363–364, 472–474, 609–610, 619, 1044. They apparently reasoned that if, as *Strickland* held, § 2 does not *require* crossover districts (for groups insufficiently large under *Gingles*), then § 2 also cannot be *satisfied by* crossover districts (for groups in fact meeting *Gingles* ' size condition). In effect, they concluded, whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates. See 1 Tr. 21–22 (counsel's explanation that "the [S]tate interpreted" *Strickland* to say that, in order to protect African–Americans' electoral ***306** strength and thus avoid § 2 liability, the BVAP in District 1 "need [ed] to be above 50 percent").

That idea, though, is at war with our § 2 jurisprudence —*Strickland* included. Under the State's view, the third *Gingles* condition is no condition at all, because even in the absence of effective white bloc-voting, a § 2 claim could succeed in a district (like the old District 1) with an under–50% BVAP. But this Court has made clear that unless *each* of the three *Gingles* prerequisites is established, "there neither has been a wrong nor can be a remedy." *Growe,* 507 U.S., at 41, 113 S.Ct. 1075. And *Strickland,* far from supporting North Carolina's view, underscored the necessity of demonstrating effective white bloc-voting to prevail in a § 2 vote-dilution suit. The plurality explained that "[i]n areas with substantial crossover voting," § 2 plaintiffs would not "be able to establish the third *Gingles* precondition" and so "majority-minority districts would not be required." 556 U.S., at 24, 129 S.Ct. 1231; see also *ibid.* (noting that States can "defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts"). Thus, North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a "strong basis in evidence," but instead on a pure error of law. *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1274.

[19] In sum: Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means "insist that a state legislature, when redistricting, determine *precisely* what percent minority population [§ 2 of the VRA] demands." *Ibid*. But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake. Accordingly, we uphold the District Court's conclusion that North Carolina's use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.

***307** IV

[20] We now look west to District 12, making its fifth(!) appearance before this Court. This time, the district's legality turns, and turns solely, on which of two possible reasons predominantly explains its most recent reconfiguration. The plaintiffs contended at trial that the General ****1473** Assembly chose voters for District 12, as for District 1, because of their race; more particularly, they urged that the Assembly intentionally increased District 12's BVAP in the name of ensuring preclearance under the VRA's § 5. But North Carolina declined to mount any defense (similar to the one we have just considered for District 1) that § 5's requirements in fact justified race-based changes to District 12—perhaps because § 5 could not reasonably be understood to have done so, see n. 10, *infra*. Instead, the State altogether denied that racial considerations accounted for (or, indeed, played the slightest role in) District 12's redesign. According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a "strictly" political gerrymander, without regard to race. 6 Record 1011. The mapmakers drew their lines, in other words, to "pack" District

12 with Democrats, not African–Americans. After hearing evidence supporting both parties' accounts, the District Court accepted the plaintiffs'.[6]

***308** Getting to the bottom of a dispute like this one poses special challenges for a trial court. In the more usual case alleging a racial gerrymander—where no one has raised a partisanship defense—the court can make real headway by exploring the challenged district's conformity to traditional districting principles, such as compactness and respect for county lines. In *Shaw II,* for example, this Court emphasized the "highly irregular" shape of then-District 12 in concluding that race predominated in its design. 517 U.S., at 905, 116 S.Ct. 1894 (internal quotation marks omitted). But such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a "political motivation" as well as a racial one. *Cromartie I,* 526 U.S., at 547, n. 3, 119 S.Ct. 1545. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries. That is because, of course, "racial identification is highly correlated with political affiliation." *Cromartie II,* 532 U.S., at 243, 121 S.Ct. 1452. As a result of those redistricting realities, a trial court has a formidable task: It must make "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines. *Cromartie I,* 526 U.S., at 546, 119 S.Ct. 1545 (internal quotation marks omitted).[7]

****1474** ***309** **[21]** Our job is different—and generally easier. As described earlier, we review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake. See *supra,* at 1464 – 1465. Under that standard of review, we affirm the court's finding so long as it is "plausible"; we reverse only when "left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S., at 573–574, 105 S.Ct. 1504; see *supra,* at 1465. And in deciding which side of that line to come down on, we give singular deference to a trial court's judgments about the credibility of witnesses. See Fed. Rule Civ. Proc. 52(a)(6). That is proper, we have explained, because the various cues that "bear so heavily on the listener's understanding of and belief in what is said" are lost on an appellate court later sifting through a paper record. *Anderson,* 470 U.S., at 575, 105 S.Ct. 1504.[8]

In light of those principles, we uphold the District Court's finding of racial predominance respecting District 12. The evidence offered at trial, including live witness testimony subject to credibility determinations, adequately supports ***310** the conclusion that race, not politics, accounted for the district's reconfiguration. And no error of law infected that judgment: Contrary to North Carolina's view, the District Court had no call to dismiss this challenge just because the plaintiffs did not proffer an alternative design for District 12 as circumstantial evidence of the legislature's intent.

A

Begin with some facts and figures, showing how the redistricting of District 12 affected its racial composition. As explained above, District 12 (unlike District 1) was approximately the right size as it was: North Carolina did not—indeed, could not—much change its total population. See *supra,* at 1466. But by further slimming the district and adding a couple of knobs to its snakelike body (including in Guilford County), the General Assembly incorporated tens of thousands of new voters and pushed out tens of thousands of old ones. And those changes followed racial lines: To be specific, the new District 12 had 35,000 more African–Americans of voting age and 50,000 fewer whites of that age. (The difference was made up of voters from other racial categories.) See ****1475** *ibid*. Those voter exchanges produced a sizable jump in the district's BVAP, from 43.8% to 50.7%. See *ibid.* The Assembly thus turned District 12 (as it did District 1, see *supra,* at 1468 – 1469) into a majority-minority district.

As the plaintiffs pointed out at trial, Rucho and Lewis had publicly stated that racial considerations lay behind District 12's augmented BVAP. In a release issued along with their draft districting plan, the two legislators ascribed that change to the need to achieve preclearance of the plan under § 5 of the VRA. See App. 358. At that time, § 5 covered Guilford County and thus prohibited any "retrogression in the [electoral] position of racial minorities" there. *Beer,* 425 U.S., at 141, 96 S.Ct. 1357; see 31 Fed.Reg. 5081 (1966). And part of Guilford County lay within District 12, which meant that the Department of Justice would closely scrutinize that district's ***311** new lines. In light of those facts, Rucho and Lewis wrote: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a [BVAP] level that is above the percentage of [BVAP] found in the current Twelfth District." App. 358. According to the two legislators, that race-based "measure w[ould] ensure preclearance of the plan." *Ibid.*

Thus, the District Court found, Rucho's and Lewis's own account "evince[d] intentionality" as to District 12's racial composition: *Because of* the VRA, they increased the number of African–Americans. 159 F.Supp.3d, at 617.

Hofeller confirmed that intent in both deposition testimony and an expert report. Before the redistricting, Hofeller testified, some black residents of Guilford County fell within District 12 while others fell within neighboring District 13. The legislators, he continued, "decided to reunite the black community in Guilford County into the Twelfth." App. 558; see *id.,* at 530–531. Why? Hofeller responded, in language the District Court emphasized: "[I]n order to be cautious and draw a plan that would pass muster under the Voting Rights Act." *Id.,* at 558; see 159 F.Supp.3d, at 619. Likewise, Hofeller's expert report highlighted the role of the VRA in altering District 12's lines. "[M]indful that Guilford County was covered" by § 5, Hofeller explained, the legislature "determined that it was prudent to reunify [the county's] African–American community" into District 12. App. 1103. That change caused the district's compactness to decrease (in expert-speak, it "lowered the Reock Score"), but that was a sacrifice well worth making: It would "avoid the possibility of a[VRA] charge" that would "inhibit [ ] preclearance." *Ibid.*

The State's preclearance submission to the Justice Department indicated a similar determination to concentrate black voters in District 12. "One of the concerns of the Redistricting Chairs," North Carolina there noted, had to do with the Justice Department's years-old objection to "a failure by ***312** the State to create a second majority minority district" (that is, in addition to District 1). *Id.*, at 478. The submission then went on to explain that after considering alternatives, the redistricters had designed a version of District 12 that would raise its BVAP to 50.7%. Thus, concluded the State, the new District 12 "increases[ ] the African–American community's ability to elect their candidate of choice." *Id.*, at 479. In the District Court's view, that passage once again indicated that making District 12 majority-minority was no "mere coincidence," but a deliberate attempt to avoid perceived obstacles to preclearance. 159 F.Supp.3d, at 617.[9]

****1476** And still there was more: Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Rucho in 2011 about the district's future make-up. According to Watt, Rucho said that "his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law." App. 2369; see *id.*, at 2393. And further, that it would then be Rucho's "job to go and convince the African–American community" that such a racial target "made sense" under the Act. *Ibid.*; see *id.*, at 2369.[10] The District Court credited Watt's testimony about ***313** the conversation, citing his courtroom demeanor and "consistent recollection" under "probing cross-examination." 159 F.Supp.3d, at 617–618.[11] In the court's view, Watt's account was of a piece with all the other evidence—including the redistricters' on-the-nose attainment of a 50% BVAP—indicating that the General Assembly, in the name of VRA compliance, deliberately redrew District 12 as a majority-minority district. See *id.,* at 618.[12]

The State's contrary story—that politics alone drove decisionmaking—came into the trial mostly through Hofeller's testimony. Hofeller explained that Rucho and Lewis instructed him, first and foremost, to make the map as a whole "more favorable to Republican candidates." App. 2682. One agreed-on stratagem in that effort was to pack the historically Democratic District 12 with even more Democratic voters, thus leaving surrounding districts more reliably Republican. See *id.*, at 2682–2683, 2696–2697. To that end, Hofeller recounted, he drew District 12's new boundaries based on political data—specifically, the voting behavior of precincts in the 2008 Presidential election between Barack Obama and John McCain. See *id.*, at 2701–2702. Indeed, he claimed, he displayed only this data, and no racial data, ***314** on his computer screen while mapping the district. See *id.*, at 2721. In part of his testimony, Hofeller further stated that the Obama–McCain election data explained ****1477** (among other things) his incorporation of the black, but not the white, parts of Guilford County then located in District 13. See *id.*, at 2824. Only *after* he drew a politics-based line between those adjacent areas, Hofeller testified, did he "check[ ]" the racial data and "f[ind] out" that the resulting configuration of District 12 "did not have a[§ 5] issue." *Id.*, at 2822.

The District Court, however, disbelieved Hofeller's asserted indifference to the new district's racial composition. The court recalled Hofeller's contrary deposition testimony—his statement (repeated in only slightly different words in his expert report) that Rucho and Lewis "decided" to shift African–American voters into District 12 "in order to" ensure preclearance under § 5. See 159 F.Supp.3d, at 619–620; App. 558. And the court explained that even at trial, Hofeller had given testimony that undermined his "blame it on politics" claim. Right after asserting that Rucho and Lewis had told

him "[not] to use race" in designing District 12, Hofeller added a qualification: "except perhaps with regard to Guilford County." *Id*., at 2791; see *id*., at 2790. As the District Court understood, that is the kind of "exception" that goes pretty far toward swallowing the rule. District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%. See *id*., at 384, 500–502.[13] The District ***315** Court came away from Hofeller's self-contradictory testimony unpersuaded that this decisive influx of black voters was an accident. Whether the racial make-up of the county was displayed on his computer screen or just fixed in his head, the court thought, Hofeller's denial of race-based districting "r[ang] hollow." 159 F.Supp.3d, at 620, n. 8.

Finally, an expert report by Dr. Stephen Ansolabehere lent circumstantial support to the plaintiffs' race-not-politics case. Ansolabehere looked at the six counties overlapping with District 12—essentially the region from which the mapmakers could have drawn the district's population. The question he asked was: Who from those counties actually ended up in District 12? The answer he found was: Only 16% of the region's white registered voters, but 64% of the black ones. See App. 321–322. Ansolabehere next controlled for party registration, but discovered that doing so made essentially no difference: For example, only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did. See *id.,* at 332. The upshot was that, regardless of party, a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders. See *ibid.* Those stark disparities led Ansolabehere to conclude that "race, and not party," was "the dominant factor" in District 12's design. *Id*., at 337.[14] His report, ****1478** as the District Court held, thus tended to ***316** confirm the plaintiffs' direct evidence of racial predominance. See 159 F.Supp.3d, at 620–621.

The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review. The court emphasized that the districting plan's own architects had repeatedly described the influx of African–Americans into District 12 as a § 5 compliance measure, not a side-effect of political gerrymandering. And those contemporaneous descriptions comported with the court's credibility determinations about the trial testimony—that Watt told the truth when he recounted Rucho's resolve to hit a majority-BVAP target; and conversely that Hofeller skirted the truth (especially as to Guilford County) when he claimed to have followed only race-blind criteria in drawing district lines. We cannot disrespect such credibility judgments. See *Anderson,* 470 U.S., at 575, 105 S.Ct. 1504 (A choice to believe "one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence," can "virtually never be clear error"). And more generally, we will not take it upon ourselves to weigh the trial evidence as if we were the first to hear it. See *id.,* at 573, 105 S.Ct. 1504 (A "reviewing court oversteps" under Rule 52(a) "if it undertakes to duplicate the role of the lower court"). No doubt other interpretations of that evidence were permissible. Maybe we would have evaluated the testimony differently ***317** had we presided over the trial; or then again, maybe we would not have. Either way—and it is only *this* which matters—we are far from having a "definite and firm conviction" that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design.

B

The State mounts a final, legal rather than factual, attack on the District Court's finding of racial predominance. When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." Brief for Appellants 31 (emphasis deleted). That is true, the State says, irrespective of what other evidence is in the case—so even if the plaintiff offers powerful direct proof that the legislature adopted the map it did for racial reasons. See Tr. of Oral Arg. 8. Because the plaintiffs here (as all agree) did not present such a counter-map, ****1479** North Carolina concludes that they cannot prevail. The dissent echoes that argument. See *post,* at 1488 – 1491.

We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. One, often highly persuasive way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district. If you were *really* sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done—*this*. Such would-have, could-

have, and (to round out the set) should-have arguments are a familiar means of undermining a claim that an action was based on a permissible, rather than a prohibited, ground. ***318** See, *e.g., Miller–El v. Dretke,* 545 U.S. 231, 249, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("If that were the [real] explanation for striking [juror] Warren[,] the prosecutors should have struck [juror] Jenkins" too).

But they are hardly the *only* means. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof. In *Bush v. Vera,* for example, this Court upheld a finding of racial predominance based on "substantial direct evidence of the legislature's racial motivations"—including credible testimony from political figures and statements made in a § 5 preclearance submission—plus circumstantial evidence that redistricters had access to racial, but not political, data at the "block-by-block level" needed to explain their "intricate" designs. See 517 U.S., at 960–963, 116 S.Ct. 1941 (plurality opinion). Not a single Member of the Court thought that the absence of a counter-map made any difference. Similarly, it does not matter in this case, where the plaintiffs' introduction of mostly direct and some circumstantial evidence—documents issued in the redistricting process, testimony of government officials, expert analysis of demographic patterns—gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question.

[22] A plaintiff's task, in other words, is simply to persuade the trial court—without any special evidentiary prerequisite—that race (not politics) was the "predominant consideration in deciding to place a significant number of voters within or without a particular district." *Alabama,* 575 U.S., at ——, 135 S.Ct., at 1265 (internal quotation marks omitted); cf. *Bethune–Hill,* 580 U.S., at ——, ——, 137 S.Ct., at 798, 799 (rejecting a similar effort to elevate one form of "persuasive circumstantial evidence" in a dispute respecting ***319** racial predominance to a "mandatory precondition" or "threshold requirement" of proof). That burden of proof, we have often held, is "demanding." *E.g., Cromartie II,* 532 U.S., at 241, 121 S.Ct. 1452. And because that is so, a plaintiff will sometimes need an alternative map, as a practical matter, to make his case. But in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail. See *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266–268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (offering a varied and non-exhaustive list of "subjects ****1480** of proper inquiry in determining whether racially discriminatory intent existed"). Nor would it make sense to do so here. The Equal Protection Clause prohibits the unjustified drawing of district lines based on race. An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.[15]

***320** North Carolina insists, however, that we have already said to the contrary—more particularly, that our decision in *Cromartie II* imposed a non-negotiable "alternative-map requirement." Brief for Appellants 31. As the State observes, *Cromartie II* reversed as clearly erroneous a trial court's finding that race, rather than politics, predominated in the assignment of voters to an earlier incarnation of District 12. See 532 U.S., at 241, 121 S.Ct. 1452; *supra,* at 1465 – 1466. And as the State emphasizes, a part of our opinion faulted the *Cromartie* plaintiffs for failing to offer a convincing account of how the legislature could have accomplished its political goals other than through the map it chose. See 532 U.S., at 257–258, 121 S.Ct. 1452. We there stated:

> "In a case such as this one where majority-minority districts ... are at issue and where racial identification correlates highly with political affiliation, ***333** the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Id.,* at 258, 121 S.Ct. 1452.

According to North Carolina, that passage alone settles this case, because it makes an alternative map "essential" to a finding that District 12 (a majority-minority district in which race and partisanship are correlated) was a racial gerrymander. Reply Brief 11. Once again, the dissent says the same. See *post,* at 1489.

***321** But the reasoning of *Cromartie II* belies that reading. The Court's opinion nowhere ****1481** attempts to explicate or justify the categorical rule that the State claims to find there. (Certainly the dissent's current defense of that rule, see *post,* at 1489 – 1491, was nowhere in evidence.) And

given the strangeness of that rule—which would treat a mere form of evidence as the very substance of a constitutional claim, see *supra,* at 1478 – 1480—we cannot think that the Court adopted it without any explanation. Still more, the entire thrust of the *Cromartie II* opinion runs counter to an inflexible counter-map requirement. If the Court had adopted that rule, it would have had no need to weigh each piece of evidence in the case and determine whether, taken together, they were "adequate" to show "the predominance of race in the legislature's line-drawing process." 532 U.S., at 243–244, 121 S.Ct. 1452. But that is exactly what *Cromartie II* did, over a span of 20 pages and in exhaustive detail. Item by item, the Court discussed and dismantled the supposed proof, both direct and circumstantial, of race-based redistricting. All that careful analysis would have been superfluous—that dogged effort wasted—if the Court viewed the absence or inadequacy of a single form of evidence as necessarily dooming a gerrymandering claim.

Rightly understood, the passage from *Cromartie II* had a different and narrower point, arising from and reflecting the evidence offered in that case. The direct evidence of a racial gerrymander, we thought, was extremely weak: We said of one piece that it "says little or nothing about whether race played a predominant role" in drawing district lines; we said of another that it "is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id.,* at 253–254, 121 S.Ct. 1452 (emphasis deleted). Nor did the report of the plaintiffs' expert impress us overmuch: In our view, it "offer[ed] little insight into the legislature's true motive." *Id.,* at 248, 121 S.Ct. 1452. That left a set of arguments of the would-have-could-have variety. For example, the plaintiffs ***322** offered several maps purporting to "show how the legislature might have swapped" some mostly black and mostly white precincts to obtain greater racial balance "without harming [the legislature's] political objective." *Id.,* at 255, 121 S.Ct. 1452 (internal quotation marks omitted). But the Court determined that none of those proposed exchanges would have worked as advertised—essentially, that the plaintiffs' "you could have redistricted differently" arguments failed on their own terms. See *id.,* at 254–257, 121 S.Ct. 1452. Hence emerged the demand quoted above, for maps that would *actually* show what the plaintiffs' had not. In a case like *Cromartie II*—that is, one in which the plaintiffs had meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives—only maps of that kind could carry the day. *Id.,* at 258, 121 S.Ct. 1452.

But this case is most unlike *Cromartie II,* even though it involves the same electoral district some twenty years on. This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly's intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's "it was really politics" defense; there was no need for an alternative map to do the same job. And we pay our precedents no respect when we extend them far beyond the circumstances for which they were designed.

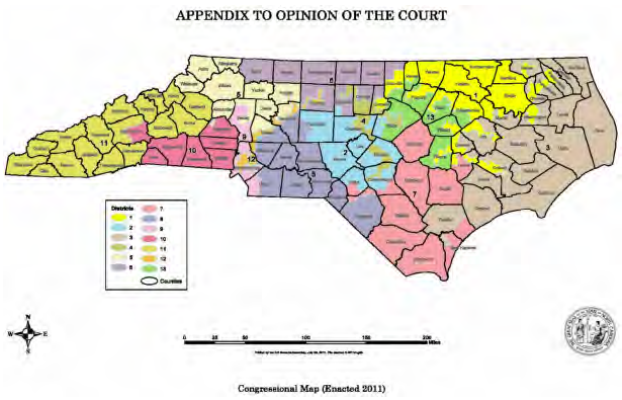
V

Applying a clear error standard, we uphold the District Court's conclusions that ****1482** racial considerations predominated in designing both District 1 and District 12. For District 12, that is all we must do, because North Carolina has made no attempt to justify race-based districting there. For District 1, we further uphold the District Court's decision that § 2 of the VRA gave North Carolina no good reason to reshuffle ***323** voters because of their race. We accordingly affirm the judgment of the District Court.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

APPENDIX



***325**

Congressional District 1 (Enacted 2011)

***326**

Congressional District 12 (Enacted 2011)

****1485** Justice THOMAS, concurring.

***327** I join the opinion of the Court because it correctly applies our precedents under the Constitution and the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10301 *et seq*. I write briefly to explain the additional grounds on which I would affirm the three-judge District Court and to note my agreement, in particular, with the Court's clear-error analysis.

As to District 1, I think North Carolina's concession that it created the district as a majority-black district is by itself sufficient to trigger strict scrutiny. See Brief for Appellants 44; see also, *e.g., Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, —— – ——, 137 S.Ct. 788, 803–804, 197 L.Ed.2d 85 (2017) (THOMAS, J., concurring in judgment in part and dissenting in part). I also think that North Carolina cannot satisfy strict scrutiny based on its efforts to comply with § 2 of the VRA. See *ante,* at 1469. In my view, § 2 does not apply to redistricting and therefore cannot justify a racial gerrymander. See ****1486** *Holder v. Hall,* 512 U.S. 874, 922–923, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment).

As to District 12, I agree with the Court that the District Court did not clearly err when it determined that race was North Carolina's predominant motive in drawing the district. See *ante,* at 1474. This is the same conclusion I reached when we last reviewed District 12. *Easley v. Cromartie,* 532 U.S. 234, 267, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*) (dissenting opinion). The Court reached the contrary conclusion in *Cromartie II* only by misapplying our deferential standard for reviewing factual findings. See *id.,* at 259–262, 121 S.Ct. 1452. Today's decision does not repeat *Cromartie II* 's error, and indeed it confines that case to its particular facts. It thus represents a welcome course correction to this Court's application of the clear-error standard.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice KENNEDY join, concurring in the judgment in part and dissenting in part.

A precedent of this Court should not be treated like a disposable household item—say, a paper plate or napkin—to be ***328** used once and then tossed in the trash. But that is what the Court does today in its decision regarding North Carolina's 12th Congressional District: The Court junks a rule adopted in a prior, remarkably similar challenge to this very same congressional district.

In *Easley v. Cromartie,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (*Cromartie II*), the Court considered the constitutionality of the version of District 12 that was adopted in 1997. *Id.,* at 238, 121 S.Ct. 1452. That district had the same basic shape as the district now before us, and the challengers argued that the legislature's predominant reason for adopting this configuration was race. *Ibid.* The State responded that its motive was not race but politics. *Id.,* at 241, 121 S.Ct. 1452. Its objective, the State insisted, was to create a district in which the Democratic candidate would win. See *ibid.*; Brief for State Appellants in *Easley v. Cromartie,* O.T. 2000, Nos. 99–1864, 99–1865, p. 25. Rejecting that explanation, a three-judge court found that the legislature's predominant motive was racial, specifically to pack African–Americans into District 12. See *Cromartie v. Hunt,* 133 F.Supp.2d 407, 420 (E.D.N.C.2000). But this Court held that this finding of fact was clearly erroneous. *Cromartie II,* 532 U.S., at 256, 121 S.Ct. 1452.

A critical factor in our analysis was the failure of those challenging the district to come forward with an alternative redistricting map that served the legislature's political objective as well as the challenged version without producing the same racial effects. Noting that race and party affiliation in North Carolina were "highly correlated," *id.,* at 243, 121 S.Ct. 1452 we laid down this rule:

> "In a case such as this one ..., the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. ***329** That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here." *Id.,* at 258, 121 S.Ct. 1452.

Now, District 12 is back before us. After the 2010 census, the North Carolina Legislature, with the Republicans in the majority, drew the present version of District 12. The challengers contend that this version violates equal protection because the predominant motive of the legislature ****1487** was racial: to pack the district with African–American voters. The legislature responds that its objective was political: to pack the district with Democrats and thus to increase the chances of Republican candidates in neighboring districts.

You might think that the *Cromartie II* rule would be equally applicable in this case, which does not differ in any relevant particular, but the majority executes a stunning about-face. Now, the challengers' failure to produce an alternative map that meets the *Cromartie II* test is inconsequential. It simply "does not matter." *Ante,* at 1479.

This is not the treatment of precedent that state legislatures have the right to expect from this Court. The failure to produce an alternative map doomed the challengers in *Cromartie II,* and the same should be true now. Partisan gerrymandering is always unsavory, but that is not the issue here. The issue is whether District 12 was drawn predominantly because of race. The record shows that it was not.[1]

I

Under the Constitution, state legislatures have "the initial power to draw districts for federal elections." ***330** *Vieth v. Jubelirer,* 541 U.S. 267, 275, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion).[2] This power, of course, must be exercised in conformity with the Fourteenth Amendment's Equal Protection Clause. And because the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking," *Miller v. Johnson,* 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), "effort[s] to separate voters into different districts on the basis of race" must satisfy the rigors of strict scrutiny. *Shaw v. Reno,* 509 U.S. 630, 649, 653, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

We have stressed, however, that courts are obligated to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," and "the good faith of a state legislature must be presumed." *Id.,* at 915, 115 S.Ct. 2475. A legislature will "almost always be aware of racial demographics" during redistricting, but evidence of such awareness does not show that the legislature violated equal protection. *Id.,* at 916, 115 S.Ct. 2475. Instead, the Court has held, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." *Cromartie II,* 532 U.S., at 241, 121 S.Ct. 1452 (citation and internal quotation marks omitted; emphasis in original).

This evidentiary burden "is a demanding one." *Ibid.* (internal quotation marks omitted). Thus, although "[t]he legislature's motivation is ... a factual question," *Hunt v. Cromartie,* 526

U.S. 541, 549, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (*Cromartie I*), an appellate court conducting clear-error review must always keep in mind the heavy evidentiary obligation **1488 borne by those challenging a districting plan. See *Cromartie II,* *331 *supra,* at 241, 257, 121 S.Ct. 1452. Recognizing "the intrusive potential of judicial intervention into the legislative realm," *Miller, supra,* at 916, 115 S.Ct. 2475 we have warned that courts must be very cautious about imputing a racial motive to a State's redistricting plan.

II

That caution "is especially appropriate ... where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II,* 532 U.S., at 242, 121 S.Ct. 1452. We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context. See *id.,* at 242, 257–258, 121 S.Ct. 1452; *Cromartie I, supra,* at 551–552, 119 S.Ct. 1545; *Bush v. Vera,* 517 U.S. 952, 967–968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion).

The problem arises from the confluence of two factors. The first is the status under the Constitution of partisan gerrymandering. As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings,* 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. See *Davis v. Bandemer,* 478 U.S. 109, 129, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Partisan gerrymandering dates back to the founding, see *Vieth, supra,* at 274–276, 124 S.Ct. 1769 (plurality opinion), and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Cromartie I, supra,* at 551, 119 S.Ct. 1545 (emphasis in original); *Vera, supra,* at 964, 116 S.Ct. 1941 (plurality opinion).

The second factor is that "racial identification is highly correlated with political affiliation" in many jurisdictions. *Cromartie II,* 532 U.S., at 243, 121 S.Ct. 1452 (describing correlation in North Carolina). This phenomenon makes it difficult to distinguish *332 between political and race-based decisionmaking. If around 90% of African–American voters cast their ballots for the Democratic candidate, as they have in recent elections,[3] a plan that packs Democratic voters will look very much like a plans that packs African–American voters. "[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African–American precincts, but the reasons would be political rather than racial." *Id.,* at 245, 121 S.Ct. 1452.

A

We addressed this knotty problem in *Cromartie II,* which, as noted, came to us **1489 after the District Court had held a trial and found as a fact that the legislature's predominant reason for drawing District 12 was race, not politics. *Id*., at 239–241, 121 S.Ct. 1452. Our review for clear error in that case did not exhibit the same diffidence as today's decision. We carefully examined each piece of direct and circumstantial evidence on which the District Court had relied and conceded that this evidence provided support for the court's finding. *Id.,* at 257, 121 S.Ct. 1452. Then, at the end of our opinion, we stated:

> "We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance." *Id.,* at 258, 121 S.Ct. 1452.

Because the plaintiffs had "failed to make any such showing," we held that the District Court had clearly erred in finding that race predominated in drawing District 12. *Ibid.*

Cromartie II plainly meant to establish a rule for use in a broad class of cases and not a rule to be employed one time only. We stated that we were "put [ting] the matter more generally" and were describing what must be shown in cases "where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation." *Ibid.* We identified who would carry the burden of the new rule ("the party attacking the legislatively drawn boundaries") and what that party

must show (that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" while achieving "significantly greater racial balance"). *Ibid.* And we reversed the finding of racial predominance due to the plaintiffs' failure to carry the burden established by this evidentiary rule. *Ibid.*

Here, too, the plaintiffs failed to carry that burden. In this case, as in *Cromartie II,* the plaintiffs allege a racial gerrymander, and the State's defense is that political motives explain District 12's boundaries. In such a case, *Cromartie II* instructed, plaintiffs must submit an alternative redistricting map demonstrating that the legislature could have achieved its political goals without the racial effects giving rise to the racial gerrymandering allegation. But in spite of this instruction, plaintiffs in this case failed to submit such a ***334** map.[4] See Brief for Appellees 31–36. Based on what we said in *Cromartie II* about *the same type of claim* involving *the same congressional district,* reversal should be a foregone conclusion. It turns out, however, that the *Cromartie II* rule was good for one use only. Even in a case involving the very same district, it is tossed aside.

B

The alternative-map requirement deserves better. It is a logical response to ****1490** the difficult problem of distinguishing between racial and political motivations when race and political party preference closely correlate.

This is a problem with serious institutional and federalism implications. When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of "offensive and demeaning" conduct. *Miller,* 515 U.S., at 912, 115 S.Ct. 2475. Indeed, we have said that racial gerrymanders "bea[r] an uncomfortable resemblance to political apartheid." *Shaw I,* 509 U.S., at 647, 113 S.Ct. 2816. That is a grave accusation to level against a state legislature.

In addition, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" because "[i]t is well settled that reapportionment is primarily the duty and responsibility of the State." *Miller, supra,* at 915, 115 S.Ct. 2475 (internal quotation marks omitted); see also *Cromartie II,* 532 U.S., at 242, 121 S.Ct. 1452. When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required—if the legislature truly did draw district boundaries on the basis of race. But if a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, ***335** usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.

There is a final, often-unstated danger where race and politics correlate: that the federal courts will be transformed into weapons of political warfare. Unless courts "exercise extraordinary caution" in distinguishing race-based redistricting from politics-based redistricting, *Miller, supra,* at 916, 115 S.Ct. 2475 they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena. If the majority party draws districts to favor itself, the minority party can deny the majority its political victory by prevailing on a racial gerrymandering claim. Even if the minority party loses in court, it can exact a heavy price by using the judicial process to engage in political trench warfare for years on end.

Although I do not imply that this is what occurred here, this case *does* reflect what litigation of this sort can look like. This is the *fifth time* that North Carolina's 12th Congressional District has come before this Court since 1993, and we have almost reached a new redistricting cycle without any certainty as to the constitutionality of North Carolina's *current* redistricting map. Given these dangers, *Cromartie II* was justified in crafting an evidentiary rule to prevent false positives.[5]

C

The majority nevertheless absolves the challengers of their failure to submit an alternative map. It argues that an alternative map cannot be "the *only* means" of proving ***336** racial predominance, and it concludes from this that an alternative map "does not matter in this case." *Ante,* at 1479 (emphasis in original). But even if ****1491** there are cases in which a plaintiff could prove a racial gerrymandering claim without an alternative map, they would be exceptional ones in which the evidence of racial predominance is overwhelming. This most definitely is not one of those cases, see Part III–C, *infra,* and the plaintiffs' failure to produce an alternative map mandates reversal. Moreover, even in an exceptional case, the

absence of such a map would still be strong evidence that a district's boundaries were determined by politics rather than race.[6] The absence of a map would "matter." Cf. *ante,* at 1479.

The majority questions the legitimacy of the alternative-map requirement, *ante,* at 1478 – 1480, and n. 15, but the rule is a sound one. It rests on familiar principles regarding the allocation of the burdens of production and persuasion and the assessment of evidence. First, in accordance with the general rule in civil cases, plaintiffs in a case like this bear the burden of proving that the legislature's motive was unconstitutional. Second, what must be shown is not simply that race played a part in the districting process but that it played the predominant role. Third, a party challenging a districting plan must overcome the strong presumption that the plan was drawn for constitutionally permissible reasons. *Miller, supra,* at 915, 115 S.Ct. 2475. Fourth, when those responsible for adopting a challenged plan contend that the plan was devised for partisan political ends, they are making an admission that may not sit well with voters, so the explanation should not be lightly dismissed. Cf. Fed. Rule Evid. 804(b)(3). And finally, the *Cromartie II* rule takes into account the difficulty of proving a negative.

***337** For challengers like those in the present case, producing a map that meets the *Cromartie II* test should not be hard if the predominant reason for a challenged plan really was race and not politics. Plaintiffs mounting a challenge to a districting plan are almost always sophisticated litigants who have the assistance of experts, and that is certainly true in the present case. Today, an expert with a computer can easily churn out redistricting maps that control for any number of specified criteria, including prior voting patterns and political party registration. Therefore, if it is indeed possible to find a map that meets the *Cromartie II* test, it should not be too hard for the challengers to do so. The State, on the other hand, cannot prove that no map meeting the *Cromartie II* test can be drawn. Even if a State submits, say, 100 alternative maps that fail the test, that would not prove that no such map could pass it. The relative ease with which the opposing parties can gather evidence is a familiar consideration in allocating the burden of production. See 1 C. Mueller & L. Kirkpatrick, Federal Evidence § 63, p. 316 (2d ed. 1994); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5122, pp. 556–557 (1977).

III

Even if we set aside the challengers' failure to submit an alternative map, the District Court's finding that race predominated in the drawing of District 12 is clearly erroneous. The State offered strong and coherent evidence that politics, not race, was the legislature's predominant aim, and the evidence supporting the District Court's contrary finding is weak and manifestly inadequate in light of the high ****1492** evidentiary standard that our cases require challengers to meet in order to prove racial predominance.[7]

***338** My analysis will proceed in three steps. First, I will discuss what the legislature's mapmaker did and why this approach is entirely consistent with his stated political objectives. Then, I will explain why this approach inevitably had the racial effect to which the challengers object. Finally, I will address the evidence of racial predominance on which the majority relies and show why it is inadequate to sustain the District Court's judgment.

A

In order to understand the mapmaker's approach, the first element to be kept in mind is that the basic shape of District 12 was legitimately taken as a given. When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and to change the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends. This approach honors settled expectations and, if the prior plan survived legal challenge, minimizes the risk that the new plan will be overturned. And that is the approach taken by the veteran mapmaker in the present case, Dr. Thomas Hofeller. App. 523 ("the normal starting point is always from the existing districts").

Dr. Hofeller began with the prior version of District 12 even though that version had a strange, serpentine shape. ***339** *Cromartie I,* 526 U.S., at 544, 119 S.Ct. 1545; App. 1163. That design has a long history. It was first adopted in 1992, and subsequent redistricting plans have built on the 1992 plan. *Ibid.* In *Cromartie II,* we sustained the constitutionality of the 1997 version of District 12, which featured the same basic shape. See 532 U.S., at 258, 121 S.Ct. 1452. And retention of this same basic shape is not challenged in this case.[8]

Using the prior design as his starting point, Dr. Hofeller assumed that District 12 would remain a "strong Democratic distric[t]." App. 521. He stated that he drew "the [overall

redistricting] plan to ... have an increased number of competitive districts for GOP candidates," *id*., at 520, and that he therefore moved more Democratic voters into District 12 in order to "increase Republican opportunities in the surrounding districts," *id*., at 1606.

****1493** Under the map now before us, District 12 is bordered by four districts.[9] Running counterclockwise, they are: District 5 to the northwest; District 9 to the southwest; District 8 to the southeast; and District 6 to the northeast. See Appendix, *ante*. According to Dr. Hofeller, the aim was to make these four districts—considered as a whole—more secure for Republicans. App. 1606, 2696.

To do this, Dr. Hofeller set out in search of pockets of Democratic voters that could be moved into District 12 from areas adjoining or very close to District 12's prior boundaries. Of the six counties through which District 12 passes, the three most heavily Democratic (and also the most populous) are Forsyth, Guilford, and Mecklenburg, which contain the major population centers of Winston–Salem, Greensboro, and Charlotte, respectively. See 7 Record 480–482; App. 1141. As a measure of voting preferences, Dr. Hofeller used ***340** the results of the then-most recent Presidential election, *i.e.,* the election of 2008. *Id.,* at 1149, 2697, 2721–2722. In that election, these three counties voted strongly for the Democratic candidate, then-Senator Barack Obama, while the other three counties, Cabarrus, Davidson, and Rowan, all voted for the Republican candidate, Senator John McCain. See 4 Record 1341–1342.

Two of the three Democratic counties, Forsyth and Guilford, are located at the northern end of District 12, while the other Democratic county, Mecklenburg, is on the southern end. See Appendix, *ante.* The middle of the district (often called the "corridor") passes through the three more Republican-friendly counties—Cabarrus, Davidson, and Rowan. *Ibid.* Thus, if a mapmaker sat down to increase the proportion of Democrats in District 12 and to reduce the proportion in neighboring districts, the most obvious way to do that was to pull additional Democrats into the district from the north and south (the most populous and heavily Democratic counties) while shifting Republican voters out of the corridor.

That, in essence, is what Dr. Hofeller did—as the majority acknowledges. *Ante,* at 1466 (Dr. Hofeller "narrow[ed District 12's] already snakelike body while adding areas at either end"); App. 1150 (Table 1), 1163. Dr. Hofeller testified that he sought to shift parts of Mecklenburg County out of Districts 8 and 9 (in order to reduce the percentage of Democrats in these two districts) and that this required him to increase the coverage of Mecklenburg County in District 12. *Id*., at 1142–1143, 1607, 2753.

Dr. Hofeller testified that he also had political plans for the current map's District 6, which differed substantially from the version in the prior map. Dr. Hofeller wanted to improve the Republicans' prospects in this new district by minimizing its coverage of Guilford County's Democratic population. *Id.,* at 1143, 1607, 2693, 2697, 2752. That also meant increasing the population of Guilford County Democrats in District 12. *Id*., at 1143, 1607, 2697.

***341** This influx of Democratic voters from the two most populous counties in District 12 required shedding voters elsewhere in order to comply with this Court's mandate of one-person, one-vote, see *Kirkpatrick v. Preisler,* 394 U.S. 526, 530–531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969),[10] and the population removed had to be added to a bordering district. App. 523. Parts of ****1494** Davidson and Rowan Counties were therefore shifted to District 5, *id*., at 1143, 1150 (Table 1), but Dr. Hofeller testified that this would not have been sufficient to satisfy the one-person, one-vote standard, so he also had to move voters from heavily Democratic Forsyth County into District 5, *id*., at 1143, 2697, 2752–2753. Doing so did not undermine his political objective, he explained, because District 5 "was stronger [for Republicans] to begin with and could take those [Forsyth] Democratic precincts" without endangering Republican chances in the district. *Id*., at 2753; see also *id*., at 2697. The end result was that, under the new map now at issue, the three major counties in the north and south constitute a larger percentage of District 12's total population, while the corridor lost population. See *id*., at 1150 (Table 1), 2149 (Finding 187).

A comparison of the 2008 Presidential election vote under the old and new versions of the districts shows the effect of Dr. Hofeller's map. District 8 (which, of the four districts bordering District 12 under the 2011 map, was the most Democratic district) saw a drop of almost 11% in the Democratic vote under the new map. See 2 Record 354, 421. District 9 saw a drop in the percentage of registered Democrats, *id.,* at 350, 417, although the vote percentage for the Democratic Presidential candidate remained essentially the same (increasing by 0.39%). *Id.,* at 354, 421. District 5, which was heavily Republican under the prior map and was redrawn to absorb Democrats from Forsyth County, saw about a 7–point swing in favor of the Democratic candidate,

***342** but it remained a strong Republican district. *Ibid.* New District 6 is less susceptible to comparison because its boundaries are completely different from the district bearing that number under the old plan, but the new District 6 was solidly Republican, with a Republican Presidential vote percentage of nearly 56%. *Ibid.* As stated by the state court that considered and rejected the same constitutional challenge now before us:

> "By increasing the number of Democratic voters in the 2011 Twelfth Congressional District located in Mecklenburg and Guilford Counties, the 2011 Congressional Plan created other districts that were more competitive for Republican candidates as compared to the 2001 versions of these districts...." App. 2150 (Finding 191).

The results of subsequent congressional elections show that Dr. Hofeller's plan achieved its goal. In 2010, prior to the adoption of the current plan, Democrats won 7 of the 13 districts, including District 8.[11] But by 2016, Republicans controlled 10 of the 13 districts, including District 8, and all the Republican candidates for the House of Representatives won their races with at least 56% of the vote.[12] In accordance with the map's design, the only Democratic seats remaining after 2016 were in Districts 1, 4, and 12. *Id.,* at 521.

In sum, there is strong evidence in the record to support Dr. Hofeller's testimony that the changes made to the 2001 map were designed to maximize Republican opportunities.

***343** B

I now turn to the connection between the mapmaker's strategy and the effect on ****1495** the percentage of African–Americans in District 12.

As we recognized in *Cromartie II,* political party preference and race are highly correlated in North Carolina generally and in the area of Congressional District 12 in particular. App. 2022 (state trial court finding that "racial identification correlates highly with political affiliation" in North Carolina). The challenger's expert, Dr. Stephen Ansolabehere, corroborated this important point. Dr. Ansolabehere calculated the statewide correlation between race and voting in 2008[13] and found a correlation of 0.8, which is "very high." *Id.,* at 342, 352 (Table 1). See also J. Levin, J. Fox, & D. Forde, Elementary Statistics in Social Research 370 (12th ed. 2014); R. Witte & J. Witte, Statistics 138 (10th ed. 2015).

In the area of District 12, the correlation is even higher. There, Dr. Ansolabehere found that the correlation "approach[ed] 1," App. 342, that is, almost complete overlap. These black Democrats also constitute a supermajority of Democrats in the area covered by the district. Under the 2001 version of District 12—which was drawn by Democrats and was never challenged as a racial gerrymander—black registered voters constituted 71.44% of Democrats in the district. 2 Record 350; see also App. 2145 (Finding 173).[14] ***344** What this means is that a mapmaker seeking to pull Democrats into District 12 would unavoidably pull in a very large percentage of African–Americans.

The distribution of Democratic voters magnified this effect. Dr. Hofeller's plan required the identification of areas of Democratic strength that were near District 12's prior boundaries. Dr. Hofeller prepared maps showing the distribution of Democratic voters by precinct,[15] see *id.*, at 1148–1149, 1176–1177, 1181, and those maps show that these voters were highly concentrated around the major urban areas of Winston–Salem (in Forsyth County), Greensboro (in Guilford County), and Charlotte (in Mecklenburg County). Dr. Ansolabehere, the challengers' expert, prepared maps showing the distribution of black registered voters in these same counties, see *id.*, at 322–328; 1 Record 128–133, and a comparison of these two sets of maps reveals that the clusters of Democratic voters generally overlap with those of registered black voters. In other words, the population of nearby Democrats who could be moved into District 12 was heavily black.

****1496** The upshot is that, so long as the legislature chose to retain the basic shape of District 12 and to increase the number of Democrats in the district, it was inevitable that the Democrats brought in would be disproportionately black.

None of this should come as a surprise. After all, when the basic shape of District 12 was created after the 1990 census, the express goal of the North Carolina Legislature was to create a majority-minority district. See *Shaw I,* 509 U.S., at 633–636, 113 S.Ct. 2816. It has its unusual shape *because* it was ***345** originally designed to capture pockets of black voters. See *Shaw v. Hunt,* 517 U.S. 899, 905–906, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*). Although the legislature has modified the district since then, see *Cromartie I,* 526 U.S., at 544, 119 S.Ct. 1545 (describing changes from

the 1991 version to the 1997 version), "it retains its basic 'snakelike' shape and continues to track Interstate 85." *Ibid.*; 1 Record 35 (Appellees' Complaint) ("Congressional District 12 has existed in roughly its current form since 1992, when it was drawn as a majority African–American district ..."); see also App. 1163 (showing the 1997, 2001, and 2011 versions of District 12). The original design of the district was devised to ensure a high concentration of black voters, and as long as the basic design is retained (as it has been), one would expect that to continue.

While plaintiffs failed to offer any alternative map, Dr. Hofeller produced a map showing what District 12 would have looked like if his computer was programmed simply to maximize the Democratic vote percentage in the district, while still abiding by the requirement of one-person, one-vote. *Id.,* at 1148. The result was a version of District 12 that is very similar to the version approved by the North Carolina Legislature. See *id*., at 1175; *id*., at 1615–1618. Indeed, this maximum-Democratic plan had a black voting age population of 50.73%, which is actually *higher* than District 12's black voting age population of 50.66%. *Id.,* at 1154 (Table 5).

Thus, the increase in the black voting age population of District 12 is easily explained by a coherent (and generally successful) political strategy. *Cromartie II,* 532 U.S., at 245, 121 S.Ct. 1452 ("[A] legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African–American precincts, but the reasons would be political rather than racial").

Amazingly, a reader of the majority opinion (and the opinion of the District Court) would remain almost entirely ignorant of the legislature's political strategy and the relationship between that strategy and the racial composition of ***346** District 12.[16] The majority's analysis is like Hamlet without the prince.[17]

****1497** C

The majority focuses almost all its attention on a few references to race by those responsible for the drafting and adoption of the redistricting plan. But the majority reads far too much into these references. First, what the plaintiffs had to prove was not simply that race played *some* role in the districting process but that it was the legislature's *predominant* consideration. Second, as I have explained, a court must exercise "extraordinary caution" before finding that a state legislature's predominant reason for a districting plan was racial. *Miller,* 515 U.S., at 916, 115 S.Ct. 2475. This means that comments should not be taken out of context and given the most sinister possible meaning. Third, the findings of the state courts in a virtually identical challenge to District 12 are entitled to respectful consideration. A North Carolina trial court, after hearing much the same evidence as the court below, found that the legislature's predominant motive was political, not racial. That decision was affirmed by the North Carolina Supreme Court. *Dickson v. Rucho,* 367 N.C. 542, 766 S.E.2d 238 (2014), vacated and remanded, ***347** 575 U.S. ——, 135 S.Ct. 1843, 191 L.Ed.2d 719 aff'd on remand, 368 N.C. 481, 781 S.E.2d 404 (2015), cert. pending, No. 16–24. Even if the judgment in the state case does not bar the present case under the doctrine of res judicata, see *ante,* at 1466 – 1468, the state-court finding illustrates the thinness of the plaintiffs' proof.

Finally, it must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons. Under our precedents, it is unconstitutional for the government to consider race in almost any context, and therefore any mention of race by the decisionmakers may be cause for suspicion. We have said, however, that that is not so in the redistricting context. For one thing, a State like North Carolina that was either wholly or partially within the coverage of § 5 of the Voting Rights Act of 1965 could not redistrict without heeding that provision's prohibition against racial retrogression, see 52 U.S.C. § 10304(b); *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. ——, ——– ——, 135 S.Ct. 1257, 1263–1263, 191 L.Ed.2d 314 (2015), and therefore race had to be kept in mind. In addition, all legislatures must also take into account the possibility of a challenge under § 2 of the Voting Rights Act claiming that a plan illegally dilutes the voting strength of a minority community. See *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). If a State ultimately concludes that it must take race into account in order to comply with the Voting Rights Act, it must show that it had a " 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus, supra,* at ——, 135 S.Ct., at 1274. But those involved in the redistricting process may legitimately make statements about Voting Rights Act compliance before deciding that the Act does not provide a need for race-based districting. And it is understandable for such individuals to explain that a race-

neutral plan happens to satisfy the criteria on which Voting Rights Act challengers might insist. In ***348** short, because of the Voting Rights Act, consideration and discussion of the racial effects of a plan may be expected.

1

The June 17, 2011, Statement

I begin with a piece of evidence that the majority does *not* mention, namely, the very first item cited by the District Court in support of its racial-predominance finding. ****1498** This evidence consisted of a June 17, 2001, statement by Senator Rucho and Representative Lewis, the state legislators who took the lead in the adoption of the current map. In that statement, Rucho and Lewis referred to "constructing [Voting Rights Act] majority black districts." App. 1025. Seizing upon the use of the plural term "districts," the court below seemed to think that it had found a smoking gun. *Harris v. McCrory,* 159 F.Supp.3d 600, 616 (M.D.N.C.2016). The State had insisted that its plan drew only one majority-minority congressional district, District 1, but since the June 17 statement "clearly refers to multiple districts that are now majority minority," *ibid.,* the court below viewed the statement as telling evidence that an additional congressional district, presumably District 12, had been intentionally designed to be a majority-minority district and was thus based on race.

There is a glaring problem with this analysis: The June 17 statement was about *state legislative districts,* not *federal congressional districts*. See App. 1024–1033. The United States, as *amicus curiae* in support of plaintiffs, concedes that the District Court made a mistake by relying on the June 17 statement. Brief for United States 27, n. 13. The majority, by contrast, tries to ignore this error. But the District Court gave the June 17 statement pride-of-place in its opinion, mentioning it first in its analysis, and the District Court seemed to think that this evidence was particularly significant, stating that the reference to multiple districts was not "the result of happenstance, a mere slip of the ***349** pen." 159 F.Supp.3d, at 616. The District Court's error shows a troubling lack of precision.

2

The § 5 Preclearance Request

Under § 5 of the Voting Rights Act, North Carolina requested preclearance from the Department of Justice shortly after the Legislature approved the new congressional plan. *Id.,* at 608. In its preclearance application, the State noted that "[o]ne of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the State to create a second majority minority district." App. 478. The application says that the Redistricting Chairs "sought input from Congressman [Mel] Watt[, the African–American incumbent who represented District 12,] regarding options for re-drawing his district," and that after this consultation, "the Chairs had the impression that Congressman Watt would oppose any redrawing of the Twelfth District ... as originally contemplated by the 1992 Justice Department objection." *Ibid.* The Chairs drew District 12 "[b]ased in part on this input from Congressman Watt." *Id*., at 478–479. Two sentences later in the same paragraph, the application observed that the black voting age population for District 12 went up from 43.77% to 50.66% and that therefore the district "maintains, and in fact increases, the African–American community's ability to elect their candidate of choice in District 12." *Id*., at 479.

According to the majority, this statement shows a "determination to concentrate black voters in District 12." *Ante,* at 1462. In fact, it shows no such thing. The statement explains that Senator Rucho and Representative Lewis decided *not* to construct District 12 as a majority-minority district—as the 1992 Justice Department had demanded—"[b]ased in part on" the input they received from Congressman Watt, ***350** whom they thought "would oppose" drawing the district "as originally contemplated by the 1992 Justice Department objection." App. 478–479. If anything, ****1499** this document cuts *against* a finding of racial predominance.

The statement's matter-of-fact reference to the increase in District 12's black voting age population hardly shows that the legislature altered District 12 *for the purpose* of causing this increase. An entirely natural interpretation is that the Redistricting Chairs simply reported this fact so that it would be before the Justice Department in the event that the Department had renewed Voting Rights Act concerns. Only by reading a great deal between the lines and adopting

the most sinister possible interpretation can the statement be viewed as pointed evidence of a predominantly racial motive.

3

The Mel Watt Testimony

In both the District Court and the state trial court, Congressman Watt testified that, while the redistricting plan was being developed, Senator Rucho invited him to his home to discuss the new boundaries of District 12. *Id.,* at 2368–2369, 1343–1344. According to Congressman Watt, Senator Rucho said that the Republican leadership wanted him to "ramp the 12th Congressional District up to over 50 percent black" because "they believed it was required ... by the Voting Rights Act." *Id.,* at 1344, 2369, 2393. In the state proceedings, Senator Rucho denied making any such statement, *id.,* at 1703, and another state legislator present at the meeting, Representative Ruth Samuelson, gave similar testimony, *id.,* at 1698. Neither Senator Rucho nor Representative Samuelson testified in federal court (although their state court testimony was made part of the federal record). See *id.,* at 2847. But the District Court credited Congressman Watt's testimony based on its assessment of his demeanor ***351** and the consistency of his recollection, 159 F.Supp.3d, at 617–618, and I accept that credibility finding for purposes of our review.[18]

But even assuming that Congressman Watt's recollection was completely accurate, all that his testimony shows is that legislative leaders *at one point in the process* thought that they had to draw District 12 as a majority-minority district in order to comply with the Voting Rights Act; it does *not* show that they actually *did* draw District 12 with the goal of creating a majority-minority district. And as explained in the discussion of the preclearance request above, Senator Rucho and Representative Lewis stated that they ultimately turned away from the creation of a majority-minority district after consulting with Congressman Watt. "Based in part on this input from Congressman Watt," they said they decided *not* to draw the district as the 1992 Department of Justice had suggested—that is, as a majority-minority district. App. 478–479.

This account is fully consistent with Congressman Watt's testimony about his ****1500** meeting with Senator Rucho. Congressman Watt noted that Senator Rucho was uncomfortable with the notion of increasing the black voting age population, *id.,* at 2369, 2393, and Congressman Watt testified that he told Senator Rucho that he was opposed to the idea, ***352** *id.,* at 1345, 2369, 2393. So it makes sense that Senator Rucho was dissuaded from taking that course by Congressman Watt's reaction. And Dr. Hofeller consistently testified that he was never asked to meet a particular black voting age population target, see Part III–C–5, *infra,* and that the only data displayed on his screen when he drew District 12 was political data. See *infra,* at 1500, n. 19. Thus, Congressman Watt's testimony, even if taken at face value, is entirely consistent with what the preclearance request recounts: After initially contemplating the possibility of drawing District 12 as a majority-minority district, the legislative leadership met with Congressman Watt, who convinced them not to do so.

4

Dr. Hofeller's Statements About Guilford County

Under the prior map, both Guilford County and the Greensboro African–American community were divided between the 12th and 13th Districts. This had been done, Dr. Hofeller explained, "to make both the Old 12th and 13th Districts strongly Democratic." App. 1103; see also *id.,* at 555, 2821; 1 Record 132–133 (showing racial demographics of Guilford precincts under 2001 and 2011 maps). But the Republican legislature wanted to make the area surrounding District 12 more Republican. The new map eliminated the old 13th District and created a new district bearing that number farther to the east. The territory to the north of Greensboro that had previously been in the 13th District was placed in a new district, District 6, which was constructed to be a Republican-friendly district, and the new map moved more of the Greensboro area into the new District 12. This move was entirely consistent with the legislature's stated goal of concentrating Democrats in the 12th District and making the surrounding districts hospitable to Republican candidates.

Dr. Hofeller testified that the placement of the Greensboro African–American community in the 12th District was the result of this political strategy. He stated that the portion ***353** of Guilford County absorbed by District 12 "wasn't moved into CD 12 because it had a substantial black population. It was moved into CD 12 because it had a substantial Democratic political voting record...." App. 2824. And Dr. Hofeller maintained that he was never instructed

to draw District 12 as a majority-minority district or to increase the district's black voting age population. See, *e.g., id.,* at 520, 556–558, 1099, 1603–1604, 2682–2683, 2789. Instead, he testified that political considerations determined the boundaries of District 12 and that the only data displayed on his computer screen when he drew the challenged map was voting data from the 2008 Presidential election.[19] *Id.,* at 1149, 2697, 2721–2722.

Dr. Hofeller acknowledged, however, that there had been concern about the possibility of a Voting Rights Act challenge ****1501** to this treatment of the Greensboro African–American community. Guilford County was covered by § 5 of the Voting Rights Act, and as noted, § 5 prohibits retrogression. Under the old map, the Guilford County African–American community was split between the old District 13 and District 12, and in both of those districts, black voters were able to elect the candidates of their choice by allying with white Democratic voters. Under the new map, however, if the Greensboro black community had been split between District 12 and the new Republican-friendly District 6, the black voters in the latter district would be unlikely to elect the candidate of their choice. Placing the African–American community in District 12 avoided this consequence. Even Congressman Watt conceded that there were potential § 5 ***354** concerns relating to the black community in Guilford County. *Id.,* at 2387–2388.

The thrust of many of Dr. Hofeller's statements about the treatment of Guilford County was that the reuniting of the Greensboro black community in District 12 was nothing more than a welcome byproduct of his political strategy. He testified that he *first* drew the district based on political considerations and *then* checked to ensure that Guilford County's black population was not fractured. *Id.,* at 2822 ("[W]hen we checked it, we found that we did not have an issue in Guilford County with fracturing the black ... community"); see also *id.,* at 556, 2821, 2823. This testimony is entirely innocuous.

There is no doubt, however, that Dr. Hofeller also made a few statements that may be read to imply that concern about Voting Rights Act litigation was part of the motivation for the treatment of Guilford County. He testified at trial that he "was instructed [not] to use race in any form *except perhaps with regard to Guilford County*." *Id.,* at 2791 (emphasis added). See *id.,* at 1103 (the legislature "determined that it was prudent to reunify the African–American community in Guilford County"); *id.,* at 558 ("[I]t was decided to reunite the black community in Guilford County into the Twelfth").

These statements by Dr. Hofeller convinced the District Court that the drawing of District 12 was not a "purely ... politically driven affair." 159 F.Supp.3d, at 619. But in order to prevail, the plaintiffs had to show much more—that race was the *predominant* reason for the drawing of District 12, and these few bits of testimony fall far short of that showing.

Our decision in *Cromartie II* illustrates this point. In that case, the legislature's mapmaker made a statement that is remarkably similar to Dr. Hofeller's. Gerry Cohen, the "legislative staff member responsible for drafting districting plans," reported: " 'I have moved Greensboro Black community ***355** into the 12th, and now need to take [about] 60,000 out of the 12th. I await your direction on this.' " 532 U.S., at 254, 121 S.Ct. 1452. This admission did not persuade the Court that the legislature's predominant motive was racial. The majority ignores this obvious parallel with *Cromartie II*.

Moreover, in an attempt to magnify the importance of the treatment of Guilford County, the majority plays games with statistics. It states that "District 12 saw a net increase of more than 25,000 black voters in Guilford County, relative to a net gain of fewer than 35,000 across the district: So the newly added parts of that county played a major role in pushing the district's BVAP over 50%." *Ante,* at 1477.

This is highly misleading. First, since the black voting age population of District 12 is just barely over 50%—specifically, 50.66%—almost *any* decision that increased the number of voting age blacks in District 12 could be said to have "played a ****1502** major role in pushing the district's BVAP over 50%."

Second, the majority provides the total number of voting age blacks added to District 12 from Guilford County (approximately 25,000) alongside the total number of voting age blacks added to the district (approximately 35,000), and this has the effect of making Guilford County look like it is the overwhelming contributor to the district's net increase in black voting age population. In truth, Mecklenburg County was by far the greatest contributor of voting age blacks to District 12 in both absolute terms (approximately 147,000) and in terms of new voting age blacks (approximately 37,000). See App. 384, 500–502. Indeed, if what matters to the majority is how much individual counties increased District 12's black voting age population

percentage, Davidson County deserves attention as well, since the portion of the county within District 12 lost over 26,000 more voting age whites than blacks. *Ibid.* That is greater than the net number of voting age blacks added to the district by Guilford County or Mecklenburg County. *Ibid.* As with so much in ***356** the majority opinion, the issue here is more nuanced—and much more favorable to the State—than the majority would have it seem.

5

The July 1, 2011, Statement

For reasons similar to those just explained, the majority makes far too much of a statement issued by Senator Rucho and Representative Lewis on July 1, 2011, when the new districting plan was proposed. Particularly in light of Dr. Hofeller's later testimony about the legislature's partisan objectives, it is apparent that this statement does not paint an entirely reliable picture of the legislature's aims. The statement begins with this proclamation: "From the beginning, our goal has remained the same: the development of fair and legal congressional and legislative districts," *id.,* at 353, and the statement seriously downplays the role of politics in the map-drawing process, acknowledging only that "we have not been ignorant of the partisan impacts of the districts we have created," *id.,* at 361.

The statement discusses the treatment of Guilford County in a section with the heading "Compliance with the Voting Rights Act." *Id.,* at 355–358. In that section, Rucho and Lewis state: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." *Id.,* at 358.

The majority and the District Court interpret this passage to say that Rucho and Lewis decided to move black voters from Guilford County into District 12 in order to ward off Voting Rights Act liability. *Ante,* at 1475 ("*Because of* the VRA, [Rucho and Lewis] increased the number of African–Americans" in District 12 (citing 159 F.Supp.3d, at 617; emphasis ***357** in original)). But that is hardly the only plausible interpretation. The statement could just as easily be understood as "an explanation by [the] legislature that *because* they chose to add Guilford County back into CD 12, the district ended up with an increased ability to elect African–American candidates, rather than the legislature explaining that they chose to add Guilford County back into CD 12 because of the [racial] results that addition created." *Id.,* at 635 (Osteen, J., concurring in part and dissenting in part) (emphasis in original). And because we are obligated to presume the good faith of the North Carolina Legislature, this latter interpretation is the appropriate one.

****1503** But even if one adopts the majority's interpretation, it adds little to the analysis. The majority's close and incriminating reading of a statement issued to win public support for the new plan may represent poetic justice: Having attempted to blur the partisan aim of the new District 12, the legislature is hoisted on its own petard. But poetic justice is not the type of justice that we are supposed to dispense. This statement is *some* evidence that race played a role in the drawing of District 12, but it is a mistake to give this political statement too much weight.

Again, we made precisely this point in *Cromartie II*. There, the "legislative redistricting leader," then-Senator Roy Cooper, testified before a legislative committee that the proposed plan " 'provides for ... *racial* and partisan *balance*.' " 532 U.S., at 253, 121 S.Ct. 1452 (emphasis added). The District Court read the statement literally and concluded that the district had been drawn with a racial objective. *Ibid.* But this Court dismissed the statement, reasoning that although "the phrase shows that the legislature considered race, along with other partisan and geographic considerations; ... it says little or nothing about whether race played a *predominant* role comparatively speaking." *Ibid.*

What was good in *Cromartie II* should also be good here.

***358** 6

Dr. Ansolabehere's Testimony

Finally, the majority cites Dr. Ansolabehere's testimony that black registered voters in the counties covered by District 12 were more likely to be drawn into District 12 than white registered voters and that black registered Democrats were more likely to be pulled in than white registered Democrats. *Ante,* at 1477 – 1478.

There is an obvious flaw in Dr. Ansolabehere's analysis. He assumed that, if race was not the driving force behind the

drawing of District 12, "white and black registered voters would have approximately the same likelihood of inclusion in a given Congressional District." App. 2597 (internal quotation marks omitted). But that would be true only if black and white voters were *evenly distributed* throughout the region, and his own maps showed that this was not so. See *id.,* at 322–328; 1 Record 128–133. Black voters were concentrated in the cities located at the north and south ends of the district and constituted a supermajority of Democrats in the area covered by District 12. See Part III–B, *supra*. As long as the basic shape of the district was retained, moving Democrats from areas outside but close to the old district boundaries naturally picked up far more black Democrats than white Democrats.

This explanation eluded Dr. Ansolabehere because he refused to consider either the implications of the political strategy that the legislature claimed to have pursued or the effects of the changes to District 12 on the surrounding districts. App. 2578–2582. The result was a distorted—and largely useless—analysis.

IV

Reviewing the evidence outlined above,[20] two themes emerge. First, District 12's borders and racial composition ***359** are readily explained by political considerations and the effects of the legislature's political strategy on the demographics of District 12. Second, the majority largely ignores ****1504** this explanation, as did the court below, and instead adopts the most damning interpretation of all available evidence.

Both of these analytical maneuvers violate our clearly established precedent. Our cases say that we must " 'exercise extraordinary caution' " " 'where the State has articulated a legitimate political explanation for its districting decision,' " *Cromartie II, supra,* at 242, 121 S.Ct. 1452 (emphasis deleted); the majority ignores that political explanation. Our cases say that "the good faith of a state legislature must be presumed," *Miller,* 515 U.S., at 915, 115 S.Ct. 2475; the majority presumes the opposite. And *Cromartie II* held that plaintiffs in a case like this are obligated to produce a map showing that the legislature could have achieved its political objectives without the racial effect seen in the challenged plan; here, the majority junks that rule and says that the plaintiffs' failure to produce such a map simply "does not matter." *Ante,* at 1479.

The judgment below regarding District 12 should be reversed, and I therefore respectfully dissent.

All Citations

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Footnotes

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

1 A plaintiff succeeds at this stage even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. See *Bush v. Vera,* 517 U.S. 952, 968–970, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) (holding that race predominated when a legislature deliberately "spread[ ] the Black population" among several districts in an effort to "protect[ ] Democratic incumbents"); *Miller v. Johnson,* 515 U.S. 900, 914, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (stating that the "use of race as a proxy" for "political interest[s]" is "prohibit[ed]").

2 Challenges to the constitutionality of congressional districts are heard by three-judge district courts, with a right of direct appeal to this Court. See 28 U.S.C. §§ 2284(a), 1253.

3 The State's argument to the contrary rests on a legal proposition that was foreclosed almost as soon as it was raised in this Court. According to the State, racial considerations cannot predominate in drawing district lines unless there is an "actual conflict" between those lines and "traditional districting principles." Brief for Appellants 45. But we rejected that view earlier this Term, holding that when (as here) race furnished "the overriding reason for choosing one map over others," a further showing of "inconsistency between the enacted plan and traditional redistricting criteria" is unnecessary

to a finding of racial predominance. *Bethune–Hill v. Virginia State Bd. of Elections,* 580 U.S. ——, ——, 137 S.Ct. 788, 799, 197 L.Ed.2d 85 (2017). And in any event, the evidence recounted in the text indicates that District 1's boundaries *did* conflict with traditional districting principles—for example, by splitting numerous counties and precincts. See *supra,* at 1469. So we would uphold the District Court's finding of racial predominance even under the (incorrect) legal standard the State proposes.

4 In the District Court, the parties also presented arguments relating to the first *Gingles* prerequisite, contesting whether the African–American community in the region was sufficiently large and compact to form a majority of a reasonably shaped district. The court chose not to decide that fact-intensive question. And aside from the State's unelaborated assertion that "[t]here is no question that the first factor was satisfied," Brief for Appellants 52, the parties have not briefed or argued the issue before us. We therefore have no occasion to address it.

5 North Carolina calls our attention to two expert reports on voting patterns throughout the State, but neither casts light on the relevant issue. The first (by Dr. Thomas Brunell) showed that some elections in many of the State's counties exhibited "statistically significant" racially polarized voting. App. 1001. The second (by Dr. Ray Block) found that in various elections across the State, white voters were "noticeably" less likely than black voters to support black candidates. *Id*., at 959. From those far-flung data points—themselves based only on past elections—the experts opined (to no one's great surprise) that in North Carolina, as in most States, there are discernible, non-random relationships between race and voting. But as the District Court found, see *Harris v. McCrory,* 159 F.Supp.3d 600, 624 (M.D.N.C.2016), that generalized conclusion fails to meaningfully (or indeed, at all) address the relevant local question: whether, in a new version of District 1 created without a focus on race, black voters would encounter "sufficient [ ]" white bloc-voting to "cancel [their] ability to elect representatives of their choice," *Gingles,* 478 U.S., at 56, 106 S.Ct. 2752. And so the reports do not answer whether the legislature needed to boost District 1's BVAP to avoid potential § 2 liability.

6 Justice ALITO charges us with "ignor[ing]" the State's political-gerrymander defense, making our analysis "like Hamlet without the prince." *Post,* at 1496 (opinion concurring in judgment in part and dissenting in part) (hereinafter dissent); see *post,* at 1496, 1504. But we simply take the State's account for what it is: one side of a thoroughly two-sided case (and, as we will discuss, the side the District Court rejected, primarily on factual grounds). By contrast, the dissent consistently treats the State's version of events (what it calls "the Legislature's political strategy and the relationship between that strategy and [District 12's] racial composition," *post,* at 1496) as if it were a simple "fact of the matter"—the premise of, rather than a contested claim in, this case. See *post,* at 1492 – 1493, 1494, 1496, 1499 – 1500, 1500 – 1501, 1503. The dissent's narrative thus tracks, top-to-bottom and point-for-point, the testimony of Dr. Hofeller, the State's star witness at trial—so much so that the dissent could just have block-quoted that portion of the transcript and saved itself a fair bit of trouble. Compare *post,* at 1492 – 1496, with App. 2671–2755. Imagine (to update the dissent's theatrical reference) *Inherit the Wind* retold solely from the perspective of William Jennings Bryan, with nary a thought given to the competing viewpoint of Clarence Darrow.

7 As earlier noted, that inquiry is satisfied when legislators have "place[d] a significant number of voters within or without" a district predominantly because of their race, regardless of their ultimate objective in taking that step. See *supra,* at 1463 – 1464, and n. 1. So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more "sellable" as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. See *Vera,* 517 U.S., at 968–970, 116 S.Ct. 1941 (plurality opinion). In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics. See *Miller,* 515 U.S., at 914, 115 S.Ct. 2475.

8 Undeterred by these settled principles, the dissent undertakes to refind the facts of this case at every turn. See *post,* at 1491 – 1503. Indeed, the dissent repeatedly flips the appropriate standard of review—arguing, for example, that the District Court's is not "the only plausible interpretation" of one piece of contested evidence and that the State offered an "entirely natural" view of another. *Post,* at 1498 – 1499, 1502; see also *post,* at 1496, 1499 – 1500, 1500, 1503. Underlying that approach to the District Court's factfinding is an elemental error: The dissent mistakes the rule that a legislature's good faith should be presumed "until a claimant makes a showing sufficient to support th[e] allegation" of "race-based

decisionmaking," *Miller,* 515 U.S., at 915, 115 S.Ct. 2475 for a kind of super-charged, pro-State presumption on appeal, trumping clear-error review. See *post,* at 1491 – 1492, n. 7.

9 The dissent's contrary reading of the preclearance submission—as reporting the redistricters' "decis[ion] *not* to construct District 12 as a majority-minority district," *post,* at 1498—is difficult to fathom. The language the dissent cites explains only why Rucho and Lewis rejected one particular way of creating such a district; the submission then relates their alternative (and, of course, successful) approach to attaining an over–50% BVAP. See App. 478–479.

10 Watt recalled that he laughed in response because the VRA required no such target. See *id*., at 2369. And he told Rucho that "the African–American community will laugh at you" too. *Ibid.* Watt explained to Rucho: "I'm getting 65 percent of the vote in a 40 percent black district. If you ramp my [BVAP] to over 50 percent, I'll probably get 80 percent of the vote, and[ ] that's not what the Voting Rights Act was designed to do." *Ibid.*

11 The court acknowledged that, in the earlier state-court trial involving District 12, Rucho denied making the comments that Watt recalled. See 159 F.Supp.3d, at 617–618. But the court explained that it could not "assess [the] credibility" of Rucho's contrary account because even though he was listed as a defense witness and present in the courtroom throughout the trial, the State chose not to put him on the witness stand. *Id.,* at 618.

12 The dissent conjures a different way of explaining Watt's testimony. Perhaps, the dissent suggests, Rucho disclosed a majority-minority target to Watt, but Watt then *changed Rucho's mind*—and perhaps it was just a coincidence (or a mistake?) that Rucho still created a 50.7%- BVAP district. See *post,* at 1499 – 1500. But nothing in the record supports that hypothesis. See *ibid.* (relying exclusively on the State's preclearance submission to back up this story); *supra,* at 1475 – 1476, and n. 9 (correcting the dissent's misreading of that submission). And the State, lacking the dissent's creativity, did not think to present it at trial.

13 The dissent charges that this comparison is misleading, but offers no good reason why that is so. See *post,* at 1501 – 1502. It is quite true, as the dissent notes, that another part of District 12 (in Mecklenburg County) experienced a net increase in black voters even larger than the one in Guilford County. See *post,* at 1501 – 1502. (The net increases in the two counties thus totaled more than 35,000; they were then partially offset by net decreases in other counties in District 12.) But that is irrelevant to the point made here: Without the numerous black voters added to District 12 in Guilford County—where the evidence most clearly indicates voters were chosen based on race—the district would have fallen well shy of majority-minority status.

14 Hofeller did not dispute Ansolabehere's figures, but questioned his inference. Those striking patterns, the mapmaker claimed, were nothing more than the result of his own reliance on voting data from the 2008 Presidential election—because that information (*i.e.,* who voted for Obama and who for McCain) tracked race better than it did party registration. See App. 1101, 1111–1114; cf. *Cromartie II,* 532 U.S. 234, 245, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (recognizing that "party registration and party preference do not always correspond"). As we have just recounted, however, the District Court had other reasons to disbelieve Hofeller's testimony that he used solely that electoral data to draw District 12's lines. See *supra,* at 1476 – 1477. And Ansolabehere contended that even if Hofeller did so, that choice of data could itself suggest an intent to sort voters by race. Voting results from a "single [Presidential] election with a Black candidate," Ansolabehere explained, would be a "problematic and unusual" indicator of future party preference, because of the racial dynamics peculiar to such a match-up. App. 341; see *id*., at 342–343. That data would, indeed, be much more useful as a reflection of an area's racial composition: "The Obama vote," Ansolabehere found, is "an extremely strong positive indicator of the location of Black registered voters" and, conversely, an "extremely strong negative indicator of the location of White registered voters." *Id*., at 342; see *id*., at 2546–2550.

15 The dissent responds that an alternative-map requirement "should not be too hard" for plaintiffs (or at least "sophisticated" litigants "like those in the present case") to meet. *Post,* at 1491 – 1492. But if the plaintiffs have already proved by a preponderance of the evidence that race predominated in drawing district lines, then we have no warrant to demand that they jump through additional evidentiary hoops (whether the exercise would cost a hundred dollars or a million, a week's more time or a year's). Or at least that would be so if we followed the usual rules. Underlying the dissent's view that we should not—that we should instead create a special evidentiary burden—is its belief that "litigation of this sort" often seeks to "obtain in court what [a political party] could not achieve in the political arena," *post,* at 1490, and so that little is lost by making suits like this one as hard as possible. But whatever the possible motivations for bringing

such suits (and the dissent says it is *not* questioning "what occurred here," *ibid.*), they serve to prevent legislatures from taking unconstitutional districting action—which happens more often than the dissent must suppose. State lawmakers sometimes misunderstand the VRA's requirements (as may have occurred here with respect to § 5), leading them to employ race as a predominant districting criterion when they should not. See *supra,* at 1475 – 1476, and n. 10. Or they may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and voting behavior to advance their partisan interests. See nn. 1, 7, *supra*. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters. When plaintiffs meet their burden of showing that such conduct has occurred, there is no basis for subjecting them to additional—and unique—evidentiary hurdles, preventing them from receiving the remedy to which they are entitled.

1 I concur in the judgment of the Court regarding Congressional District 1. The State concedes that the district was intentionally created as a majority-minority district. See Brief for Appellants 44. And appellants have not satisfied strict scrutiny.

2 Article I, § 4, of the Constitution reserves to state legislatures the power to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's authority to "make or alter such Regulations, except as to the Places of chusing Senators."

3 According to polling data, around 90% of African–American voters have voted for the Democratic candidate for President in recent years. See https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/groups–voted–2016/ (all Internet materials as last visited May 19, 2017) (in 2016, 88%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2012/ (in 2012, 93%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2008/ (in 2008, 95%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2004/ (in 2004, 88%); https://ropercenter.cornell.edu/polls/us–elections/how–groups–voted/how–groups–voted–2000/ (in 2000, 90%).

4 The challengers' failure to do so is especially glaring given that at least two alternative maps *were* introduced during the legislative debates over the 2011 map, see 2 Record 357–366, 402–411; App. 883–887, though neither party contends that those maps met the legislature's political goals.

5 Ignoring all of these well-founded reasons supporting the alternative-map requirement, the majority mischaracterizes my argument as, at bottom, resting on the proposition that "little is lost by making suits like this one as hard as possible." *Ante,* at 1480, n. 15. That is not my view, and it is richly ironic for the Court that announced the alternative-map requirement to accuse those who defend the requirement of erecting illegitimate and unnecessary barriers to the vindication of constitutional rights.

6 The majority cites *Bush v. Vera,* 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), as proof that the lack of an alternative-map requirement has not "made any difference" in our past cases. *Ante,* at 1479. *Vera* was decided before *Cromartie II,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001), announced the alternative-map requirement, so its failure to mention that requirement is hardly surprising.

7 The majority accuses me of failing to accord proper deference to the District Court's factual findings and of disregarding the clear-error standard of review, *ante,* at 1474, n. 8, but that is nonsense. Unlike the majority, I simply follow *Cromartie II* by evaluating the District Court's findings *in light of the plaintiffs' burden*. See 532 U.S., at 241, 257, 121 S.Ct. 1452. The heavier a plaintiffs' evidentiary burden, the harder it is to find that plaintiffs have carried their burden—and the more likely that it would be clearly erroneous to find that they have. In this context, we are supposed to presume that the North Carolina Legislature acted in good faith and exercise "extraordinary caution" before rejecting the legislature's political explanation. *Miller v. Johnson,* 515 U.S. 900, 915–916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Given that the State has offered a coherent and persuasive political explanation for District 12's boundaries, plaintiffs bear a "demanding" burden in attempting to prove racial predominance. *Cromartie II, supra,* at 241, 257, 121 S.Ct. 1452. Because the evidence they have put forward is so weak, see Part III–C, *infra,* they have failed to carry that burden, and it was clear error for the District Court to hold otherwise. See *Cromartie II, supra,* at 241, 257, 121 S.Ct. 1452 (applying the same clear-error analysis that I apply here).

8 This same basic shape was retained in the map proposed in the state legislature by the Democratic leadership and in the map submitted by the Southern Coalition for Social Justice. See 2 Record 402, 357.

9 A fifth district, District 2, appears to touch District 12 at the border of Guilford and Randolph Counties, but only to a *de minimis* extent.

10 District 12 was overpopulated by 2,847 people heading into the 2011 redistricting cycle. App. 1115; 2 Record 347.

11 North Carolina State Board of Elections, 11/02/2010 Official General Election Results—Statewide, http://er.ncsbe.gov/?election_dt =11/02/2010&county_id=0&office=FED&contest=0.

12 North Carolina State Board of Elections, 11/08/2016 Official General Election Results—Statewide, http://er.ncsbe.gov/?election_dt =11/08/2016&county_id=0&office=FED&contest=0.

13 As noted, Dr. Hofeller used the results of the 2008 Presidential election as a measure of party preference. In 2008, the Democratic candidate for President was then-Senator Barack Obama, the first black major party Presidential nominee, and it is true that President Obama won a higher percentage of the nationwide African–American vote in 2008 (95%) than did the Democratic Presidential candidates in 2000 (90%), 2004 (88%), and 2016 (88%). See *supra,* at 1488, n. 3. But as these figures show, the correlation between race and political party preference was very high in all these elections. Therefore, the use of 2008 statistics does not appear to have substantially affected the analysis.

14 Even two alternative redistricting plans offered prior to the enactment of the 2011 map—one submitted by the Southern Coalition for Social Justice and the other submitted by Democratic leaders in the state legislature—retained the basic shape of District 12 and resulted in black voters constituting 71.53% and 69.14% of registered Democrats, respectively. 2 Record 361 (Southern Coalition for Social Justice map), 406 (Congressional Fair and Legal map); see also App. 883–887, 2071 (Finding 34), 2145 (Finding 173).

15 To minimize jargon, I will use the term "precincts" to refer to vote tabulation districts (VTDs). See *id*., at 1609–1610, for an explanation of VTDs.

16 The District Court's description of the legislature's political strategy was cursory, and it spent no time analyzing the demographics of the region. See *Harris v. McCrory,* 159 F.Supp.3d 600, 618–619 (M.D.N.C.2016).

17 The majority concedes that this is a "thoroughly two-sided case," *ante,* at 1473, n. 6, yet the majority's opinion is thoroughly one sided. It offers no excuse for its failure to meaningfully describe—much less engage with—the State's political explanation for District 12's boundaries. Instead, it tries to change the subject, accusing me of treating the State's account as essentially uncontested. *Ante,* at 1473, n. 6. This is a hollow accusation. In this opinion, I lay out the evidence supporting the State's political explanation in Parts III–A and III–B, but I do not accept that account at face value. Instead, I go on to demonstrate that the plaintiffs' contrary arguments are exceedingly weak (Part III–C). Only after considering the evidence on both sides do I conclude that the State's explanation holds up.

18 That being said, Congressman Watt's testimony was double-hearsay: Congressman Watt testified about what Senator Rucho said *someone else* said. See App. 1345 (state trial court evidentiary ruling). For unknown reasons, Appellants failed to raise this objection below, but that only means that the testimony was *admitted*. The *weight* of that testimony is a different matter, and in general, hearsay should be viewed with great skepticism. *Ellicott v. Pearl,* 10 Pet. 412, 436, 9 L.Ed. 475 (1836) (majority opinion of Story, J.) (hearsay is "exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character"); *Queen v. Hepburn,* 7 Cranch 290, 296, 3 L.Ed. 348 (1813) (majority opinion of Marshall, C.J.) ("Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible"); see also *Chambers v. Mississippi,* 410 U.S. 284, 298, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

19 Significantly, while the District Court doubted Dr. Hofeller's contention that politics, not race, dictated the boundaries of District 12 and that Dr. Hofeller was unaware of the relevant racial demographics in the region, see 159 F.Supp.3d, at 619–620, and n. 8, it did not dispute that only political data was displayed on his screen when he drew the district. The state trial court expressly found that only political data was displayed on Dr. Hofeller's screen. See App. 2150 (Finding 188).

20 The District Court relied on other evidence as well, but its probative value is so weak that even the majority does not cite it.

End of Document

New York Official Reports

32 Misc.3d 709, 927 N.Y.S.2d 548, 2011 N.Y. Slip Op. 21223

**1 County of Nassau et al., Petitioners/Plaintiffs

v

State of New York et al., Respondents/Defendants.

Supreme Court, Albany County
June 20, 2011

CITE TITLE AS: County of Nassau v State of New York

HEADNOTE

Parties
Capacity to Sue
Municipalities Generally Lack Capacity to Challenge Acts of State

Plaintiffs, the County of Nassau and its election commissioners, lacked capacity to pursue a combined action and proceeding challenging the constitutionality of the Election Reform and Modernization Act of 2005 (L 2005, ch 181, as amended by L 2007, ch 506)—which, among other things, effectively prohibits the continued use of lever voting machines and provides for the use of electronic and optical scan machines—and a resolution of defendant Board of Elections. With few exceptions, municipalities and their officials lack capacity to challenge acts of the State and state legislation, either directly or in a representative capacity on behalf of their citizens. Here, plaintiffs' challenges failed to meet the only relevant exception, which applies where compliance with a state statute would force municipal officials to violate a constitutional proscription. The Constitution authorizes the Legislature to select methods of voting, including the use of electronic machines, and plaintiffs' concerns about disenfranchisement, bipartisan canvassing, secrecy and voter intent were meritless. Likewise, plaintiffs' objections to the particular machines certified by the Board did not confer capacity to challenge its resolution.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law § 136; Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 733, 746, 747; Am Jur 2d, Parties §§ 28, 392.

Carmody-Wait 2d, Parties §§ 19:3, 19:11.

NY Jur 2d, Constitutional Law § 54; NY Jur 2d, Counties, Towns, and Municipal Corporations § 224; NY Jur 2d, Parties § 16.

Siegel, NY Prac § 136.

ANNOTATION REFERENCE

See ALR Index under Counties; Elections and Voting; Parties.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: lack! /5 capacity standing /s county mun! & challenge /s state /4 legislation

APPEARANCES OF COUNSEL

John Ciampoli, *County Attorney*, Mineola, for petitioners/plaintiffs. *Paul M. Collins*, Albany, for New York State Board of *710 Elections and others, respondents/defendants. *Eric T. Schneiderman*, *Attorney General*, Albany (*Bruce J. Boivin* of counsel), for State of New York, respondent/defendant. **2

OPINION OF THE COURT

Michael C. Lynch, J.

In March, 2010, the County of Nassau and its two election commissioners (hereinafter the County plaintiffs), commenced this combined action/proceeding in the County of Nassau essentially challenging the constitutionality of the New York Election Reform and Modernization Act of 2005 (ERMA) (L 2005, ch 181, as amended by L 2007, ch 506) and the December 15, 2009 resolution of the New York State Board of Elections (hereinafter Board) certifying the use of electronic voting machines or systems pursuant to Election Law § 7-201.

By decision and order (Woodard, J.) dated October 13, 2010, the court granted the State of New York's (hereinafter State)

application changing the venue of the entire action from Nassau County to the County of Albany. In so finding, the court referred the respective motions of the State and the Board seeking to dismiss the petition/complaint to Albany County for resolution. Those motions to dismiss are addressed in this decision.

Following oral argument in Albany County on March 18, 2011, and at the court's invitation, the parties submitted supplemental memoranda, as listed below, intended to address certain developments since the motions were filed.

In *United States v New York State Bd. of Elections* (06 CV 0263 [ND NY]), the Federal District Court issued various remedial orders including a May 20, 2010 order (Sharpe, J.) directing the County to utilize optical scan voting machines compliant with the Help America Vote Act (42 USC §§ 15301-15545) (HAVA) for the fall 2010 elections (*see* exhibit Nassau 39 annexed to State's motion to dismiss). As a predicate to issuing the injunction, the District Court found that lever voting machines utilized in New York were not in compliance with HAVA. As such, the District Court directed the County to accept and utilize HAVA-compliant optical scan voting systems. The County complied and utilized the ES & S scanners in the fall 2010 elections.

Following the County's appeal from the May 20, 2010 injunction order, the United States Court of Appeals for the Second Circuit issued an order, dated September 7, 2010, affirming the injunction. Pertinent here, the Second Circuit recognized that ***711** the County had "commenced litigation in state court challenging ****3** the constitutionality of ERMA under the constitution of New York State. Nothing is preventing Nassau from pursuing that litigation." The quoted phrase confirms that the present action/proceeding is not preempted by the federal litigation. Nor, as the State and Board claim, is the United States Attorney a necessary party in this litigation, given the Second Circuit's recognition that even if the County is successful in state court, the County would not be precluded "from filing suit in federal district court to dispute whether its lever voting machines are HAVA-compliant." The point of distinction is that the County plaintiffs' challenge in this litigation pertains to ERMA, not HAVA.

It is also important to recognize that article 9 of the Election Law was amended during 2010 to provide for the canvassing of ballots when ballot scanners have been utilized (L 2010, ch 163 [eff July 7, 2010]). While this legislation was enacted after the subject motions were filed, the issues presented will be addressed in accord with the law as it exists today (*see Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475, 486-487 [1954], *appeal dismissed* 351 US 922 [1956]).

In 2007, ERMA was amended to require the replacement of the lever voting machines then utilized in New York elections with voting machines or systems compliant with Election Law § 7-202 and HAVA (L 2007, ch 506). Pursuant to Election Law § 7-202 (4), local boards of election are authorized to ""purchase direct recording electronic machines or optical scan machines." In effect, this legislation precludes the continued use of lever voting machines in New York. This mandate deflates the argument of the State and Board that the County plaintiffs failed to exhaust their administrative remedy by presenting lever voting machines as an alternative.

The Board is authorized to examine and certify the use of voting machines and systems pursuant to Election Law § 7-201. In so doing, the standard is to assure compliance with HAVA and Election Law § 7-202. The examination requires "a thorough review and testing of any electronic or computerized features of the machine or system" (Election Law § 7-201 [1]).

The County plaintiffs' core thesis is that the voting systems approved by the Board are not secure and thus compromise the voting process protected under the State Constitution (*see* preliminary statement in verified petition/complaint annexed as exhibit A to the County's notice of cross motion). During oral ***712** argument, the County expanded on this premise by asserting the approved systems fail to comply with Election Law § 7-202 (1) (t), which specifies that a voting machine or system "not include any device or functionality potentially capable of ****4** externally transmitting or receiving data via the internet or via radio waives or via other wireless means." The approved machines have both Ethernet ports and USB ports, features which the County plaintiffs contend are violative of Election Law § 7-202 (1) (t). The County plaintiffs have requested an evidentiary hearing to demonstrate that the approved systems do not comply with Election Law § 7-202. As explained during oral argument, the County plaintiffs maintain they do not object to the use of electronic voting machines per se, but challenge the approved machines as defective and subject to being compromised by electronic or computerized tampering.

As a threshold matter, the State and Board contend that the County plaintiffs lack the legal capacity to commence this lawsuit. The traditional rule, followed in New York, is that municipalities and their officials do not have legal capacity to challenge acts of the State and state legislation, either directly or in a representative capacity on behalf of their citizens (*City of New York v State of New York*, 86 NY2d 286, 289-290 [1995]; *County of Albany v Hooker*, 204 NY 1 [1912]). The only exception pertinent here is where compliance with a state statute would force municipal officials "to violate a constitutional proscription" (86 NY2d at 292 [citations omitted]). By compelling the County to utilize electronic voting machines, the County basically maintains that ERMA is forcing county officials to compromise the voting process protected under the State Constitution.

Specifically, the County plaintiffs allege six causes of action in their complaint: (1) that the use of unsecure electronic voting machines required by ERMA will disenfranchise voters in violation of article I, § 1 of the State Constitution; (2) that ERMA violates article II, § 8 of the State Constitution by preventing bipartisan canvassing of ballots; (3) that ERMA violates article II, § 8 because it requires local boards of election to delegate their canvassing authority to private vendors; (4) that the use of optical scan voting machines mandated by ERMA violates article II, § 7 by failing to preserve secrecy in voting; (5) that the electronic voting machines certified by the Board disregard voter intent by accepting ballots containing an overvote or undervote; and (6) that the Board's certification of voting systems ***713** in December 2009, including the ES & S system utilized by the County during the 2010 election cycle, was arbitrary and capricious.

"Legislative enactments enjoy a presumption of constitutionality, imposing a heavy burden on a party trying to overcome it" (*Matter of Griffiss Local Dev. Corp. v State of New York Auth. Budget Off.*, 85 AD3d 1402, 1403 [2011] [internal quotation marks and citations omitted]). ****5**

Article II, § 7 of the State Constitution specifies the manner of voting in elections "shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." This constitutional authorization empowers the State Legislature to define alternate methods of voting. It follows that the State Constitution does not prohibit the use of electronic voting machines or systems; or mandate the use of lever voting machines. That the State Legislature, through ERMA, has opted to require the use of electronic voting machines is within its constitutional authority. The County plaintiffs' thesis that they are being compelled to disenfranchise voters through the use of these machines is simply not persuasive. The claim is akin to that of the city officials in the *City of New York* case asserting that inadequate state funding compelled them to compromise the constitutional rights of students to a viable education. In response, Judge Levine reasoned, as follows:

> "Surely, it cannot be persuasively argued that the City officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control" (*City of New York* at 295).

The same holds true here.

With respect to the second and third causes of action, the 2010 amendments to Election Law article 9, implement a canvassing process to accommodate bipartisan board review. This is not a situation where the bipartisan requirements of article II, § 8 have been implicated (*compare Matter of Graziano v County of Albany*, 3 NY3d 475, 481 [2004]). Similarly unconvincing is the County's contention ERMA compromises a voters right to secrecy protected under article II, § 7. Indeed, the statute expressly requires that approved voting machines or ***714** systems "provide the voter an opportunity to privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted" (Election Law § 7-202 [1] [e]); and "be provided with a screen and hood or curtain or privacy features with equivalent function which shall be so made and adjusted as to conceal the voter and his or her action while voting" (Election Law § 7-202 [1] [m]). As for disregarding a voter's intent in an instance of an undervote or overvote, the County plaintiffs acknowledge in their complaint that the electronic voting machines include a display screen alerting voters of an undervote or overvote (verified petition complaint para 183; Election Law § 7-202 [1] [d]).

In sum, the County plaintiffs have failed to bring their constitutional claims ****6** within any recognized exception and thus lack legal capacity to pursue these claims. The same holds true for their sixth cause of action pursuant to CPLR article 78 challenging the Board's certification as arbitrary and capricious. As noted above, the State Legislature has empowered the Board to examine and certify the propriety of the electronic voting machines (Election Law § 7-201). That

the County plaintiffs object to the machines certified by the Board does not translate into legal capacity to challenge the Board's decision. Insofar as the County plaintiffs emphasize the restrictions defined in Election Law § 7-202 (1) (t), which are designed to prevent external tampering with the recorded vote through the Internet or other wireless means, the Board necessarily must have the means to input ballot information into the electronic voting machines, and the ability to preserve such data. Under Election Law § 9-102 (2) (c), voting machines may be equipped with "a removable electronic or computerized device" for recording the vote. That the electronic voting machines approved by the Board include Ethernet ports and USB ports does not sustain the County plaintiffs' assertion that these machines are compromised under Election Law § 7-202 (1) (t).

Since the County plaintiffs lack the legal capacity to pursue this litigation, the motions to dismiss the petition/complaint are granted, without costs.

102 S.Ct. 3211
Supreme Court of the United States

Mary Ellen CRAWFORD, a Minor, etc., et al., Petitioners

v.

BOARD OF EDUCATION OF the CITY OF LOS ANGELES et al.

No. 81–38.
|
Argued March 22, 1982.
|
Decided June 30, 1982.

Synopsis

After California state court had ordered busing of students to remedy segregation in Los Angeles school district, voters of California adopted a constitutional amendment limiting state court-ordered busing for desegregation purposes to those instances in which a federal court would order busing to remedy a Fourteenth Amendment violation. The state trial court then ordered implementation of a revised desegregation plan and minority students appealed. The California Court of Appeal, 113 Cal.App.3d 633, 170 Cal.Rptr. 495, reversed and the California Supreme Court denied certiorari. The United States Supreme Court, Justice Powell, held that: (1) state constitutional amendment did not employ a racial classification; (2) repeal or modification of desegregation or antidiscrimination laws is not a presumptively invalid racial classification; (3) evidence sustained state court determination that the amendment was not an action with a discriminatory purpose; and (4) Fourteenth Amendment does not preclude a state, once it has chosen to do more than the Fourteenth Amendment requires, from later receding from that action.

Affirmed.

Justice Blackmun filed a concurring opinion in which Justice Brennan joined.

Justice Marshall filed a dissenting opinion.

West Headnotes (8)

[1] **Constitutional Law** Desegregation and integration in general

Fourteenth Amendment does not preclude a state, once it has chosen to do more in the area of desegregation than is required by the Fourteenth Amendment, from later receding from that position. U.S.C.A.Const.Amend. 14.

2 Cases that cite this headnote

[2] **Education** Transportation for racial integration; busing

California constitutional amendment limiting state court-ordered busing of school students for desegregation to those cases in which a federal court would do so to remedy a violation of the Fourteenth Amendment only limits state courts when enforcing the State Constitution; the Amendment would not bar state court enforcement of state statutes requiring busing for desegregation or other purposes. West's Ann.Cal.Const.Art. 1, § 7.

10 Cases that cite this headnote

[3] **Constitutional Law** Busing

Education Transportation for racial integration; busing

California constitutional amendment limiting state court-ordered busing to situations in which a federal court would order such a remedy to correct a Fourteenth Amendment violation is not unconstitutional on the theory that it employs a racial classification or that it creates a dual court system because other state created rights may be vindicated in the state courts without limitation on remedies. U.S.C.A.Const.Amend. 14; West's Ann.Cal.Const.Art. 1, § 7.

11 Cases that cite this headnote

[4] **Constitutional Law** School location

Neighborhood school policy does not offend the Fourteenth Amendment in itself. U.S.C.A.Const.Amend. 14.

6 Cases that cite this headnote

[5] **Constitutional Law** Intentional or purposeful action

The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification; if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional. U.S.C.A.Const.Amend. 14.

15 Cases that cite this headnote

[6] **Constitutional Law** Busing

Education Transportation for racial integration; busing

California constitutional amendment limiting state court-ordered busing for desegregation purposes to those situations in which a federal court would employ such a remedy to correct a Fourteenth Amendment violation was nothing more than a mere repeal of court orders which went beyond that standard and was not unconstitutional on the theory that it fundamentally altered the judicial system to require those seeking redress from racial isolation to be satisfied with less than full relief from a state court. West's Ann.Cal.Const.Art. 1, § 7; U.S.C.A.Const.Amend. 14.

22 Cases that cite this headnote

[7] **Education** Transportation for racial integration; busing

Evidence sustained state court findings that constitutional amendment limiting state court-ordered busing for desegregation to those instances in which a federal court would order busing to correct a Fourteenth Amendment violation was not adopted for a discriminatory purpose. West's Ann.Cal.Const.Art. 1, § 7; U.S.C.A.Const.Amend. 14.

11 Cases that cite this headnote

[8] **Constitutional Law** Intentional or purposeful action requirement

Constitutional Law Intentional or purposeful action

Law neutral on its face may be unconstitutional if motivated by a discriminatory purpose; in determining whether such a purpose is the motivating factor, racially disproportionate effect of official action provides an important starting point. U.S.C.A.Const.Amend. 14.

28 Cases that cite this headnote

****3212** ***527** *Syllabus*[*]

In a California state-court action seeking desegregation of the schools in the Los Angeles Unified School District (District), the trial court, in 1970, found *de jure* segregation in violation of both the State and Federal Constitutions and ordered the District to prepare a desegregation plan. The California Supreme Court affirmed, but based its decision solely upon the Equal Protection Clause of the State Constitution, which bars *de facto* as well as *de jure* segregation. On remand, the trial court approved a desegregation plan that included substantial mandatory pupil reassignment and busing. While the trial court was considering alternative new plans in 1979, the voters of California ratified an amendment (Proposition I) to the State Constitution which provides that state courts shall not order mandatory pupil assignment ****3213** or transportation unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The trial court denied the District's request to halt all mandatory reassignment and busing, holding that Proposition I was not applicable in light of the court's 1970 finding of *de jure* segregation in violation of the Fourteenth Amendment. The court then ordered implementation of a revised plan that again included substantial mandatory pupil reassignment and busing. The California Court of Appeal reversed, concluding that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation. The Court of Appeal also held

that Proposition I was constitutional under the Fourteenth Amendment and barred that part of the plan requiring mandatory student reassignment and busing.

Held: Proposition I does not violate the Fourteenth Amendment. Pp. 3216–3222.

(a) This Court's decisions will not support the contention that once a State choses to do "more" than the Fourteenth Amendment requires, it may never recede. Such an interpretation of that Amendment would be destructive of a State's democratic processes and of its ability to experiment in dealing with the problems of a heterogeneous population. Proposition I does not embody, expressly or implicitly, a racial classification. ***528** The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification. Pp. 3216–3219.

(b) Proposition I cannot be characterized as something more than a mere repeal. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, distinguished. The State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment. Nor does Proposition I allocate governmental or judicial power on the basis of a discriminatory principle. A "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas. It was constitutional for the people of the State to determine that the Fourteenth Amendment's standard was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I. Pp. 3216–3219.

(c) Even if it could be assumed that Proposition I had a disproportionate adverse effect on racial minorities, there is no reason to differ with the state appellate court's conclusion that Proposition I in fact was not enacted with a discriminatory purpose. The purposes of the Proposition—chief among them the educational benefits of neighborhood schooling—are legitimate, nondiscriminatory objectives, and the state court characterized the claim of discriminatory intent on the part of millions of voters as but "pure speculation." Pp. 3221–3222.

113 Cal.App.3d 633, 170 Cal.Rptr. 495, affirmed.

Attorneys and Law Firms

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Fred Okrand, Mark D. Rosenbaum, Mary Ellen Gale, Bruce J. Ennis, E. Richard Larson,* and *Paul Hoffman.*

G. William Shea argued the cause for respondents. With him on the brief for respondent Board of Education of City of Los Angeles were *Peter W. James, David T. Peterson, Michael M. Johnson* and *Jerry F. Halverson. Cliff Fridkis* filed a brief for respondent Bustop, Inc.

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging affirmance. With him on the ***529** brief were *Assistant Attorney General Reynolds, Deputy Solicitor General Wallace,* and *Richard G. Wilkins.**

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Opinion

Justice POWELL delivered the opinion of the Court.

An amendment to the California Constitution provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The question for our decision is whether this provision is itself in violation of the Fourteenth Amendment.

****3214** I

This litigation began almost 20 years ago in 1963, when minority students attending school in the Los Angeles Unified School District (District) filed a class action in state court ***530** seeking desegregation of the District's schools.[1] The case went to trial some five years later, and in 1970 the trial court issued an opinion finding that the District was substantially segregated in violation of the State and Federal Constitutions. The court ordered the District to prepare a desegregation plan for immediate use. App. 139.

On the District's appeal, the California Supreme Court affirmed, but on a different basis. *Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976). While the trial court had found *de jure* segregation in violation of the Fourteenth Amendment of the United States Constitution, see App. 117, 120–121, the California Supreme Court based its affirmance solely upon the Equal Protection Clause of the State Constitution.[2] The court explained that under the California Constitution "state school boards ... bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be ***531** de facto or de jure in origin." 17 Cal.3d, at 290, 130 Cal.Rptr., at 730, 551 P.2d, at 34. The court remanded to the trial court for preparation of a "reasonably feasible" plan for school desegregation. *Id.,* at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.[3]

On remand, the trial court rejected the District's mostly voluntary desegregation plan but ultimately approved a second plan that included substantial mandatory school reassignment and transportation—"busing"—on a racial and ethnic basis.[4] The ****3215** plan was put into effect in the fall of 1978, but after one year's experience, all parties to the litigation were dissatisfied. See 113 Cal.App.3d 633, 636, 170 Cal.Rptr. 495, 497 (1981). Although the plan continued in operation, the trial court began considering alternatives in October 1979.

In November 1979 the voters of the State of California ratified Proposition I, an amendment to the Due Process and ***532** Equal Protection Clauses of the State Constitution.[5] Proposition I conforms the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment:

> "[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause...."[6]

***533** Following approval of Proposition I, the District asked the Superior Court to halt all mandatory reassignment and busing of pupils. App. 185. On May 19, 1980, the court denied the District's application. The court reasoned that Proposition I was of no effect in this case in light of the court's 1970 finding of *de jure* segregation by the District in violation of the Fourteenth Amendment. Shortly thereafter, the court ordered implementation of a revised desegregation plan, one that again substantially relied upon mandatory pupil reassignment and transportation.[7]

****3216** The California Court of Appeal reversed. 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1981). The court found that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation.[8] Thus, Proposition I ***534** was applicable to the trial court's desegregation plan and would bar that part of the plan requiring mandatory student reassignment and transportation. Moreover, the court concluded that Proposition I was constitutional under the Fourteenth Amendment. *Id.*, at 654, 170 Cal.Rptr., at 509. The court found no obligation on the part of the State to retain a greater remedy at state law against racial segregation than was provided by the Federal Constitution. *Ibid.* The court rejected the claim that Proposition I was adopted with a discriminatory purpose. *Id.*, at 654–655, 170 Cal.Rptr., at 509.[9]

Determining Proposition I to be applicable and constitutional, the Court of Appeal vacated the orders entered by the Superior Court. The California Supreme Court denied hearing. App. to Pet. for Cert. 73a.[10] We granted certiorari. 454 U.S. 892, 102 S.Ct. 386, 70 L.Ed.2d 206 (1981).

***535** II

[1] We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede.[11] We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.

[2] Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. ****3217** It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it. Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state-law obligation to ***536** take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.[12]

[3] Nonetheless, petitioners contend that Proposition I is unconstitutional on its face. They argue that Proposition I employs an "explicit racial classification" and imposes a "race-specific" burden on minorities seeking to vindicate state-created rights. By limiting the power of state courts to enforce the state-created right to desegregated schools, petitioners contend, Proposition I creates a "dual court system" that discriminates on the basis of race.[13] They emphasize that other state-created rights may be vindicated by the state courts without limitation on remedies. Petitioners argue that the "dual court system" created by Proposition I is unconstitutional unless supported by a compelling state interest.

[4] We would agree that if Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest. "A racial classification, regardless of purported motivation, is presumptively invalid ***537** and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). See *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). But Proposition I does not embody a racial classification.[14] It neither says nor implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards.[15] Indeed, even if Proposition I had ****3218** a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.[16] In addition, this Court previously has held that even when a neutral law has a disproportionately ***538** adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.[17]

[5] Similarly, the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.[18] This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place. In *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 414, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977), we found that the school board's mere repudiation of an earlier resolution calling for desegregation did not violate the Fourteenth Amendment.[19] In *Reitman v. Mulkey*, 387 U.S. 369, 376, 87 S.Ct. 1627, 1631, 18 L.Ed.2d 830 (1967), and again in *Hunter v. Erickson,* 393 U.S. 385, 390, n. 5, 89 S.Ct. 557, 560, n. 5, 21 L.Ed.2d 616 (1969), we were careful to note that the laws under review did more than "mere[ly] repeal" existing antidiscrimination legislation.[20] ***539** In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.[21]

Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our **3219 heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities.[22] Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects.[23] Yet these would be the results of requiring a State *540 to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people.

III

[6] Petitioners seek to avoid the force of the foregoing considerations by arguing that Proposition I is not a "mere repeal." Relying primarily on the decision in *Hunter v. Erickson, supra*, they contend that Proposition I does not simply repeal a state-created right but fundamentally alters the judicial system so that "those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court."[24] We do not view *Hunter* as controlling here, nor are we persuaded by petitioners' characterization of Proposition I as something more than a mere repeal.

In *Hunter* the Akron city charter had been amended by the voters to provide that no ordinance regulating real estate on the basis of race, color, religion, or national origin could take effect until approved by a referendum. As a result of the charter amendment, a fair housing ordinance, adopted by the City Council at an earlier date, was no longer effective. In holding the charter amendment invalid under the Fourteenth Amendment, the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The *541 amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U.S., at 389–390, 89 S.Ct., at 559–560. Thus, whereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle.[25] As such, the charter **3220 amendment placed an impermissible, "special burde[n] on racial minorities within the governmental process." *Id.*, at 391, 89 S.Ct., at 560–561.[26]

Hunter involved more than a "mere repeal" of the fair housing ordinance; persons seeking anti-discrimination housing laws —presumptively racial minorities—were "singled out for mandatory referendums while no other group ... face[d] that obstacle." *James v. Valtierra, supra*, 402 U.S. 137, 142, 91 S.Ct. 1331, 1334, 28 L.Ed.2d 678 (1971). By contrast, even on the assumption that racial minorities benefited from the busing required by state law, Proposition I is less than a "repeal" of the California Equal Protection Clause. As noted above, after Proposition I, the State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment.

Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the *542 same." *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940). Remedies appropriate in one area of legislation may not be desirable in another. The remedies available for violation of the antitrust laws, for example, are different than those available for violation of the Civil Rights Acts. Yet a "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas.[27] Surely it was constitutional for the California Supreme Court to caution that although "in some circumstances busing will be an appropriate and useful element in a desegregation plan," in other circumstances "its 'costs,' both in financial and educational terms, will render its use inadvisable." See n. 3, *supra.* It was equally constitutional for the people of the State to determine that the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I.[28]

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.

***543** IV

The California Court of Appeal also rejected petitioners' claim that Proposition I, if facially valid, was nonetheless unconstitutional because enacted with a discriminatory purpose. The court reasoned that the purposes of the Proposition were well stated ****3221** in the Proposition itself.[29] Voters may have been motivated by any of these purposes, chief among them the educational benefits of neighborhood schooling. The court found that voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem. See n. 1, *supra.* It characterized petitioners' claim of discriminatory intent on the part of millions of voters as but "pure speculation." 113 Cal.App.3d, at 655, 170 Cal.Rptr., at 509.

[7] In *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), the Court considered the constitutionality of another California Proposition. In that case, the California Supreme Court had concluded that the Proposition was unconstitutional because it gave the State's approval to private racial discrimination. This Court agreed, deferring to the findings made by the California court. The Court noted that the California court was "armed ... with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate." *Id.*, at 378, 87 S.Ct., at 1633. Similarly, in this case, ***544** again involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court.[30]

[8] Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose. In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides "an 'important starting point.' " *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 274, 99 S.Ct., at 2293, quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

Proposition I in no way purports to limit the power of state courts to remedy the effects of intentional segregation with its accompanying stigma. The benefits of neighborhood schooling are racially neutral. This manifestly is true in Los Angeles where over 75% of the public school body is composed of groups viewed as racial minorities. See nn. 1 and 16, *supra.* Moreover, the Proposition simply removes one means of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.[31]

***545** ****3222** Even if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose. See 113 Cal.App.3d, at 654–655, 170 Cal.Rptr., at 509. In this case the Proposition was approved by an overwhelming majority of the electorate.[32] It received support from members of all races.[33] The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate.

Accordingly the judgment of the California Court of Appeal is

Affirmed.

Justice BLACKMUN, with whom Justice BRENNAN joins, concurring.

While I join the opinion of the Court, I write separately to address what I believe are the critical distinctions between this case and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896.

***546** The Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws. Thus the Court has found particularly pernicious those classifications that threaten the

ability of minorities to involve themselves in the process of self-government, for if laws are not drawn within a "just framework," *Hunter v. Erickson*, 393 U.S. 385, 393, 89 S.Ct. 557, 562, 21 L.Ed.2d 616 (1969) (Harlan, J., concurring), it is unlikely that they will be drawn on just principles.

The Court's conclusion in *Seattle* followed inexorably from these considerations. In that case the statewide electorate reallocated decisionmaking authority to " 'mak[e] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.' " *Washington v. Seattle School District No. 1*, *supra*, at 470, 102 S.Ct., at 3195 (emphasis in original), quoting *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 562 (Harlan, J., concurring). The Court found such a political structure impermissible, recognizing that if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be "relegated, by state fiat, in a most basic way to second-class status." *Plyler v. Doe*, 457 U.S. 202, 233, 102 S.Ct. 2382, 2403, 72 L.Ed.2d 786 (1982) (BLACKMUN, J., concurring).

In my view, something significantly different is involved in this case. State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the State's political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy. Indeed, ruling for petitioners ***547** on a *Hunter* theory seemingly would mean that ****3223** statutory affirmative-action or antidiscrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity.

In short, the people of California—the same "entity" that put in place the State Constitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable. The "political process or the decisionmaking mechanism used to *address* racially conscious legislation" has not been "singled out for peculiar and disadvantageous treatment," *Washington v. Seattle School District No. 1*, 458 U.S., at 458, 102 S.Ct., at 3203 (emphasis in original), for those political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected by Proposition I. And I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judiciary's ability to enforce that right—" 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' " *Supra*, at 486, 102 S.Ct., at 3203, quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 783–784, n. 4, 82 L.Ed. 1234 (1938).

Because I find *Seattle* distinguishable from this case, I join the opinion and judgment of the Court.

Justice MARSHALL, dissenting.

The Court today addresses two ballot measures, a state constitutional amendment, and a statutory initiative each of which is admittedly designed to substantially curtail, if not eliminate, the use of mandatory student assignment or transportation as a remedy for *de facto* segregation. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (*Seattle*), the Court concludes that Washington's Initiative 350, which effectively prevents school boards from ordering mandatory school assignment in the absence of a finding of *de jure* segregation within the meaning of the Fourteenth Amendment, is unconstitutional because "it uses the racial nature of an issue to define the governmental decisionmaking ***548** structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, *supra*, at 470, 102 S.Ct., at 3195. Inexplicably, the Court simultaneously concludes that California's Proposition I, which effectively prevents a state court from ordering the same mandatory remedies in the absence of a finding of *de jure* segregation, *is* constitutional because "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Ante*, at 3220. Because I fail to see how a fundamental redefinition of the governmental decisionmaking structure with respect to the same racial issue can be unconstitutional when the State seeks to remove the authority from local school boards, yet constitutional when the State attempts to achieve the same result by limiting the power of its courts, I must dissent from the Court's decision to uphold Proposition I.

I

In order to understand fully the implications of the Court's action today, it is necessary to place the facts concerning the adoption of Proposition I in their proper context. Nearly two decades ago, a unanimous California Supreme Court declared that "[t]he segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 880, 31 Cal.Rptr. 606, 608–609, 382 P.2d 878, 880–881 (1963). Recognizing that the "right to an equal opportunity for education and the harmful consequences of segregation" do not differ according to the *cause* of racial ****3224** isolation, the California Supreme Court declined to adopt the distinction between *de facto* and *de jure* segregation engrafted by this Court on the Fourteenth Amendment. ***549** *Id.*, at 881, 31 Cal.Rptr., at 609–610, 382 P.2d, at 881–882. Instead, the court clearly held that "school boards [must] take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id.*, at 881, 31 Cal.Rptr., at 610, 382 P.2d, at 882.

As the California Supreme Court subsequently explained, the duty established in *Jackson* does not require that "each school in a district ... reflect the racial composition of the district as a whole." *Crawford v. Board of Education*, 17 Cal.3d 280, 302, 130 Cal.Rptr. 724, 738, 551 P.2d 28, 42 (1976) (*Crawford I*). Rather, it is sufficient that school authorities "take reasonable and feasible steps to eliminate *segregated* schools, i.e., schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience." *Id.*, at 303, 130 Cal.Rptr., at 739, 551 P.2d, at 43 (emphasis in original). Moreover, the California courts have made clear that the primary responsibility for implementing this state constitutional duty lies with local school boards. "[S]o long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation, and its harmful consequences, ... the judiciary should [not] intervene in the desegregation process." *Id.*, at 305–306, 130 Cal.Rptr., at 741, 551 P.2d, at 45. If, however, a school board neglects or refuses to implement meaningful programs designed to bring about an end to racial isolation in the public schools, "the court is left with no alternative but to intervene to protect the constitutional rights of minority children." *Id.*, at 307, 130 Cal.Rptr., at 741, 551 P.2d, at 45. When judicial intervention is necessary, the court "may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate the harmful consequences of school segregation in the district." *Id.*, at 307, 130 Cal.Rptr., at 742, 551 P.2d, at 46. Moreover, "once a school board defaults in its constitutional task, the court, in ***550** devising a remedial order, is not precluded from requiring the busing of children as part of a reasonably feasible desegregation plan." *Id.*, at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.

Like so many other decisions protecting the rights of minorities, California's decision to eradicate the evils of segregation regardless of cause has not been a popular one. In the nearly two decades since the State Supreme Court's decision in *Jackson*, there have been repeated attempts to restrain school boards and courts from enforcing this constitutional guarantee by means of mandatory student transfers or assignments. In 1970, shortly after the San Francisco Unified School District voluntarily adopted a desegregation plan involving mandatory student assignment, the California Legislature enacted Education Code § 1009.5, Cal.Educ.Code Ann. § 1009.5, currently codified at Cal.Educ.Code Ann. § 35350 (West 1978), which provides that "[n]o governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." In *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669 (1971), the California Supreme Court interpreted this provision only to bar a school district from compelling students, without parental consent, to use means of transportation furnished by the district. Construing the statute to prohibit nonconsensual assignment of students for the purpose of eradicating *de jure* or *de facto* segregation, the court concluded, would clearly violate both the State and the Federal Constitutions by "exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in ****3225** the schools." *Id.*, at 943, 92 Cal.Rptr., at 311, 479 P.2d, at 671.

The very next year, opponents of mandatory student assignment for the purpose of achieving racial balance again attempted to eviscerate the state constitutional guarantee recognized in *Jackson.* Proposition 21, which was enacted by referendum in November 1972, stated that "[n]o public school ***551** student shall, because of his race, creed, or color, be assigned to or be required to attend a particular

school." Predictably, the California Supreme Court struck down Proposition 21 "for the same reasons set forth by us in *Johnson*." *Santa Barbara School District v. Superior Court*, 13 Cal.3d 315, 324, 118 Cal.Rptr. 637, 645, 530 P.2d 605, 613 (1975).

Finally, in 1979, the people of California enacted Proposition I. That Proposition, like all of the previous initiatives, effectively deprived California courts of the ability to enforce the state constitutional guarantee that minority children will not attend racially isolated schools by use of what may be "the sole and exclusive means of eliminating racial segregation in the schools," *San Francisco Unified School District v. Johnson, supra*, at 943, 92 Cal.Rptr., at 311, 479 P.2d, at 671, mandatory student assignment and transfer. Unlike the earlier attempts to accomplish this objective, however, Proposition I does not purport to prevent mandatory assignments and transfers when such measures are predicated on a violation of the Federal Constitution. Therefore, the only question presented by this case is whether the fact that mandatory transfers may still be made to vindicate federal constitutional rights saves this initiative from the constitutional infirmity presented in the previous attempts to accomplish this same objective. In my view, the recitation of the obvious—that a state constitutional amendment does not override federal constitutional guarantees—cannot work to deprive minority children in California of their federally protected right to the equal protection of the laws.

II

A

In *Seattle*, the Court exhaustively set out the relevant principles that control the present inquiry. We there found that a series of precedents, exemplified by *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y.1970) (three-judge court), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), establish that the Fourteenth Amendment ***552** prohibits a State from allocating "governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S., at 470, 102 S.Ct., at 3195 (emphasis in original). We concluded that "state action of this kind ... 'places *special* burdens on racial minorities within the governmental process' ... thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.' " *Ibid.* (emphasis in original), quoting *Hunter v. Erickson*, *supra*, at 391, 395, 89 S.Ct., at 560, 562 (Harlan, J., concurring).

It is therefore necessary to determine whether Proposition I works a "nonneutral" reallocation of governmental power on the basis of the racial nature of the decision. This determination is also informed by our decision in *Seattle*. In that case we were presented with a statewide initiative which effectively precluded local school boards from ordering mandatory student assignment or transfer except where required to remedy a constitutional violation. We concluded that the initiative violated the Fourteenth Amendment because it reallocated decisionmaking authority over racial issues from the local school board to a "new and remote level of government." *Seattle*, at 483, 102 S.Ct., at 3202. In reaching this conclusion, we specifically affirmed three principles that are particularly relevant to the present inquiry.

First, we rejected the State's argument that a statewide initiative prohibiting mandatory ****3226** student assignment has no "racial overtones" simply because it does not mention the words "race" or "integration." *Seattle*, at 471, 102 S.Ct., at 3195. We noted that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350." *Ibid.* In light of its language and the history surrounding its adoption, we found it "beyond reasonable dispute ... that the initiative was enacted ' "because of," not merely "in spite of," its adverse effects upon' busing for integration." ***553** *Ibid.*, quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Moreover, we rejected the Solicitor General's remarkable contention, a contention also pressed here, that "busing for integration ... is not a peculiarly 'racial' issue at all." *Seattle*, at 471–472, 102 S.Ct., at 3196. While not discounting the value of an integrated education to non-minority students, we concluded that *Lee v. Nyquist, supra*, definitively established that "desegregation of the public schools ... at bottom inures primarily to the benefit of the minority, and is designed for that purpose," thereby bringing it within the *Hunter* doctrine. *Seattle*, 458 U.S., at 472, 102 S.Ct., at 3196.

Second, the *Seattle* Court determined that Initiative 350 unconstitutionally reallocated power from local school boards to the state legislature or the statewide electorate. After the enactment of Initiative 350, local school boards continued to

exercise considerable discretion over virtually all educational matters, including student assignment. Those seeking to eradicate *de facto* segregation, however, were forced to "surmount a considerably higher hurdle than persons seeking comparable legislative action," *Seattle*, at 474, 102 S.Ct., at 3197, for instead of seeking relief from the local school board, those pursuing this racial issue were forced to appeal to a different and more remote level of government. Just as in *Hunter v. Erickson, supra*, where those interested in enacting fair housing ordinances were compelled to gain the support of a majority of the electorate, we held that this reallocation of governmental power along racial lines offends the Equal Protection Clause. Our holding was not altered by the fact that those seeking to combat *de facto* segregation could still pursue their cause by petitioning local boards to enact voluntary measures or by seeking action from the state legislature. Nor were we persuaded by the argument that no transfer of power had occurred because the State was ultimately responsible for the educational policy of local school boards We found it sufficient that Initiative 350 had deprived those seeking ***554** to redress a racial harm of the right to seek a particularly effective form of redress from the level of government ordinarily empowered to grant the remedy.

Finally, the Court's decision in *Seattle* implicitly rejected the argument that state action that reallocates governmental power along racial lines can be immunized by the fact that it specifically leaves intact rights guaranteed by the Fourteenth Amendment. The fact that mandatory pupil reassignment was still available as a remedy for *de jure* segregation did not alter the conclusion that an unconstitutional reallocation of power had occurred with respect to those seeking to combat *de facto* racial isolation in the public schools.

B

In my view, these principles inexorably lead to the conclusion that California's Proposition I works an unconstitutional reallocation of state power by depriving California courts of the ability to grant meaningful relief to those seeking to vindicate the State's guarantee against *de facto* segregation in the public schools. Despite Proposition I's apparent neutrality, it is "beyond reasonable dispute," *Seattle*, at 471, 102 S.Ct., at 3195, and the majority today concedes, that "court-ordered busing in *excess* of that required by the Fourteenth Amendment ... prompted the initiation and probably the adoption of Proposition ****3227** I." *Ante*, at 3218, n.18 (emphasis in original).[1] Because "minorities may consider busing for integration to be 'legislation that is in their interest,' " *Seattle*, at 474, 102 S.Ct., at 3197, quoting ***555** *Hunter v. Erickson*, 393 U.S., at 395, 89 S.Ct., at 562 (Harlan, J., concurring), Proposition I is sufficiently "racial" to invoke the*Hunter* doctrine.[2]

Nor can there be any doubt that Proposition I works a substantial reallocation of state power. Prior to the enactment of Proposition I, those seeking to vindicate the rights enumerated by the California Supreme Court in *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963), just as those interested in attaining any other educational objective, followed a two-stage procedure. First, California's minority community could attempt to convince the local school board voluntarily to comply with its constitutional obligation to take reasonably feasible steps to eliminate racial isolation in the public schools. If the board was either unwilling or unable to carry out its constitutional duty, those seeking redress could petition the California state courts to require school officials to live up to their obligations. Busing could be required as part of a judicial remedial order. *Crawford I*, 17 Cal.3d, at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.

Whereas Initiative 350 attempted to deny minority children the first step of this procedure, Proposition I eliminates by fiat the second stage: the ability of California courts to order meaningful compliance with the requirements of the State Constitution. After the adoption of Proposition I, the only method of enforcing against a recalcitrant school board the state constitutional duty to eliminate racial isolation is to petition either the state legislature or the electorate as a whole. Clearly, the rules of the game have been significantly ***556** changed for those attempting to vindicate this state constitutional right.[3]

The majority seeks to conceal the unmistakable effects of Proposition I by calling it a "mere repeal" of the State's earlier commitment to do " 'more' than the Fourteenth Amendment requires." *Ante*, at 3216. Although ****3228** it is true that we have never held that the "mere repeal of an existing [anti-discrimination] ordinance violates the Fourteenth Amendment," *Hunter v. Erickson*, *supra*, at 390, n.5, 89 S.Ct., at 560, n.5, it is equally clear that the reallocation of governmental power created by Proposition I is not a "mere repeal" within the meaning of any of our prior decisions.

In *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977), the new members of the Dayton Board of Education repudiated a resolution drafted by their predecessors admitting the Board's role in the establishment of a segregated school system and calling for various remedial actions. In ***557** concluding that the Board was constitutionally permitted to withdraw its own prior *mea culpa*, this Court was careful to note that "*[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs.* " *Id.*, at 413, 97 S.Ct., at 2772 (emphasis added). Therefore, the only time that this Court has squarely held that a "mere repeal" did not violate the Fourteenth Amendment, it was presented with a situation where a governmental entity rescinded *its own* prior statement of policy without affecting any existing educational policy. It is no surprise that such conduct passed constitutional muster.

By contrast, in *Seattle, Hunter*, and *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967),[4] the three times that this Court has explicitly rejected the argument that a proposed change constituted a "mere repeal" of an existing policy, the alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a drastic alteration of the substantive effect of existing policy. This case falls squarely within this latter category. To be sure, the *right* to be free from racial isolation in the public schools remains unaffected by Proposition I. See *ante*, at 3217; see, *McKinny v. Oxnard Union High School District Board of Trustees*, 31 Cal.3d 79, 92–93, 181 Cal.Rptr. 549, 556, 642 P.2d 460, 467 (1982). But Proposition I does repeal the power of the state court to *enforce* this existing constitutional guarantee through the use of mandatory pupil assignment and transfer.

The majority asserts that the Fourteenth Amendment does not "require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Ante*, at 3219. A state court's authority to order appropriate remedies for ***558** state constitutional violations, however, is no more based on the "final authority" of the people than the power of the local Seattle School Board to make decisions regarding pupil assignment is premised on the State's ultimate control of the educational process. Rather, the authority of California courts to order mandatory student assignments in this context springs from the same source as the authority underlying other remedial measures adopted by state and federal courts in the absence of statutory authorization: the "courts power to provide equitable relief" to remedy a constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554 (1971); *Crawford I*, 17 Cal.3d, at 307, 130 Cal.Rptr., at 742, 551 P.2d, at 46 ("a trial court may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate ... school segregation"). Even assuming that the source of a court's power to remedy a constitutional violation can be traced back to "the people," the majority's conclusion that "the people" can therefore confer that remedial power on a discriminatory basis is ****3229** plainly inconsistent with our prior decisions. In*Hunter v. Erickson*, 393 U.S., at 392, 89 S.Ct., at 561, we struck down the referendum at issue even though the people of Akron, Ohio, undoubtedly retained "final authority" for all legislation. Similarly, in *Seattle* we concluded that the reallocation of power away from local school boards offended the Equal Protection Clause even though the State of Washington "is ultimately responsible for providing education within its borders." 458 U.S., at 477, 102 S.Ct., at 3199. The fact that this change was enacted through popular referendum, therefore, cannot immunize it from constitutional review. See*Lucas v. Colorado General Assembly*, 377 U.S. 713, 736–737, 84 S.Ct. 1459, 1473–1474, 12 L.Ed.2d 632 (1964).

As in *Seattle, Hunter*, and *Reitman*, Proposition I's repeal of the state court's enforcement powers was the work of an independent governmental entity, and not of the state courts themselves. That this repeal drastically alters the substantive ***559** rights granted by existing policy is patently obvious from the facts of this litigation.[5] By prohibiting California courts from ordering mandatory student assignment when necessary to eliminate racially isolated schools, Proposition I has placed an enormous barrier between minority children and the effective enjoyment of their constitutional rights, a barrier that is not placed in the path of those who seek to vindicate other rights granted by state law. This Court's precedents demonstrate that, absent a compelling state interest, which respondents have hardly demonstrated, such a discriminatory barrier cannot stand.[6]

***560** The fact that California attempts to cloak its discrimination in the mantle of the Fourteenth Amendment does not alter this result. Although it might seem "paradoxical" to some Members of this Court that a referendum that adopts the wording of the Fourteenth Amendment might violate it, the paradox is specious.

Because of the Supremacy Clause, Proposition I would have precisely the same legal effect if it contained no reference to the Fourteenth Amendment. The lesson of *Seattle* is that a State, in prohibiting conduct that is not required by the Fourteenth Amendment, may nonetheless create a discriminatory reallocation of governmental power that does violate equal protection. The fact that some less effective avenues remain open to those interested in mandatory student assignment to eliminate racial isolation, like the fact that the voters in *Hunter* conceivably might have enacted fair housing ****3230** legislation, or that those interested in busing to eliminate racial isolation in *Seattle* conceivably might use the State's referendum process, does not justify the discriminatory reallocation of governmental decisionmaking.

In this case, the reallocation of power occurs in the judicial process—the major arena minorities have used to ensure the protection of rights "in their interest." *Hunter v. Erickson*, *supra*, at 395, 89 S.Ct., at 563 (Harlan, J., concurring). Certainly, *Hunter* and *Seattle* cannot be distinguished on the ground that they concerned the reallocation of legislative power, whereas Proposition I redistributes the inherent power of a court to tailor the remedy to the violation. As we have long recognized, courts too often have been "the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963). See *Reitman v. Mulkey*, 387 U.S., at 377, 87 S.Ct., at 1632 (invalidating state constitutional amendment because "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, ***561** *or judicial* regulation at any level of the state government") (emphasis added). It is no wonder, as the present case amply illustrates, that whatever progress has been made towards the elimination of *de facto* segregation has come from the California courts. Indeed, Proposition I, by denying full access to the only branch of government that has been willing to address this issue meaningfully, is far worse for those seeking to vindicate the plainly unpopular cause of racial integration in the public schools than a simple reallocation of an often unavailable and unresponsive legislative process. To paraphrase, "[i]t surely is an excessively formal exercise ... to argue that the procedural revisions at issue in *Hunter* [and *Seattle*] imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by [Proposition I] does not erect comparable political obstacles." *Seattle*, 458 U.S., at 475, n. 17, 102 S.Ct., at 3197, n. 17.

III

Even if the effects of Proposition I somehow can be distinguished from the enactments at issue in *Hunter* and *Seattle*, the result reached by the majority today is still plainly inconsistent with our precedents. Because it found that the segregation of the California public schools violated the Fourteenth Amendment, the state trial court never considered whether Proposition I was itself unconstitutional because it was the product of discriminatory intent. Despite the absence of *any* factual record on this issue, the Court of Appeal rejected petitioners' argument that the law was motivated by a discriminatory intent on the ground that the recitation of several potentially legitimate purposes in the legislation's preamble rendered any claim that it had been enacted for an invidious purpose "pure speculation." 113 Cal.App.3d 633, 655, 170 Cal.Rptr. 495, 509 (1981).

In *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977), we declared that "[d]etermining ***562** whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Petitioners assert that the disproportionate impact of Proposition I, combined with the circumstances surrounding its adoption and the history of opposition to integration cited *supra*, at 3223–3225, clearly indicates the presence of discriminatory intent. See Brief for Petitioners 64–96. Yet despite the fact that *no inquiry* has been conducted into these allegations by either the trial or the appellate court, this Court, in its haste to uphold the banner of "neighborhood schools," affirms a factual determination that was never made. Such blind allegiance to the conclusory statements of a ****3231** lower court is plainly forbidden by our prior decisions.[7]

IV

Proposition I is in some sense "better" than the Washington initiative struck down in *Seattle*.[8] In their generosity, California voters have allowed those seeking racial balance to petition the very school officials who have steadfastly maintained the color line at the schoolhouse door to comply voluntarily with their continuing state constitutional duty to desegregate. At the same time, the voters have deprived minorities of the only method of redress that has proved

effective—the full remedial powers of the state judiciary. In the name of the State's "ability to experiment," *ante*, at 3216, the Court today allows this placement of yet another burden ***563** in the path of those seeking to counter the effects of nearly three centuries of racial prejudice. Because this decision is neither justified by our prior decisions nor consistent with our duty to guarantee all citizens the equal protection of the laws, I must dissent.

All Citations

458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948, 5 Ed. Law Rep. 82

Footnotes

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

1 In 1980 the District included 562 schools with 650,000 students in an area of 711 square miles. In 1968 when the case went to trial, the District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980 the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other. See 113 Cal.App.3d 633, 642, 170 Cal.Rptr. 495, 501 (1981).

2 "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature. We shall explain, however, that we do not rest our decision on this characterization because we continue to adhere to our conclusion in [*Jackson v. Pasadena City School Dist.*, 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963)] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.' " *Crawford v. Board of Education*, 17 Cal.3d, at 285, 130 Cal.Rptr., at 726, 551 P.2d, at 30. The court explained that federal cases were not controlling:

> "In focusing primarily on ... federal decisions ... defendant ignores a significant line of California decisions, decisions which authoritatively establish that in this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." *Id.,* at 290, 130 Cal.Rptr., at 729–730, 551 P.2d, at 33–34.

3 In stating general principles to guide the trial court on remand, the State Supreme Court discussed the 'busing' question: "While critics have sometimes attempted to obscure the issue, court decisions time and time again emphasized that "busing" is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field.... [I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.*, at 309, 130 Cal.Rptr., at 743, 551 P.2d, at 47. It noted as well that a state court should not intervene to speed the desegregation process so long as the school board takes "reasonably feasible steps to alleviate school segregation," *id.,* at 305, 130 Cal.Rptr., at 741, 551 P.2d, at 45, and that "a court cannot properly issue a 'busing' order so long as a school district continues to meet its constitutional obligations." *Id.,* at 310, 130 Cal.Rptr., at 744, 551 P.2d, at 48.

4 The plan provided for the mandatory reassignment of approximately 40,000 students in the fourth through eighth grades. Some of these children were bused over long distances requiring daily round-trip bus rides of as long as two to four hours. In addition, the plan provided for the voluntary transfer of some 30,000 students.

> Respondent Bustop, Inc., unsuccessfully sought to stay implementation of the plan. See *Bustop, Inc. v. Board of Education*, 439 U.S. 1380, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978) (REHNQUIST, J., in chambers); *Bustop, Inc. v. Board of Education*, 439 U.S. 1384, 99 S.Ct. 44, 58 L.Ed.2d 92 (1978) (POWELL, J., in chambers).

5 Proposition I was placed before the voters following a two-thirds vote of each house of the state legislature. Cal.Const., Art. 18, § 1. The State Senate approved the Proposition by a vote of 28 to 6, the State Assembly by a vote of 62 to 17. The voters favored the Proposition by a vote of 2,433,312 (68.6%) to 1,112,923 (31.4%). The Proposition received a

majority of the vote in each of the State's 58 counties and in 79 of the State's 80 assembly districts. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3–4, 43–49.

6 Proposition I added a lengthy proviso to Art. 1, § 7(a), of the California Constitution. Following passage of Proposition I, § 7 now provides, in relevant part:

> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
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> "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.
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> "In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

7 The Superior Court ordered the immediate implementation of the revised plan. The District was unsuccessful in its effort to gain a stay of the plan pending appeal. See *Board of Education v. Superior Court*, 448 U.S. 1343, 101 S.Ct. 21, 65 L.Ed.2d 1166 (1980) (REHNQUIST, J., in chambers).

8 "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to *de jure* segregation in violation of the Fourteenth Amendment.... But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements." 113 Cal.App.3d, at 645–646, 170 Cal.Rptr., at 503.

9 The Court of Appeal also rejected the claim that Proposition I deprived minority children of a "vested right" to desegregated education in violation of due process. See *id.,* at 655–656, 170 Cal.Rptr., at 509–510. Petitioners no longer advance this claim.

10 On March 16, 1981, the District directed that mandatory pupil reassignment under the Superior Court's revised plan be terminated on April 20, 1981. On that date, parents of children who had been reassigned were given the option of returning their children to neighborhood schools. According to respondent Board of Education, approximately 7,000 pupils took this option of whom 4,300 were minority students. Brief for Respondent Board of Education 10.

The state courts refused to enjoin termination of the plan. On April 17, 1981, however, the United States District Court for the Central District of California issued a temporary restraining order preventing termination of the plan. *Los Angeles NAACP v. Los Angeles Unified School District*, 513 F.Supp. 717. The District Court found that there was a "fair chance" that intentional segregation by the District could be demonstrated. *Id.*, at 720. The District Court's order was vacated on the following day by the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District v.*

District Court, 650 F.2d 1004 (1981). On remand the District Court denied the District's motion to dismiss. This ruling has been certified for interlocutory appeal. See Brief for Respondent Board of Education 10, n. 4.

On September 10, 1981, the Superior Court approved a new, voluntary desegregation plan.

11 Respondent Bustop, Inc., argues that far from doing "more" than the Fourteenth Amendment requires, the State actually violated the Amendment by assigning students on the basis of race when such assignments were not necessary to remedy a federal constitutional violation. See Brief for Respondent Bustop, Inc., 10–18. We do not reach this contention.

12 In this respect this case differs from the situation presented in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896.

In an opinion delivered after Proposition I was enacted, the California Supreme Court stated that "the amendment neither releases school districts from their State Constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation." *McKinny v. Oxnard Union High School District Board of Trustees*, 31 Cal.3d 79, 92–93, 181 Cal.Rptr. 549, 566, 642 P.2d 460, 467 (1982). Moreover, the Proposition only limits state courts when enforcing the State Constitution. Thus, the Proposition would not bar state-court enforcement of state *statutes* requiring busing for desegregation or for any other purpose. Cf. *Brown v. Califano*, 201 U.S.App.D.C. 235, 244, 627 F.2d 1221, 1230 (1980) (legislation limiting power of federal agency to require busing by local school boards held constitutional in view of the "effective avenues for desegregation" left open by the legislation).

13 "[I]t is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case." Brief for Petitioners 48.

14 In *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), the Court invalidated a city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." *Id.*, at 391, 89 S.Ct., at 560. In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in *Hunter* are missing. See *infra.*

15 A neighborhood school policy in itself does not offend the Fourteenth Amendment. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28, 91 S.Ct. 1267, 1282, 28 L.Ed.2d 554 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes"). Cf. 20 U.S.C. § 1701: "(a) The Congress declares it to be the policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and (2) the neighborhood is the appropriate basis for determining public school assignments."

16 In the Los Angeles School District, white students are now the racial minority, see n. 1, *supra.* Similarly, in Los Angeles County, racial minorities, including those of Spanish origin, constitute the majority of the population. See U.S. Dept. of Commerce, 1980 Census of Population and Housing, California, Advance Reports 6 (Mar.1981).

17 See *Washington v. Davis*, 426 U.S. 229, 238–248, 96 S.Ct. 2040, 2046–2052, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *James v. Valtierra*, 402 U.S. 137, 141, 91 S.Ct. 1331, 1333, 28 L.Ed.2d 678 (1971).

18 Proposition I is not limited to busing for the purpose of racial desegregation. It applies neutrally to "pupil school assignment or pupil transportation" in general. Even so, it is clear that court-ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of Proposition I.

19 See *Dayton Bd. of Ed. v. Brinkman*, 443 U.S., at 531, n. 5, 99 S.Ct., at 2976, n. 5 ("Racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment").

20 In *Hunter* we noted that "we do not hold that mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment." 393 U.S., at 390, n. 5, 89 S.Ct., at 560, n. 5. In *Reitman* the Court held that California Proposition 14 was unconstitutional under the Fourteenth Amendment not because it repealed two pieces of antidiscrimination legislation, but because the Proposition involved the State in private racial discrimination: "Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." 387 U.S., at 380–381, 87 S.Ct., at 1634.

21 Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason. See *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

22 See *Palmer v. Thompson*, 403 U.S. 217, 228, 91 S.Ct. 1940, 1946, 29 L.Ed.2d 438 (1971) ("To hold ... that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped ... would plainly discourage the expansion and enlargement of needed services in the long run") (BURGER, C. J., concurring); *Reitman v. Mulkey, supra*, 387 U.S., at 395, 87 S.Ct., at 1641 ("Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable") (Harlan, J., dissenting).

23 In his dissenting opinion in *Reitman v. Mulkey, supra*, at 395, 87 S.Ct., at 1641, Justice Harlan remarked upon the need for legislative flexibility when dealing with the "delicate and troublesome problems of race relations." He noted:

> "The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum." 387 U.S., at 395–396, 87 S.Ct., at 1641.

24 Tr. of Oral Arg. 6. See *id.*, at 7–8 ("The fact that a state may be free to remove a right or remove a duty, does not mean that it has the same freedom to leave the right in place but simply, in a discriminatory way we argue, provide less than full judicial remedy").

25 "In the case before us ... the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 393 U.S., at 395, 89 S.Ct., at 563 (Harlan, J., concurring).

26 The *Hunter* Court noted that although "the law on its face treats Negro and white, Jew and gentile in an identical manner," *id.*, at 391, 89 S.Ct., at 560, a charter amendment making it more difficult to pass antidiscrimination legislation could only disadvantage racial minorities in the governmental process.

27 Petitioners contend that Proposition I only restricts busing for the purpose of racial discrimination. The Proposition is neutral on its face, however, and respondents—as well as the State in its *amicus* brief—take issue with petitioners' interpretation of the provision.

28 Similarly, a "dual constitution" is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others. Nor is a "dual executive branch" created when an agency is given enforcement powers in one area but not in another. Cf. *Brown v. Califano*, 201 U.S.App.D.C. 235, 627 F.2d 1221 (1980) (upholding federal legislation prohibiting a federal executive agency, but not local school officials or federal courts, from requiring busing).

29 The Proposition contains its own statement of purpose:

> "[T]he Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment."

30 Cf. *Washington v. Davis*, 426 U.S., at 253, 96 S.Ct., at 2054 ("The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.") (STEVENS, J., concurring).

31 In *Brown v. Califano, supra*, the Court of Appeals found that a federal statute preventing the Department of Health, Education, and Welfare (HEW) from requiring busing "to a school other than the school which is nearest the student's home," 42 U.S.C. § 2000d, was not unconstitutional. HEW retained authority to encourage school districts to desegregate through other means, and the enforcement powers of the Department of Justice were left untouched. The court therefore concluded that the limits on HEW's ability to order mandatory busing did not have a discriminatory effect. And, having done so, it refused to inquire into legislative motivation: "Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." 201 U.S.App.D.C., at 248, 627 F.2d, at 1234 (footnote omitted).

32 Cf. *Washington v. Davis*, *supra*, at 253, 96 S.Ct., at 2054 (STEVENS, J., concurring) ("It is unrealistic ... to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it").

33 Proposition I received support from 73.9% of the voters in Los Angeles County which has a "minority" population—including persons of Spanish origin—of over 50%. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3. See n. 16, *supra.* By contrast, the Proposition received its smallest percentage of the vote in Humboldt and Marin Counties which are nearly all-white in composition.

1 Just as in *Seattle*, the fact that other types of student transfers conceivably might be prohibited does not alter this conclusion: "Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by" Proposition I. *Seattle*, at 471, 102 S.Ct., at 3195. Indeed in their response to the petition for certiorari, respondents characterized Proposition I as addressing but "one narrow area: the power of a state court to order mandatory student assignment or transportation as a desegregation remedy." Brief in Opposition 9.

2 It is therefore irrelevant whether the "benefits of neighborhood schooling are racially neutral," as the majority asserts. *Ante*, at 3221; see *ante*, at 3218. In *Seattle*, 458 U.S., at 472, 102 S.Ct., at 3196, we specifically rejected the argument that because some minorities as well as whites supported the initiative, it could not be considered a racial classification.

3 There can be no question that the practical effect of Proposition I will be to deprive state courts of "the sole and exclusive means of eliminating racial segregation in the schools." *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937, 943, 92 Cal.Rptr. 309, 311, 479 P.2d 669, 671 (1971). As we have often noted, "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina Board of Ed. v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971). Moreover, Proposition I prevents a state court from ordering school officials to take any action respecting *pupil school assignment*, as well as pupil transportation. Presumably, state courts could not design a remedy involving the "pairing" or "clustering" of schools, even if such a remedy did not involve *any* "busing." In the present case, the state trial court found that the voluntary programs proposed by the Los Angeles School Board were "constitutionally suspect" because they "place[d] the burden of relieving the racial isolation of the minority student upon the minority student." App. 160. Consequently, since "a voluntary program would not serve to integrate the community's schools," *Seattle*, 458 U.S., at 473, n. 16, 102 S.Ct., at 3197, n. 16, Proposition I, like the measures at issue in *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y.1970) (three-judge court), summarily aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), and *Seattle*, precludes the effective enjoyment by California's minority children of their right to eliminate racially isolated schools.

4 In *Reitman v. Mulkey*, this Court struck down another California ballot measure, granting every resident the absolute constitutional right to sell or rent his property to whomever he or she chooses. We held that the provision amounted to an unconstitutional authorization of private discrimination.

5 Indeed Proposition I by its express terms allows for the modification of existing plans upon the application of any interested person. Art. 1, § 7(a).

6 As the majority notes, Proposition I states that the "people of the State of California find and declare that this amendment is necessary to serve compelling public interests," including, *inter alia*, "making the most efficient use of ... limited financial

resources," protecting the "health and safety" of all students, preserving "harmony and tranquility," and "protecting the environment." *Ante*, at 3215, n. 6. These purported justifications, while undoubtedly meritorious, are clearly insufficient to sustain the racial classification established by Proposition I. As we have often noted, racial classifications may only be upheld where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). It goes without saying that a self-serving conclusory statement of necessity will not suffice to fulfill this burden. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28, 29–31, 91 S.Ct. 1267, 1282, 1283, 28 L.Ed.2d 554 (1971) (rejecting a similar list of justifications for establishing a racial classification). "In any event, [respondents] have failed to show that the purpose[s] they impute to the [Proposition] could not be accomplished by alternative methods, not involving racial distinctions." *Lee v. Nyquist*, 318 F.Supp., at 720.

Parenthetically, it is interesting to note that the allegedly compelling interest in establishing "neighborhood schools" so often referred to by the majority appears nowhere in the official list of justifications. The absence of any mention of this supposed justification is not surprising in light of the fact that the Proposition's ban on student "assignment" effectively prevents desegregation remedies that would not require a student to leave his "neighborhood." See n. 3, *supra.*

7 The majority's reliance on *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), is therefore misplaced. How can any deference be given to the state court's "knowledge of the facts and circumstances concerning the passage and potential impact" of Proposition I, *id.*, at 378, 87 S.Ct., at 1633, when no such findings were ever made.

8 Initiative 350, however, at least did "not hinder [the] State from enforcing [the State] Constitution." *Seattle*, 458 U.S., at 490, n. 3, 102 S.Ct., at 3205, n. 3 (POWELL, J., dissenting).

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138 S.Ct. 1916
Supreme Court of the United States

Beverly R. GILL, et al., Appellants

v.

William WHITFORD, et al.

No. 16–1161
|
Argued Oct. 3, 2017.
|
Decided June 18, 2018.

Synopsis

Background: Democratic voters filed § 1983 action against members of Wisconsin Elections Commission, claiming that state legislative redistricting plan drafted and enacted by Republican-controlled Wisconsin legislature was unconstitutional partisan gerrymander that systematically diluted voting strength of Democratic voters statewide based on their political beliefs, in violation of Equal Protection Clause and First Amendment rights of association and free speech, by two gerrymandering techniques known as "cracking," or dividing party's supporters among multiple districts so they fell short of majority in each one, and "packing," or concentrating one party's backers in a few districts that they won by overwhelming margins. After trial before a three-judge panel of the United States District Court for the Western District of Wisconsin, Ripple, Circuit Judge, sitting by designation, 218 F.Supp.3d 837, judgment was entered for plaintiffs, an injunction was entered, 2017 WL 383360, and plaintiffs' motion to amend the judgment was granted, 2017 WL 2623104. Consideration of jurisdiction for direct appeal was postponed by the Supreme Court, and the judgment was stayed.

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

[1] voters' allegations, that the redistricting plan caused them to suffer statewide harm to their interests in their collective representation in state legislature and in influencing legislature's overall composition and policymaking, did not support Article III standing;

[2] evidence of an efficiency gap, and similar measures of partisan asymmetry, did not address the effect that a gerrymander had on the votes of particular citizens, as required for injury-in-fact element for Article III standing; but

[3] Supreme Court would not direct dismissal of voters' claims, and instead would remand the case so voters would have opportunity to prove concrete and particularized injuries.

Vacated and remanded.

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

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

West Headnotes (18)

[1] Federal Civil Procedure In general; injury or interest

Federal Civil Procedure Rights of third parties or public

A plaintiff seeking relief in federal court must first demonstrate that he has Article III standing to do so, including that he has a personal stake in the outcome, distinct from a generally available grievance about government. U.S.C.A. Const. Art. 3, § 2, cl. 1.

55 Cases that cite this headnote

[2] Federal Civil Procedure In general; injury or interest

The threshold requirement for Article III standing, under which a plaintiff must have a personal stake in the outcome, distinct from a generally available grievance about government, ensures that federal courts act as judges, and do not engage in policymaking properly left to elected representatives. U.S.C.A. Const. Art. 3, § 2, cl. 1.

53 Cases that cite this headnote

[3] **States** Compactness; contiguity; gerrymandering in general

Taking political considerations into account in fashioning a state legislative reapportionment plan is not sufficient to invalidate it as a partisan gerrymander, because districting inevitably has and is intended to have substantial political consequences.

7 Cases that cite this headnote

[4] **Constitutional Law** Political Questions

Failure of political will does not justify unconstitutional remedies, because the power of federal judges to say what the law is rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity, for Article III jurisdiction, of resolving, according to legal principles, a plaintiff's particular claim of legal right. U.S.C.A. Const. Art. 3, § 2, cl. 1.

5 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; injury or interest

To ensure that the Federal Judiciary respects the proper and properly limited role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy. U.S.C.A. Const. Art. 3, § 2, cl. 1.

28 Cases that cite this headnote

[6] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Rights of third parties or public

A federal court is not a forum for generalized grievances, and the requirement, for federal jurisdiction, that a plaintiff show a personal stake in the outcome of the controversy ensures that courts exercise power that is judicial in nature. U.S.C.A. Const. Art. 3, § 2, cl. 1.

45 Cases that cite this headnote

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

The requirement, for federal jurisdiction, that a plaintiff show a personal stake in the outcome of the controversy is enforced by insisting that a plaintiff satisfy a three-part test for Article III standing: (1) he suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) the injury is likely to be redressed by a favorable judicial decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

121 Cases that cite this headnote

[8] **Federal Civil Procedure** In general; injury or interest

Foremost among the requirements for Article III standing is injury in fact, which requires a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affects the plaintiff in a personal and individual way. U.S.C.A. Const. Art. 3, § 2, cl. 1.

88 Cases that cite this headnote

[9] **Election Law** Nature and source of right

Election Law Persons entitled to bring contest

A person's right to vote is individual and personal in nature, and thus, voters who allege facts showing disadvantage to themselves as individuals have Article III standing to sue to remedy that disadvantage. U.S.C.A. Const. Art. 3, § 2, cl. 1.

55 Cases that cite this headnote

[10] **States** Persons entitled to sue, standing, and parties

To extent that vote dilution was Wisconsin Democratic voters' alleged harm from Republican-controlled Wisconsin legislature's alleged partisan gerrymandering in state legislative redistricting plan, that injury was district specific because the disadvantage to a voter as an individual resulted from the boundaries of the particular district in which he resided, and thus, a voter's remedy had to be limited to the inadequacy that produced his injury in fact as element for Article III standing, which remedy would be revision of the boundaries of the voter's own district. U.S.C.A. Const. Art. 3, § 2, cl. 1.

48 Cases that cite this headnote

[11] **Constitutional Law** Elections

A plaintiff who alleges that he is the object of a racial gerrymander, i.e., a drawing of legislative district lines on the basis of race, has Article III standing to assert only that his own district has been so gerrymandered. U.S.C.A. Const. Art. 3, § 2, cl. 1.

17 Cases that cite this headnote

[12] **Constitutional Law** Elections

A plaintiff who complains of racial gerrymandering, but who does not live in a gerrymandered district, asserts only a generalized grievance against governmental conduct of which he or she does not approve, which is not sufficient to support Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

29 Cases that cite this headnote

[13] **States** Persons entitled to sue, standing, and parties

Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed district-by-district.

7 Cases that cite this headnote

[14] **States** Persons entitled to sue, standing, and parties

Allegation of Wisconsin Democratic voters, that Republican-controlled Wisconsin legislature's alleged partisan gerrymandering in state legislative redistricting plan caused them to suffer statewide harm to their interests in their collective representation in state legislature and in influencing legislature's overall composition and policymaking, did not involve individual and personal injury of the kind required for Article III standing; such allegation presented an undifferentiated, generalized grievance. U.S.C.A. Const. Art. 3, § 2, cl. 1.

15 Cases that cite this headnote

[15] **States** Persons entitled to sue, standing, and parties

At pleading stage, Wisconsin Democratic voters sufficiently alleged particularized harm, as required for injury-in-fact element for Article III standing in action alleging partisan gerrymandering in Republican-controlled Wisconsin legislature's state legislative redistricting plan, by alleging that the plan diluted the influence of their votes as a result of packing or cracking in their legislative districts. U.S.C.A. Const. Art. 3, § 2, cl. 1.

4 Cases that cite this headnote

[16] **States** Persons entitled to sue, standing, and parties

Assuming that Wisconsin Democratic voters' partisan gerrymandering claims were justiciable, injury in fact, as element for voters' Article III standing, depended on effect of Republican-controlled Wisconsin legislature's state legislative redistricting plan, not mapmakers' intent, and required a showing of a burden on plaintiffs' votes that was actual or imminent, not conjectural or hypothetical. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3 Cases that cite this headnote

[17] **States** Persons entitled to sue, standing, and parties

Assuming that Democratic voters' partisan gerrymandering claims, arising from Republican-controlled Wisconsin legislature's state legislative redistricting plan, were justiciable, evidence of an efficiency gap, and similar measures of partisan asymmetry, did not address effect that a gerrymander had on votes of particular citizens, as required for injury-in-fact element for Article III standing; partisan-asymmetry metrics such as efficiency gap measured something else entirely, i.e., effect that a gerrymander had on the fortunes of political parties. U.S.C.A. Const. Art. 3, § 2, cl. 1.

26 Cases that cite this headnote

[18] **Federal Courts** Particular cases

States Persons entitled to sue, standing, and parties

States Judgment and relief in general

Supreme Court, upon determining that Wisconsin Democratic voters had failed to demonstrate their Article III standing in action alleging partisan gerrymandering in Republican-controlled Wisconsin legislature's state legislative redistricting plan, would not direct dismissal of voters' claims, and instead would remand the case to three-judge District Court so that voters would have opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes; the case was unusual because it concerned an unsettled kind of claim the Court had not agreed upon, for which contours and justiciability were unresolved, and four voters alleged that they lived in districts in which Democrats like them had been packed or cracked. U.S.C.A. Const. Art. 3, § 2, cl. 1.

6 Cases that cite this headnote

****1919** *Syllabus*[*]

***48** Members of the Wisconsin Legislature are elected from single-member legislative districts. Under the Wisconsin Constitution, the legislature must redraw the boundaries of those districts following each census. After the 2010 census, the legislature passed a new districting plan known as Act 43. Twelve Democratic voters, the plaintiffs in this case, alleged that Act 43 ****1920** harms the Democratic Party's ability to convert Democratic votes into Democratic seats in the legislature. They asserted that Act 43 does this by "cracking" certain Democratic voters among different districts in which those voters fail to achieve electoral majorities and "packing" other Democratic voters in a few districts in which Democratic candidates win by large margins. The plaintiffs argued that the degree to which packing and cracking has favored one political party over another can be measured by an "efficiency gap" that compares each party's respective "wasted" votes—*i.e.,* votes cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win—across all legislative districts. The plaintiffs claimed that the statewide enforcement of Act 43 generated an excess of wasted Democratic votes, thereby violating the plaintiffs' First Amendment right of association and their Fourteenth Amendment right to equal protection. The defendants, several members of the state election commission, moved to dismiss the plaintiffs' claims. They argued that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative district in which they vote. The three-judge District Court denied the defendants' motion and, following a trial, concluded that Act 43 was an unconstitutional partisan gerrymander. Regarding standing, the court held that the plaintiffs had suffered a particularized injury to their equal protection rights.

Held : The plaintiffs have failed to demonstrate Article III standing. Pp. 1926 – 1934.

(a) Over the past five decades this Court has repeatedly been asked to decide what judicially enforceable limits, if any, the Constitution sets on partisan gerrymandering. Previous attempts at an answer have left few clear landmarks for addressing the question and have generated ***49** conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury. See *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298, *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85, *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158

L.Ed.2d 546, and *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609. Pp. 1926 – 1929.

(b) A plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663. That requirement ensures that federal courts "exercise power that is judicial in nature," *Lance v. Coffman,* 549 U.S. 437, 439, 441, 127 S.Ct. 1194, 167 L.Ed.2d 29. To meet that requirement, a plaintiff must show an injury in fact—his pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.,* which "affect[s] the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, and n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351.

The right to vote is "individual and personal in nature," *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506, and "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage, *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs here alleged that they suffered such injury from partisan gerrymandering, which works through the "cracking" and "packing" of voters. To the extent that the plaintiffs' alleged harm is the dilution of their votes, that injury is ****1921** district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she does not approve." *United States v. Hays,* 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635.

The plaintiffs argue that their claim, like the claims presented in *Baker* and *Reynolds,* is statewide in nature. But the holdings in those cases were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362 because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362. Here, the plaintiffs' claims turn on allegations that their ***50** votes have been diluted. Because that harm arises from the particular composition of the voter's own district, remedying the harm does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey,* 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606.

The plaintiffs argue that their legal injury also extends to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. To date, however, the Court has not found that this presents an individual and personal injury of the kind required for Article III standing. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. The harm asserted by the plaintiffs in this case is best understood as arising from a burden on their own votes. Pp. 1928 – 1932.

(c) Four of the plaintiffs in this case pleaded such a particularized burden. But as their case progressed to trial, they failed to pursue their allegations of individual harm. They instead rested their case on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence. First, they presented testimony pointing to the lead plaintiff's hope of achieving a Democratic majority in the legislature. Under the Court's cases to date, that is a collective political interest, not an individual legal interest. Second, they produced evidence regarding the mapmakers' deliberations as they drew district lines. The District Court relied on this evidence in concluding that those mapmakers sought to understand the partisan effect of the maps they were drawing. But the plaintiffs' establishment of injury in fact turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' " *Defenders of Wildlife,* 504 U.S., at 560, 112 S.Ct. 2130. Third, the plaintiffs presented partisan-asymmetry ****1922** studies showing that Act 43 had skewed Wisconsin's statewide map in favor of Republicans. Those studies do not address the effect that a gerrymander has on the votes of particular citizens. They measure instead the effect that a gerrymander has on

the fortunes of political parties. That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. Pp. 1931 – 1934.

(d) Where a plaintiff has failed to demonstrate standing, this Court usually directs dismissal. See, *e.g., DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589. Here, however, where the case concerns an unsettled kind of claim that the Court has not agreed upon, the contours and ***51** justiciability of which are unresolved, the case is remanded to the District Court to give the plaintiffs an opportunity to prove concrete and particularized injuries using evidence that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 264–265, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314. Pp. 1933 – 1934.

218 F.Supp.3d 837, vacated and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which THOMAS and GORSUCH, JJ., joined except as to Part III. KAGAN, J., filed a concurring opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***52** The State of Wisconsin, like most other States, entrusts to its legislature the periodic task of redrawing the boundaries ***53** of the State's legislative districts. A group of ****1923** Wisconsin Democratic voters filed a complaint in the District Court, alleging that the legislature carried out this task with an eye to diminishing the ability of Wisconsin Democrats to convert Democratic votes into Democratic seats in the legislature. ***54** The plaintiffs asserted that, in so doing, the legislature had infringed their rights under the First and Fourteenth Amendments.

[1] **[2]** But a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has "a personal stake in the outcome," *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), distinct from a "generally available grievance about government," *Lance v. Coffman,* 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*). That threshold requirement "ensures that we act *as judges,* and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry,* 570 U.S. 693, 700, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). Certain of the plaintiffs before us alleged that they had such a personal stake in this case, but never followed up with the requisite proof. The District Court and this Court therefore lack the power to resolve their claims. We vacate the judgment and remand the case for further proceedings, in the course of which those plaintiffs may attempt to demonstrate standing in accord with the analysis in this opinion.

I

Wisconsin's Legislature consists of a State Assembly and a State Senate. Wis. Const., Art. IV, § 1. The 99 members of the Assembly are chosen from single districts that must

"consist of contiguous territory and be in as compact form as practicable." § 4. State senators are likewise chosen from single-member districts, which are laid on top of the State Assembly districts so that three Assembly districts form one Senate district. See § 5; Wis. Stat. § 4.001 (2011).

The Wisconsin Constitution gives the legislature the responsibility to "apportion and district anew the members of the senate and assembly" at the first session following each census. Art. IV, § 3. In recent decades, however, that responsibility has just as often been taken up by federal courts. Following the census in 1980, 1990, and 2000, federal courts drew the State's legislative districts when the Legislature ***55** and the Governor—split on party lines—were unable to agree on new districting plans. The legislature has broken the logjam just twice in the last 40 years. In 1983, a Democratic legislature passed, and a Democratic Governor signed, a new districting plan that remained in effect until the 1990 census. See 1983 Wis. Laws ch. 4. In 2011, a Republican legislature passed, and a Republican Governor signed, the districting plan at issue here, known as Act 43. See Wis. Stat. §§ 4.009, 4.01–4.99; 2011 Wis. Laws ch. 4. Following the passage of Act 43, Republicans won majorities in the State Assembly in the 2012 and 2014 elections. In 2012, Republicans won 60 Assembly seats with 48.6% of the two-party statewide vote for Assembly candidates. In 2014, Republicans won 63 Assembly seats with 52% of the statewide vote. 218 F.Supp.3d 837, 853 (W.D.Wis.2016).

In July 2015, twelve Wisconsin voters filed a complaint in the Western District of Wisconsin challenging Act 43. The plaintiffs identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates." 1 App. 32, Complaint ¶ 15. They alleged that Act 43 is a partisan gerrymander that "unfairly favor[s] Republican voters and candidates," and that it does so by "cracking" and "packing" ****1924** Democratic voters around Wisconsin. *Id.,* at 28–30, ¶¶ 5–7. As they explained:

> "Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins." *Id.,* at 29, ¶ 5.

Four of the plaintiffs—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—alleged that they lived in State Assembly districts where Democrats have been cracked or packed. *Id.,* at 34–36, ¶¶ 20, 23, 24, 26; see *id.,* at 50–53, ¶¶ 60–70 (describing packing and cracking in Assembly Districts 22, 26, 66, and 91). All of the plaintiffs ***56** also alleged that, regardless of "whether they themselves reside in a district that has been packed or cracked," they have been "harmed by the manipulation of district boundaries" because Democrats statewide "do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly." *Id.,* at 33, ¶ 16.

The plaintiffs argued that, on a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an "efficiency gap" that compares each party's respective "wasted" votes across all legislative districts. "Wasted" votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win. *Id.,* at 28–29, ¶ 5. The plaintiffs alleged that Act 43 resulted in an unusually large efficiency gap that favored Republicans. *Id.,* at 30, ¶ 7. They also submitted a "Demonstration Plan" that, they asserted, met all of the legal criteria for apportionment, but was at the same time "almost perfectly balanced in its partisan consequences." *Id.,* at 31, ¶ 10. They argued that because Act 43 generated a large and unnecessary efficiency gap in favor of Republicans, it violated the First Amendment right of association of Wisconsin Democratic voters and their Fourteenth Amendment right to equal protection. The plaintiffs named several members of the state election commission as defendants in the action. *Id.,* at 36, ¶¶ 28–30.

The election officials moved to dismiss the complaint. They argued, among other things, that the plaintiffs lacked standing to challenge the constitutionality of Act 43 as a whole because, as individual voters, their legally protected interests extend only to the makeup of the legislative districts in which they vote. A three-judge panel of the District Court, see 28 U.S.C. § 2284(a), denied the defendants' motion. In the District Court's view, the plaintiffs "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across ***57** the state." *Whitford v. Nichol,* 151 F.Supp.3d 918, 924 (W.D.Wis.2015). It therefore followed, in the District Court's opinion, that "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, ... they should be permitted to bring a statewide claim." *Id.,* at 926.

The case proceeded to trial, where the plaintiffs presented testimony from four fact witnesses. The first was lead plaintiff William Whitford, a retired law professor at the University of Wisconsin in Madison. Whitford testified that

he lives in Madison in the 76th Assembly District, and acknowledged on cross-examination that this is, under any plausible circumstances, a heavily Democratic district. Under Act 43, the Democratic share of the Assembly vote in Whitford's district is 81.9%; under the plaintiffs' ideal map —their Demonstration Plan—the projected Democratic share **1925 of the Assembly vote in Whitford's district would be 82%. 147 Record 35–36. Whitford therefore conceded that Act 43 had not "affected [his] ability to vote for and elect a Democrat in [his] district." *Id.,* at 37. Whitford testified that he had nevertheless suffered a harm "relate[d] to [his] ability to engage in campaign activity to achieve a majority in the Assembly and the Senate." *Ibid.* As he explained, "[t]he only practical way to accomplish my policy objectives is to get a majority of the Democrats in the Assembly and the Senate ideally in order to get the legislative product I prefer." *Id.,* at 33.

The plaintiffs also presented the testimony of legislative aides Adam Foltz and Tad Ottman, as well as that of Professor Ronald Gaddie, a political scientist who helped design the Act 43 districting map, regarding how that map was designed and adopted. In particular, Professor Gaddie testified about his creation of what he and the District Court called "S curves": color-coded tables of the estimated partisan skew of different draft redistricting maps. See 218 F.Supp.3d, at 850, 858. The colors corresponded with assessments regarding whether different districts tilted Republican *58 or Democratic under various statewide political scenarios. The S curve for the map that was eventually adopted projected that "Republicans would maintain a majority under any likely voting scenario," with Democrats needing 54% of the statewide vote to secure a majority in the legislature. *Id.,* at 852.

Finally, the parties presented testimony from four expert witnesses. The plaintiffs' experts, Professor Kenneth Mayer and Professor Simon Jackman, opined that—according to their efficiency-gap analyses—the Act 43 map would systematically favor Republicans for the duration of the decade. See *id.,* at 859–861. The defendants' experts, Professor Nicholas Goedert and Sean Trende, opined that efficiency gaps alone are unreliable measures of durable partisan advantage, and that the political geography of Wisconsin currently favors Republicans because Democrats —who tend to be clustered in large cities—are inefficiently distributed in many parts of Wisconsin for purposes of winning elections. See *id.,* at 861–862.

At the close of evidence, the District Court concluded—over the dissent of Judge Griesbach—that the plaintiffs had proved a violation of the First and Fourteenth Amendments. The court set out a three-part test for identifying unconstitutional gerrymanders: A redistricting map violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Id.,* at 884.

The court went on to find, based on evidence concerning the manner in which Act 43 had been adopted, that "one of the purposes of Act 43 was to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade." *Id.,* at 896. It also found that the "more efficient distribution of Republican voters has *59 allowed the Republican Party to translate its votes into seats with significantly greater ease and to achieve—and preserve —control of the Wisconsin legislature." *Id.,* at 905. As to the third prong of its test, the District Court concluded that the burdens the Act 43 map imposed on Democrats could not be explained by "legitimate state prerogatives [or] neutral factors." *Id.,* at 911. The court recognized that "Wisconsin's political geography, particularly the high concentration of Democratic voters in urban **1926 centers like Milwaukee and Madison, affords the Republican Party a natural, but modest, advantage in the districting process," but found that this inherent geographic disparity did not account for the magnitude of the Republican advantage. *Id.,* at 921, 924.

Regarding standing, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." *Id.,* at 928. It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." *Ibid.* The court turned away the defendants' argument that the plaintiffs' injury was not sufficiently particularized by finding that "[t]he harm that the plaintiffs have experienced ... is one shared by Democratic voters in the State of Wisconsin. The dilution of their votes is both personal and acute." *Id.,* at 930.

Judge Griesbach dissented. He wrote that, under this Court's existing precedents, "partisan intent" to benefit one party

rather than the other in districting "is not illegal, but is simply the consequence of assigning the task of redistricting to the political branches." *Id.,* at 939. He observed that the plaintiffs had not attempted to prove that "specific districts ... had been gerrymandered," but rather had "relied on statewide data and calculations." *Ibid*. And he argued that the plaintiffs' proof, resting as it did on statewide ***60** data, had "no relevance to any gerrymandering injury alleged by a voter in a single district." *Id.,* at 952. On that basis, Judge Griesbach would have entered judgment for the defendants.

The District Court enjoined the defendants from using the Act 43 map in future elections and ordered them to have a remedial districting plan in place no later than November 1, 2017. The defendants appealed directly to this Court, as provided under 28 U.S.C. § 1253. We stayed the District Court's judgment and postponed consideration of our jurisdiction. 582 U.S. 914, 137 S.Ct. 2268, 198 L.Ed.2d 698 (2017).

II

A

Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines. Our previous attempts at an answer have left few clear landmarks for addressing the question. What our precedents have to say on the topic is, however, instructive as to the myriad competing considerations that partisan gerrymandering claims involve. Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.

[3] Our first consideration of a partisan gerrymandering claim came in *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). There a group of plaintiffs challenged the constitutionality of a Connecticut redistricting plan that "consciously and overtly adopted and followed a policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." *Id.,* at 738, 93 S.Ct. 2321. To that end, the redistricting plan broke up numerous towns, "wiggl[ing] and joggl[ing]" district boundary lines in order to "ferret out pockets of each party's strength." *Id.,* at 738, and n. 3, 752, ***61** n. 18, 93 S.Ct. 2321. ****1927** The plaintiffs argued that, notwithstanding the rough population equality of the districts, the plan was unconstitutional because its consciously political design was "nothing less than a gigantic political gerrymander." *Id.,* at 752, 93 S.Ct. 2321. This Court rejected that claim. We reasoned that it would be "idle" to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," because districting "inevitably has and is intended to have substantial political consequences." *Id.,* at 752–753, 93 S.Ct. 2321.

Thirteen years later came *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Unlike the bipartisan gerrymander at issue in *Gaffney,* the allegation in *Bandemer* was that Indiana Republicans had gerrymandered Indiana's legislative districts "to favor Republican incumbents and candidates and to disadvantage Democratic voters" through what the plaintiffs called the "stacking" (packing) and "splitting" (cracking) of Democrats. 478 U.S., at 116–117, 106 S.Ct. 2797 (plurality opinion). A majority of the Court agreed that the case before it was justiciable. *Id.,* at 125, 127, 106 S.Ct. 2797. The Court could not, however, settle on a standard for what constitutes an unconstitutional partisan gerrymander.

Four Justices would have required the *Bandemer* plaintiffs to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.,* at 127, 106 S.Ct. 2797. In that plurality's view, the plaintiffs had failed to make a sufficient showing on the latter point because their evidence of unfavorable election results for Democrats was limited to a single election cycle. See *id.,* at 135, 106 S.Ct. 2797.

Three Justices, concurring in the judgment, would have held that the "Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.,* at 147, 106 S.Ct. 2797 (opinion of O'Connor, J.). Justice O'Connor took issue, in particular, with the plurality's focus on factual questions concerning "statewide ***62** electoral success." *Id.,* at 158, 106 S.Ct. 2797. She warned that allowing district courts to "strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Id.,* at 160, 106 S.Ct. 2797.

Justice Powell, joined by Justice Stevens, concurred in part and dissented in part. In his view, the plaintiffs' claim was not simply that their "voting strength was diluted statewide," but rather that "certain key districts were grotesquely gerrymandered to enhance the election prospects of Republican candidates." *Id.,* at 162, 169, 106 S.Ct. 2797. Thus, he would have focused on the question "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.,* at 165, 106 S.Ct. 2797.

Eighteen years later, we revisited the issue in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004). In that case the plaintiffs argued that Pennsylvania's Legislature had created "meandering and irregular" congressional districts that "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to provide an advantage to Republican candidates for Congress. *Id.,* at 272–273, 124 S.Ct. 1769 (plurality opinion) (brackets omitted).

The *Vieth* Court broke down on numerous lines. Writing for a four-Justice plurality, Justice Scalia would have held that the plaintiffs' claims were nonjusticiable ****1928** because there was no "judicially discernible and manageable standard" by which to decide them. *Id.,* at 306, 124 S.Ct. 1769. On those grounds, the plurality affirmed the dismissal of the claims. *Ibid.* Justice KENNEDY concurred in the judgment. He noted that "there are yet no agreed upon substantive principles of fairness in districting," and that, consequently, "we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden" on constitutional rights. *Id.,* at 307–308, 124 S.Ct. 1769. He rejected the principle advanced by the plaintiffs—that "a majority of voters ***63** in [Pennsylvania] should be able to elect a majority of [Pennsylvania's] congressional delegation"—as a "precept" for which there is "no authority." *Id.,* at 308, 124 S.Ct. 1769. Yet Justice KENNEDY recognized the possibility that "in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens" representational rights. *Id.,* at 312, 124 S.Ct. 1769.

Four Justices dissented in three different opinions. Justice Stevens would have permitted the plaintiffs' claims to proceed on a district-by-district basis, using a legal standard similar to the standard for racial gerrymandering set forth in *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). See 541 U.S., at 335–336, 339, 124 S.Ct. 1769. Under this standard, any district with a "bizarre shape" for which the only possible explanation was "a naked desire to increase partisan strength" would be found unconstitutional under the Equal Protection Clause. *Id.,* at 339, 124 S.Ct. 1769. Justice Souter, joined by Justice GINSBURG, agreed that a plaintiff alleging unconstitutional partisan gerrymandering should proceed on a district-by-district basis, as "we would be able to call more readily on some existing law when we defined what is suspect at the district level." See *id.,* at 346–347, 124 S.Ct. 1769.

Justice BREYER dissented on still other grounds. In his view, the drawing of single-member legislative districts—even according to traditional criteria—is "rarely ... politically neutral." *Id.,* at 359, 124 S.Ct. 1769. He therefore would have distinguished between gerrymandering for passing political advantage and gerrymandering leading to the "unjustified entrenchment" of a political party. *Id.,* at 360–361, 124 S.Ct. 1769.

The Court last took up this question in *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*). The plaintiffs there challenged a mid-decade redistricting map passed by the Texas Legislature. As in *Vieth,* a majority of the Court could find no justiciable standard by which to resolve the plaintiffs' partisan gerrymandering claims. Relevant to this case, an *amicus* brief ***64** in support of the *LULAC* plaintiffs proposed a "symmetry standard" to "measure partisan bias" by comparing how the two major political parties "would fare hypothetically if they each ... received a given percentage of the vote." 548 U.S., at 419, 126 S.Ct. 2594 (opinion of KENNEDY, J.). Justice KENNEDY noted some wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *Id.,* at 420, 126 S.Ct. 2594. Aside from that problem, he wrote, the partisan bias standard shed no light on "how much partisan dominance is too much." *Ibid.* Justice KENNEDY therefore concluded that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *Ibid.*

Justice Stevens would have found that the Texas map was a partisan gerrymander ****1929** based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. *Id.,* at 466–467, 471–473, 126 S.Ct. 2594 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and Justice GINSBURG, noted that he would not "rule out the utility of a criterion of

symmetry," and that "further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.,* at 483–484, 126 S.Ct. 2594 (opinion concurring in part and dissenting in part).

B

[4] At argument on appeal in this case, counsel for the plaintiffs argued that this Court *can* address the problem of partisan gerrymandering because it *must* : The Court should exercise its power here because it is the "only institution in the United States" capable of "solv[ing] this problem." Tr. of Oral Arg. 62. Such invitations must be answered with care. "Failure of political will does not justify unconstitutional remedies." *Clinton v. City of New York,* 524 U.S. 417, 449, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (KENNEDY, J., concurring). Our power as judges to "say what the law is," *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803), rests not on the default of politically accountable ***65** officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.

Our considerable efforts in *Gaffney, Bandemer, Vieth,* and *LULAC* leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering. In particular, two threshold questions remain: what is necessary to show standing in a case of this sort, and whether those claims are justiciable. Here we do not decide the latter question because the plaintiffs in this case have not shown standing under the theory upon which they based their claims for relief.

[5] **[6]** **[7]** **[8]** To ensure that the Federal Judiciary respects "the proper—and properly limited—role of the courts in a democratic society," *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), a plaintiff may not invoke federal-court jurisdiction unless he can show "a personal stake in the outcome of the controversy." *Baker,* 369 U.S., at 204, 82 S.Ct. 691. A federal court is not "a forum for generalized grievances," and the requirement of such a personal stake "ensures that courts exercise power that is judicial in nature." *Lance,* 549 U.S., at 439, 441, 127 S.Ct. 1194. We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the "invasion of a legally protected interest" that is "concrete and particularized," *i.e.,* which "affect [s] the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, and n. 1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[9] We have long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, "voters who allege facts showing ***66** disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Baker,* 369 U.S., at 206, 82 S.Ct. 691. The plaintiffs in ****1930** this case alleged that they suffered such injury from partisan gerrymandering, which works through "packing" and "cracking" voters of one party to disadvantage those voters. 1 App. 28–29, 32–33, Complaint ¶¶ 5, 15. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to "waste" their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking). *Id.,* at 32–33, ¶ 15.

[10] To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[ ]," *Baker,* 369 U.S., at 206, 82 S.Ct. 691 therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." *Lewis v. Casey,* 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

[11] **[12]** **[13]** For similar reasons, we have held that a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race —has standing to assert only that his own district has been so gerrymandered. See *United States v. Hays,* 515 U.S. 737, 744–745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, "assert[s] only a generalized grievance against governmental conduct of which he or she

does not approve." *Id.,* at 745, 115 S.Ct. 2431. Plaintiffs who complain of racial gerrymandering in their State cannot sue to invalidate the whole State's legislative districting map; such complaints ***67** must proceed "district by district." *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 262, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015).

The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker* and *Reynolds,* which they assert were "statewide in nature" because they rested on allegations that "districts *throughout a state* [had] been malapportioned." Brief for Appellees 29. But, as we have already noted, the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were "individual and personal in nature," *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362 because the claims were brought by voters who alleged "facts showing disadvantage to themselves as individuals," *Baker,* 369 U.S., at 206, 82 S.Ct. 691.

The plaintiffs' mistaken insistence that the claims in *Baker* and *Reynolds* were "statewide in nature" rests on a failure to distinguish injury from remedy. In those malapportionment cases, the only way to vindicate an individual plaintiff's right to an equally weighted vote was through a wholesale "restructuring of the geographical distribution of seats in a state legislature." *Reynolds,* 377 U.S., at 561, 84 S.Ct. 1362; see, *e.g., Moss v. Burkhart,* 220 F.Supp. 149, 156–160 (W.D.Okla.1963) (directing the county-by-county reapportionment of the Oklahoma Legislature), aff'd *sub nom. Williams v. Moss,* 378 U.S. 558, 84 S.Ct. 1907, 12 L.Ed.2d 1026 (1964) (*per curiam*).

Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their ****1931** votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be. Cf. ***68** *Alabama Legislative Black Caucus,* 575 U.S., at 262–263, 135 S.Ct., at 1265. This fits the rule that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis,* 518 U.S., at 357, 116 S.Ct. 2174.

[14] The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." Brief for Appellees 31. But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance,* 549 U.S., at 442, 127 S.Ct. 1194. A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public." *Ex parte Levitt,* 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (*per curiam*).

We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies. Justice KAGAN's concurring opinion endeavors to address "other kinds of constitutional harm," see *post,* at 1938, perhaps involving different kinds of plaintiffs, see *post,* at 1938 – 1939, and differently alleged burdens, see *post,* at 81. But the opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others. See *Public Workers v. Mitchell,* 330 U.S. 75, 90, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (noting that courts must "respect the limits of [their] unique authority" and engage in "[j]udicial exposition ... only when necessary to decide definite issues between litigants"). The reasoning of this Court ***69** with respect to the disposition of this case is set forth in this opinion and none other. And the sum of the standing principles articulated here, as applied to this case, is that the harm asserted by the plaintiffs is best understood as arising from a burden on those plaintiffs' own votes. In this gerrymandering context that burden arises through a voter's placement in a "cracked" or "packed" district.

C

[15] Four of the plaintiffs in this case—Mary Lynne Donohue, Wendy Sue Johnson, Janet Mitchell, and Jerome Wallace—pleaded a particularized burden along such lines. They alleged that Act 43 had "dilut[ed] the influence" of their

votes as a result of packing or cracking in their legislative districts. See 1 App. 34–36, Complaint ¶¶ 20, 23, 24, 26. The facts necessary to establish standing, however, must not only be alleged at the pleading stage, but also proved at trial. See *Defenders of Wildlife,* 504 U.S., at 561, 112 S.Ct. 2130. As the proceedings in the ****1932** District Court progressed to trial, the plaintiffs failed to meaningfully pursue their allegations of individual harm. The plaintiffs did not seek to show such requisite harm since, on this record, it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. They instead rested their case at trial—and their arguments before this Court—on their theory of statewide injury to Wisconsin Democrats, in support of which they offered three kinds of evidence.

First, the plaintiffs presented the testimony of the lead plaintiff, Professor Whitford. But Whitford's testimony does not support any claim of packing or cracking of himself as a voter. Indeed, Whitford expressly acknowledged that Act 43 did not affect the weight of his vote. 147 Record 37. His testimony points merely to his hope of achieving a Democratic majority in the legislature—what the plaintiffs describe here as their shared interest in the composition of "the legislature as a whole." Brief for Appellees 32. ***70** Under our cases to date, that is a collective political interest, not an individual legal interest, and the Court must be cautious that it does not become "a forum for generalized grievances." *Lance,* 549 U.S., at 439, 441, 127 S.Ct. 1194.

Second, the plaintiffs provided evidence regarding the mapmakers' deliberations as they drew district lines. As the District Court recounted, the plaintiffs' evidence showed that the mapmakers "test[ed] the partisan makeup and performance of districts as they might be configured in different ways." 218 F.Supp.3d, at 891. Each of the mapmakers' alternative configurations came with a table that listed the number of "Safe" and "Lean" seats for each party, as well as "Swing" seats. *Ibid.* The mapmakers also labeled certain districts as ones in which "GOP seats [would be] strengthened a lot," *id.,* at 893; 2 App. 344, or which would result in "Statistical Pick Ups" for Republicans. 218 F.Supp.3d, at 893 (alterations omitted). And they identified still other districts in which "GOP seats [would be] strengthened a little," "weakened a little," or were "likely lost." *Ibid.*

[16] The District Court relied upon this evidence in concluding that, "from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing." *Id.,* at 895. That evidence may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims against the defendants, assuming such claims present a justiciable controversy. But the question at this point is whether the plaintiffs have established injury in fact. That turns on effect, not intent, and requires a showing of a burden on the plaintiffs' votes that is "actual or imminent, not 'conjectural' or 'hypothetical.' " *Defenders of Wildlife,* 504 U.S., at 560, 112 S.Ct. 2130.

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies similar to those discussed in *LULAC.* ***71** The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." Brief for Appellees 37. In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry—the "efficiency gap" of wasted votes. See *supra,* at 1923 – 1924. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit. See Stephanopoulos & McGhee, ****1933** Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831 (2015); McGhee, Measuring Partisan Bias in Single–Member District Electoral Systems, 39 Leg. Studies Q. 55 (2014).

The plaintiffs asserted in their complaint that the "efficiency gap captures in a single number all of a district plan's cracking and packing." 1 App. 28–29, Complaint ¶ 5 (emphasis deleted). That number is calculated by subtracting the statewide sum of one party's wasted votes from the statewide sum of the other party's wasted votes and dividing the result by the statewide sum of all votes cast, where "wasted votes" are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory. See Brief for Eric McGhee as *Amicus Curiae* 6, and n. 3. The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats. Though they take no firm position on the matter, the plaintiffs have suggested that an efficiency gap in the range of 7% to 10% should trigger constitutional scrutiny. See Brief for Appellees 52–53, and n. 17.

[17] The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just "a pencil and paper or a hand calculator"—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. Brief for Heather K. Gerken et al. as *Amici Curiae* ***72** 27 (citing Wang, Let Math Save Our Democracy, N.Y. Times, Dec. 5, 2015). We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

Consider the situation of Professor Whitford, who lives in District 76, where, defendants contend, Democrats are "naturally" packed due to their geographic concentration, with that of plaintiff Mary Lynne Donohue, who lives in Assembly District 26 in Sheboygan, where Democrats like her have allegedly been deliberately cracked. By all accounts, Act 43 has not affected Whitford's individual vote for his Assembly representative—even plaintiffs' own demonstration map resulted in a virtually identical district for him. Donohue, on the other hand, alleges that Act 43 burdened her individual vote. Yet neither the efficiency gap nor the other measures of partisan asymmetry offered by the plaintiffs are capable of telling the difference between what Act 43 did to Whitford and what it did to Donohue. The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.

That shortcoming confirms the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.

III

[18] In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. See, *e.g.*, ***73** *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). This is not the ****1934** usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes. Cf. *Alabama Legislative Black Caucus,* 575 U.S., at 264–265, 135 S.Ct., at 1266 (remanding for further consideration of the plaintiffs' gerrymandering claims on a district-by-district basis). We express no view on the merits of the plaintiffs' case. We caution, however, that "standing is not dispensed in gross": A plaintiff's remedy must be tailored to redress the plaintiff's particular injury. *Cuno,* 547 U.S., at 353, 126 S.Ct. 1854.

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

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring.
The Court holds today that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing. See *ante,* at 1929 – 1932. The Court also holds that none of the plaintiffs here have yet made that required showing. See *ante,* at 1931 – 1932.

I agree with both conclusions, and with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts, see *ante,* at 1933 – 1934. I write to address in more detail what kind of evidence the ***74** present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing—that is, about how their vote dilution case could then proceed on the merits. The key point is that the case could go forward in much the same way it did below: Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury—an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. But because on remand they may well develop the associational theory, I address the standing requirement that would then apply. As I'll explain, a plaintiff presenting such a theory would not need to show that her particular voting district was packed or cracked for standing purposes because that fact would bear no connection to her substantive claim. Indeed, everything about the litigation of that claim—from standing on down to remedy—would be statewide in nature.

Partisan gerrymandering, as this Court has recognized, is "incompatible with democratic **1935 principles." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 576 U.S. 787, 791, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704 (2015) (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 292, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion); alterations omitted). More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. None of those facts gives judges any excuse to *75 disregard Article III's demands. The Court is right to say they were not met here. But partisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

I

As the Court explains, the plaintiffs' theory in this case focuses on vote dilution. See *ante,* at 1930 – 1931 ("Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted"); see also *ante,* at 1929 – 1930, 1931 – 1932. That is, the plaintiffs assert that Wisconsin's State Assembly Map has caused their votes "to carry less weight than [they] would carry in another, hypothetical district." *Ante,* at 1931. And the mechanism used to wreak that harm is "packing" and "cracking." *Ante,* at 1929 – 1930. In a relatively few districts, the mapmakers packed supermajorities of Democratic voters—well beyond the number needed for a Democratic candidate to prevail. And in many more districts, dispersed throughout the State, the mapmakers cracked Democratic voters—spreading them sufficiently thin to prevent them from electing their preferred candidates. The result of both practices is to "waste" Democrats' votes. *Ibid.*

The harm of vote dilution, as this Court has long stated, is "individual and personal in nature." *Reynolds v. Sims,* 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); see *ante,* at 1930 – 1931. It arises when an election practice—most commonly, the drawing of district lines—devalues one citizen's vote as compared to others. Of course, such practices invariably affect more than one citizen at a time. For example, our original one-person, one-vote cases considered how malapportioned maps "contract[ed] the value" of urban citizens' votes while "expand[ing]" the value of rural citizens' votes. *76 *Wesberry v. Sanders,* 376 U.S. 1, 7, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964). But we understood the injury as giving diminished weight to each particular vote, even if millions were so touched. In such cases, a voter living in an overpopulated district suffered "disadvantage to [herself] as [an] individual [ ]": Her vote counted for less than the votes of other citizens in her State. *Baker v. Carr,* 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); see *ante,* at 1930 – 1931. And that kind of disadvantage is what a plaintiff asserting a vote dilution claim—in the one-person, one-vote context or any other—always alleges.

To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been "contract[ed]." *Wesberry,* 376 U.S., at 7, 84 S.Ct. 526. And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. See *ante,* at 1931 – 1932. For packing and cracking are the ways in which a partisan gerrymander dilutes votes. Cf. *Voinovich v. Quilter,* 507 U.S. 146, 153–154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (explaining **1936 that packing or cracking can also support racial vote dilution claims). Consider the perfect form of each variety. When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. But either way, such a citizen's vote carries less weight—has less consequence—than it would under a neutrally drawn map. See *ante,* at 1929 – 1930, 1931. So when she shows that her

district has been packed or cracked, she proves, as she must to establish standing, that she is "among the injured." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 563, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)); see *ante,* at 1931 – 1932.

In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight. Cf. *ante,* at 1933 (suggesting ***77** how an alternative map may shed light on vote dilution or its absence); *Easley v. Cromartie,* 532 U.S. 234, 258, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (discussing the use of alternative maps as evidence in a racial gerrymandering case); *Cooper v. Harris,* 581 U.S. 285, 317–322, 137 S.Ct. 1455, 1478–1482, 197 L.Ed.2d 837 (2017) (same); Brief for Political Geography Scholars as *Amici Curiae* 12–14 (describing computer simulation techniques for devising alternative maps). For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50–50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote.

Here, the Court is right that the plaintiffs have so far failed to make such a showing. See *ante,* at 1931 – 1933. William Whitford was the only plaintiff to testify at trial about the alleged gerrymander's effects. He expressly acknowledged that his district would be materially identical under any conceivable map, whether or not drawn to achieve partisan advantage. See *ante,* at 1932, 1931 – 1933. That means Wisconsin's plan could not have diluted Whitford's own vote. So whatever other claims he might have, see *infra,* at 1937 – 1939, Whitford is not "among the injured" in a vote dilution challenge. *Lujan,* 504 U.S., at 563, 112 S.Ct. 2130 (quoting *Sierra Club,* 405 U.S., at 735, 92 S.Ct. 1361). Four other plaintiffs differed from Whitford by alleging in the complaint that they lived in packed or cracked districts. But for whatever reason, they failed to back up those allegations with evidence as the suit proceeded. See *ante,* at 1931 – 1932. So they too did not show the injury—a less valuable vote—central to their vote dilution theory.

That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so ***78** that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." *Ante,* at 1934. That means the plaintiffs—both the four who initially made those assertions and any others (current or newly joined)—now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. ****1937** Recall that the plaintiffs here alleged—and the District Court found, see 218 F.Supp.3d 837, 896 (W.D.Wis.2016)—that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district (see, *e.g., Benisek v. Lamone,* post, p. 155 (*per curiam*)) or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies.

When the court addresses those merits questions, it can consider statewide (as well as local) evidence. Of course, the court below and others like it are currently debating, without guidance from this Court, what elements make up a vote dilution claim in the partisan gerrymandering context. But assume that the plaintiffs must prove illicit partisan intent —a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). So, for example, the plaintiffs here introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State—and that they graded draft maps according to the amount of advantage ***79** those maps conferred on Republicans. See 218 F.Supp.3d, at 890–896. This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. "Voters," we held, "of course[ ] can present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Alabama*

Legislative Black Caucus v. Alabama, 575 U.S. 254, 263, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015). And in particular, "[s]uch evidence is perfectly relevant" to showing that mapmakers had an invidious "motive" in drawing the lines of "multiple districts in the State." *Id.,* at 266–267, 135 S.Ct., at 1267. The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district—so that the [plaintiff] may be unpacked or uncracked, as the case may be." *Ante,* at 16. But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." *Ibid.* (emphasis added). Not necessarily—but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

II

Everything said so far relates only to suits alleging that a partisan gerrymander ****1938** dilutes individual votes. That is the ***80** way the Court sees this litigation. See *ante,* at 1929 – 1932. And as I'll discuss, that is the most reasonable view. See *infra,* at 1939 – 1940. But partisan gerrymanders inflict other kinds of constitutional harm as well. Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members. The plaintiffs here have sometimes pointed to that kind of harm. To the extent they meant to do so, and choose to do so on remand, their associational claim would occasion a different standing inquiry than the one in the Court's opinion.

Justice KENNEDY explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546. "Representative democracy," Justice KENNEDY pointed out, is today "unimaginable without the ability of citizens to band together" to advance their political beliefs. *Id.,* at 314, 124 S.Ct. 1769 (opinion concurring in judgment) (quoting *California Democratic Party v. Jones,* 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000)). That means significant "First Amendment concerns arise" when a State purposely "subject[s] a group of voters or their party to disfavored treatment." 541 U.S., at 314, 124 S.Ct. 1769. Such action "burden[s] a group of voters' representational rights." *Ibid.*; see *id.,* at 315, 124 S.Ct. 1769 (similarly describing the "burden[ ] on a disfavored party and its voters" and the "burden [on] a group's representational rights"). And it does so because of their "political association," "participation in the electoral process," "voting history," or "expression of political views." *Id.,* at 314–315, 124 S.Ct. 1769.

As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This ***81** is the kind of "burden" to "a group of voters' representational rights" Justice KENNEDY spoke of. *Id.,* at 314, 124 S.Ct. 1769. Members of the "disfavored party" in the State, *id.,* at 315, 124 S.Ct. 1769 deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). See *Anderson v. Celebrezze,* 460 U.S. 780, 791–792, and n. 12, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (concluding that similar harms inflicted by a state election law amounted to a "burden imposed on ... associational rights"). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). Cf. *California Democratic Party,* 530 U.S., at 586, 120 S.Ct. 2402 (holding that a state law violated state political parties' First Amendment rights of association). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.

And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies.

Standing, we have long held, "turns on the nature and source of the claim asserted." *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Indeed, that idea lies at the root of today's opinion. It is because the Court views the harm ****1939** alleged as vote dilution that it (rightly) insists that each plaintiff show packing or cracking in her own district to establish her standing. See *ante,* at 1929 – 1932; *supra,* at 1935 – 1936. But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party ***82** and carry out that organization's activities and objects. See *supra,* at 1937 – 1939. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

On occasion, the plaintiffs here have indicated that they have an associational claim in mind. In addition to repeatedly alleging vote dilution, their complaint asserted in general terms that Wisconsin's districting plan infringes their "First Amendment right to freely associate with each other without discrimination by the State based on that association." 1 App. 61, Complaint ¶ 91. Similarly, the plaintiffs noted before this Court that "[b]eyond diluting votes, partisan gerrymandering offends First Amendment values by penalizing citizens because of ... their association with a political party." Brief for Appellees 36 (internal quotation marks omitted). And finally, the plaintiffs' evidence of partisan asymmetry well fits a suit alleging associational injury (although, as noted below, that was not how it was used, see *infra,* at 1939 – 1940). As the Court points out, what those statistical metrics best measure is a gerrymander's effect "on the fortunes of political parties" and those associated with them. *Ante,* at 1933.

In the end, though, I think the plaintiffs did not sufficiently advance a First Amendment associational theory to avoid the Court's holding on standing. Despite referring to that theory in their complaint, the plaintiffs tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes. Even their proof of partisan asymmetry was used for that purpose—although as noted above, it could easily have supported the alternative theory of associational ***83** harm, see *supra,* at 1939. The plaintiffs joining in this suit do not include the State Democratic Party (or any related statewide organization). They did not emphasize their membership in that party, or their activities supporting it. And they did not speak to any tangible associational burdens—ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions and purposes, see *supra,* at 1937 – 1939. Even in this Court, when disputing the State's argument that they lacked standing, the plaintiffs reiterated their suit's core theory: that the gerrymander "intentionally, severely, durably, and unjustifiably dilutes Democratic votes." Brief for Appellees 29–30. Given that theory, the plaintiffs needed to show that their own votes were indeed diluted in order to establish standing.

But nothing in the Court's opinion prevents the plaintiffs on remand from pursuing an associational claim, or from satisfying the different standing requirement that theory would entail. The Court's ****1940** opinion is about a suit challenging a partisan gerrymander on a particular ground—that it dilutes the votes of individual citizens. That opinion "leave[s] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." *Ante,* at 1931. And in particular, it leaves for another day the theory of harm advanced by Justice KENNEDY in *Vieth* : that a partisan gerrymander interferes with the vital "ability of citizens to band together" to further their political beliefs. 541 U.S., at 314, 124 S.Ct. 1769 (quoting *California Democratic Party,* 530 U.S., at 574, 120 S.Ct. 2402). Nothing about that injury is "generalized" or "abstract," as the Court says is true of the plaintiffs' dissatisfaction with the "overall composition of the legislature." *Ante,* at 1931. A suit raising an associational theory complains of concrete "burdens on a disfavored party" and its members as they pursue their political interests and goals. *Vieth,* 541 U.S., at 315, 124 S.Ct. 1769 (opinion of KENNEDY, J.); see *supra,* at 1937 – 1939. ***84** And when the suit alleges that a gerrymander has imposed those burdens on a statewide basis, then its litigation should be statewide too—as to standing, liability, and remedy alike.

III

Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth,*

541 U.S., at 316, 124 S.Ct. 1769 (opinion of KENNEDY, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.,* at 317, 124 S.Ct. 1769 (internal quotation marks omitted). It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around." *Arizona State Legislature,* 576 U.S., at 824, 135 S.Ct., at 2677 (quoting Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005)).

And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences. The congressional brief describes a "cascade of negative results" from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems. Brief for Bipartisan Group of Current and Former Members of Congress as *Amici Curiae* 4; see *id.,* at 10–23. The state legislators tell a similar story. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal [ ]." Brief for Bipartisan Group of 65 Current and Former State Legislators as *Amici Curiae* 6, 25.

***85** I doubt James Madison would have been surprised. What, he asked when championing the Constitution, would make the House of Representatives work? The House must be structured, he answered, to instill in its members "an habitual recollection of their dependence on the people." The Federalist No. 57, p. 352 (C. Rossiter ed. 1961). Legislators must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Ibid.* When that moment does not come—when legislators can entrench themselves in office despite the people's will—the foundation ****1941** of effective democratic governance dissolves.

And our history offers little comfort. Yes, partisan gerrymandering goes back to the Republic's earliest days; and yes, American democracy has survived. But technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like). See Brief for Political Science Professors as *Amici Curiae* 28. Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders on record. *Id.,* at 3. The technology will only get better, so the 2020 cycle will only get worse.

Courts have a critical role to play in curbing partisan gerrymandering. Over fifty years ago, we committed to providing judicial review in the redistricting arena, because we understood that "a denial of constitutionally protected rights demands judicial protection." *Reynolds,* 377 U.S., at 566, 84 S.Ct. 1362. Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy ***86** for their constitutional harms. Of course, their dire need provides no warrant for courts to disregard Article III. Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion because I agree that the plaintiffs have failed to prove Article III standing. I do not join Part III, which gives the plaintiffs another chance to prove their standing on remand. When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. *E.g., Lance v. Coffman,* 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (*per curiam*); *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 354, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); *United States v. Hays,* 515 U.S. 737, 747, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995). The Court departs from our usual practice because this is supposedly "not the usual case." *Ante,* at 1933 – 1934. But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. See *ante,* at 1929 – 1932. After a year and a half of litigation in the District Court, including a 4–day trial, the plaintiffs had a more-than-ample opportunity

to prove their standing under these principles. They failed to do so. Accordingly, I would have remanded this case with instructions to dismiss.

All Citations

585 U.S. 48, 138 S.Ct. 1916, 201 L.Ed.2d 313, 86 USLW 4415, 18 Cal. Daily Op. Serv. 5845, 2018 Daily Journal D.A.R. 5768, 27 Fla. L. Weekly Fed. S 373

Footnotes

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

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in U.S. v. State of N.C., E.D.N.C., February 8, 1996

91 S.Ct. 849
Supreme Court of the United States

Willie S. GRIGGS et al., Petitioners,
v.
DUKE POWER COMPANY.

No. 124
|
Argued Dec. 14, 1970.
|
Decided March 8, 1971.

Synopsis

Class action by Negro employees against employer alleging that employment practices violated Civil Rights Act. The United States District Court for the Middle District of North Carolina, at Greensboro, 292 F.Supp. 243, dismissed complaint, and plaintiffs appealed. The Court of Appeals, 420 F.2d 1225, affirmed, in part, reversed in part, and remanded, holding that in absence of a discriminatory purpose, requirement of high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs was permitted by the Civil Rights Act, and rejecting claim that because such requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under the Act unless shown to be job-related. Certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that employer was prohibited by provisions of Act pertaining to employment opportunities from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs, where neither standard was shown to be significantly related to successful job performance, both requirements operated to disqualify Negroes at a substantially higher rate than white applicants, and jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites.

Reversed.

Mr. Justice Brennan took no part in consideration or decision of case.

West Headnotes (9)

[1] **Civil Rights** Purpose and construction in general

Civil Rights Discrimination by reason of race, color, ethnicity, or national origin, in general

Objective of Congress in enacting provisions of Civil Rights Act pertaining to employment opportunities was to achieve equality of employment opportunities and remove barriers that operated in the past to favor an identifiable group of white employees over other employees. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

223 Cases that cite this headnote

[2] **Civil Rights** Disparate impact

Under provisions of Civil Rights Act pertaining to employment opportunities, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

395 Cases that cite this headnote

[3] **Civil Rights** Affirmative Action; Remedial Measures

Congress did not intend by provisions of Civil Rights Act pertaining to employment opportunities to guarantee a job to every person regardless of qualifications; the Act does not command that any person be hired simply because he was formerly subject of discrimination, or because he is a member of a minority group; discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed; what is required by Congress is removal of

artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on basis of race or other impermissible classification. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

606 Cases that cite this headnote

[4] **Civil Rights** Disparate impact

Provisions of Civil Rights Act pertaining to employment opportunities proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Civil Rights Act of 1964 §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

292 Cases that cite this headnote

[5] **Civil Rights** Discrimination by reason of race, color, ethnicity, or national origin, in general

Civil Rights Disparate impact

If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited by provisions of Civil Rights Act pertaining to employment opportunities. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

110 Cases that cite this headnote

[6] **Civil Rights** Disparate impact

Civil Rights Educational requirements; ability tests

Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

841 Cases that cite this headnote

[7] **Administrative Law and Procedure** Employment discrimination

Civil Rights Administrative Agencies and Proceedings

Administrative interpretation of Civil Rights Act by enforcing agency is entitled to great deference. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

284 Cases that cite this headnote

[8] **Civil Rights** Disparate impact

Civil Rights Educational requirements; ability tests

Equal Employment Opportunity Commission's construction of section of Civil Rights Act authorizing use of any professionally developed ability test that is not designed, intended, or used to discriminate because of race to require that employment tests be job-related comports with congressional intent. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e–2(h).

180 Cases that cite this headnote

[9] **Civil Rights** Disparate impact

Civil Rights Educational requirements; ability tests

Employer was prohibited, by provisions of Civil Rights Act pertaining to employment opportunities, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs, where neither standard was shown to be significantly related to successful job performance, both requirements operated to disqualify Negroes at a substantially higher rate than white applicants, and the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

719 Cases that cite this headnote

Attorneys and Law Firms

****850** ***425** Jack Greenberg, New York City, for petitioners.

****851** George W. Ferguson, Jr., for respondent.

Lawrence M. Cohen for the Chamber of Commerce of the United States, as amicus curiae.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education ***426** or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[1]

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the ***427** Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four 'operating' departments in which only whites were employed.[2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any 'inside' department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' ****852** departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it become necessary to register satisfactory scores on two professionally prepared aptitude ***428** tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an 'inside' job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.[3]

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern,

particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

***429** The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.[4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.[5] We ****853** granted the writ on these claims. 399 U.S. 926, 90 S.Ct. 2238, 26 L.Ed.2d 791.

[1] **[2]** The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove ***430** barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

[3] The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, 'whites register far better on the Company's alternative requirements' than Negroes.[6] 420 F.2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any ***431** person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

[4] **[5]** Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

****854** The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria ***432** are now used.[7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such longrange requirements fulfill a genuine business need. In the present case the Company has made no such showing.

[6] The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to

discriminate against Negro employees.' 420 F.2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

***433** The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by s 703(h) of the Act.[8] That section authorizes the use of 'any professionally developed ability test' that is not 'designed, intended or used to discriminate because of race * * *.' (Emphasis added.)

[7] The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting s 703(h) to permit only the use of job-related tests.[9] The administrative ****855** interpretation of the ***434** Act by the enforcing agency is entitled to great deference. See, e.g., United States v. City of Chicago, 400 U.S. 8, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970); Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Power Reactor Development Co. v. Electricians, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

Section 703(h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination.[10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' 110 Cong.Rec. 7247.[11] (Emphasis added.) Despite ***435** these assurances, Senator Tower of Texas introduced an amendment authorizing 'professionally developed ability tests.' Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, 'whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the ****856** guise of compliance with the statute.' 110 Cong.Rec. 13504 (remarks of Sen. Case).

[8] The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of s 703(h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: 'Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this ***436** amendment and have found it to be in accord with the intent and purpose of that title.' 110 Cong.Rec. 13724. The amendment was then adopted.[12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of s 703(h) to require that employment tests be job related comports with congressional intent.

[9] Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What

Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

All Citations

401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, 3 Fair Empl.Prac.Cas. (BNA) 175, 3 Empl. Prac. Dec. P 8137, 88 P.U.R.3d 90

Footnotes

1 The Act provides:

'Sec. 703. (a) It shall be an unlawful employment practice for an employer—

'(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

'(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. * * *' 78 Stat. 255, 42 U.S.C. s 2000e—2.

2 A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

3 The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

4 The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

5 One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used

6 In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl.Prac. Guide, 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70—552, CCH Empl.Prac. Guide, 6139 (Feb. 19, 1970).

7 For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

8 Section 703(h) applies only to tests. It has no applicability to the high school diploma requirement.

9 EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

'The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.'

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR s 1607, 35 Fed.Reg. 12333 (Aug. 1, 1970). These guidelines demand that employers using tests have available 'data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' Id., at s 1607.4(c).

10 The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in Myart v. Motorola Co. (The decision is reprinted at 110 Cong.Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong.Rec. 5614—5616; Smathers, id., at 5999—6000; Holland, id., at 7012—7013; Hill, id., at 8447; Tower, id., at 9024; Talmadge, id., at 9025—9026; Fulbright, id., at 9599—9600; and Ellender, id., at 9600.

11 The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

'There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.' 110 Cong.Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong.Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure 'applicable job qualifications' are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine qualifications. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

12 Senator Tower's original amendment provided in part that a test would be permissible 'if * * * in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved * * *.' 110 Cong.Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

113 S.Ct. 1075
Supreme Court of the United States

Joan GROWE, Secretary of State of Minnesota, et al., Appellants,

v.

James EMISON et al.

No. 91–1420
|
Argued Nov. 2, 1992.
|
Decided Feb. 23, 1993.

Synopsis

Action was brought seeking declaratory and injunctive relief barring use of allegedly fragmented districts for future elections and adoption of new districts. A three judge panel of the United States District Court for the District of Minnesota, Lay, Circuit Judge, and Magnuson, J., 782 F.Supp. 427, held that redistricting plan adopted by state court fragmented minority voting interest and failed to provide affirmative relief necessary to adequately protect minority voting rights under the Voting Rights Act, and adopted different plan containing super-majority minority senate district for a city. Appeal was taken. The Supreme Court, Justice Scalia, held that district court had erred in not deferring to state court's timely efforts to redraw legislative and congressional districts, and (2) district court had erred in concluding that state court's legislative plan violated Voting Rights Act.

Reversed and remanded.

West Headnotes (10)

[1] **Federal Courts** Federal-state relations, questions of state law, and parallel state proceedings

When federal and state courts find themselves exercising concurrent jurisdiction over same subject matter, federal court generally need neither abstain (i.e. dismiss case before it) nor defer to state proceedings (i.e. withhold action until state proceedings have concluded).

30 Cases that cite this headnote

[2] **Federal Courts** Pullman abstention
Federal Courts Stay

Pullman doctrine, recognizing that federal courts should not prematurely resolve constitutionality of state statute, calls for deferral of federal suit pending conclusion of state proceedings, rather than abstention in form of dismissal of federal suit.

26 Cases that cite this headnote

[3] **States** Evidence in general
United States Judicial review and enforcement

Absent evidence that appropriate state bodies will fail timely to perform duty of apportioning federal congressional and state legislative districts, following new census results, federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it. U.S.C.A. Const. Art. 1, § 2, cl. 3.

38 Cases that cite this headnote

[4] **Injunction** Redistricting and reapportionment
States Judicial intervention and immunity in general

Federal district court erred by issuing injunction prohibiting any state court plan implementation of state legislative and federal congressional redistricting, while affording Legislature time to complete plan it was preparing; requirement that federal courts defer to state redistricting efforts applied to courts as well as legislatures. U.S.C.A. Const. Art. 1, § 2, cl. 3.

45 Cases that cite this headnote

[5] **Courts** Restraining Particular Proceedings

Federal district court could not enjoin state court from proceeding with plan for state legislative and federal congressional redistricting, even though federal lawsuit challenging existing districts claimed violation of Voting Rights Act, while state lawsuit did not. U.S.C.A. Const. Art. 1, § 2, cl. 3; Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

30 Cases that cite this headnote

[6] **Courts** Restraining Particular Proceedings

Federal courts could not enjoin state court adoption of plan for state legislative and federal congressional redistricting, so as to narrow choice of applicable plans to one being adopted pursuant to federal litigation or one being adopted by state legislature, on grounds that 90–day period during which unsuccessful state litigants could appeal state court plan would create problems of establishing definitive districts in time for elections; requirement that districts be established in time for elections did not mandate that time be allowed for judicial review. U.S.C.A. Const. Art. 1, § 2, cl. 3; 51 M.S.A., Rules Civ.App.Proc., Rule 104.01.

19 Cases that cite this headnote

[7] **Courts** Restraining Particular Proceedings

Federal district court erred by issuing injunction prohibiting implementation of plan for state legislative redistricting, adopted by state court; after state court entered that order, federal court was limited under full faith and credit statute to entertaining federal court complaints relating to legislative redistricting only to extent those claims challenged state court's plan. 28 U.S.C.A. § 1738; U.S.C.A. Const. Art. 1, § 2, cl. 3.

35 Cases that cite this headnote

[8] **Courts** Restraining Particular Proceedings

Federal Courts Reapportionment

Federal court considering challenge to existing congressional districts erred by not deferring to state court's timely consideration of congressional reapportionment, and issuing injunction having effect of preventing state court from developing redistricting plan. U.S.C.A. Const. Art. 1, § 2, cl. 3.

24 Cases that cite this headnote

[9] **States** Dilution of voting power in general

Requirements for successful vote dilution claim with respect to proposed multimember district, announced in *Thornberg v. Gingles,* applied as well to voter fragmentation claim involving single member district. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

134 Cases that cite this headnote

[10] **States** Compactness; contiguity; gerrymandering in general

Voter fragmentation had not been established, as necessary to support noncompact super-majority minority state legislative district comprising areas north and south of downtown business district; no statistical showing had been made of a minority group that was politically cohesive, or that there was white majority bloc voting. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

159 Cases that cite this headnote

****1076** ***25** *Syllabus*[*]

Shortly after a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other election officials, appellee voters filed a similar action against essentially the same officials in the Federal District Court. Both suits alleged that, in light of the 1990 census results, the State's congressional and legislative districts were malapportioned, in violation of the Federal and State Constitutions; the federal suit contained the additional claim that the current districts diluted the vote of minority groups in Minneapolis, in violation of § 2 of the Voting Rights Act of 1965. Both suits sought declaration that the current districts were unlawful, and judicial construction of new districts if the state legislature failed to act. After the state legislature adopted a new legislative districting plan,

which contained numerous drafting errors, a second federal action was filed raising constitutional challenges to the new legislative districts; the two federal suits were consolidated. The District Court set a deadline for the legislature to act on redistricting plans, but refused to abstain or defer to the state-court proceedings. The state court, having found the new legislative districts defective because of the drafting errors, issued a preliminary legislative redistricting plan correcting most of those errors, to be held in abeyance pending further action by the legislature. Before the state court could take additional action, the District Court stayed the state-court proceedings; this Court vacated that stay. When the Governor vetoed the legislature's effort to correct the defective legislative redistricting plan, and to adopt new congressional districts, the state court issued a final order adopting its legislative plan, and held hearings on the congressional plans submitted by the parties. Before the state court could issue a congressional plan, however, the District Court adopted its own redistricting ****1077** plans, both legislative and congressional, and permanently enjoined interference with state implementation of those plans. The District Court found, in effect, that the state court's legislative plan violated the Voting Rights Act because it did not contain a "super-majority minority" Senate district; its own plan contained such a district, designed to create a majority composed of at least three separately identifiable minority groups.

***26** *Held:*

1. The District Court erred in not deferring to the state court's timely efforts to redraw the legislative and congressional districts. States have the primary duty and responsibility to perform that task, and federal courts must defer their action when a State, through its legislative *or* judicial branch, has begun in timely fashion to address the issue. *Scott v. Germano,* 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965). Absent evidence that these branches cannot timely perform their duty, a federal court cannot affirmatively obstruct, or permit federal litigation to impede, state reapportionment. Judged by these principles, the District Court erred in several respects: It set a deadline for reapportionment directed only to the state legislature, instead of to the legislature and courts; it issued an injunction that treated the state court's provisional legislative plan as "interfering" in the reapportionment process; it failed to give the state court's final order adopting a legislative plan *legal effect* under the principles of federalism and comity embodied in the full faith and credit statute; and it actively prevented the state court from issuing its own congressional plan, although it appears that the state court was prepared to do so. Pp. 1080–1083.

2. The District Court erred in its conclusion that the state court's legislative plan violated § 2 of the Voting Rights Act. The three prerequisites that were identified in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), as necessary to establish a vote-dilution claim with respect to a multimember districting plan—a minority group that is sufficiently large and geographically compact to constitute a majority in a single-member district, minority political cohesion, and majority bloc voting that enables defeat of the minority's preferred candidate—are also necessary to establish a vote-fragmentation claim with respect to a single-member district. In the present case, even making the dubious assumption that the minority voters were geographically compact, the record contains no statistical or anecdotal evidence of majority bloc voting or minority political cohesion among the distinct ethnic and language minority groups the District Court combined in the new district. The *Gingles* preconditions were not only ignored but were on this record unattainable. Pp. 1083–1085.

782 F.Supp. 427, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

John R. Tunheim, St. Paul, MN, for appellants.

***27** Sol. Gen. Kenneth W. Starr, Washington, DC, as amicus curiae for U.S. supporting the appellants.

Bruce Donald Willis, Minneapolis, MN, for appellees.

Opinion

Justice SCALIA delivered the opinion of the Court.

This case raises important issues regarding the propriety of the District Court's pursuing reapportionment of Minnesota's state legislative and federal congressional districts in the face of Minnesota state-court litigation seeking similar relief, and regarding the District Court's conclusion that the state court's legislative plan violated § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973.

I

In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials ****1078** responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution. *Cotlow v. Growe,* No. C8–91–985. The plaintiffs asserted that the 1990 federal census results revealed a significant change in the distribution of the state population, and requested that the court declare the current districts unlawful and draw new districts if the legislature failed to do so. In February, the parties stipulated that, in light of the new census, the challenged districting plans were ***28** unconstitutional. The Minnesota Supreme Court appointed a Special Redistricting Panel (composed of one appellate judge and two district judges) to preside over the case.

In March, a second group of plaintiffs filed an action in federal court against essentially the same defendants, raising similar challenges to the congressional and legislative districts. *Emison v. Growe,* 782 F.Supp. 427. The *Emison* plaintiffs (who include members of various racial minorities) in addition raised objections to the legislative districts under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, alleging that those districts needlessly fragmented two Indian reservations and divided the minority population of Minneapolis. The suit sought declaratory relief and continuing federal jurisdiction over any legislative efforts to develop new districts. A three-judge panel was appointed pursuant to 28 U.S.C. § 2284(a).

While the federal and state actions were getting underway, the Minnesota Legislature was holding public hearings on, and designing, new legislative districts. In May, it adopted a new legislative districting plan, Chapter 246, Minn.Stat. §§ 2.403–2.703 (Supp.1991), and repealed the prior 1983 apportionment. It was soon recognized that Chapter 246 contained many technical errors—mistaken compass directions, incorrect street names, noncontiguous districts, and a few instances of double representation. By August, committees of the legislature had prepared curative legislation, Senate File 1596 and House File 1726 (collectively, Senate File 1596), but the legislature, which had adjourned in late May, was not due to reconvene until January 6, 1992.

Later in August, another group of plaintiffs filed a second action in federal court, again against the Minnesota Secretary of State. *Benson v. Growe,* No. 4–91–603. The *Benson* plaintiffs, who include the Republican minority leaders of the Minnesota Senate and House, raised federal and state constitutional challenges to Chapter 246, but no Voting ***29** Rights Act allegations. The *Benson* action was consolidated with the *Emison* suit; the *Cotlow* plaintiffs, as well as the Minnesota House of Representatives and State Senate, intervened.

With the legislature out of session, the committees' proposed curative measures for Chapter 246 pending, and the state court in *Cotlow* considering many of the same issues, the District Court granted the defendants' motion to defer further proceedings pending action by the Minnesota Legislature. It denied, however, defendants' motion to abstain in light of the *Cotlow* suit, or to allow the state court first to review any legislative action or, if the legislature failed to act, to allow the state court first to issue a court-ordered redistricting plan. The District Court set a January 20, 1992, deadline for the state legislature's action on both redistricting plans, and appointed special masters to develop contingent plans in the event the legislature failed to correct Chapter 246 or to reapportion Minnesota's eight congressional districts.

Meanwhile, the *Cotlow* panel concluded (in October) that Chapter 246, applied as written (*i.e.,* with its drafting errors), violated both the State and Federal Constitutions, and invited the parties to submit alternative legislative plans based on Chapter 246. It also directed the parties to submit by mid-October written arguments on any Chapter 246 violations of the Voting Rights Act. In late ****1079** November, the state court issued an order containing its preliminary legislative redistricting plan—essentially Chapter 246 with the technical corrections (though not the stylistic corrections) contained in Senate File 1596. (Since no party had responded to its order concerning Voting Rights Act violations, the court concluded that Chapter 246 did not run afoul of that Act.) It proposed putting its plan into effect on January 21, 1992, if the legislature had not acted by then. Two weeks later, after further argument, the *Cotlow* panel indicated it ***30** would release a revised and final version of its legislative redistricting plan in a few days.

In early December, before the state court issued its final plan, the District Court stayed all proceedings in the *Cotlow* case, and enjoined parties to that action from "attempting to enforce or implement any order of the ... Minnesota

Special Redistricting Panel which has proposed adoption of a reapportionment plan relating to state redistricting or Congressional redistricting." App. to Juris. Statement 154. The court explained its action as necessary to prevent the state court from interfering with the legislature's efforts to redistrict and with the District Court's jurisdiction. It mentioned the *Emison* Voting Rights Act allegations as grounds for issuing the injunction, which it found necessary in aid of its jurisdiction, see 28 U.S.C. § 1651. One judge dissented.

Four days later the state court issued an order containing its final legislative plan, subject to the District Court's injunction and still conditioned on the Legislature's failure to adopt a lawful plan. The same order provided, again subject to the District Court's injunction, that congressional redistricting plans be submitted by mid-January. The obstacle of the District Court injunction was removed on January 10, 1992, when, upon application of the *Cotlow* plaintiffs, we vacated the injunction. 502 U.S. 1022, 112 S.Ct. 855, 116 L.Ed.2d 764.

When the legislature reconvened in January, both Houses approved the corrections to Chapter 246 contained in Senate File 1596 and also adopted a congressional redistricting plan that legislative committees had drafted the previous October. The Governor, however, vetoed the legislation. On January 30, the state court issued a final order adopting its legislative plan and requiring that plan to be used for the 1992 primary and general elections. By February 6, pursuant to an order issued shortly after this Court vacated the injunction, the parties had submitted their proposals for congressional redistricting, and on February 17 the state court held hearings on the competing plans.

***31** Two days later, the District Court issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with state implementation of those plans. 782 F.Supp. 427, 448–449 (Minn.1992). The *Emison* panel found that the state court's modified version of Chapter 246 "fails to provide the equitable relief necessary to cure the violation of the Voting Rights Act," *id.,* at 440, which in its view required at least one "super-majority minority" Senate district, a district in which the minority constitutes a clear majority. The District Court rejected Chapter 246 as a basis for its plan, and instead referred to state policy as expressed in the Minnesota Constitution and in a resolution adopted by both Houses of the legislature. See Minn. Const., Art. 4, § 2; H.R.Con.Res. No. 2, 77th Leg., Reg.Sess. (1991). Judge MacLaughlin dissented in part. The District Court was unanimous, however, in its adoption of a congressional redistricting plan, after concluding that the preexisting 1982 plan violated Art. I, § 2, of the Federal Constitution. Although it had received the same proposed plans submitted to the state court earlier that month, it used instead a congressional plan prepared by its special masters. Finally, the District Court retained jurisdiction to ensure adoption of its reapportionment ****1080** plans and to enforce the permanent injunction.

In early March, the state court indicated that it was "fully prepared to release a congressional plan" but that the federal injunction prevented it from doing so. In its view, the federal plan reached population equality "without sufficient regard for the preservation of municipal and county boundaries." App. to Juris.Statement 445–446.

Appellants sought a stay of the District Court's February order pending this appeal. Justice BLACKMUN granted the stay with respect to the legislative redistricting plan. No. 91–1420 (Mar. 11, 1992) (in chambers). We noted probable jurisdiction. 503 U.S. 958, 112 S.Ct. 1557, 118 L.Ed.2d 206 (1992).

***32** II

In their challenge to both of the District Court's redistricting plans, appellants contend that, under the principles of *Scott v. Germano,* 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965) (*per curiam*), the court erred in not deferring to the Minnesota Special Redistricting Panel's proceedings. We agree.

[1] **[2]** The parties do not dispute that both courts had jurisdiction to consider the complaints before them. Of course federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i.e.,* dismiss the case before it) nor defer to the state proceedings (*i.e.,* withhold action until the state proceedings have concluded). See *McClellan v. Carland,* 217 U.S. 268, 282, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910). In rare circumstances, however, principles of federalism and comity dictate otherwise. We have found abstention necessary, for example, when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain

ongoing state criminal proceedings. See *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814–817, 96 S.Ct. 1236, 1244–1246, 47 L.Ed.2d 483 (1976) (collecting examples). We have required deferral, causing a federal court to "sta[y] its hands," when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case. *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941).[1]

***33** In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself. In *Germano,* a Federal District Court invalidated Illinois' Senate districts and entered an order requiring the State to submit to the court any revised Senate districting scheme it might adopt. An action had previously been filed in state court attacking the same districting scheme. In that case the Illinois Supreme Court held (subsequent to the federal court's order) that the Senate districting scheme was invalid, but expressed confidence that the General Assembly would enact a lawful plan during its then current session, scheduled to end in July 1965. The Illinois Supreme Court retained jurisdiction to ensure that the upcoming 1966 general elections would be conducted pursuant to a constitutionally valid plan.

****1081** This Court disapproved the District Court's action. The District Court "should have stayed its hand," we said, and in failing to do so overlooked this Court's teaching that state courts have a significant role in redistricting. 381 U.S., at 409, 85 S.Ct., at 1527.

> "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.
>
> "...The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election...." *Ibid.* (citations omitted).

[3] ***34** Today we renew our adherence to the principles expressed in *Germano,* which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U.S. Const., Art. I, § 2. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

[4] Judged by these principles, the District Court's December injunction of state-court proceedings, vacated by this Court in January, was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state *judicial* redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as "interfering" in the reapportionment process. But the doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment. The Minnesota Special Redistricting Panel's issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable "interference," was precisely the sort of state judicial supervision of redistricting we have encouraged. See *Germano,* 381 U.S., at 409, 85 S.Ct., at 1526 (citing cases).

[5] Nor do the reasons offered by the District Court for its actions in December and February support departure from the *Germano* principles. It is true that the *Emison* plaintiffs alleged that the 1983 legislative districting scheme violated ***35** the Voting Rights Act, while the *Cotlow* complaint never invoked that statute. *Germano,* however, does not require that the federal and state-court complaints be identical; it instead focuses on the nature of the relief requested: reapportionment of election districts. Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer.

[6] The District Court also expressed concern over the lack of time for orderly appeal, prior to the State's primaries, of any judgment that might issue from the state court, noting that Minnesota allows the losing party 90 days to appeal. See Minn.Rule Civ.App.Proc. 104.01. We fail to see the relevance

of the speed of appellate review. *Germano* requires only that the state agencies adopt a constitutional plan "within ample time ... to be utilized in the [upcoming] election," 381 U.S., at 409, 85 S.Ct., at 1527. It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States ****1082** must often redistrict in the most exigent circumstances—during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year. Our consideration of this appeal, long after the Minnesota primary and final elections have been held, itself reflects the improbability of completing judicial review before the necessary deadline for a new redistricting scheme.

[7] It may be useful to describe what ought to have happened with respect to each redistricting plan. The state court entered its judgment adopting its modified version of Chapter 246 in late January (nearly three weeks before the federal court issued its opinion). That final order, by declaring the legislature's version of Chapter 246 unconstitutional and adopting a legislative plan to replace it, altered the status quo: The state court's plan became the law of Minnesota. At the very least, the elementary principles of federalism and comity embodied in the full faith and credit statute, ***36** 28 U.S.C. § 1738, obligated the federal court to give that judgment *legal effect,* rather than treating it as simply one of several competing legislative redistricting proposals available for the District Court's choosing. See *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 286, 296, 90 S.Ct. 1739, 1742, 1747, 26 L.Ed.2d 234 (1970). In other words, after January 30 the federal court was empowered to entertain the *Emison* plaintiffs' claims relating to legislative redistricting only to the extent those claims challenged the *state court's* plan. Cf. *Wise v. Lipscomb,* 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978) (opinion of WHITE, J.).

[8] With respect to the congressional plan, the District Court did not ignore any state-court judgment, but only because it had actively prevented such a judgment from issuing. The wrongfully entered December injunction prevented the Special Redistricting Panel from developing a contingent plan for congressional redistricting, as it had for legislative redistricting prior to the injunction. The state court's December order to the parties for mid-January submission of congressional plans was rendered a nullity by the injunction, which was not vacated until January 10. The net effect was a delay of at least a few weeks in the submissions to the state court, and in hearings on those submissions. A court may not acknowledge *Germano* in one breath and impede a state court's timely development of a plan in the next. It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed. But the January 20 deadline that the District Court established here was explicitly directed *solely at the legislature.* The state court was never given a time by which it should decide on reapportionment, legislative *or* congressional, if it wished to avoid federal intervention.

Of course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries. ***37** *Germano* requires deferral, not abstention. But in this case, in addition to the fact that the federal court itself had been (through its injunction) a cause of the state court's delay, it nonetheless appeared that the state court was fully prepared to adopt a congressional plan in as timely a manner as the District Court. The Special Redistricting Panel received the same plans submitted to the federal court, and held hearings on those plans two days before the federal court issued its opinion. The record simply does not support a conclusion that the state court was either unwilling or unable to adopt a congressional plan in time for the elections.[2] What occurred here was not a last-minute federal-court rescue of ****1083** the Minnesota electoral process, but a race to beat the Minnesota Special Redistricting Panel to the finish line. That would have been wrong, even if the Panel had not been tripped earlier in the course. The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment.

III

[9] **[10]** The District Court concluded that there was sufficient evidence to prove minority vote dilution in a portion of the city of Minneapolis, in violation of § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[3] 782 F.Supp., at 439. Choosing not ***38** to apply the preconditions for a vote-dilution violation set out by this Court for challenges to multimember districts, see *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the court instead proceeded directly to the "totality of circumstances" test in § 2(b) and found unlawful dilution. It rejected, as a basis for its redistricting plan, Chapter 246, Chapter 246 as modified by Senate File 1596, and the state court's version of Chapter 246, and adopted instead its special masters' legislative plan, which includes a Senate district stretching from south Minneapolis,

around the downtown area, and then into the northern part of the city in order to link minority populations. This oddly shaped creation, Senate District 59, is 43 percent black and 60 percent minority, including at least three separately identifiable minority groups.[4] In the District Court's view, based on "[j]udicial experience, as well as the results of past elections," a super-majority minority Senate district in Minneapolis was required in order for a districting scheme to comply with the ***39** Voting Rights Act. 782 F.Supp., at 440. We must review this analysis because, if it is correct, the District Court was right to deny effect to the state-court legislative redistricting plan.

As an initial matter, it is not clear precisely which legislative districting plan produced the vote dilution that necessitated the super-majority remedy. For almost a decade prior to the 1992 election season, the only legislative districting plan that had been in use in Minnesota was the 1983 plan, which all parties agreed was unconstitutional in light of the 1990 census. More importantly, the state court had *declared* the 1983 plan to be unconstitutional in its final order of January 30. Once that order issued, the *Emison* ****1084** plaintiffs' claims that the 1983 plan violated the Voting Rights Act became moot, unless those claims also related to the superseding plan. But no party to this litigation has ever alleged that either Chapter 246, or the modified version of Chapter 246 adopted by the state court, resulted in vote dilution. The District Court did not hold a hearing or request written argument from the parties on the § 2 validity of any particular plan; nor does the District Court's discussion focus on any particular plan.

Although the legislative plan that in the court's view produced the § 2 "dilution" violation is unclear, the District Court did clearly conclude that the state court's plan could not remedy that unspecified violation because it "fail[ed] to provide the affirmative relief necessary to adequately protect minority voting rights." *Id.,* at 448. The District Court was of the view, in other words, as the dissenting judge perceived, see *id.,* at 452, and n. 6 (MacLaughlin, J., concurring in part and dissenting in part), that *any* legislative plan lacking a super-majority minority Senate district in Minneapolis violated § 2. We turn to the merits of this position.

Our precedent requires that, to establish a vote-dilution claim with respect to a multimember districting plan (and ***40** hence to justify a super-majority districting remedy), a plaintiff must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S., at 50–51, 106 S.Ct., at 2766–2767. We have not previously considered whether these *Gingles* threshold factors apply to a § 2 dilution challenge to a single-member districting scheme, a so-called "vote fragmentation" claim. See *id.,* at 46–47, n. 12, 106 S.Ct., at 2764, n. 12. We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts, see, *e.g., id.,* at 47, and n. 13, 106 S.Ct., at 2764, and n. 13; *id.,* at 87, 106 S.Ct., at 2785 (O'CONNOR, J., concurring in judgment); *Rogers v. Lodge,* 458 U.S. 613, 616–617, 102 S.Ct. 3272, 3274–3275, 73 L.Ed.2d 1012 (1982); see also *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966)—which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment, see, *e.g., Connor v. Finch,* 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977). It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district. Certainly the reasons for the three *Gingles* prerequisites continue to apply: The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, see *Gingles, supra,* at 50, n. 17, 106 S.Ct., at 2765, n. 17. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population, see *Gingles, supra,* at 51, 106 S.Ct., at 2766. Unless these ***41** points are established, there neither has been a wrong nor can be a remedy.[5]

****1085** In the present case, even if we make the dubious assumption that the minority voters were "geographically compact," there was quite obviously a higher-than-usual need for the second of the *Gingles* showings. Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential. See *Badillo v. Stockton,* 956 F.2d

884, 891 (CA9 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs,* 906 F.2d 524 (CA 11 1990); *Campos v. Baytown,* 840 F.2d 1240, 1244 (CA5 1988), cert. denied, 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (1989). Since a court may not presume bloc voting within even a single minority group, see *Gingles, supra,* at 46, 106 S.Ct., at 2764, it made no sense for the District Court to (in effect) indulge that presumption as to bloc voting within an agglomeration of distinct minority groups.

We are satisfied that in the present case the *Gingles* preconditions were not only ignored but were unattainable. As the District Court acknowledged, the record simply "contains no statistical evidence" of minority political cohesion (whether of one or several minority groups) or of majority bloc voting in Minneapolis. 782 F.Supp., at 436, n. 30. And even anecdotal evidence is lacking. Recognizing this void, the court relied on an article identifying bloc voting as a ***42** national phenomenon that is " 'all but inevitable.' " *Ibid.,* quoting Howard & Howard, The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm, 83 Colum.L.Rev. 1615, 1625 (1983). A law review article on national voting patterns is no substitute for proof that bloc voting occurred in Minneapolis. Cf. *Gingles,* 478 U.S., at 58–61, 106 S.Ct., at 2770–2771 (summarizing statistical and anecdotal evidence in that case). Section 2 "does not assume the existence of racial bloc voting; plaintiffs must prove it." *Id.,* at 46, 106 S.Ct., at 2764.

* * *

The District Court erred in not deferring to the state court's efforts to redraw Minnesota's state legislative and federal congressional districts. Its conclusion that the state court's legislative districting plan (which it treated as merely one available option) violated § 2 of the Voting Rights Act was also erroneous. Having found these defects, we need not consider the other points of error raised by appellants.

The judgment is reversed, and the case is remanded with instructions to dismiss.

So ordered.

All Citations

507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388, 61 USLW 4163

Footnotes

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

1 We have referred to the *Pullman* doctrine as a form of "abstention," see 312 U.S., at 501–502, 61 S.Ct., at 645–646. To bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* "deferral." *Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute, just as *Germano* deferral recognizes that federal courts should not prematurely involve themselves in redistricting.

2 Although under Minnesota law legislative districts must be drawn before precinct boundaries can be established, see Minn.Stat. § 204B.14, subd. 3 (Supp.1991), congressional districts were not needed in advance of the March 3 precinct caucuses. Congressional district conventions did not take place until late April and early May.

3 That section provides:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

"(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political

subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

4 These percentages refer to total population. To establish whether a § 2 violation has occurred (which presumably requires application of the same standard that measures whether a § 2 violation has been remedied) other courts have looked to, not the district's total minority population, but the district's minority population *of voting age.* See, *e.g., Romero v. Pomona,* 883 F.2d 1418, 1425–1426, and n. 13 (CA9 1989) (citing cases). *Gingles* itself repeatedly refers to the voting population, see, *e.g.,* 478 U.S., at 48, 50, 106 S.Ct., at 2765, 2766. We have no need to pass upon this aspect of the District Court's opinion.

5 *Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. *Gingles, supra,* at 46–47, n. 12, 106 S.Ct., at 2764, n. 12. We do not reach that question in the present case either: Although the *Emison* plaintiffs alleged both vote dilution and minimization of vote influence (in the 1983 plan), the District Court considered only the former issue in reviewing the state court's plan.

786 Fed.Appx. 705 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Don HIGGINSON, Plaintiff-Appellant,

v.

Xavier BECERRA, in his official capacity as Attorney General of California; City of Poway, Defendants-Appellees, California League of United Latin American Citizens; et al., Intervenor-Defendants-Appellees.

No. 19-55275
|
Argued and Submitted November 5, 2019 Pasadena, California
|
FILED December 4, 2019

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Appeal from the United States District Court for the Southern District of California, William Q. Hayes, District Judge, Presiding, D.C. No. 3:17-cv-02032-WQH-MSB

Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA,[*] District Judge.

***706** MEMORANDUM[**]

Don Higginson appeals the district court's dismissal on remand of his complaint for failure to state a claim. *See Higginson v. Becerra*, 363 F. Supp. 3d 1118 (S.D. Cal. 2019).[1] We have jurisdiction under 28 U.S.C. § 1291. Agreeing with the decision of the California Court of Appeal in *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 51 Cal. Rptr. 3d 821 (2006), we affirm.

In June 2017, the City of Poway, California received a letter from a private attorney threatening a lawsuit, claiming the City had violated the California Voting Rights Act ("CVRA"), Cal. Elec. Code §§ 14025–32. In response, the City Council determined that instead of defending the threatened litigation and incurring significant expenses in doing so, it would adopt a resolution that would transition the City from at-large to district-based elections.

Higginson's complaint alleges that he, a resident of the City, lives in a racially gerrymandered electoral district because: (1) "[t]he City would not have switched from at-large elections to single-district[ ] elections but for the prospect of liability under the CVRA;" and (2) "[t]he CVRA makes race the predominant factor in drawing electoral districts" by compelling a political subdivision to "abandon its at-large system based on the existence of racially polarized voting and nothing more."

Reviewed de novo and viewed in the light most favorable to him, the allegations of the operative complaint fail to plausibly state that Higginson is a victim of racial

gerrymandering. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1149 (9th Cir. 2019) (stating standard of review). Racial gerrymandering occurs when a political subdivision "intentionally assign[s] citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2314, 201 L.Ed.2d 714 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)). Plaintiff alleges no facts concerning the City's motivations for placing him or any other Poway voter in any particular electoral district. *See Bethune-Hill v. Va. State Bd. of Elections*, —— U.S. ——, 137 S. Ct. 788, 797, 197 L.Ed.2d 85 (2017) ("[A] plaintiff alleging racial gerrymandering bears the burden 'to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' ") (quoting *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)). Similarly, he fails to cite any language in the CVRA that mandates how electoral districts can or should be drawn. *See* Cal. Elec. Code §§ 14025–32.

The operative complaint does not allege that the City or the CVRA "distribute[d] burdens or benefits on the basis of individual racial classifications." ***707** *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed "to eliminate racial disparities through race-neutral means." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, —— U.S. ——, 135 S. Ct. 2507, 2524, 192 L.Ed.2d 514 (2015); *see also Bush v. Vera*, 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

Because Plaintiff's allegations do not trigger strict scrutiny, *see Cooper v. Harris*, —— U.S. ——, 137 S. Ct. 1455, 1464, 197 L.Ed.2d 837 (2017), and he does not contend the City lacked a rational basis for its actions, *see FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993), he fails to state a claim for relief. He also therefore was not entitled to injunctive relief. *See Short v. Brown*, 893 F.3d 671, 675–76 (9th Cir. 2018).

AFFIRMED.

All Citations

786 Fed.Appx. 705 (Mem)

Footnotes

* The Honorable Louis Guirola, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 We previously held that Plaintiff has standing to assert an as-applied challenge to the City's adoption of Map 133, the district-based electoral map adopted by the City in October 2017. *Higginson v. Becerra*, 733 F. App'x 402, 403 (9th Cir. 2018).

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125 S.Ct. 1141
Supreme Court of the United States

Garrison S. JOHNSON, Petitioner,

v.

CALIFORNIA et al.

No. 03–636.
|
Argued Nov. 2, 2004.
|
Decided Feb. 23, 2005.

Synopsis

Background: African–American state prison inmate brought § 1981 and § 1983 equal-protection action against corrections officials, challenging unwritten policy of placing new or transferred inmates with cellmates of same race during initial evaluation. The United States District Court for the Central District of California, Kim M. Wardlaw, J., granted officials' motion to dismiss. Inmate appealed. The Ninth Circuit Court of Appeals, 207 F.3d 650, reversed in part and remanded. On remand, the District Court, Consuelo B. Marshall, C.J., granted summary judgment for officials. Inmate again appealed. The Ninth Circuit Court of Appeals, 321 F.3d 791, affirmed. Certiorari was granted.

[Holding:] The United States Supreme Court, Justice O'Connor, held that strict scrutiny standard of review, rather than "reasonably related to legitimate penological interest" standard, governed inmate's challenge.

Reversed and remanded.

Justice Ginsburg filed concurring opinion joined by Justices Souter and Breyer.

Justice Stevens filed dissenting opinion.

Justice Thomas filed dissenting opinion joined by Justice Scalia.

The Chief Justice took no part in the decision of the case.

West Headnotes (2)

[1] **Constitutional Law** Race, National Origin, or Ethnicity

Under strict scrutiny standard of review, as applied to government-imposed racial classification challenged on equal protection grounds, government has burden of proving that classification is narrowly tailored measure that furthers compelling governmental interest. U.S.C.A. Const.Amend. 14.

387 Cases that cite this headnote

[2] **Constitutional Law** Prisons

Prisons Race

Strict scrutiny standard of review rather than "reasonably related to legitimate penological interest" standard governed inmate's equal-protection challenge to state corrections department's unwritten policy of placing new or transferred inmates double-celled during initial 60–day evaluation with cellmates of same race; corrections officials had to demonstrate that policy, assertedly adopted to prevent violence caused by racial gangs, was narrowly tailored to address necessities of prison security and discipline. U.S.C.A. Const.Amend. 14.

392 Cases that cite this headnote

**1142 *499 *Syllabus* [*]

The California Department of Corrections' (CDC) unwritten policy of racially segregating prisoners in double cells for up to 60 days each time they enter a new correctional facility is based on the asserted rationale that it prevents violence caused by racial gangs. Petitioner Johnson, an African–American inmate who has been intermittently double-celled under the policy's terms ever since his 1987 incarceration, filed this suit alleging that the policy violates his Fourteenth Amendment right to equal protection. The District Court ultimately granted defendant former CDC officials summary

judgment on grounds that they were entitled to qualified immunity. The Ninth Circuit affirmed, holding that the policy's constitutionality should be reviewed under the deferential standard articulated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64, not under strict scrutiny, and that the policy survived *Turner* scrutiny.

Held: Strict scrutiny is the proper standard of review for an equal protection challenge to the CDC's policy. Pp. 1146–1152.

(a) Because the CDC's policy is "immediately suspect" as an express racial classification, *Shaw v. Reno,* 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511, the Ninth Circuit erred in failing to apply strict scrutiny and thereby to require the CDC to demonstrate that the policy is narrowly tailored to serve a compelling state interest, see *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158. *"[A]ll* racial classifications [imposed by government] ... must be analyzed ... under strict scrutiny," *ibid.,* in order to " 'smoke out' illegitimate ****1143** uses of race by assuring that [government] is pursuing a goal important enough to warrant [such] a highly suspect tool," *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854. The CDC's claim that its policy should be exempt from this categorical rule because it is "neutral"—*i.e.,* because all prisoners are "equally" segregated—ignores this Court's repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally," *Shaw, supra,* at 651, 113 S.Ct. 2816. Indeed, the Court rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and refuses to resurrect it today. The Court has previously applied a heightened standard of review in evaluating racial segregation in prisons. *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212. The need for strict scrutiny is no less important here. By perpetuating ***500** the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw, supra,* at 648, 113 S.Ct. 2816. Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. In fact, the United States argues that it is possible to address prison security concerns through individualized consideration without using racial segregation, unless it is warranted as a necessary and temporary response to a serious threat of race-related violence. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible. Pp. 1146–1148.

(b) The Court declines the CDC's invitation to make an exception to the categorical strict scrutiny rule and instead to apply *Turner's* deferential review standard on the ground that the CDC's policy applies only in the prison context. The Court has never applied the *Turner* standard—which asks whether a regulation that burdens prisoners' fundamental rights is "reasonably related" to "legitimate penological interests," 482 U.S., at 89, 107 S.Ct. 2254—to racial classifications. *Turner* itself did not involve such a classification, and it cast no doubt on *Lee.* That is unsurprising, as the Court has applied the *Turner* test *only* to rights that are "inconsistent with proper incarceration." *Overton v. Bazzetta,* 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162. The right not to be discriminated against based on one's race is not susceptible to *Turner's* logic because it is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Cf. *Batson v. Kentucky,* 476 U.S. 79, 99, 106 S.Ct. 1712, 90 L.Ed.2d 69. Deference to the particular expertise of officials managing daily prison operations does not require a more relaxed standard here. The Court did not relax the standard of review for racial classifications in prison in *Lee,* and it refuses to do so today. Rather, it explicitly reaffirms that the "necessities of prison security and discipline," *Lee, supra,* at 334, 88 S.Ct. 994, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities, see, *e.g., Grutter v. Bollinger,* 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304. Because *Turner's* standard would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy ****1144** does not in practice advance that goal, it is too lenient a standard to ferret out invidious uses of race. Contrary to the CDC's protest, strict scrutiny will not render prison administrators unable to address legitimate problems of race-based violence in prisons. On remand, the CDC will have the burden of demonstrating that its policy is ***501** narrowly tailored with regard to new inmates as well as transferees. Pp. 1148–1152.

(c) The Court does not decide whether the CDC's policy violates equal protection, but leaves it to the Ninth Circuit, or the District Court, to apply strict scrutiny in the first instance.

See, *e.g., Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 557–558, 114 S.Ct. 2396, 129 L.Ed.2d 427. P. 1152.

321 F.3d 791, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post,* p. 1152. STEVENS, J., filed a dissenting opinion, *post,* p. 1153. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 1157. REHNQUIST, C.J., took no part in the decision of the case.

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Opinion

Justice O'CONNOR delivered the opinion of the Court.

***502** The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy.

I

A

CDC institutions house all new male inmates and all male inmates transferred from other state facilities in reception centers for up to 60 days upon their arrival. During that time, prison officials evaluate the inmates to determine their ultimate placement. Double-cell assignments in the reception centers are based on a number of factors, predominantly race. In fact, the CDC has admitted that the chances of an inmate being assigned a cellmate of another race are " '[p]retty close' " to zero percent. App. to Pet. for Cert. 3a. The CDC further subdivides prisoners within each racial group. Thus, Japanese–Americans are housed separately from Chinese–Americans, and northern California Hispanics are separated from southern California Hispanics.

The CDC's asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. Brief for Respondents 1–6. It cites numerous incidents of racial violence in CDC facilities and identifies five major prison gangs in ****1145** the State: Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. *Id.,* at 2. The CDC also notes that prison-gang culture is violent and murderous. *Id.,* at 3. An associate warden testified ***503** that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. App. 215a. Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. See, *e.g., id.,* at 305a–306a. The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others. See Brief for Respondents 29.

With the exception of the double cells in reception areas, the rest of the state prison facilities—dining areas, yards, and cells—are fully integrated. After the initial 60–day period, prisoners are allowed to choose their own cellmates. The CDC usually grants inmate requests to be housed together, unless there are security reasons for denying them.

B

Garrison Johnson is an African–American inmate in the custody of the CDC. He has been incarcerated since 1987 and, during that time, has been housed at a number of California prison facilities. Fourth Amended Complaint 3, Record, Doc. No. 78. Upon his arrival at Folsom prison in 1987, and each time he was transferred to a new facility thereafter, Johnson was double-celled with another African–American inmate. See *ibid.*

Johnson filed a complaint *pro se* in the United States District Court for the Central District of California on February 24, 1995, alleging that the CDC's reception-center housing policy violated his right to equal protection under the Fourteenth Amendment by assigning him cellmates on

the basis of his race. He alleged that, from 1987 to 1991, former CDC Director James Rowland instituted and enforced an unconstitutional policy of housing inmates according to race. Second Amended Complaint 2–4, Record, Doc. No. 21. Johnson made the same allegations against former Director James Gomez for the period from 1991 until the filing of his complaint. *Ibid.* The District Court dismissed his complaint ***504** for failure to state a claim. The Court of Appeals for the Ninth Circuit reversed and remanded, holding that Johnson had stated a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Johnson v. California,* 207 F.3d 650, 655 (2000).

On remand, Johnson was appointed counsel and granted leave to amend his complaint. On July 5, 2000, he filed his Fourth Amended Complaint. Record, Doc. No. 81. Johnson claimed that the CDC's policy of racially segregating all inmates in reception-center cells violated his rights under the Equal Protection Clause. Johnson sought damages, alleging that former CDC Directors Rowland and Gomez, in their individual capacities, violated his constitutional rights by formulating and implementing the CDC's housing policy. He also sought injunctive relief against former CDC Director Stephen Cambra.

Johnson has consistently challenged, and the CDC has consistently defended, the policy as a whole—as it relates to both new inmates and inmates transferred from other facilities. Johnson was first segregated in 1987 as a new inmate when he entered the CDC facility at Folsom. Since 1987, he has been segregated each time he has been transferred to a new facility. Thus, he has been subject to the CDC's policy both as a new inmate and as an inmate transferred from one facility to another.

After discovery, the parties moved for summary judgment. The District Court ****1146** granted summary judgment to the defendants on grounds that they were entitled to qualified immunity because their conduct was not clearly unconstitutional. The Court of Appeals for the Ninth Circuit affirmed. 321 F.3d 791 (2003). It held that the constitutionality of the CDC's policy should be reviewed under the deferential standard we articulated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)—not strict scrutiny. 321 F.3d, at 798–799. Applying *Turner,* it held that Johnson had the burden of refuting the "common-sense connection" between the policy and ***505** prison violence. 321 F.3d, at 802. Though it believed this was a "close case," *id.,* at 798, the Court of Appeals concluded that the policy survived *Turner's* deferential standard, 321 F.3d, at 807.

The Court of Appeals denied Johnson's petition for rehearing en banc. Judge Ferguson, joined by three others, dissented on grounds that "[t]he panel's decision ignore[d] the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny, and fail[ed] to recognize that [the] *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological objectives." 336 F.3d 1117 (2003) (internal quotation marks and citations omitted). We granted certiorari to decide which standard of review applies. 540 U.S. 1217, 124 S.Ct. 1505, 158 L.Ed.2d 151 (2004).

II

A

[1] We have held that "*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis added). Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Ibid.* We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, see *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), race-based preferences in government contracts, see *Adarand, supra,* at 226, 115 S.Ct. 2097, and race-based districting intended to improve minority representation, see *Shaw v. Reno,* 509 U.S. 630, 650, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and ***506** again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining ... what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). We therefore apply strict scrutiny to *all* racial classifications to " 'smoke out' illegitimate uses of race

by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*[1]

The CDC claims that its policy should be exempt from our categorical rule because **1147 it is "neutral"—that is, it "neither benefits nor burdens one group or individual more than any other group or individual." Brief for Respondents 16. In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw, supra,* at 651, 113 S.Ct. 2816. Indeed, we rejected the notion that separate can ever be equal—or "neutral"—50 years ago in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and we refuse to resurrect it today. See also *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (rejecting the argument that race-based peremptory challenges were permissible because they applied equally to white and black jurors and holding that "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

We have previously applied a heightened standard of review in evaluating racial segregation in prisons. In *Lee v.* *507 *Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) *(per curiam),* we upheld a three-judge court's decision striking down Alabama's policy of segregation in its prisons. *Id.,* at 333–334, 88 S.Ct. 994. Alabama had argued that desegregation would undermine prison security and discipline, *id.,* at 334, 88 S.Ct. 994, but we rejected that contention. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion"—"that prison authorities have the right, acting in good faith and in *particularized circumstances,* to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.* (emphasis added). The concurring Justices emphasized that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

[2] The need for strict scrutiny is no less important here, where prison officials cite racial violence as the reason for their policy. As we have recognized in the past, racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility.*" *Shaw, supra,* at 643, 113 S.Ct. 2816 (citing *J.A. Croson Co., supra,* at 493, 109 S.Ct. 706 (plurality opinion); emphasis added). Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract." *Shaw, supra,* at 648, 113 S.Ct. 2816; see also Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002) (in a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those *508 racially integrated"). See also Brief for Former State Corrections Officials as *Amici Curiae* 19 (opinion of former corrections officials from six States that "racial integration of cells tends to diffuse racial tensions and thus diminish interracial violence" and that "a blanket **1148 policy of racial segregation of inmates is contrary to sound prison management").

The CDC's policy is unwritten. Although California claimed at oral argument that two other States follow a similar policy, see Tr. of Oral Arg. 30–31, this assertion was unsubstantiated, and we are unable to confirm or deny its accuracy.[2] Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. See Brief for United States as *Amicus Curiae* 24. Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. 28 CFR § 551.90 (2004) ("[BOP] staff shall not discriminate *509 against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs"). The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." Brief for United States as *Amicus Curiae* 25. Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence." *Id.,* at 24. As to transferees, in particular, whom the CDC has already evaluated at least once, it is not clear why more individualized determinations are not possible.

Because the CDC's policy is an express racial classification, it is "immediately suspect." *Shaw,* 509 U.S., at 642, 113 S.Ct. 2816; see also *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 485, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). We therefore hold that the Court of Appeals erred when it failed to apply strict scrutiny to the CDC's policy and to require the CDC to demonstrate that its policy is narrowly tailored to serve a compelling state interest.

B

The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and instead to apply the deferential standard of review articulated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), because its segregation policy applies only ****1149** in the prison context. We decline the invitation. In *Turner,* we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. *Id.,* at 81, 107 S.Ct. 2254. We rejected the prisoners' argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners' ***510** fundamental rights was "reasonably related" to "legitimate penological interests." *Id.,* at 89, 107 S.Ct. 2254.

We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification, and it cast no doubt on *Lee.* We think this unsurprising, as we have applied *Turner's* reasonable-relationship test *only* to rights that are "inconsistent with proper incarceration." *Overton v. Bazzetta,* 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003); see also *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"). This is because certain privileges and rights must necessarily be limited in the prison context. See *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (" '[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system' " (quoting *Price v. Johnston,* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948))). Thus, for example, we have relied on *Turner* in addressing First Amendment challenges to prison regulations, including restrictions on freedom of association, *Overton, supra;* limits on inmate correspondence, *Shaw v. Murphy,* 532 U.S. 223, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001); restrictions on inmates' access to courts, *Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); restrictions on receipt of subscription publications, *Thornburgh v. Abbott,* 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); and work rules limiting prisoners' attendance at religious services, *Shabazz, supra.* We have also applied *Turner* to some due process claims, such as involuntary medication of mentally ill prisoners, *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); and restrictions on the right to marry, *Turner, supra.*

The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner.* It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discriminationis ***511** not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is "especially pernicious in the administration of justice." *Rose v. Mitchell,* 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). And public respect for our system of justice is undermined when the system discriminates based on race. Cf. *Batson v. Kentucky,* 476 U.S. 79, 99, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race"). When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations ****1150** of that Amendment under the "deliberate indifference" standard, rather than *Turner's* "reasonably related" standard. See *Hope v. Pelzer,* 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (asking whether prison officials displayed " 'deliberate indifference' to the inmates' health or safety" where an inmate claimed that they violated his rights under the Eighth Amendment (quoting *Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992))). This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment. See *Spain v. Procunier,* 600 F.2d 189, 193–194 (C.A.9 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of

the amendment is to protect persons convicted of crimes. ... Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary").

In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. ***512** Granting the CDC an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp,* 481 U.S. 279, 309, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (internal quotation marks omitted).

The CDC argues that "[d]eference to the particular expertise of prison officials in the difficult task of managing daily prison operations" requires a more relaxed standard of review for its segregation policy. Brief for Respondents 18. But we have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion. For example, we have held that, despite the broad discretion given to prosecutors when they use their peremptory challenges, using those challenges to strike jurors on the basis of their race is impermissible. See *Batson, supra,* at 89–96, 106 S.Ct. 1712. Similarly, in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race. Compare generally *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (partisan gerrymandering), with *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (racial gerrymandering).

We did not relax the standard of review for racial classifications in prison in *Lee,* and we refuse to do so today. Rather, we explicitly reaffirm what we implicitly held in *Lee:* The "necessities of prison security and discipline," 390 U.S., at 334, 88 S.Ct. 994, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities. See *Grutter,* 539 U.S., at 353, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) (citing *Lee* for the principle that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); *J.A. Croson Co.,* 488 U.S., at 521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment) (citing *Lee* for the proposition that "only a social emergency rising to the level of imminent danger to life and limb—for ***513** example, a prison race riot, requiring temporary segregation of inmates —can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens' " (quoting ****1151** *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting))); see also *Pell,* 417 U.S., at 823, 94 S.Ct. 2800 ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves").

Justice THOMAS would subject race-based policies in prisons to *Turner's* deferential standard of review because, in his view, judgments about whether race-based policies are necessary "are better left in the first instance to the officials who run our Nation's prisons." *Post,* at 1168. But *Turner* is too lenient a standard to ferret out invidious uses of race. *Turner* requires only that the policy be "reasonably related" to "legitimate penological interests." 482 U.S., at 89, 107 S.Ct. 2254. *Turner* would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal. See, *e.g.,* 321 F.3d, at 803 (case below) (reasoning that, under *Turner,* the Court of Appeals did "not have to agree that the policy actually advances the CDC's legitimate interest, but only [that] 'defendants might reasonably have thought that the policy would advance its interests' "). See also *Turner, supra,* at 90, 107 S.Ct. 2254 (warning that *Turner* is not a "least restrictive alternative test" (internal quotation marks omitted)).

For example, in Justice THOMAS' world, prison officials could segregate visiting areas on the ground that racial mixing would cause unrest in the racially charged prison atmosphere. Under *Turner,* "[t]he prisoner would have to prove that there would *not* be a riot[.] [But] [i]t is certainly 'plausible' that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could potentially lead to conflict." ***514** 336 F.3d, at 1120 (case below) (Ferguson, J., dissenting from denial of rehearing en banc). Indeed, under Justice THOMAS' view, there is no obvious limit to permissible segregation in prisons. It is not readily apparent why, if segregation in reception centers is justified, segregation in the dining halls, yards, and general housing areas is not also permissible. Any of these areas could be the potential site of racial violence. If Justice THOMAS' approach were to carry the day, even the

blanket segregation policy struck down in *Lee* might stand a chance of survival if prison officials simply asserted that it was necessary to prison management. We therefore reject the *Turner* standard for racial classifications in prisons because it would make rank discrimination too easy to defend.

The CDC protests that strict scrutiny will handcuff prison administrators and render them unable to address legitimate problems of race-based violence in prisons. See also *post,* at 1161–1162, 1170–1171 (THOMAS, J., dissenting). Not so. Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand,* 515 U.S., at 237, 115 S.Ct. 2097 (internal quotation marks omitted); *Grutter,* 539 U.S., at 326–327, 123 S.Ct. 2325 ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"). Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end. See *id.,* at 327, 123 S.Ct. 2325 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is ****1152** also satisfied").[3]

***515** The fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Adarand, supra,* at 229–230, 115 S.Ct. 2097. At this juncture, no such determination has been made. On remand, the CDC will have the burden of demonstrating that its policy is narrowly tailored with regard to new inmates as well as transferees. Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.

III

We do not decide whether the CDC's policy violates the Equal Protection Clause. We hold only that strict scrutiny is the proper standard of review and remand the case to allow the Court of Appeals for the Ninth Circuit, or the District Court, to apply it in the first instance. See *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 557–558, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1031–1032, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (same). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

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

***516** I join the Court's opinion, subject to the reservation expressed in *Grutter v. Bollinger,* 539 U.S. 306, 344–346, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (GINSBURG, J., concurring).

The Court today resoundingly reaffirms the principle that state-imposed racial segregation is highly suspect and cannot be justified on the ground that " 'all persons suffer [the separation] in equal degree.' " *Ante,* at 1147 (quoting *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). While I join that declaration without reservation, I write separately to express again my conviction that the same standard of review ought not control judicial inspection of every official race classification. As I stated most recently in *Gratz v. Bollinger,* 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (dissenting opinion): "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures ****1153** taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated." See also *Grutter,* 539 U.S., at 344–346, 123 S.Ct. 2325 (GINSBURG, J., concurring); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 271–276, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (GINSBURG, J., dissenting).

There is no pretense here, however, that the California Department of Corrections (CDC) installed its segregation policy to "correct inequalities." See Wechsler, The Nationalization of Civil Liberties and Civil Rights, Supp. to 12 Tex. Q. 10, 23 (1968). Experience in other States and in federal prisons, see *ante,* at 1148; *post,* at 1154–1155 (STEVENS, J., dissenting), strongly suggests that CDC's race-based assignment of new inmates and transferees, administratively convenient as it may be, is not necessary to the safe management of a penal institution.

Disagreeing with the Court that "strict scrutiny" properly applies to any and all racial classifications, see *ante,* at 1146–1148, 1150–1151, 1151–1152, but agreeing that the stereotypical classification at hand warrants rigorous scrutiny, I join the Court's opinion.

Justice STEVENS, dissenting.

***517** In my judgment a state policy of segregating prisoners by race during the first 60 days of their incarceration, as well as the first 60 days after their transfer from one facility to another, violates the Equal Protection Clause of the Fourteenth Amendment. The California Department of Corrections (CDC) has had an ample opportunity to justify its policy during the course of this litigation, but has utterly failed to do so whether judged under strict scrutiny or the more deferential standard set out in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The CDC had no incentive in the proceedings below to withhold evidence supporting its policy; nor has the CDC made any offer of proof to suggest that a remand for further factual development would serve any purpose other than to postpone the inevitable. I therefore agree with the submission of the United States as *amicus curiae* that the Court should hold the policy unconstitutional on the current record.

The CDC's segregation policy[1] is based on a conclusive presumption that housing inmates of different races together creates an unacceptable risk of racial violence. Under the policy's logic, an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence. The ***518** CDC, however, has offered scant empirical evidence or expert opinion to justify this use of race under even a minimal level of constitutional scrutiny. The presumption underlying the policy is undoubtedly overbroad. The CDC has made no effort to prove what fraction of new or transferred inmates are members of race-based gangs, nor has it shown more generally that interracial violence is disproportionately ****1154** greater than intraracial violence in its prisons. Proclivity toward racial violence unquestionably varies from inmate to inmate, yet the CDC applies its blunderbuss policy to *all* new and transferred inmates housed in double cells regardless of their criminal histories or records of previous incarceration. Under the CDC's policy, for example, two car thieves of different races—neither of whom has any history of gang involvement, or of violence, for that matter—would be barred from being housed together during their first two months of prison. This result derives from the CDC's inflexible judgment that such integrated living conditions are simply too dangerous. This Court has never countenanced such racial prophylaxis.

To establish a link between integrated cells and violence, the CDC relies on the views of two state corrections officials. They attested to their belief that double-celling members of different races would lead to violence and that this violence would spill out into the prison yards. One of these officials, an associate warden, testified as follows:

> "[W]ith the Asian population, the control sergeants have to be more careful than they do with Blacks, Whites, and Hispanics because, for example, you cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it. The same with Laotians, Vietnamese, Cambodians, Filipinos. You have to be very careful about housing other Asians with other Asians. It's very culturally heavy." App. 189a.

***519** Such musings inspire little confidence. Indeed, this comment supports the suspicion that the policy is based on racial stereotypes and outmoded fears about the dangers of racial integration. This Court should give no credence to such cynical, reflexive conclusions about race. See, *e.g., Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"); *Watson v. Memphis,* 373 U.S. 526, 536, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963) (rejecting the city's plea for delay in desegregating public facilities when "neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

The very real risk that prejudice (whether conscious or not) partly underlies the CDC's policy counsels in favor of relaxing the usual deference we pay to corrections officials in these matters. We should instead insist on hard evidence, especially given that California's policy is an outlier when compared to nationwide practice. The Federal Bureau of Prisons administers 104 institutions; no similar policy is applied in any of them. Countless state penal institutions are operated without such a policy. An *amici* brief filed by six former state corrections officials with an aggregate of over 120 years of experience managing prison systems in Wisconsin, Georgia, Oklahoma, Kansas, Alaska, and Washington makes clear that a blanket policy of even temporary segregation runs counter to the great weight of professional opinion on sound prison

management. See Brief for Former State Corrections Officials as *Amici Curiae* 19. Tellingly, the CDC can only point to two other States, Texas and Oklahoma, that use racial status in assigning inmates in prison reception areas. It is doubtful from the record that these States' policies have the same broad and inflexible sweep as California's, and this is ultimately beside the point. What is important is that the Federal Government ****1155** and the vast ***520** majority of States address the threat of interracial violence in prisons without resorting to the expedient of segregation.

In support of its policy, the CDC offers poignant evidence that its prisons are infested with violent race-based gangs. The most striking of this evidence involves a series of riots that took place between 1998 and 2001 at Pelican Bay State Prison. That prison houses some of the State's most violent criminal offenders, including "validated" gang members who have been transferred from other prisons. The riots involved both interracial and intraracial violence. In the most serious incident, involving 250–300 inmates, "Southern Hispanic" gang members, joined by some white inmates, attacked a number of black inmates.

Our judicial role, however, requires that we scratch below the surface of this evidence, lest the sheer gravity of a threat be allowed to authorize any policy justified in its name. Upon inspection, the CDC's *post hoc,* generalized evidence of gang violence is only tenuously related to its segregation policy. Significantly, the CDC has not cited a single specific incident of interracial violence between cellmates—much less a *pattern* of such violence—that prompted the adoption of its unique policy years ago. Nor is there any indication that antagonism between cellmates played any role in the more recent riots the CDC mentions. And despite the CDC's focus on prison gangs and its suggestion that such gangs will recruit new inmates into committing racial violence during their 60–day stays in the reception centers, the CDC has cited no evidence of such recruitment, nor has it identified any instances in which new inmates committed racial violence against other new inmates in the common areas, such as the yard or the cafeteria. Perhaps the CDC's evidence might provide a basis for arguing that at Pelican Bay and other facilities that have experienced similar riots, some race-conscious measures are justified if properly tailored. See *Lee v. Washington,* 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring). But even if the incidents cited by the CDC, ***521** which occurred in the general prison population, were relevant to the conditions in the reception centers, they provide no support for the CDC's decision to apply its segregation policy to *all* of its reception centers, without regard for each center's security level or history of racial violence. Nor do the incidents provide any support for a policy applicable only to cellmates, while the common areas of the prison in which the disturbances occurred remain fully integrated.

Given the inherent indignity of segregation and its shameful historical connotations, one might assume that the CDC came to its policy only as a last resort. Distressingly, this is not so: There is no evidence that the CDC has ever experimented with, or even carefully considered, race-neutral methods of achieving its goals. That the policy is unwritten reflects, I think, the evident lack of deliberation that preceded its creation.

Specifically, the CDC has failed to explain why it could not, as an alternative to automatic segregation, rely on an individualized assessment of each inmate's risk of violence when assigning him to a cell in a reception center. The Federal Bureau of Prisons and other state systems do so without any apparent difficulty. For inmates who are being transferred from one facility to another—who represent approximately 85% of those subject to the segregation policy—the CDC can simply examine their prison records to determine if they have any known gang affiliations or if they have ever engaged in or threatened ****1156** racial violence. For example, the CDC has had an opportunity to observe petitioner for almost 20 years; surely the CDC could have determined his placement without subjecting him to a period of segregation.[2] For new inmates, assignments can be based on their ***522** presentence reports, which contain information about offense conduct, criminal record, and personal history—including any available information about gang affiliations. In fact, state law requires the county probation officer to transmit a presentence report to the CDC along with an inmate's commitment papers. See Cal.Penal Code Ann. § 1203c (West 2004); Cal. Rule of Court 4.411(d) (Criminal Cases) (West Supp.2004).

Despite the rich information available in these records, the CDC considers these records only rarely in assigning inmates to cells in the reception centers. The CDC's primary explanation for this is administrative inefficiency —the records, it says, simply do not arrive in time. The CDC's counsel conceded at oral argument that presentence reports "have a fair amount of information," but she stated that, "in California, the presentence report does not always accompany the inmate and frequently does not. It follows

some period of time later from the county." Tr. of Oral Arg. 33. Despite the state-law requirement to the contrary, counsel informed the Court that the counties are not preparing the presentence reports "in a timely fashion." *Ibid.* Similarly, with regard to transferees, counsel stated that their prison records do not arrive at the reception centers in time to make cell assignments. *Id.,* at 28. Even if such inefficiencies might explain a temporary expedient in some cases, they surely do not justify a systemwide policy. When the State's interest in administrative convenience is pitted against the Fourteenth Amendment's ban on racial segregation, the latter must prevail. When there has been no "serious, good faith consideration of workable race-neutral alternatives that will achieve the [desired goal]," ***523** *Grutter v. Bollinger,* 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and when "obvious, easy alternatives" are available, *Turner,* 482 U.S., at 90, 107 S.Ct. 2254, the conclusion that CDC's policy is unconstitutional is inescapable regardless of the standard of review that the Court chooses to apply.[3]

In fact, the CDC's failure to demand timely presentence reports and prison records undercuts the sincerity of its concern for inmate security during the reception process. Race is an unreliable and necessarily ****1157** underinclusive predictor of violence. Without the inmate-specific information found in the records, there is a risk that corrections officials will, for example, house together inmates of the same race who are nevertheless members of rival gangs, such as the Bloods and Crips.[4]

Accordingly, while I agree that a remand is appropriate for a resolution of the issue of qualified immunity, I respectfully dissent from the Court's refusal to decide, on the basis of the record before us, that the CDC's policy is unconstitutional.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

***524** The questions presented in this case require us to resolve two conflicting lines of precedent. On the one hand, as the Court stresses, this Court has said that " '*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.' " *Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); emphasis added). On the other, this Court has no less categorically said that "the [relaxed] standard of review we adopted in *Turner* [*v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987),] applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper,* 494 U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (emphasis added).

Emphasizing the former line of cases, the majority resolves the conflict in favor of strict scrutiny. I disagree. The Constitution has always demanded less within the prison walls. Time and again, even when faced with constitutional rights no less "fundamental" than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons. There is good reason for such deference in this case. California oversees roughly 160,000 inmates in prisons that have been a breeding ground for some of the most violent prison gangs in America—all of them organized along racial lines. In that atmosphere, California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing. The majority is concerned with sparing inmates the indignity and stigma of racial discrimination. *Ante,* at 1147–1148. California is concerned with their safety and saving their lives. I respectfully dissent.

***525** I

To understand this case, one must understand just how limited the policy at issue is. That requires more factual background than the Court's opinion provides. Petitioner Garrison Johnson is a black inmate in the California Department of Corrections (CDC), currently serving his sentence for murder, robbery, and assault with a deadly weapon. App. 255a–256a, 259a. Johnson began serving his sentence in June 1987 at the California Institution for Men in Chino, California. ****1158** *Id.,* at 79a, 264a. Since that time he has been transferred to a number of other facilities within the CDC. *Id.,* at 79a–82a.

When an inmate like Johnson is admitted into the California prison system or transferred between the CDC's institutions, he is housed initially for a brief period—usually no more than 60 days—in one of California's prison reception centers for men. *Id.,* at 303a–305a. CDC, Department Operations Manual § 61010.3 (2004) (hereinafter CDC Operations Manual), available at http://www. corr.ca.gov/RegulationsPolicies/PDF/DOM/00_dept_ops_maunal.pdf (all Internet materials as visited Feb. 18, 2005, and available in Clerk of Court's case file). In 2003, the centers processed more than 40,000

newly admitted inmates, almost 72,000 inmates returned from parole, over 14,000 inmates admitted for other reasons, and some portion of the 254,000 inmates who were transferred from one prison to another. CDC, Movement of Prison Population 3 (2003).

At the reception center, prison officials have limited information about an inmate, "particularly if he has never been housed in any CDC facility." App. 303a. The inmate therefore is classified so that prison officials can place the inmate in appropriate permanent housing. During this process, the CDC evaluates the inmate's "physical, mental and emotional health." *Ibid.* The CDC also reviews the inmate's criminal ***526** history and record in jail to assess his security needs and classification level. *Id.,* at 304a. Finally, the CDC investigates whether the inmate has any enemies in prison. *Ibid.* This process determines the inmate's ultimate housing placement and has nothing to do with race.

While the process is underway, the CDC houses the inmate in a one-person cell, a two-person cell, or a dormitory. *Id.,* at 305a. The few single cells available at reception centers are reserved for inmates who present special security problems, including those convicted of especially heinous crimes or those in need of protective custody. See, *e.g.,* CDC Operations Manual § 61010.11.3. At the other end of the spectrum, lower risk inmates are assigned to dormitories. App. 189a–190a. Placement in either a single cell or a dormitory has nothing to do with race, except that prison officials attempt to maintain a racial balance within each dormitory. *Id.,* at 250a. Inmates placed in single cells or dormitories lead fully integrated lives: The CDC does not distinguish based on race at any of its facilities when it comes to jobs, meals, yard and recreation time, or vocational and educational assignments. *Ibid.*

Yet some prisoners, like Johnson, neither require confinement in a single cell nor may be safely housed in a dormitory. The CDC houses these prisoners in double cells during the 60–day period. In pairing cellmates, race is indisputably the predominant factor. *Id.,* at 305a, 309a. California's reason is simple: Its prisons are dominated by violent gangs. Brief for Respondents 1–5. And as the largest gangs' names indicate —the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, the Nazi Low Riders, and La Nuestra Familia —they are organized along racial lines. See Part II–B, *infra.*

According to the State, housing inmates in double cells without regard to race threatens not only prison discipline, but also the physical safety of inmates and staff. App. 305a–306a, 310a–311a. That is because double cells are especially ***527** dangerous. The risk of racial violence in public areas of prisons is high, and the tightly confined, private conditions of cells hazard even more violence. Prison staff cannot ****1159** see into the cells without going up to them, and inmates can cover the windows to prevent the staff from seeing inside the cells. *Id.,* at 306a. The risk of violence caused by this privacy is grave, for inmates are confined to their cells for much of the day. *Ibid.; id.,* at 187a–188a.

Nevertheless, while race is the predominant factor in pairing cellmates, it is hardly the only one. After dividing this subset of inmates based on race, the CDC further divides them based on geographic or national origin. As an example, Hispanics from northern and southern California are not housed together in reception centers because they often belong to rival gangs —La Nuestra Familia and the Mexican Mafia, respectively. *Id.,* at 185a. Likewise, Chinese and Japanese inmates are not housed together, nor are Cambodians, Filipinos, Laotians, or Vietnamese. *Id.,* at 189a. In addition to geographic and national origin, prison officials consider a host of other factors, including inmates' age, mental health, medical needs, criminal history, and gang affiliation. *Id.,* at 304a, 309a. For instance, when Johnson was admitted in 1987, he was a member of the Crips, a black street gang. *Id.,* at 93a. He was therefore ineligible to be housed with nonblack inmates. *Id.,* at 183a; Brief for Respondents 12, n. 9.

Moreover, while prison officials consider race in assigning inmates to double cells, the record shows that inmates are not necessarily housed with other inmates of the same race during that 60–day period. When a Hispanic inmate affiliated with the Crips asked to be housed at the reception center with a black inmate, for example, prison administrators granted his request. App. 183a–184a, 199a. Such requests are routinely granted after the 60–day period, when prison officials complete the classification process and transfer an ***528** inmate from the reception center to a permanent placement at that prison or another one.[1] *Id.,* at 311a–312a.

II

Traditionally, federal courts rarely involved themselves in the administration of state prisons, "adopt[ing] a broad hands-off attitude toward problems of prison administration."[2] *Procunier v. Martinez,* 416 U.S. 396, 404, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). For most of this Nation's ****1160** history, only law-abiding citizens could claim the cover of the

Constitution: Upon conviction and incarceration, defendants forfeited their constitutional rights and possessed instead only those rights that the State chose to extend them. See, *e.g., Shaw v. Murphy,* 532 U.S. 223, 228, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001); *Ruffin v. Commonwealth,* 62 Va. 790, 796 (1871). In recent decades, however, this Court has decided ***529** that incarceration does not divest prisoners of all constitutional protections. See, *e.g., Wolff v. McDonnell,* 418 U.S. 539, 555–556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (the right to due process); *Cruz v. Beto,* 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam) (the right to free exercise of religion).[3]

At the same time, this Court quickly recognized that the extension of the Constitution's demands behind prison walls had to accommodate the needs of prison administration. This Court reached that accommodation in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which "adopted a unitary, deferential standard for reviewing prisoners' constitutional claims," *Shaw, supra,* at 229, 113 S.Ct. 2816. That standard should govern Johnson's claims, as it has governed a host of other claims challenging conditions of confinement, even when restricting the rights at issue would otherwise have occasioned strict scrutiny. Under the *Turner* standard, the CDC's policy passes constitutional muster because it is reasonably related to legitimate penological interests.

A

Well before *Turner,* this Court recognized that experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country. See, *e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (courts must give "appropriate deference to the decisions of prison administrators"); *Procunier, supra,* at 405, 94 S.Ct. 1800 ("[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration ***530** and reform"). *Turner* made clear that a deferential standard of review would apply across the board to inmates' constitutional challenges to prison policies.

At issue in *Turner* was the constitutionality of a pair of Missouri prison regulations limiting inmate-to-inmate correspondence and inmate marriages. The Court's analysis proceeded in two steps. First, the Court recognized that prisoners are not entirely without constitutional rights. As proof, it listed certain constitutional rights retained by prisoners, including the right to be "protected against invidious racial discrimination ..., *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968)." *Turner,* 482 U.S., at 84, 107 S.Ct. 2254. Second, the Court concluded that for prison administrators rather than courts to " 'make the difficult judgments concerning institutional operations,' " *id.,* at 89, 107 S.Ct. 2254 (quoting *Jones, supra,* at 128, 97 S.Ct. 2532), courts should ****1161** uphold prison regulations that impinge on those constitutional rights if they reasonably relate to legitimate penological interests, 482 U.S., at 89, 107 S.Ct. 2254. Nowhere did the Court suggest that *Lee's* right to be free from racial discrimination was immune from *Turner's* deferential standard of review. To the contrary, "[w]e made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Harper,* 494 U.S., at 224, 110 S.Ct. 1028 (emphasis added).

Consistent with that understanding, this Court has applied *Turner's* standard to a host of constitutional claims by prisoners, regardless of the standard of review that would apply outside prison walls.[4] And this Court has adhered to ***531** *Turner* despite being urged to adopt different standards of review based on the constitutional provision at issue. See *Harper, supra,* at 224, 110 S.Ct. 1028 (*Turner's* standard of review "appl [ies] in all cases in which a prisoner asserts that a prison regulation violates the Constitution, *not just those in which the prisoner invokes the First Amendment*" (emphasis added)); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 353, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) ("We take this opportunity to reaffirm our refusal, *even where claims are made under the First Amendment,* to substitute our judgment on ... difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison" (internal quotation marks and citation omitted; emphasis added)). Our steadfast adherence makes sense: If *Turner* is our accommodation of the Constitution's demands to those of prison administration, see *supra,* at 1160–1161, we should apply it uniformly to prisoners' challenges to their conditions of confinement.

After all, Johnson's claims, even more than other claims to which we have applied *Turner's* test, implicate *Turner's* rationale. In fact, in a passage that bears repeating, the *Turner* Court explained precisely why deference to the judgments of California's prison officials is necessary:

> "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative ***532** problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration." ****1162** 482 U.S., at 89, 107 S.Ct. 2254 (internal quotation marks and alteration omitted).

The majority's failure to heed that advice is inexplicable, especially since *Turner* itself recognized the "growing problem with prison gangs." *Id.,* at 91, 107 S.Ct. 2254. In fact, there is no more "intractable problem" inside America's prisons than racial violence, which is driven by race-based prison gangs. See, *e.g., Dawson v. Delaware,* 503 U.S. 159, 172–173, and n. 1, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (THOMAS, J., dissenting); *Stefanow v. McFadden,* 103 F.3d 1466, 1472 (C.A.9 1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry").

B

The majority decides this case without addressing the problems that racial violence poses for wardens, guards, and inmates throughout the federal and state prison systems. But that is the core of California's justification for its policy: It maintains that, if it does not racially separate new cellmates thrown together in close confines during their initial admission or transfer, violence will erupt.

The dangers California seeks to prevent are real. See Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 12. Controlling prison gangs is the central challenge facing correctional officers and administrators. Carlson, Prison Interventions: Evolving Strategies to Control Security Threat Groups, 5 Corrections Mgmt. Q. 10 (Winter 2001) (hereinafter Carlson). The worst gangs are highly regimented and sophisticated organizations that commit crimes ranging from drug trafficking to theft and murder. *Id.,* at 12; Cal. Dept. of Justice, Division of Law Enforcement, Organized Crime in California Annual Report to the California Legislature 2003, p. 15, available ***533** at http://caag.state.ca.us/publications/org_crime.pdf. In fact, street gangs are often just an extension of prison gangs, their " 'foot soldiers' " on the outside. *Ibid.;* Willens, Structure, Content and the Exigencies of War: American Prison Law After Twenty–Five Years 1962–1987, 37 Am. U. L.Rev. 41, 55–56 (1987). And with gang membership on the rise, the percentage of prisoners affiliated with prison gangs more than doubled in the 1990's.[5]

The problem of prison gangs is not unique to California,[6] but California has a history like no other. There are at least five major gangs in this country—the Aryan Brotherhood, the Black Guerrilla Family, the Mexican Mafia, La Nuestra Familia, and the Texas Syndicate—all of which originated in California's prisons.[7] ****1163** Unsurprisingly, then, California has the largest number of gang-related inmates of any correctional system in the country, including the Federal Government. Carlson 16.

As their very names suggest, prison gangs like the Aryan Brotherhood and the Black Guerrilla Family organize themselves along racial lines, and these gangs perpetuate hate and violence. Irwin 182, 184. Interracial murders and assaults ***534** among inmates perpetrated by these gangs are common.[8] And, again, that brutality is particularly severe in California's prisons. See, *e.g., Walker v. Gomez,* 370 F.3d 969, 971 (C.A.9 2004) (describing "history of significant racial tension and violence" at Calipatria State Prison); *id.,* at 979–980 (Rymer, J., dissenting) (same); App. 297a–299a (describing 2–year span at Pelican Bay Prison, during which there were no fewer than nine major riots that left at least one inmate dead and many more wounded).

C

It is against this backdrop of pervasive racial violence that California racially segregates inmates in the reception centers' double cells, for brief periods of up to 60 days, until such time as the State can assign permanent housing. Viewed in that context and in light of the four factors enunciated in *Turner,* California's policy is constitutional: The CDC's policy is reasonably related to a legitimate penological interest; alternative means of exercising the restricted right remain open to inmates; racially integrating double cells might

negatively impact prison inmates, staff, and administrators; and there are no obvious, easy alternatives to the CDC's policy.

1

First, the policy is reasonably related to a legitimate penological interest. *Turner, supra,* at 89, 107 S.Ct. 2254. The protection of inmates and staff is undeniably a legitimate penological interest. See *Bell v. Wolfish,* 441 U.S. 520, 546–547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). ***535** The evidence shows, and Johnson has never contested, that the objective of California's policy is reducing violence among the inmates and against the staff. No cells are designated for, nor are special privileges afforded to, any racial group. App. 188a, 305a. Because prison administrators use race as a factor in making initial housing assignments "solely on the basis of [its] potential implications for prison security," the CDC's cell assignment practice is neutral. *Thornburgh v. Abbott,* 490 U.S. 401, 415, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *Turner,* 482 U.S., at 90, 107 S.Ct. 2254.

California's policy bears a valid, rational connection to this interest. The racial component to prison violence is impossible for prison administrators to ignore. Johnson himself testified that he is afraid of violence—based solely on the color of his skin.[9] In combating that violence, an inmate's ****1164** arrival or transfer into a new prison setting is a critical time for inmate and staff alike. The policy protects an inmate from other prisoners, and they from him, while prison officials gather more information, including his gang affiliation, about his compatibility with other inmates. App. 249a. This connection between racial violence and the policy makes it far from "arbitrary or irrational." *Turner, supra,* at 89–90, 107 S.Ct. 2254.

Indeed, Johnson concedes that it would be perfectly constitutional for California to take account of race "as part of an overall analysis of proclivity to violence based upon a series of facts existing in that prison." Tr. of Oral Arg. 15. But that is precisely what California does. It takes into account a host of factors in addition to race: geographic or national ***536** origin, age, physical size, mental health, medical needs, criminal history, and, of course, gang affiliation. *Supra,* at 1159. California does not simply assign inmates to double cells in the reception centers based on race—it also separates *intra*racially (for example, northern from southern Hispanics or violent from nonviolent offenders).

2

Second, alternative means of exercising the restricted right remain open to inmates like Johnson. *Turner, supra,* at 90, 107 S.Ct. 2254. The CDC submits, and Johnson does not contest, that all other facets of prison life are fully integrated: work, vocational, and educational assignments; dining halls; and exercise yards and recreational facilities. App. 250a. And after a brief detention period at the reception center, inmates may select their own cellmates regardless of race in the absence of overriding security concerns. *Id.,* at 311a–312a. Simply put, Johnson has spent, and will continue to spend, the vast bulk of his sentence free from any limitation on the race of his cellmate.

3

Third, Johnson fails to establish that the accommodation he seeks—*i.e.,* assigning inmates to double cells without regard to race—would not significantly impact prison personnel, other inmates, and the allocation of prison resources. *Harper,* 494 U.S., at 226–227, 110 S.Ct. 1028; *Turner, supra,* at 90, 107 S.Ct. 2254. Prison staff cannot see into the double cells without going up to them, and inmates can cover the windows so that staff cannot see inside the cells at all. App. 306a. Because of the limited number of staff to oversee the many cells, it "would be very difficult to assist inmates if the staff were needed in several places at one time." *Ibid.* Coordinated gang attacks against nongang cellmates could leave prison officials unable to respond effectively. In any event, diverting prison resources to monitor cells disrupts services elsewhere.

***537** Then, too, fights in the cells are likely to spill over to the exercise yards and common areas. *Ibid.;* see also *id.,* at 187a. As *Turner* made clear: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." 482 U.S., at 90, 107 S.Ct. 2254; see also *White v. Morris,* 832 F.Supp. 1129, 1130 (S.D.Ohio 1993) (racially integrated double-celling contributed to a race riot in which 10 people were murdered). California prison officials are united in the view that racially integrating double cells in the ****1165** reception centers would lead to serious violence.[10] This is precisely the sort of testimony that the Court found persuasive in *Turner* itself. 482 U.S., at 92, 107 S.Ct. 2254.

4

Finally, Johnson has not shown that there are "obvious, easy alternatives" to the CDC's policy. *Id.,* at 90, 107 S.Ct. 2254. Johnson contends that, for newly admitted inmates, prison officials need only look to the information available in the presentence report that must accompany a convict to prison. See Cal.Penal Code Ann. § 1203(c) (West 2004); Cal. Rules of Ct., Crim., Rule 4.411(d) (West Supp.2004). But prison officials already do this to the extent that they can. Indeed, gang affiliation, not race, is the first factor in determining initial housing assignments. App. 315a. Race becomes the predominant factor only because gang affiliation is often not known, especially with regard to newly admitted inmates. As the Court of Appeals pointed out: "There is little chance ***538** that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate." 321 F.3d 791, 806 (C.A.9 2003); see also App. 185a, 189a. Even if the CDC had the manpower and resources to prescreen the more than 40,000 new inmates it receives yearly, leafing through presentence reports would not tell prison officials what they need to know. See *ante,* at 1155–1157 (STEVENS, J., dissenting).

Johnson presents a closer case with regard to the segregation of prisoners whom the CDC transfers between facilities. As I understand it, California has less need to segregate prisoners about whom it already knows a great deal (since they have undergone the initial classification process and been housed for some period of time). However, this does not inevitably mean that racially integrating transferred inmates, while obvious and easy, is a true alternative. For instance, an inmate may have affiliated with a gang since the CDC's last official assessment, or his past lack of racial violence may have been due to the absence of close confinement with members of other races. The CDC's policy does not appear to arise from laziness or neglect; California is a leader in institutional intelligence gathering. See Carlson 16 ("The CDC devotes 75 intelligence staff to gathering and verifying inmate-related information," both in prisons and on the streets). In short, applying the policy to transfers is not "arbitrary or irrational," requiring that we set aside the considered contrary judgment of prison administrators. *Turner, supra,* at 89–90, 107 S.Ct. 2254.

III

The majority claims that strict scrutiny is the applicable standard of review based on this Court's precedents and its general skepticism of racial classifications. It is wrong on both scores.

A

Only once before, in *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) *(per curiam),* has this Court considered ****1166** the constitutionality ***539** of racial classifications in prisons. The majority claims that *Lee* applied "a heightened standard of review." *Ante,* at 1147. But *Lee* did not address the applicable standard of review. And even if it bore on the standard of review, *Lee* would support the State here.

In *Lee,* a three-judge District Court ordered Alabama to desegregate its prisons under *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *Washington v. Lee,* 263 F.Supp. 327, 331–332 (M.D.Ala.1966). In so doing, the District Court rejected any notion that "consideration[s] of prison security or discipline" justified the "complete and permanent segregation of the races in all the Alabama penal facilities." *Id.,* at 331. However, the District Court noted "that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period." *Ibid.* (footnote omitted). It provided only one example—"the 'tank' used in ... large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober," *id.,* at 331, n. 6—and the court left unmentioned why it would have been necessary to separate drunk whites from blacks on a Birmingham Saturday night.

This Court, in a *per curiam,* one-paragraph opinion, affirmed the District Court's order. It found "unexceptionable" not only the District Court's general rule that wholesale segregation of penal facilities was unconstitutional, but also the District Court's "allowance for the necessities of prison security and discipline." *Lee,* 390 U.S., at 334, 88 S.Ct. 994. Indeed, Justices Black, Harlan, and Stewart concurred

> "to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and

in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.*

***540** Those Justices were "unwilling to assume" that such an "explicit pronouncement [would] evinc[e] any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

Lee said nothing about the applicable standard of review, for there was no need. Surely Alabama's wholesale segregation of its prisons was unconstitutional even under the more deferential standard of review that applies within prisons. This Court's brief, *per curiam* opinion in *Lee* simply cannot bear the weight or interpretation the majority places on it. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 24, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) (noting "our customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"); *Edelman v. Jordan,* 415 U.S. 651, 670–671, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Yet even if *Lee* had announced a heightened standard of review for prison policies that pertain to race, *Lee* also carved out an exception to the standard that California's policy would certainly satisfy. As the *Lee* concurrence explained without objection, the Court's exception for "the necessities of prison security and discipline" meant that "prison authorities have the right, acting in *good faith* and in *particularized circumstances,* to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." 390 U.S., at 334, 88 S.Ct. 994 (opinion of Black, Harlan, and Stewart, JJ., concurring) (emphasis added).

California's policy—which is a far cry from the wholesale segregation at issue in ****1167** *Lee*—would fall squarely within *Lee's* exception. Johnson has never argued that California's policy is motivated by anything other than a desire to protect inmates and staff. And the "particularized" nature of the policy is evident: It applies only to new inmates and transfers, only in a handful of prisons, only to double cells, and only then for a period of no more than two months. In the name of following a test that *Lee* did not create, the majority ***541** opts for a more demanding standard of review than *Lee's* language even arguably supports.

The majority heavily relies on this Court's statement that " 'all racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.' " *Ante,* at 1146 (emphasis deleted) (quoting *Adarand Constructors, Inc.,* 515 U.S., at 227, 115 S.Ct. 2097). *Adarand* has nothing to do with this case. *Adarand's* statement that "all racial classifications" are subject to strict scrutiny addressed the contention that classifications favoring rather than disfavoring blacks are exempt. *Id.,* at 226–227, 115 S.Ct. 2097; accord, *Grutter v. Bollinger,* 539 U.S. 306, 353, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). None of these statements overruled, *sub silentio, Turner* and its progeny, especially since the Court has repeatedly held that constitutional demands are diminished in the unique context of prisons. See, *e.g., Harper,* 494 U.S., at 224, 110 S.Ct. 1028; *Abbott,* 490 U.S., at 407, 109 S.Ct. 1874; *Turner,* 482 U.S., at 85, 107 S.Ct. 2254; see also *Webster v. Fall,* 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

B

The majority offers various other reasons for applying strict scrutiny. None is persuasive. The majority's main reason is that "*Turner's* reasonable-relationship test [applies] *only* to rights that are 'inconsistent with proper incarceration.' " *Ante,* at 1149 (quoting *Overton v. Bazzetta,* 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003)). According to the majority, the question is thus whether a right "need necessarily be compromised for the sake of proper prison administration." *Ante,* at 1149. This inconsistency-with-proper-prison-administration test begs the question at the heart of this case. For a court to know whether any particular right is inconsistent with proper prison administration, it must have some implicit notion of what a proper prison ought to look like and how it ***542** ought to be administered. *Overton, supra,* at 139, 123 S.Ct. 2162 (THOMAS, J., concurring in judgment). But the very issue in this case is whether such second-guessing is permissible.

The majority's test eviscerates *Turner.* Inquiring whether a given right is consistent with "proper prison administration" calls for precisely the sort of judgments that *Turner* said courts were ill equipped to make. In none of the cases in which the Court deferred to the judgments of prison officials under *Turner* did it examine whether "proper" prison security and discipline permitted greater speech or associational rights *(Abbott, supra; Shaw,* 532 U.S. 223, 121 S.Ct. 1475, 149

L.Ed.2d 420; and *Overton, supra)*; expanded access to the courts (*Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)); broader freedom from bodily restraint *(Harper, supra);* or additional free exercise rights *(O'Lone,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282). The Court has steadfastly refused to undertake the threshold standard-of-review inquiry that **1168 *Turner* settled, and that the majority today resurrects. And with good reason: As *Turner* pointed out, these judgments are better left in the first instance to the officials who run our Nation's prisons, not to the judges who run its courts.

In place of the Court's usual deference, the majority gives conclusive force to its own guesswork about "proper" prison administration. It hypothesizes that California's policy might incite, rather than diminish, racial hostility.[11] *543 *Ante,* at 1146–1148. The majority's speculations are implausible. New arrivals have a strong interest in promptly convincing other inmates of their willingness to use violent force. See Brief for National Association of Black Law Enforcement Officers, Inc., as *Amicus Curiae* 13–14 (citing commentary and congressional findings); cf. *United States v. Santiago,* 46 F.3d 885, 888 (C.A.9 1995) (describing one Hispanic inmate's murder of another in order to join the Mexican Mafia); *United States v. Silverstein,* 732 F.2d 1338, 1341 (C.A.7 1984) (prospective members of the Aryan Brotherhood must "make bones," or commit a murder, to be eligible for membership). In any event, the majority's guesswork falls far short of the compelling showing needed to overcome the deference we owe to prison administrators.

The majority contends that the Court "[has] put the burden on state actors to demonstrate that their race-based policies are justified," *ante,* at 1147, n. 1, and "[has] refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion," *ante,* at 1150. Yet two Terms ago, in upholding the University of Michigan Law School's affirmative-action program, this Court deferred to the judgment by the law school's faculty and administrators on their need for diversity in the student body. See *Grutter, supra,* at 328, 123 S.Ct. 2325 ("The Law School's educational judgment that ... diversity is essential to its educational mission is one to which we defer"). Deference would seem all the more warranted in the prison context, for whatever the Court knows of administering educational institutions, it knows much less about administering penal ones. The potential consequences of second-guessing the judgments of prison administrators are also much more severe. See *White v. Morris,* 832 F.Supp. 1129, 1130 (S.D.Ohio 1993) (racially integrated double-celling that resulted *544 from federal consent decree was a factor in the worst prison riot in Ohio history). More importantly, as I have explained, the Court has recognized that the typically exacting review it applies to restrictions on fundamental rights must be relaxed in the unique context of prisons. See, *e.g., Harper,* 494 U.S., at 224, 110 S.Ct. 1028; *Abbott,* 490 U.S., at 407, 109 S.Ct. 1874; **1169 *Turner,* 482 U.S., at 85, 107 S.Ct. 2254. The majority cannot fall back on the Constitution's usual demands, because those demands have always been lessened inside the prison walls. See *supra,* at 1160.

The majority also mentions that California's policy may be the only one of its kind, as virtually all other States and the Federal Government manage their prison systems without racially segregating inmates. *Ante,* at 1148. This is both irrelevant and doubtful. It is irrelevant because the number of States that have followed California's lead matters not to the applicable standard of review (the only issue the Court today decides), but to whether California satisfies whatever standard applies, a question the majority leaves to be addressed on remand. In other words, the uniqueness of California's policy might show whether the policy is reasonable or narrowly tailored—but deciding whether to apply *Turner* or strict scrutiny in the first instance must depend on something else, like the majority's inconsistency-with-proper-prison-administration test. The commonness of California's housing policy is further irrelevant because strict scrutiny now applies to all claims of racial discrimination in prisons, regardless of whether the policies being challenged are unusual.

The majority's assertion is doubtful, because at least two other States apply similar policies to newly admitted inmates. Both Oklahoma and Texas, like California, assign newly admitted inmates to racially segregated cells in their prison reception centers.[12] The similarity is not surprising: *545 States like California and Texas have historically had the most severe problems with prison gangs. However, even States with less severe problems maintain that policies like California's are necessary to deal with race-related prison violence. See Brief for States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as *Amici Curiae* 16. Relatedly, 10.3% of all wardens at maximum security facilities in the United States report that their inmates are assigned to racially segregated cells—apparently on a *permanent* basis. Henderson, Cullen, Carroll, & Feinberg, Race, Rights, and Order in Prison: A National

Survey of Wardens on the Racial Integration of Prison Cells, 80 Prison J. 295, 304 (Sept.2000). In the same survey, 4.3% of the wardens report that their States have an official policy against racially integrating male inmates in cells. *Id.,* at 302. Presumably, for the remainder of prisons in which inmates are assigned to racially segregated cells, that policy is the result of discretionary decisions by wardens rather than of official state directives. *Ibid.* In any event, the ongoing debate about the best way to reduce racial violence in prisons should not be resolved by judicial decree: It is the job "of prison administrators ... and not the courts, to make the difficult judgments concerning institutional operations." *Jones,* 433 U.S., at 128, 97 S.Ct. 2532.

****1170** The majority also observes that we have already carved out an exception to *Turner* for Eighth Amendment claims of cruel and unusual punishment in prison. See ***546** *Hope v. Pelzer,* 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). In that context, we have held that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Setting aside whether claims challenging inmates' conditions of confinement should be cognizable under the Eighth Amendment at all, see *Hudson v. McMillian,* 503 U.S. 1, 18–19, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (THOMAS, J., dissenting), the "deliberate indifference" standard does not bolster the majority's argument. If anything, that standard is *more* deferential to the judgments of prison administrators than *Turner's* reasonable-relationship test: It subjects prison officials to liability only when they are subjectively aware of the risk to the inmate, and they fail to take reasonable measures to abate the risk. *Farmer, supra,* at 847, 114 S.Ct. 1970. It certainly does not demonstrate the wisdom of an exception that imposes a heightened standard of review on the actions of prison officials.

Moreover, the majority's decision subjects prison officials to competing and perhaps conflicting demands. In this case, California prison officials have uniformly averred that random double-celling poses a substantial risk of serious harm to the celled inmates. App. 245a–246a, 251a. If California assigned inmates to double cells without regard to race, knowing full well that violence might result, that would seem the very definition of deliberate indifference. See *Robinson v. Prunty,* 249 F.3d 862, 864–865 (C.A.9 2001) (prisoner alleged an Eighth Amendment violation because administrators had *failed* to consider race when releasing inmates into the yards); *Jensen v. Clarke,* 94 F.3d 1191, 1201, 1204 (C.A.8 1996) (court held that random double-celling by prison officials constituted deliberate indifference, and affirmed an injunction and attorney's fees awarded against the officials). Nor would a victimized inmate need to prove that prison officials had anticipated any particular attack; it would be sufficient that prison officials had ignored a dangerous condition ***547** that was chronic and ongoing—like interracial housing in closely confined quarters within prisons dominated by racial gangs. *Farmer, supra,* at 843–844, 114 S.Ct. 1970. Under *Farmer,* prison officials could have been ordered to take account of the very thing to which they may now have to turn a blind eye: inmates' race.

Finally, the majority presents a parade of horribles designed to show that applying the *Turner* standard would grant prison officials unbounded discretion to segregate inmates throughout prisons. See *ante,* at 1151. But we have never treated *Turner* as a blank check to prison officials. Quite to the contrary, this Court has long had "confidence that ... a reasonableness standard is not toothless." *Abbott,* 490 U.S., at 414, 109 S.Ct. 1874 (internal quotation marks omitted). California prison officials segregate only double cells, because only those cells are particularly difficult to monitor—unlike "dining halls, yards, and general housing areas." *Ante,* at 1151. Were California's policy not so narrow, the State might well have race-neutral means at its disposal capable of accommodating prisoners' rights without sacrificing their safety. See *Turner,* 482 U.S., at 90–91, 107 S.Ct. 2254. The majority does not say why *Turner's* standard ably polices all other constitutional infirmities, just not racial discrimination. In any event, it is not the refusal to apply —for the first time ever—a strict standard of review in the prison context that is "fundamentally at odds" ****1171** with our constitutional jurisprudence. *Ante,* at 1146–1147, n. 1. Instead, it is the majority's refusal—for the first time ever—to defer to the expert judgment of prison officials.

IV

Even under strict scrutiny analysis, "it is possible, even likely, that prison officials could show that the current policy meets the test." 336 F.3d 1117, 1121 (C.A.9 2003) (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc). As Johnson concedes, all States have a compelling interest in ***548** maintaining order and internal security within their prisons. See Reply Brief for Petitioner 18; see also *Procunier,* 416 U.S., at 404, 94 S.Ct. 1800. Thus the question on remand will be whether the CDC's

policy is narrowly tailored to serve California's compelling interest.[13] The other dissent notes the absence of evidence on that question, see *ante,* at 1154–1155 (opinion of STEVENS, J.), but that is hardly California's fault.

From the outset, Johnson himself has alleged, in terms taken from *Turner*, that the CDC's policy is "not related to a legitimate penological interest." *Johnson v. California,* 207 F.3d 650, 655 (C.A.9 2000) *(per curiam)* (discussing Johnson's Third Amended Complaint). In reinstating Johnson's equal protection claim following the District Court's dismissal, the Court of Appeals repeated Johnson's allegation, without indicating that strict scrutiny should apply on remand before the District Court.[14] *Ibid.* And on remand, again Johnson alleged only that the CDC's policy "is not reasonably related to the legitimate penological interests of the CDC." App. 51a (Fourth Amended Complaint ¶ 23).

After the District Court granted qualified immunity to some of the defendants, Johnson once again appealed. In his brief before the Court of Appeals, Johnson assumed that ***549** both *Lee* and *Turner* applied, without arguing that there was any tension between them; indeed, nowhere in his brief did Johnson even mention the words "strict scrutiny." Brief for Appellant in No. 01–56436(CA9), pp. 20, 26, 2001 WL 34091249. Perhaps as a result, the Court of Appeals did not discuss strict scrutiny in its second decision, the one currently before this Court. The Court of Appeals did find tension between *Lee* and *Turner;* however, it resolved this tension in *Turner's* favor. 321 F.3d, at 799. Yet the Court of Appeals accepted *Lee's* test at face value: Prison officials may only make racial classifications " 'in good faith and in particularized circumstances.' " 321 F.3d, at 797. The Court of Appeals, like Johnson, ****1172** did *not* equate *Lee's* test with strict scrutiny, and in fact it mentioned strict scrutiny only when it quoted the portion of *Turner* that *rejects* strict scrutiny as the proper standard of review in the prison context. 321 F.3d, at 798. Even Johnson did not make the leap equating *Lee* with strict scrutiny when he requested that the Court of Appeals rehear his case. Appellant's Petition for Panel Rehearing with Suggestion for Rehearing En Banc in No. 01–56436(CA9), pp. 4–5. That leap was first made by the judges who dissented from the Court of Appeals' denial of rehearing en banc. 336 F.3d, at 1118 (Ferguson, J., joined by Pregerson, Nelson, and Reinhardt, JJ., dissenting from denial of rehearing en banc).

Thus, California is now, after the close of discovery, subject to a more stringent standard than it had any reason to anticipate from Johnson's pleadings, the Court of Appeals' initial decision, or even the Court of Appeals' decision below. In such circumstances, California should be allowed to present evidence of narrow tailoring, evidence it was never obligated to present in either appearance before the District Court. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1031–1032, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (remanding for consideration under the correct legal standard); *id.,* at 1033, 112 S.Ct. 2886 (KENNEDY, J., concurring in judgment) ("Although we establish a framework ***550** for remand, ... we do not decide the ultimate [constitutional] question [because] [t]he facts necessary to the determination have not been developed in the record").

* * *

Petitioner Garrison Johnson challenges not permanent, but temporary, segregation of only a portion of California's prisons. Of the 17 years Johnson has been incarcerated, California has assigned him a cellmate of the same race for no more than a year (and probably more like four months); Johnson has had black cellmates during the other 16 years, but by his own choice. Nothing in the record demonstrates that if Johnson (or any other prisoner) requested to be housed with a person of a different race, it would be denied (though Johnson's gang affiliation with the Crips might stand in his way). Moreover, Johnson concedes that California's prisons are racially violent places, and that he lives in fear of being attacked because of his race. Perhaps on remand the CDC's policy will survive strict scrutiny, but in the event that it does not, Johnson may well have won a Pyrrhic victory.

All Citations

543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949, 05 Cal. Daily Op. Serv. 1568, 2005 Daily Journal D.A.R. 2118

Footnotes

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

1 Justice THOMAS takes a hands-off approach to racial classifications in prisons, suggesting that a "compelling showing [is] needed to overcome the deference we owe to prison administrators." *Post,* at 1168 (dissenting opinion). But such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.

2 Though, as Justice THOMAS points out, see *post,* at 1169, and n. 12, inmates in reception centers in Oklahoma and Texas " 'are not generally assigned randomly to racially integrated cells,' " it is also the case that "these inmates are not precluded from integrated cell assignments," Oklahoma Dept. of Corrections, Policies and Procedures, Operations Memorandum No. OP–030102, Inmate Housing (Sept. 16, 2004), available at http://www.doc.state.ok.us/docs/policies.htm (as visited Jan. 21, 2005, and available in Clerk of Court's case file); Texas Dept. of Criminal Justice, Security Memorandum No. SM–01.28, Assignment to General Population Two–Person Cells (June 15, 2002). See also Brief for Former State Corrections Officials as *Amici Curiae* 20, n. 10 ("To the extent that race is considered in the assignment calculus in Oklahoma, it appears to be one factor among many, and as a result, individualized consideration is given to all inmates"). We therefore have no way of knowing whether, in practice, inmates in Oklahoma and Texas, like those in California, have close to no chance, App. to Pet. for Cert. 3a, of being celled with a person of a different race. See also Brief for Former State Corrections Officials as *Amici Curiae* 19–20 ("[W]e are aware of no state other than California that assumes that every incoming prisoner is incapable of getting along with a cell mate of a different race. And we are aware of no state other than California that has acted on such an assumption by adopting an inflexible and absolute policy of racial segregation of double cells in reception centers").

3 Justice THOMAS characterizes the CDC's policy as a "limited" one, see *post,* at 1157, but the CDC's policy is in fact sweeping in its application. It applies to *all* prisoners housed in double cells in reception centers, whether newly admitted or transferred from one facility to another. Moreover, despite Justice THOMAS' suggestion that the CDC considers other nonracial factors in determining housing placements, the CDC itself has admitted that, in practice, there is a " '[p]retty close' " to zero percent chance that an inmate will be housed with a person of a different race. App. to Pet. for Cert. 3a. See also generally *post,* at 1153–1154, and n. 1 (STEVENS, J., dissenting). Thus, despite an inmate's "age, physical size, mental health, medical needs, [and] criminal history," *post,* at 1164 (THOMAS, J., dissenting), the fact that he is black categorically precludes him from being celled with a white inmate. As we explain, see *infra,* at 1152 and we do not decide whether the threat of violence in California prisons is sufficient to justify such a broad policy.

1 The CDC operates 32 prisons, 7 of which house reception centers. All new inmates and all inmates transferring between prisons are funneled through one of these reception centers before they are permanently placed. At the centers, inmates are housed either in dormitories, double cells, or single cells (of which there are few). Under the CDC's segregation policy, race is a determinative factor in placing inmates in double cells, regardless of the other factors considered in such decisions. While a corrections official with 24 years of experience testified that an exception to this policy was once granted to a Hispanic inmate who had been "raised with Crips," App. 184a, the CDC's suggestion that its policy is therefore flexible, see Brief for Respondents 9, strains credulity. There is no evidence that the CDC routinely allows inmates to opt out of segregation, much less evidence that the CDC informs inmates of their supposed right to do so.

2 In explaining why it cannot prescreen new inmates, the CDC's brief all but concedes that segregating transferred inmates is unnecessary. See Brief for Respondents 42 ("If the officials had all of the necessary information to assess the inmates' violence potential when the inmates arrived, perhaps a different practice could be used. But unlike the federal system, where the inmates generally are in federal custody from the moment they are arrested, state inmates are in county custody until they are convicted and later transferred to the custody of the CDC").

3 Because the *Turner* factors boil down to a tailoring test, and I conclude that the CDC's policy is, at best, an " 'exaggerated response' " to its asserted security concerns, see *Turner v. Safley,* 482 U.S. 78, 90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), I find it unnecessary to address specifically the other factors, such as whether new and transferred inmates have "alternative means" of exercising their right to equal protection during their period of housing segregation, *id.,* at 89, 107 S.Ct. 2254. Indeed, this case demonstrates once again that "[h]ow a court describes its standard of review when a prison

regulation infringes fundamental constitutional rights often has far less consequence[s] for the inmates than the actual showing that the court demands of the State in order to uphold the regulation." *Id.,* at 100, 107 S.Ct. 2254 (STEVENS, J., concurring in part and dissenting in part).

4 The CDC's policy may be counterproductive in other ways. For example, an official policy of segregation may initiate new arrivals into a corrosive culture of prison racial segregation, lending credence to the view that members of other races are to be feared and that racial alliances are necessary. While integrated cells encourage inmates to gain valuable cross-racial experiences, segregated cells may well facilitate the formation of race-based gangs. See Brief for Former State Corrections Officials as *Amici Curiae* 19 (citing evidence and experience suggesting that the racial integration of cells on balance decreases interracial violence).

1 Johnson has never requested—not during his initial admittance, nor his subsequent transfers, nor his present incarceration—that he be housed with a person of a different race. App. 106a, 112a–113a, 175a. According to Johnson, he considered the policy a barrier to any such request; however, Johnson has also testified that he never filed a grievance with prison officials about the segregation policy. *Id.,* at 112a–113a, 124a–125a. Neither the parties nor the majority discusses whether Johnson has exhausted his action under Rev. Stat. § 1979, 42 U.S.C. § 1983, as required by the Prison Litigation Reform Act of 1995, 110 Stat. 1321–66, as amended, 42 U.S.C. § 1997e(a). See *Booth v. Churner,* 532 U.S. 731, 734, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). The majority thus assumes that statutorily mandated exhaustion is not jurisdictional, and that California has waived the issue by failing to raise it. See, *e.g., Richardson v. Goord,* 347 F.3d 431, 433–434 (C.A.2 2003); *Perez v. Wisconsin Dept. of Corrections,* 182 F.3d 532, 536 (C.A.7 1999).

2 The majority refers to my approach as a "hands-off" one because I would accord deference to the judgments of the State's prison officials. See *ante,* at 1146–1147, n. 1. Its label is historically inaccurate. The "hands-off" approach was that taken prior to the 1960's by federal courts, which generally declined to consider the merits of prisoners' claims. See, *e.g.,* J. Fliter, Prisoners' Rights: The Supreme Court and Evolving Standards of Decency 64–65 (2001); M. Feeley & E. Rubin, Judicial Policy Making and the Modern State 30–34 (2000); S. Krantz & L. Branham, Cases and Materials on the Law of Sentencing, Corrections and Prisoners' Rights 264–265 (4th ed.1991).

3 A prisoner may not entirely surrender his constitutional rights at the prison gates, *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), but certainly he leaves some of his liberties behind him. When a prisoner makes a constitutional claim, the initial question should be whether the prisoner possesses the right at issue at all, or whether instead the prisoner has been divested of the right as a condition of his conviction and confinement. See *Overton v. Bazzetta,* 539 U.S. 126, 140, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003) (THOMAS, J., concurring in judgment); *Coffin v. Reichard,* 143 F.2d 443, 445 (C.A.6 1944).

4 See, *e.g., Overton, supra,* at 132, 123 S.Ct. 2162 (the right to association under the First and Fourteenth Amendments); *Shaw v. Murphy,* 532 U.S. 223, 228–229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) (the right to communicate with fellow inmates under the First Amendment); *Lewis v. Casey,* 518 U.S. 343, 361, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (the right of access to the courts under the Due Process and Equal Protection Clauses); *Washington v. Harper,* 494 U.S. 210, 223–225, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (the right to refuse forced medication under the Due Process Clause); *Thornburgh v. Abbott,* 490 U.S. 401, 413–414, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (the right to receive correspondence under the First Amendment); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349–350, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (the right to free exercise of religion under the First Amendment).

5 See National Gang Crime Research Center, A National Assessment of Gangs and Security Threat Groups (STGs) in Adult Correctional Institutions: Results of the 1999 Adult Corrections Survey, p. 5, http:// www.ngcrc.com/ngcrc/page7.htm.

6 See, *e.g., Fraise v. Terhune,* 283 F.3d 506, 512–513 (C.A.3 2002) (describing violence caused by a single black prison gang, the Five Percent Nation, in various New Jersey correctional facilities); *Conroy v. Dingle,* No. Civ. 01–1626 (RHK/RLE), 2002 WL 31357055, *1–*2 (D.Minn., Oct. 11, 2002) (describing rival racial gangs at Minnesota's Moose Lake facility, a medium security prison).

7 See D. Orlando–Morningstar, Prison Gangs, Special Needs Offenders Bulletin, Federal Judicial Center 4 (Oct.1997); see also J. Irwin, Prisons in Turmoil 189 (1980) (hereinafter Irwin) (describing the establishment and rise of gangs inside

the California prison system, first the Mexican Mafia, followed by La Nuestra Familia, the Aryan Brotherhood, and the Black Guerrilla Family); *United States v. Shryock,* 342 F.3d 948, 961 (C.A.9 2003) (detailing rise of Mexican Mafia inside the California prison system).

8 See, *e.g., id.,* at 962–969 (describing a host of murders and attempted murders by a handful of Mexican Mafia members); *United States v. Silverstein,* 732 F.2d 1338, 1341–1342 (C.A.7 1984) (describing murder of a black inmate by members of the Aryan Brotherhood); *State v. Kell,* 61 P.3d 1019, 1024–1025 (Utah 2002) (describing fatal stabbing of a black inmate by two white supremacists); *State v. Farmer,* 126 Ariz. 569, 570–571, 617 P.2d 521, 522–523 (1980) (en banc) (describing murder of a black inmate by members and recruits of the Aryan Brotherhood).

9 Specifically, Johnson testified:

"I was incarcerated at Calipatria before the major riot broke out there with Mexican and black inmates. ... If I would have stayed there, I would have been involved in that because you have four facilities there and *each facility went on a major riot and a lot of people got hurt and injured just based on your skin color.* I'm black, and if I was there I would have been hurt." App. 102a (emphasis added).

10 See *id.,* at 245a–246a (Cambra declaration) ("If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that ... there will be fights in the cells and the problems will emanate onto the prison yards"); *id.,* at 250a–251a (Schulteis declaration) ("At CSP–Lancaster, if we were to disregard the initial housing placement [according to race], then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them").

11 The majority's sole empirical support for its speculation is a study of Texas prison desegregation that found the rate of violence higher in racially segregated double cells. *Ante,* at 1147–1148 (citing Trulson & Marquart, The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons, 36 Law & Soc. Rev. 743, 774 (2002)). However, the study's authors specifically note that Texas—like California—does not integrate its "initial diagnostic facilities" or its "transfer facilities." See *id.,* at 753, n. 13. Thus the study says nothing about the violence likely to result from integrating cells when inmates are thrown together for brief periods during admittance or transfer. What the study does say is that, once Texas has had the time to gather inmate-related information and make more permanent housing assignments, racially integrated cells may be the preferred option. But California leaves open that door: Inmates are generally free to room with whomever they like on a permanent basis.

12 See Oklahoma Dept. of Corrections, Policies and Procedures, Operations Memorandum No. OP–030102, Inmate Housing (Sept. 16, 2004) ("Upon arrival at the assessment and reception center ... [f]or reasons of safety and security, newly received inmates are not generally assigned randomly to racially integrated cells") (available at http:// www.doc.state.ok.us/docs/policies.htm); Texas Dept. of Criminal Justice, Security Memorandum No. SM–01.28, Assignment to General Population Two–Person Cells (June 15, 2002) ("Upon arrival at a reception and diagnostic center ... [f]or reasons of safety and security, newly-received offenders are not generally assigned randomly to racially integrated cells due to the fact that the specific information needed to assess an offender's criminal and victimization history is not available until after diagnostic processing has been completed").

13 On the majority's account, deference to the judgments of prison officials in the application of strict scrutiny is presumably warranted to account for "the special circumstances [that prisons] present," *ante,* at 1152. See *Grutter v. Bollinger,* 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Although I disagree that deference is normally appropriate when scrutinizing racial classifications, there is some logic to the majority's qualification in this case because the Constitution's demands have always been diminished in the prison context. See, *e.g., Harper,* 494 U.S., at 224, 110 S.Ct. 1028; *Abbott,* 490 U.S., at 407, 109 S.Ct. 1874; *Turner v. Safley,* 482 U.S. 78, 85, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

14 The Court of Appeals cited both *Turner* and *Lee v. Washington,* 390 U.S. at 333, 88 S.Ct. 994 (1968) *(per curiam),* for the proposition that certain constitutional protections, among them the protection against state-sponsored racial discrimination, extend to the prison setting. However, the Court of Appeals did not discuss the applicable standard of review, nor did it attempt to resolve the tension between *Turner* and *Lee* that the majority finds.

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KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Lemonds v. St. Louis County, 8th Cir.(Mo.), August 3, 2000

114 S.Ct. 2647
Supreme Court of the United States

Bolley JOHNSON, Speaker of the Florida House of Representatives, et al., Appellants
v.
Miguel DE GRANDY, et al.
Miguel DE GRANDY, et al., Appellants,
v.
Bolley JOHNSON, Speaker of the Florida House of Representatives, et al.
UNITED STATES, Appellant,
v.
FLORIDA, et al.

Nos. 92–519, 92–593 and 92–767
|
Argued Oct. 4, 1993.
|
Decided June 30, 1994.

Synopsis
Action was brought challenging Florida legislative districting plan. A three-judge district court in the Northern District of Florida found that there was dilution of hispanic and black voting strength, 875 F.Supp. 1550, and state appealed. The Supreme Court, Justice Souter, held that: (1) no violation of § 2 of the Voting Rights Act could be found where minority voters formed effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting age population, even though it might have been possible to create additional districts in which minority voters represented a majority; (2) proportionality is not an affirmative defense which must be pled; and (3) proportionality does not defeat claim of vote dilution in all cases.

Affirmed in part and reversed in part.

Justice O'Connor filed a concurring opinion.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment.

Justice Thomas dissented and filed an opinion in which Justice Scalia joined.

West Headnotes (17)

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

No violation of § 2 of the Voting Rights Act existed where, in spite of continuing discrimination and racial block voting, minority members formed effecting voting majorities in a number of districts which was roughly proportional to the minority voters' respective shares in the voting age population. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

42 Cases that cite this headnote

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

Although proportionality between the number of majority-minority districts and the percentage of minority voters in the voting age population is not dispositive in challenge to single-member district plan, it is relevant. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

151 Cases that cite this headnote

[3] **Judgment** Reviewing court's determination

District court properly refused to give preclusive effect to decision of state Supreme Court upholding districting plan against Voting Rights Act challenge, where the state Supreme Court stated that it was impossible for it to conduct the complete factual analysis contemplated by the Act and that its holding was without prejudice to the right of anyone to question the validity of the plan by filing a petition in the Supreme Court. Voting Rights Act of 1965, § 2, as amended, 42

U.S.C.A. § 1973; West's F.S.A. Const. Art. 3, § 16(c).

16 Cases that cite this headnote

[4] **Federal Courts** Exhaustion of other remedies

States Persons entitled to sue, standing, and parties

When Florida Supreme Court upheld the constitutionality of legislative redistricting plan pursuant to its state constitutional mandate to review apportionment resolutions within 30 days, but then stated that its decision was without prejudice to the right of any protestor to question the validity of the plan by filing a petition in the Supreme Court, those protesting the plan were not required to file petition with the Florida Supreme Court, and could, instead, maintain action in federal district court. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; West's F.S.A. Const. Art. 3, § 16(c).

9 Cases that cite this headnote

[5] **Federal Courts** Conclusiveness; res judicata and collateral estoppel

Federal court gives no greater preclusive effect to state court judgments then the state itself would do.

956 Cases that cite this headnote

[6] **Courts** Constitutional questions, civil rights, and discrimination in general

Courts United States Supreme Court, exclusive federal jurisdiction of

Rooker/Feldman abstention doctrine which bars the party from seeking judicial review of a state court decision in federal district did not preclude United States from bringing Voting Rights Act action in federal district court after state Supreme Court had upheld redistricting plan in proceeding to which the United States was not a party. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; West's F.S.A. Const. Art. 3, § 16(c).

1808 Cases that cite this headnote

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

Gingles factors for determining whether there has been illegal dilution of minority voting strength cannot be applied mechanically or without regard to nature of claim. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

5 Cases that cite this headnote

[8] **Election Law** Vote Dilution

Voting Rights Act precludes fragmenting minority voters among several districts where block voting majority can routinely outvote them or packing them into one or a small number of districts to minimize their influence in adjacent districts with the result that the line drawing, interacting with social and historical conditions, impairs the ability of protected class to elect candidate of its choice on an equal basis with other voters. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; West's F.S.A. Const. Art. 3, § 16(c).

32 Cases that cite this headnote

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

In order to show vote dilution through districting of single-member districts, there must be the possibility of creating more than the existing number of reasonably compact districts with sufficiently large minority population to elect candidates of its choice. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

97 Cases that cite this headnote

[10] **Election Law** Vote Dilution

Gingles factors of compactness/numerousness, minority cohesion or block voting, and majority block voting are necessary preconditions for establishing vote dilution through a districting plan but they are not sufficient in combination,

either in the sense that a court's examination of relevant circumstances is complete once the three factors are found to exist or in the sense that the three in combination necessarily and in all circumstances demonstrate dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

65 Cases that cite this headnote

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

Election Law Evidence

Lack of electoral success of candidates supported by minority voters is evidence of vote dilution, but courts must also examine other evidence and the totality of the circumstances, including the extent of the opportunity which minority voters enjoy to participate in the political process. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

86 Cases that cite this headnote

[12] **Election Law** Vote Dilution

Concept of proportionality between the number of voting districts in which minorities represent a majority and the share of the relevant population represented by minorities is distinct from the subject of the proportional representation clause of the Voting Rights Act. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

27 Cases that cite this headnote

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

Provision of the Voting Rights Act that nothing in the Act establishes a right to have members of a protected class elected in numbers equal to their proportion of the population speaks to the success of minority candidates, as distinct from political or electoral power of minority voters, and emphasizes that the ultimate rights is equality of opportunity, not guarantee of electoral success for minority-preferred candidates, of whatever race. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

57 Cases that cite this headnote

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

Legislative district lines which apparently provided political effectiveness for hispanic and black voters in proportion to their voting age numbers did not deny equal political opportunity, even though it would have been possible to create another district in which hispanic voters would represent a majority. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

18 Cases that cite this headnote

[15] **Election Law** Vote Dilution

Failure to maximize the number of electoral districts of which minority voters represent a majority, even in the face of block voting or other incidents of societal bias, is not vote dilution prohibited by the Voting Rights Act. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

20 Cases that cite this headnote

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

Fact that the percentage of single-member districts in which minority voters form effective majority mirrors the minority voters' percentage of the relevant population does not establish as a matter of law that there is no dilution in minority voting strength. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

52 Cases that cite this headnote

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

Proportionality is not an affirmative defense to a claim of dilution under the Voting Rights Act and proportionality may be considered even when not pled by way of affirmative defense. Voting

Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

**2650 *Syllabus*[*]

In these consolidated cases, a group of Hispanic voters, a group of black voters, and the Federal Government claim that Florida's reapportionment plan for the State's single-member Senate and House districts (SJR 2–G) unlawfully dilutes the voting strength of Hispanics and blacks in the Dade County area, in violation of § 2 of the Voting Rights Act of 1965. The State Supreme Court, in a review required by the State Constitution, declared the plan valid under federal and state law, while acknowledging that time constraints precluded full review and authorizing any interested party to bring a § 2 challenge in that court. The plaintiffs chose, however, to pursue their claims in federal court. A three-judge District Court reviewed the totality of circumstances as required by § 2 and *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, and concluded that the three *Gingles* preconditions for establishing dilution were satisfied, justifying a finding of vote dilution. Specifically, the court found that voting proceeded largely along racial lines, producing a system of "tripartite politics"; that Hispanics in the Dade County area could constitute a majority in 11 House and 4 Senate districts, but that SJR 2–G had created only 9 House and 3 Senate districts with Hispanic majorities; that an additional majority-black Senate district could have been drawn; and that Florida's minorities had suffered historically from official discrimination, the social, economic, and political effects of which they continued to feel. The court imposed a remedial plan with 11 majority-Hispanic House districts but, concluding that the remedies for blacks and Hispanics in the senatorial districts were mutually exclusive, left SJR 2–G's Senate districts in force.

Held:

1. The District Court properly refused to give preclusive effect to the State Supreme Court's decision validating SJR 2–G. Pp. 2653–2654.

*998 2. There is no violation of § 2 in SJR 2–G's House districts, where in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of House districts roughly proportional to their respective shares in the voting-age population. While such proportionality is not dispositive, it is a relevant fact in the totality of circumstances to be analyzed when determining whether minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b). Pp. 2654–2662.

(a) This Court assumes without deciding that the first *Gingles* factor has been satisfied in these cases. Pp. 2655–2656.

(b) While proof of the *Gingles* factors is necessary to make out a claim that a set of district lines violates § 2, it is not necessarily sufficient. Rather, a court must assess the probative significance of the *Gingles* factors after considering all circumstances with arguable bearing on the issue of equal political opportunity. Here, the court misjudged the relative importance of the *Gingles* factors and of historical discrimination by equating dilution where these had been found with failure to maximize the number of majority-minority districts. Dilution cannot be inferred from the mere failure to guarantee minority voters maximum political influence. Pp. 2656–2660.

(c) Ruling as the State proposes, that as a matter of law no dilution occurs whenever **2651 proportionality exists, would likewise provide a bright-line decisional rule only in derogation of the statutory text. While proportionality is an indication that minority voters have equal political and electoral opportunity in spite of racial polarization, it is no guarantee, and it cannot serve as a shortcut to determining whether a set of districts unlawfully dilutes minority voting strength. Pp. 2660–2662.

(d) This Court need not reach the United States' argument that proportionality should be assessed only on a statewide basis in cases challenging districts for electing a body with statewide jurisdiction. The argument would recast this litigation as it comes before the Court, for up until now the dilution claims have been litigated not on a statewide basis, but on a smaller geographical scale. P. 2662.

3. The District Court's decision to leave undisturbed the State's plan for Senate districts was correct. However, in reaching its decision, the court once again misapprehended the legal test for vote dilution. As in the case of the House districts, the totality of circumstances appears not to support a finding of dilution in the Senate districts. P. 2663.

815 F.Supp. 1550, (N.D.Fla.1992) affirmed in part and reversed in part.

***999** SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, STEVENS, O'CONNOR, and GINSBURG, JJ., joined, and in all but Parts III–B–2, III–B–4, and IV of which KENNEDY, J., joined. O'CONNOR, J., filed a concurring opinion, *post,* p. 2664. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 2664. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 2667.

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Opinion

***1000** Justice SOUTER delivered the opinion of the Court.

[1] **[2]** These consolidated cases are about the meaning of vote dilution and the facts required to show it, when § 2 of the Voting Rights Act of 1965 is applied to challenges to single-member legislative districts. See 79 Stat. 437, as amended, 42 U.S.C. § 1973. We hold that no violation of § 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population. While such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Ibid.*

I

On the first day of Florida's 1992 legislative session, a group of Hispanic voters including Miguel De Grandy (De Grandy plaintiffs) complained in the United States District Court against the speaker of Florida's House of Representatives, the president of its Senate, the Governor, and other state officials (State). The complainants alleged that the districts from which Florida voters had chosen their state senators and representatives since 1982 were malapportioned, failing to reflect changes in the State's population during the ensuing decade. The State Conference of NAACP Branches and individual black voters (NAACP ***1001** plaintiffs) ****2652** filed a similar suit, which the three-judge District Court consolidated with the De Grandy case.[1]

Several months after the first complaint was filed, on April 10, 1992, the state legislature adopted Senate Joint Resolution 2–G (SJR 2–G), providing the reapportionment plan currently at issue. The plan called for dividing Florida into 40 single-member Senate, and 120 single-member House, districts based on population data from the 1990 census. As the Constitution of Florida required, the state attorney general then petitioned the Supreme Court of Florida for a declaratory judgment that the legislature's apportionment plan was valid under federal and state law. See Fla. Const., Art. III, § 16(c). The court so declared, while acknowledging that state constitutional time constraints precluded full review for conformity with § 2 of the Voting Rights Act and recognizing the right of any interested party to bring a § 2 challenge to the plan in the Supreme Court of Florida. See *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So.2d 276, 285–286 (1992).[2]

The De Grandy and NAACP plaintiffs responded to SJR 2–G by amending their federal complaints to charge the new ***1002** reapportionment plan with violating § 2.[3] They claimed that SJR 2–G " 'unlawfully fragments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process,' " and they pointed to areas around the State where black or Hispanic populations could have formed a voting majority in a politically cohesive, reasonably compact district (or in more than one), if SJR 2–G had not fragmented each group among several districts or packed it into just a few. *De Grandy v. Wetherell,* 815 F.Supp. 1550, 1559–1560 (ND Fla.1992).

The Department of Justice filed a similar complaint, naming the State of Florida and several elected officials as defendants and claiming that SJR 2–G diluted the voting strength of blacks and Hispanics in two parts of the State in violation of

§ 2. The Government alleged that SJR 2–G diluted the votes of the Hispanic population in an area largely covered by Dade County (including Miami) and the black population in an area covering much of Escambia County (including Pensacola).[4] App. 75. The District Court consolidated this action with the other two and held a 5–day trial, followed immediately by an hours-long hearing on remedy.

At the end of the hearing, on July 1, 1992, the District Court ruled from the bench. It held the plan's provisions for state House districts to be in violation of § 2 because "more than [SJR 2–G's] nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters," and it imposed a remedial plan offered by the De Grandy plaintiffs calling for 11 majority-Hispanic House districts. ***1003** App. to Juris. Statement 2a, 203a. As to the Senate, the court found that a fourth majority-Hispanic district could be drawn in addition to the three provided by SJR 2–G, but only at the expense of black voters in the area. ****2653** *Id.,* at 202a; 815 F.Supp., at 1560. The court was of two minds about the implication of this finding, once observing that it meant the legislature's plan for the Senate was a violation of § 2 but without a remedy, once saying the plan did not violate § 2 at all.[5] In any event, it ordered elections to be held using SJR 2–G's senatorial districts.

In a later, expanded opinion the court reviewed the totality of circumstances as required by § 2 and *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In explaining Dade County's "tripartite politics," in which "ethnic factors ... predominate over all other[s] ...," 815 F.Supp., at 1572, the court found political cohesion within each of the Hispanic and black populations but none between the two, *id.,* at 1569, and a tendency of non-Hispanic whites to vote as a bloc to bar minority groups from electing their chosen candidates except in a district ***1004** where a given minority makes up a voting majority,[6] *id.,* at 1572. The court further found that the nearly one million Hispanics in the Dade County area could be combined into 4 Senate and 11 House districts, each one relatively compact and with a functional majority of Hispanic voters, *id.,* at 1568–1569, whereas SJR 2–G created fewer majority-Hispanic districts; and that one more Senate district with a black voting majority could have been drawn, *id.,* at 1576. Noting that Florida's minorities bore the social, economic, and political effects of past discrimination, the court concluded that SJR 2–G impermissibly diluted the voting strength of Hispanics in its House districts and of both Hispanics and blacks in its Senate districts. *Id.,* at 1574. The findings of vote dilution in the senatorial districts had no practical effect, however, because the court held that remedies for the blacks and the Hispanics were mutually exclusive; it consequently deferred to the state legislature's work as the "fairest" accommodation of all the ethnic communities in south Florida. *Id.,* at 1580.

We stayed the judgment of the District Court, 505 U.S. 1232, 113 S.Ct. 1, 120 L.Ed.2d 930 (1992), and noted probable jurisdiction, 507 U.S. 907, 113 S.Ct. 1249, 122 L.Ed.2d 648 (1993).

II

[3] Before going to the issue at the heart of these cases, we need to consider the District Court's refusal to give preclusive effect to the decision of the State Supreme Court validating SJR 2–G. The State argues that the claims of the De Grandy plaintiffs should have been dismissed as res judicata because they had a full and fair opportunity to litigate vote dilution before the State Supreme Court, see *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So.2d, at 285. The premise, however, ***1005** is false, exaggerating the review afforded the De Grandy plaintiffs in the state court and ignoring that court's own opinion of its judgment's limited scope. Given ****2654** the state constitutional mandate to review apportionment resolutions within 30 days, see Fla. Const., Art. III, § 16(c), the Supreme Court of Florida accepted briefs and evidentiary submissions, but held no trial. In that court's own words, it was "impossible ... to conduct the complete factual analysis contemplated by the Voting Rights Act ... within the time constraints of article III," and its holding was accordingly "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." 597 So.2d, at 282, 285–286.

[4] **[5]** The State balks at recognizing this express reservation by blaming the De Grandy plaintiffs for not returning to the State Supreme Court with the § 2 claims. But the plaintiffs are free to litigate in any court with jurisdiction, and their choice to forgo further, optional state review hardly converted the state constitutional judgment into a decision following "full and fair opportunity to litigate," *Allen v. McCurry,* 449 U.S. 90, 104, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980), as res judicata would require. For that matter, a federal court gives no greater preclusive effect to a state-court judgment than the state court itself would do, *Marrese*

v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 384–386, 105 S.Ct. 1327, 1334–35, 84 L.Ed.2d 274 (1985), and the Supreme Court of Florida made it plain that its preliminary look at the vote dilution claims would have no preclusive effect under Florida law.

[6] The State does not, of course, argue that res judicata bars the claims of the United States, which was not a party in the Florida Supreme Court action. It contends instead that the Federal Government's § 2 challenge deserved dismissal under this Court's *Rooker*/*Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state ***1006** judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights. See *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103 S.Ct. 1303, 1314–15, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). But the invocation of *Rooker*/*Feldman* is just as inapt here, for unlike Rooker or Feldman, the United States was not a party in the state court. It was in no position to ask this Court to review the state court's judgment and has not directly attacked it in this proceeding. Cf. *Feldman, supra,* 460 U.S. at 468, and n. 2, 472, and n. 8, 103 S.Ct., at 1307, and n. 2, 1309, and n. 8 (suing District of Columbia Court of Appeals); *Rooker, supra,* 263 U.S., at 414, 44 S.Ct., at 149 (seeking to have state court's judgment declared null and void). The United States merely seeks to litigate its § 2 case for the first time, and the Government's claims, like those of the private plaintiffs, are properly before the federal courts.

III

On the merits of the vote dilution claims covering the House districts, the crux of the State's argument is the power of Hispanics under SJR 2–G to elect candidates of their choice in a number of districts that mirrors their share of the Dade County area's voting-age population (*i.e.,* 9 out of 20 House districts); this power, according to the State, bars any finding that the plan dilutes Hispanic voting strength. The District Court is said to have missed that conclusion by mistaking our precedents to require the plan to maximize the number of Hispanic-controlled districts.

[7] The State's argument takes us back to ground covered last Term in two cases challenging single-member districts. See *Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Growe v. Emison,* 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). In *Growe,* we held that a claim of vote dilution in a single-member district requires proof meeting the same three threshold conditions for a dilution challenge to a multimember district: that a minority group be " 'sufficiently large and geographically ****2655** compact to constitute a majority ***1007** in a single-member district' "; that it be " 'politically cohesive' "; and that " 'the white majority vot[e] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.' " *Id.,* at 40, 113 S.Ct., at 1084 (quoting *Thornburg v. Gingles,* 478 U.S., at 50–51, 106 S.Ct., at 2766, 2767). Of course, as we reflected in *Voinovich* and amplify later in this opinion, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." 507 U.S., at 158, 113 S.Ct., at 1157.

[8] In *Voinovich* we explained how manipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door. See *id.,* at 153–154, 113 S.Ct., at 1155. Section 2 prohibits either sort of line-drawing where its result, " 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Ibid.* (quoting *Gingles, supra,* 478 U.S., at 47, 106 S.Ct., at 2765).[7]

Plaintiffs in *Growe* and *Voinovich* failed to show vote dilution because the former did not prove political cohesiveness of the minority group, *Growe, supra,* at 41–42, 113 S.Ct., at 1085 and the latter showed no significant white bloc voting, *Voinovich, supra,* at 158, 113 S.Ct., at 1158. Here, on the contrary, the District Court found, and the State does not challenge, the presence of both these *Gingles* preconditions. The dispute in this litigation centers on two quite different questions: whether Hispanics are sufficiently numerous and geographically compact to be a majority in additional single-member districts, as required by the first *Gingles* factor; and whether, even with all three *Gingles* ***1008** conditions satisfied, the circumstances in totality support a finding of vote dilution when Hispanics can be expected to elect their chosen representatives in substantial proportion to their percentage of the area's population.

A

[9] When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice. The District Court found the condition satisfied by contrasting SJR 2–G with the De Grandy plan for the Dade County area, which provided for 11 reasonably compact districts, each with a voting-age population at least 64 percent Hispanic. 815 F.Supp., at 1580. While the percentage figures are not disputed, the parties disagree about the sufficiency of these super-majorities to allow Hispanics to elect representatives of their choice in all 11 districts. The District Court agreed with plaintiffs that the supermajorities would compensate for the number of voting-age Hispanics who did not vote, most commonly because they were recent immigrants who had not become citizens of the United States. *Id.,* at 1567–1568. The State protests that fully half of the Hispanic voting-age residents of the region are not citizens, with the result that several districts in the De Grandy plan lack enough Hispanic voters to elect candidates of their choice without cross-over votes from other ethnic groups. On these assumptions, the State argues that the condition necessary to justify tinkering with the State's plan disappears.

We can leave this dispute without a winner. The parties' ostensibly factual disagreement ****2656** raises an issue of law about which characteristic of minority populations (*e.g.,* age, citizenship) ought to be the touchstone for proving a dilution claim and devising a sound remedy. These cases may be resolved, however, without reaching this issue or the related ***1009** question whether the first *Gingles* condition can be satisfied by proof that a so-called influence district may be created (that is, by proof that plaintiffs can devise an additional district in which members of a minority group are a minority of the voters, but a potentially influential one). As in the past, we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied in these cases. See *Voinovich, supra,* at 154, 113 S.Ct., at 1155–1156; see also *Growe, supra,* at 41–42, n. 5, 113 S.Ct., at 1084, n. 5 (declining to reach the issue); *Gingles, supra,* 478 U.S., at 46–47, n. 12, 106 S.Ct., at 2764, n. 12 (same).

B

We do, however, part company from the District Court in assessing the totality of circumstances. The District Court found that the three *Gingles* preconditions were satisfied, and that Hispanics had suffered historically from official discrimination, the social, economic, and political effects of which they generally continued to feel, 815 F.Supp., at 1573–1574. Without more, and on the apparent assumption that what could have been done to create additional Hispanic supermajority districts should have been done, the District Court found a violation of § 2. But the assumption was erroneous, and more is required, as a review of *Gingles* will show.

1

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), prompted this Court's first reading of § 2 of the Voting Rights Act of 1965 after its 1982 amendment.[8] Section 2(a) of the amended Act prohibits any "standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or ***1010** membership in a language minority group]...." Section 2(b) provides that a denial or abridgment occurs where,

> "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

Gingles provided some structure to the statute's "totality of circumstances" test in a case challenging multimember legislative districts. See 478 U.S., at 46–51, 106 S.Ct., at 2764–2767. The Court listed the factors put forward as relevant in the Senate Report treating the 1982 amendments,[9] and held that

> **2657 *1011 "[w]hile many or all of [them] may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.,* at 48–49, 106 S.Ct., at 2765–2766 (footnote omitted) (emphasis in original).

The Court thus summarized the three now-familiar *Gingles* factors (compactness/numerousness, minority cohesion or bloc voting, and majority bloc voting) as "necessary preconditions," *id.,* at 50, 106 S.Ct., at 2766, for establishing vote dilution by use of a multimember district.

[10] **[11]** But if *Gingles* so clearly identified the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution. This was true not only because bloc voting was a matter of degree, with a variable legal significance depending on other facts, *id.,* at 55–58, 106 S.Ct., at 2768–2770, but also because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts. Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political *1012 processes. *Id.,* at 46, 79–80, 106 S.Ct., at 2764, 2781–2782; *id.,* at 98–99, 106 S.Ct., at 2791–2792 (O'CONNOR, J., concurring in judgment). To be sure, some § 2 plaintiffs may have easy cases, but although lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors, that conclusion must still be addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment.[10]

2

If the three *Gingles* factors may not be isolated as sufficient, standing alone, to prove dilution in every multimember district challenge, *a fortiori* they must not be when the **2658 challenge goes to a series of single-member districts, where dilution may be more difficult to grasp. Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral *1013 success in place of none, but the chance for more success in place of some. When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls. As facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution.

[12] **[13]** The cases now before us, of course, fall on this more complex side of the divide, requiring a court to determine whether provision for somewhat fewer majority-minority districts than the number sought by the plaintiffs was dilution of the minority votes. The District Court was accordingly required to assess the probative significance of the *Gingles* factors critically after considering the further circumstances with arguable bearing on the issue of equal political opportunity. We think that in finding dilution here the District Court misjudged the relative importance of the *Gingles* factors and of historical discrimination, measured against evidence tending to show that in spite of these facts, SJR 2–G would provide minority voters with an equal measure of political and electoral opportunity.

The District Court did not, to be sure, commit the error of treating the three *Gingles* conditions as exhausting the enquiry required by § 2. Consistently with *Gingles,* the court received evidence of racial relations outside the immediate confines of voting behavior and found a history of discrimination against Hispanic voters continuing in society generally to the present day. But the District Court was not critical enough in asking whether a history of persistent discrimination reflected in the larger society and its bloc-voting behavior portended any dilutive effect from a newly proposed districting scheme, whose pertinent features were majority-minority districts in substantial proportion to the minority's share of voting-age population. The court failed to ask whether the totality of facts, including those pointing to *1014 proportionality,[11] showed that the new scheme would deny minority voters equal political opportunity.

[14] Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently

providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity. The record establishes that Hispanics constitute 50 percent of the voting-age population in Dade County and under SJR 2–G would make up supermajorities in 9 of the 18 House districts located primarily within the county. Likewise, if one considers the 20 House districts located at least in part within Dade County, the record indicates that Hispanics would be an effective voting majority in 45 percent of them (*i.e.,* nine), and would constitute 47 percent of the voting-age population in the area. 815 F.Supp., at 1580; App. to Juris. Statement 180a–183a. In other words, under SJR 2–G Hispanics in the Dade County area would enjoy substantial proportionality. On this evidence, we think the State's scheme would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it. Thus in spite of **2659 that history and its legacy, including the racial cleavages that characterize Dade County politics today, we see no grounds for holding in these cases *1015 that SJR 2–G's district lines diluted the votes cast by Hispanic voters.

The De Grandy plaintiffs urge us to put more weight on the District Court's findings of packing and fragmentation, allegedly accomplished by the way the State drew certain specific lines: "[T]he line of District 116 separates heavily Hispanic neighborhoods in District 112 from the rest of the heavily Hispanic Kendall Lakes area and the Kendall area," so that the line divides "neighbors making up the ... same housing development in Kendall Lakes," and District 114 "packs" Hispanic voters, while Districts 102 and 109 "fragmen[t]" them. 815 F.Supp., at 1569 (internal quotation marks omitted). We would agree that where a State has split (or lumped) minority neighborhoods that would have been grouped into a single district (or spread among several) if the State had employed the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction, the inconsistent treatment might be significant evidence of a § 2 violation, even in the face of proportionality. The district court, however, made no such finding. Indeed, the propositions the Court recites on this point are not even phrased as factual findings, but merely as recitations of testimony offered by plaintiffs' expert witness. While the District Court may well have credited the testimony, the court was apparently wary of adopting the witness's conclusions as findings. But even if one imputed a greater significance to the accounts of testimony, they would boil down to findings that several of SJR 2–G's district lines separate portions of Hispanic neighborhoods, while another district line draws several Hispanic neighborhoods into a single district. This, however, would be to say only that lines could have been drawn elsewhere, nothing more. But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size. Attaching the labels "packing" and "fragmenting" to these phenomena,without *1016 more, does not make the result vote dilution when the minority group enjoys substantial proportionality.

3

[15] It may be that the significance of the facts under § 2 was obscured by the rule of thumb apparently adopted by the District Court, that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2, at least where societal discrimination against the minority had occurred and continued to occur. But reading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting (plus some other incidents of societal bias to be expected where bloc voting occurs) causes its own dangers, and they are not to be courted.

Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts.[12] The point of the hypothetical is not, of course, that any given district is likely to be open to such extreme manipulation, or that bare majorities are likely to vote in full force and strictly along racial lines, but that reading § 2 to define dilution as any failure to maximize tends to *1017 obscure the very object of the statute and **2660 to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. However prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75 percent above its numerical

strength[13] indicates a denial of equal participation in the political process. Failure to maximize cannot be the measure of § 2.

4

[16] While, for obvious reasons, the State agrees that a failure to leverage minority political strength to the maximum possible point of power is not definitive of dilution in bloc-voting societies, it seeks to impart a measure of determinacy by applying a definitive rule of its own: that as a matter of law no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population.[14] Proportionality so defined, see n. 11, ***1018** *supra,* would thus be a safe harbor for any districting scheme.

The safety would be in derogation of the statutory text and its considered purpose, however, and of the ideal that the Voting Rights Act of 1965 attempts to foster. An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed "based on the totality of circumstances." 42 U.S.C. § 1973(b). The need for such "totality" review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power, *McCain v. Lybrand,* 465 U.S. 236, 243–246, 104 S.Ct. 1037, 1042–44, 79 L.Ed.2d 271 (1984), a point recognized by Congress when it amended the statute in 1982: "[S]ince the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," Senate Report 10 (discussing § 5). In modifying § 2, Congress thus endorsed our view in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), that "whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' " Senate Report 30 (quoting 412 U.S., at 766, 770, 93 S.Ct., at 2339, 2341). In a substantial number of voting jurisdictions, that past reality has included such reprehensible practices as ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, and the white primary; and other practices censurable when the object of their use is discriminatory, such as at-large elections, runoff requirements, anti-single-shot devices, gerrymandering, the impeachment of office-holders, the annexation or deannexation of territory, and the creation or elimination of elective offices.[15] Some of those ****2661** expedients ***1019** could occur even in a jurisdiction with numerically demonstrable proportionality; the harbor safe for States would thus not be safe for voters.[16] It is, in short, for good reason that we have been, and remain, chary of entertaining a simplification of the sort the State now urges upon us. Cf. *Gingles,* 478 U.S., at 77, 106 S.Ct., at 2780 ("[P]ersistent proportional representation ... [may] not accurately reflect the minority group's ability to elect its preferred representatives").

Even if the State's safe harbor were open only in cases of alleged dilution by the manipulation of district lines, however, it would rest on an unexplored premise of highly suspect validity: that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class. Under the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line. But see *Baird v. Consolidated City of Indianapolis,* 976 F.2d 357, 359 (CA7 1992) ("A balanced bottom line does not foreclose proof of discrimination along the way"); *Richmond v. United States,* 422 U.S. 358, 378–379, 95 S.Ct. 2296, 2307–2308, 45 L.Ed.2d 245 (1975) (territorial annexation aimed at diluting black votes forbidden by § 5, regardless of its actual effect).

Finally, we reject the safe harbor rule because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary ***1020** to achieve equal political and electoral opportunity. Because in its simplest form the State's rule would shield from § 2 challenge a districting scheme in which the number of majority-minority districts reflected the minority's share of the relevant population, the conclusiveness of the rule might be an irresistible inducement to create such districts. It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the "politics of second best," see B. Grofman, L. Handley, & R. Niemi, Minority Representation and the Quest for Voting Equality 136 (1992). If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form

coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

It is enough to say that, while proportionality in the sense used here is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, "to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b), the degree of probative value assigned to proportionality may vary with other facts.[17] No single statistic provides **2662 courts with a shortcut *1021 to determine whether a set of single-member districts unlawfully dilutes minority voting strength.

5

[17] While the United States concedes the relevance of proportionality to a § 2 claim, it would confine proportionality to an affirmative defense, and one to be made only on a statewide basis in cases that challenge districts for electing a body with statewide jurisdiction. In this litigation, the United States would have us treat any claim that evidence of proportionality supports the State's plan as having been waived because the State made no argument in the District Court that the proportion of districts statewide in which Hispanics constitute an effective voting majority mirrors the proportion of statewide Hispanic population.[18]

The argument has two flaws. There is, first, no textual reason to segregate some circumstances from the statutory totality, to be rendered insignificant unless the defendant pleads them by way of affirmative defense. Second, and just as importantly, the argument would recast these cases as they come to us, in order to bar consideration of proportionality except on statewide scope, whereas up until now the *1022 dilution claims have been litigated on a smaller geographical scale. It is, indeed, the plaintiffs themselves, including the United States, who passed up the opportunity to frame their dilution claim in statewide terms. While the United States points to language in its complaint alleging that the redistricting plans dilute the votes of "Hispanic citizens and black citizens in the State of Florida," App. 77, the complaint identifies "several areas of the State" where such violations of § 2 are said to occur, and then speaks in terms of Hispanics in the Dade County area (and blacks in the area of Escambia County), *id.,* at 75–76. Nowhere do the allegations indicate that claims of dilution "in the State of Florida" are not to be considered in terms of the areas specifically mentioned. The complaint alleges no facts at all about the contours, demographics, or voting patterns of any districts outside the Dade County or Escambia County areas, and neither the evidence at trial nor the opinion of the District Court addressed white bloc voting and political cohesion of minorities statewide. The De Grandy plaintiffs even voluntarily dismissed their claims of Hispanic vote dilution outside the Dade County area. See 815 F.Supp., at 1559, n. 13. Thus we have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy.

6

In sum, the District Court's finding of dilution did not address the statutory standard of unequal political and electoral opportunity, and reflected instead a misconstruction of § 2 that equated dilution with failure to maximize the number of reasonably compact majority-minority districts. Because the ultimate finding of dilution in districting for the Florida House was based on a misreading of the governing law, we hold it to be clearly erroneous. See *Gingles,* 478 U.S., at 79, 106 S.Ct., at 2781.

**2663 *1023 IV

Having found insufficient evidence of vote dilution in the drawing of House districts in the Dade County area, we look now to the comparable districts for the state Senate. As in the case of House districts, we understand the District Court to have misapprehended the legal test for vote dilution when it found a violation of § 2 in the location of the Senate district lines. Because the court did not modify the State's plan, however, we hold the ultimate result correct in this instance.

SJR 2–G creates 40 single-member Senate districts, 5 of them wholly within Dade County. Of these five, three have Hispanic supermajorities of at least 64 percent, and one has a clear majority of black voters. Two more Senate districts crossing county lines include substantial numbers of Dade County voters, and in one of these, black voters, although not

close to a majority, are able to elect representatives of their choice with the aid of cross-over votes. 815 F.Supp., at 1574, 1579.

Within this seven-district Dade County area, both minority groups enjoy rough proportionality. The voting-age population in the seven-district area is 44.8 percent Hispanic and 15.8 percent black. Record, U.S.Exh. 7. Hispanics predominate in 42.9 percent of the districts (three out of seven), as do blacks in 14.3 percent of them (one out of seven). While these numbers indicate something just short of perfect proportionality (42.9 percent against 44.8; 14.3 percent against 15.8), the opposite is true of the five districts located wholly within Dade County.[19]

**1024 The District Court concentrated not on these facts but on whether additional districts could be drawn in which either Hispanics or blacks would constitute an effective majority. The court found that indeed a fourth senatorial district with a Hispanic supermajority could be drawn, or that an additional district could be created with a black majority, in each case employing reasonably compact districts. Having previously established that each minority group was politically cohesive, that each labored under a legacy of official discrimination, and that whites voted as a bloc, the District Court believed it faced "two independent, viable Section 2 claims." 815 F.Supp., at 1577. Because the court did not, however, think it was possible to create both another Hispanic district and another black district on the same map, it concluded that no remedy for either violation was practical and, deferring to the State's plan as a compromise policy, imposed SJR 2–G's senatorial districts. *Id.,* at 1580.

We affirm the District Court's decision to leave the State's plan for Florida State Senate districts undisturbed. As in the case of the House districts, the totality of circumstances appears not to support a finding of vote dilution here, where both minority groups constitute effective voting majorities in a number of state Senate districts substantially proportional to their share in the population, and where plaintiffs have not produced evidence otherwise indicating that under SJR 2–G voters in either minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

V

There being no violation of the Voting Rights Act shown, we have no occasion to review the District Court's decisions going to remedy. The judgment of the District Court is accordingly affirmed in part and reversed in part.

It is so ordered.

**2664 *1025 Justice O'CONNOR, concurring.

The critical issue in these cases is whether § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, requires courts to "maximize" the number of districts in which minority voters may elect their candidates of choice. The District Court, applying the maximization principle, operated "on the apparent assumption that what could have been done to create additional Hispanic supermajority districts should have been done." *Ante,* at 2656. The Court today makes clear that the District Court was in error, and that the Voting Rights Act does not require maximization. *Ante,* at 2660 ("Failure to maximize cannot be the measure of § 2"); *ante,* at 2662 (the District Court improperly "equated dilution with failure to maximize the number of reasonably compact majority-minority districts").

But today's opinion does more than reject the maximization principle. The opinion's central teaching is that proportionality—defined as the relationship between the number of majority-minority voting districts and the minority group's share of the relevant population—is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive. Lack of proportionality is probative evidence of vote dilution. "[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Thornburg v. Gingles,* 478 U.S. 30, 84, 106 S.Ct. 2752, 2784, 92 L.Ed.2d 25 (1986) (O'CONNOR, J., concurring in judgment). Thus, in evaluating the *Gingles* preconditions and the totality of the circumstances a court must always consider the relationship between the number of majority-minority voting districts and the minority group's share of the population. Cf. *id.,* at 99, 106 S.Ct., at 2791–92 ("[T]he relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution").

**1026 The Court also makes clear that proportionality is never dispositive. Lack of proportionality can never by itself prove dilution, for courts must always carefully and

searchingly review the totality of the circumstances, including the extent to which minority groups have access to the political process. *Ante,* at 2657. Nor does the presence of proportionality prove the absence of dilution. Proportionality is not a safe harbor for States; it does not immunize their election schemes from § 2 challenge. *Ante,* at 2660–2662.

In sum, the Court's carefully crafted approach treats proportionality as relevant evidence, but does not make it the only relevant evidence. In doing this the Court makes clear that § 2 does not require maximization of minority voting strength, yet remains faithful to § 2's command that minority voters be given equal opportunity to participate in the political process and to elect representatives of their choice. With this understanding, I join the opinion of the Court.

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

At trial, the plaintiffs alleged that the State violated § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, by not creating as many majority-minority districts as was feasible. The District Court agreed and found a violation of § 2, thus equating impermissible vote dilution with the failure to maximize the number of majority-minority districts. I agree with the Court that the District Court's maximization theory was an erroneous application of § 2.

A more difficult question is whether proportionality, ascertained by comparing the number of majority-minority districts to the minority group's proportion of the relevant population, is relevant in deciding whether there has been vote dilution under § 2 in a challenge to election district lines. The statutory text does not yield a clear answer.

The statute, in relevant part, provides: "The extent to which members of a protected class have been elected to ***1027** office in the ****2665** State or political subdivision is one circumstance which may be considered [in determining whether there has been vote dilution]: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." § 1973(b) (emphasis in original). By its terms, this language addresses the number of minorities elected to office, not the number of districts in which minorities constitute a voting majority. These two things are not synonymous, and it would be an affront to our constitutional traditions to treat them as such. The assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter. See *Voinovich v. Quilter,* 507 U.S. 146, 151–152, 158, 113 S.Ct. 1149, 1154, 1157–1158, 122 L.Ed.2d 500 (1993); A. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 210–216 (1987); C. Swain, Black Faces, Black Interests, ch. 6 (1993). And on a more fundamental level, the assumption reflects "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 636, 110 S.Ct. 2997, 3046, 111 L.Ed.2d 445 (1990) (KENNEDY, J., dissenting); see also *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 186–187, 97 S.Ct. 996, 1020–1021, 51 L.Ed.2d 229 (1977) (Burger, C.J., dissenting).

Although the statutory text does not speak in precise terms to the issue, our precedents make clear that proportionality, or the lack thereof, has some relevance to a vote dilution claim under § 2. In a unanimous decision last Term, we recognized that single-member districts were subject to vote dilution challenges under § 2, and further that "[d]ividing [a politically cohesive] minority group among various [single-member] districts so that it is a majority in none" is one "device for diluting minority voting power" within the meaning of the statute. *Voinovich v. Quilter,* 507 U.S., at 152–153, 113 S.Ct., at 1154–1155). If "the fragmentation of a minority group among ***1028** various districts" is an acknowledged dilutive device, *id.,* at 153, 113 S.Ct., at 1155, it follows that analysis under § 2 takes some account of whether the number of majority-minority districts falls short of a statistical norm. Cf. *Washington v. Davis,* 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976) (discriminatory impact relevant to allegation of intentional discrimination). Both the majority and concurring opinions in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), reflect the same understanding of the statute. See *id.,* at 50, n. 16, 106 S.Ct., at 2766, n. 16 (In a "gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote"); *id.,* at 84, 106 S.Ct., at 2784 (O'CONNOR, J., concurring in judgment) ("[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large"). Indeed, to say that proportionality is irrelevant under the § 2 results test is the equivalent of saying (contrary to our

precedents) that no § 2 vote dilution challenges can be brought to the drawing of single-member districts.

To be sure, placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act of 1965, as amended. See *Gingles, supra,* at 99, 106 S.Ct., at 2791–92 (O'CONNOR, J., concurring in judgment). As today's decision provides, a lack of proportionality is "never dispositive" proof of vote dilution, just as the presence of proportionality "is not a safe harbor for States [and] does not immunize their election schemes from § 2 challenge." *Ante,* at 2664 (O'CONNOR, J., concurring); see also *ante,* at 2661, n. 17. But given our past construction of the statute, I would hesitate to conclude that proportionality has no relevance to the § 2 inquiry.

****2666** It is important to emphasize that the precedents to which I refer, like today's decision, only construe the statute, and ***1029** do not purport to assess its constitutional implications. See *Chisom v. Roemer,* 501 U.S. 380, 418, 111 S.Ct. 2354, 2376, 115 L.Ed.2d 348 (1991) (KENNEDY, J., dissenting). Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 litigation. Likewise, a court finding a § 2 violation might believe that the only appropriate remedy is to order the offending State to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance, under § 5 of the Act, 42 U.S.C. § 1973c, to a State's proposed legislative redistricting. Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against. See *Metro Broadcasting, Inc. v. FCC, supra,* 497 U.S., at 636–637, 110 S.Ct., at 3046–3047 (KENNEDY, J., dissenting). As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.

"The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 518, 109 S.Ct. 706, 735, 102 L.Ed.2d 854 (1989) (KENNEDY, J., concurring in part and concurring in judgment). Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and are presumed invalid. *Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993) (internal quotation marks omitted); see also A. Bickel, The Morality of Consent 133 (1975). This is true regardless of "the race of those burdened or benefited by a particular classification." *Croson, supra,* 488 U.S., at 494, 109 S.Ct., at 722 (opinion of O'CONNOR, J.); 488 U.S., at 520, 109 S.Ct., at 736 (SCALIA, J., concurring in judgment). Furthermore, "[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons ***1030** suffer them in equal degree." *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991); see also *Plessy v. Ferguson,* 163 U.S. 537, 560, 16 S.Ct. 1138, 1147, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

These principles apply to the drawing of electoral and political boundaries. As Justice Douglas, joined by Justice Goldberg, stated 30 years ago:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated.... Since that system is at war with the democratic ideal, it should find no footing here." *Wright v. Rockefeller,* 376 U.S. 52, 67, 84 S.Ct. 603, 611, 11 L.Ed.2d 512 (1964) (dissenting opinion).

In like fashion, Chief Justice Burger observed that the "use of a mathematical formula" to assure a minimum number of majority-minority districts "tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *United Jewish Organizations v. Carey,* 430 U.S., at 186, 97 S.Ct., at 1020 (dissenting opinion). And last Term in *Shaw,* we voiced our agreement with these sentiments, observing that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." 509 U.S., at 657, 113 S.Ct., at 2832.

Our decision in *Shaw* alluded to, but did not resolve, the broad question whether "the intentional creation of majority-minority districts, ****2667** without more, always gives rise to an equal protection claim." *Id.,* at 649, 113 S.Ct., at 2828 (internal quotation marks omitted); see also *id.,* at 657, 113 S.Ct., at 2832. While recognizing that redistricting differs from many other kinds of state decisionmaking ***1031** "in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic

status, religion and political persuasion," we stated that "the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race" does "not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Id.,* at 646, 113 S.Ct., at 2826. (emphasis in original) We went on to hold that "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race" must be subject to strict scrutiny under the Equal Protection Clause. *Id.,* at 658, 113 S.Ct., at 2832; see also *id.,* at 649, 653, 113 S.Ct., at 2828, 2830. Given our decision in *Shaw,* there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause. But no constitutional claims were brought here, and the Court's opinion does not address any constitutional issues. Cf. *Voinovich v. Quilter,* 507 U.S., at 157, 113 S.Ct., at 1157.

With these observations, I concur in all but Parts III–B–2, III–B–4, and IV of the Court's opinion and in its judgment.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

For the reasons I explain in *Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), I would vacate the judgment of the District Court and remand with instructions to dismiss the actions consolidated in these cases for failure to state a claim under § 2 of the Voting Rights Act of 1965. 42 U.S.C. § 1973. Each of the actions consolidated in these cases asserted that Florida's apportionment plan diluted the vote of a minority group. In accordance ***1032** with the views I express in *Holder,* I would hold that an apportionment plan is not a "standard, practice, or procedure" that may be challenged under § 2. I therefore respectfully dissent.

All Citations

512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775, 62 USLW 4755

Footnotes

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

1 The complaints also challenged Florida's congressional districts, but that element of the litigation has been resolved separately, see *De Grandy v. Wetherell,* 794 F.Supp. 1076 (ND Fla.1992) (three-judge court), and without appeal.

2 In an additional step not directly relevant to this appeal, the State submitted SJR 2–G to the Department of Justice for preclearance pursuant to 42 U.S.C. § 1973c (§ 5 of the Voting Rights Act of 1965). Five Florida counties, but not Dade County, are subject to preclearance. *De Grandy v. Wetherell,* 815 F.Supp. 1550, 1574 (ND Fla.1992). When the Attorney General of the United States refused to preclear the plan's Senate districts for the Hillsborough County area and the state legislature refused to revise the plan, the Supreme Court of Florida ordered the adjustments necessary to obtain preclearance, 601 So.2d 543 (1992); it is the version of SJR 2–G so adjusted that is at issue in this litigation. 815 F.Supp., at 1557–1558.

3 The complaints also alleged violation of Art. I, § 2, and the Fourteenth and Fifteenth Amendments of the United States Constitution, but these claims were later dismissed voluntarily.

4 The Voting Rights Act of 1965 and constitutional claims as to the Escambia County area were settled by the parties and are not at issue in this appeal.

5 The court's judgment filed July 2, 1992, App. to Juris. Statement 5a, said SJR 2–G's state senatorial districts "do not violate Section 2," but its subsequent opinion explaining the judgment said the senatorial districts do indeed violate § 2, and that its earlier language "should be read as holding that the Florida Senate plan does not violate Section 2 *such that a different remedy must be imposed.*" 815 F.Supp., at 1582 (emphasis added).

Any conflict in these two formulations is of no consequence here. "This Court 'reviews judgments, not statements in opinions,' " *California v. Rooney,* 483 U.S. 307, 311, 107 S.Ct. 2852, 2854, 97 L.Ed.2d 258 (1987) *(per curiam)* (quoting *Black v. Cutter Laboratories,* 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956)), and the De Grandy plaintiffs and the United States have appealed the failure of the District Court to provide relief for alleged § 2 violations in SJR 2–G's senatorial districts. The State is entitled to "urge any grounds which would lend support to the judgment below," *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 419, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977), including the argument it makes here that the District Court was correct not to impose a remedy different from SJR 2–G because the State's reapportionment plan did not violate § 2.

6 The Court recognizes that the terms "black," "Hispanic," and "white" are neither mutually exclusive nor collectively exhaustive. We follow the practice of the District Court in using them as rough indicators of south Florida's three largest racial and linguistic minority groups.

7 See also 478 U.S., at 50, n. 16, 106 S.Ct., at 2766, n. 16 (discussing vote dilution through gerrymandering district lines). For earlier precedents recognizing that racial gerrymanders have played a central role in discrimination against minority groups, see *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Perkins v. Matthews,* 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971); *Connor v. Finch,* 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977).

8 Congress amended the statute to reach cases in which discriminatory intent is not identified, adding new language designed to codify *White v. Regester,* 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973). S.Rep. No. 97–417, p. 2 (1982) 1982 U.S.Code Cong. & Admin.News p. 177 (hereinafter Senate Report).

9 As summarized in *Gingles,* 478 U.S., at 44–45, 106 S.Ct., at 2763: "[T]he Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. [Senate Report 28–29.] The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.,* at 29."

10 If challenges to multimember districts are likely to be the easier plaintiffs' cases, it is worth remembering that even in multimember district challenges, proof of the *Gingles* factors has not always portended liability under § 2. In *Baird v. Consolidated City of Indianapolis,* 976 F.2d 357 (1992), the Seventh Circuit confronted a scheme for electing a City–County Council of 29 members. Voters chose 25 of their representatives from single-member districts and 4 at large, from a district representing the entire area. Black plaintiffs brought a vote dilution claim challenging the lines for single-member districts and the existence of the four-member at-large district. After the Council had redrawn its single-member districts to rectify dilution there, the District Court held, and the Seventh Circuit affirmed, that the four-member district did not dilute black voting strength because proof of the three *Gingles* factors was not enough "if other considerations show that the minority has an undiminished right to participate in the political process." 976 F.2d, at 359. The "other considerations" in *Baird* included the fact that the new single-member districts were so drawn that blacks formed a voting majority in seven of them (28 percent of the single-member districts and 24 percent of the entire council) while blacks constituted 21 percent of the local population; and that while the four at-large seats tended to go to Republicans, one of the Republicans elected in 1991 was black. *Id.,* at 358, 361.

11 "Proportionality" as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. Cf. Senate Report 29, n. 115 (minority candidates' success

at the polls is not conclusive proof of minority voters' access to the political process). And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

12 Minority voters might instead be denied control over a single seat, of course. Each district would need to include merely 51 members of the majority group; minority voters fragmented among the 10 districts could be denied power to affect the result in any district.

13 When 40 percent of the population determines electoral outcomes in 7 out of 10 districts, the minority group can be said to enjoy effective political power 75 percent above its numerical strength.

14 See Brief for Appellees in Nos. 92–593, 92–767, p. 20 ("If the statutory prohibition against providing minorities 'less opportunity than other members of the electorate ... to elect representatives of their choice' is given its natural meaning, it cannot be violated by a single-member district plan that assures minority groups voting control over numbers of districts that are numerically proportional to their population in the area where presence of the three *Gingles* preconditions has been established").

The parties dispute whether the relevant figure is the minority group's share of the population, or of some subset of the population, such as those who are eligible to vote, in that they are United States citizens, over 18 years of age, and not registered at another address (as students and members of the military often are). Because we do not elevate this proportion to the status of a magic parameter, and because it is not dispositive here, we do not resolve that dispute. See *supra,* at 2655–2656.

15 See generally J.M. Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One–Party South, 1880–1910 (1974); Kousser, The Undermining of the First Reconstruction, Lessons for the Second, in Minority Vote Dilution 27 (C. Davidson ed. 1984); Hearings on the Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., 1999–2022, 2115–2120 (1981).

16 The State might say, of course, that ostensibly "proportional" districting schemes that were nonetheless subject to diluting practices would not "assur[e]" minority voters their apparent voting power. But this answer would take us right back to a searching review of the factual totality, leaving the State's defensive rule without any particular utility.

17 So, too, the degree of probative value assigned to disproportionality, in a case where it is shown, will vary not only with the degree of disproportionality but with other factors as well. "[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision." *Gingles,* 478 U.S., at 94–95, 106 S.Ct., at 2789 (O'CONNOR, J., concurring in judgment).

18 The argument for proportionality statewide favors the State if it is based on the proportion of Hispanic citizens of voting age statewide. According to census data not available at the time of trial and thus not in the record, Hispanics constitute 7.15 percent of the citizen voting-age population of Florida, which corresponds to eight or nine Hispanic-majority House districts (120 ×7.15% = 8.58).

If instead one calculates the proportion of statewide Hispanic-majority House districts on the basis of total population or voting-age population, the result favors plaintiffs. Hispanics constitute 12.2 percent of the State's total population and 11.7 percent of the State's voting-age population, corresponding to 14 or 15 seats (120 × 12.2% = 14.64; 120 × 11.7% = 14.04). We need not choose among these calculations to decide these cases.

19 In the five districts wholly within Dade County, where Hispanics are concentrated, the voting-age population is 53.9 percent Hispanic and 13.5 percent black. Sixty percent of the districts are Hispanic majority (three out of five), and 20 percent are black majority (one out of five), so that each minority group protected by § 2 enjoys an effective voting majority in marginally more districts than proportionality would indicate (60 percent over 53.9; 20 percent over 13.5).

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204 F.3d 1335
United States Court of Appeals,
Eleventh Circuit.

Brenda M. JOHNSON, William Guice, et al., Plaintiffs–Appellants,

v.

DeSOTO COUNTY BOARD OF COMMISSIONERS, R.V. Griffin, in his official capacity as chairperson of the DeSoto County Board of Commissioners, et al., Defendants–Appellees.

No. 98–3714.
|
March 3, 2000.

Synopsis
Black voters brought action alleging that at-large method of electing county school board and county commission violated Voting Rights Act and constitution. Following trial, the United States District Court for the Middle District of Florida, No. 90-00366-CV-FTM-17, Anne C. Conway, J., entered judgment for defendants, and voters appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) evidence of population changes occurring after census was admissible despite defendants' stipulation and admissions that voters could establish required majority-minority district; (2) Act was not violated absent showing that black-majority district existed; and (3) voters failed toshow lack of equal political opportunity that was caused by county's electoral system, as required to establish constitutional claims.

Affirmed.

West Headnotes (14)

[1] **Counties** Nature and constitution in general

Evidence of population changes occurring after census was not barred by county defendants' pretrial stipulation and admissions that plaintiff black voters could establish required majority-minority district in support of claimed Voting Rights Act violation, since stipulation and admissions were based on and limited to census-year data, and plaintiffs were not unfairly prejudiced. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

1 Case that cites this headnote

[2] **Federal Civil Procedure** Effect

The scope and effect of admissions, like the scope and effect of stipulations, is a matter for determination by the trial court, in the exercise of its broad discretion. Fed.Rules Civ.Proc.Rule 36, 28 U.S.C.A.

13 Cases that cite this headnote

[3] **Counties** Nature and constitution in general

Education Redistricting; Voting Rights Act

Post-census evidence derived from voter registration information was admissible in black voters' action alleging that methods of electing county school board and county commission violated Voting Rights Act, to rebut presumptive accuracy of census figures. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

4 Cases that cite this headnote

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

In action for violation of Voting Rights Act, continuing accuracy of census figures is presumed only until the party challenging the census data overcomes the presumption with competent evidence to the contrary; although a burden rests on the party challenging the continuing accuracy of the census to introduce evidence to the contrary, the burden to establish that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district remains, throughout

the case, with the plaintiff. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

6 Cases that cite this headnote

[5] **Election Law** Evidence

Whether evidence derived from voter registration figures is sufficiently reliable to be admitted and considered in an action brought under the Voting Rights Act is a determination in the discretion of the district court. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

2 Cases that cite this headnote

[6] **Counties** Nature and constitution in general

Black voters failed to show existence of black-majority district in county as required to establish prima facie case of vote dilution under Voting Rights Act, even if such district would have been possible under most recent census figures, in view of evidence of population growth in county since census year, particularly outside of proposed black-majority district. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

1 Case that cites this headnote

[7] **Federal Courts** Elections, voting, and political rights

Court of Appeals reviews for clear error district court's finding of no vote dilution in action brought under Voting Rights Act. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

5 Cases that cite this headnote

[8] **Counties** Nature and constitution in general

Education Redistricting; Voting Rights Act

Court did not impermissibly presume that voter registration mirrored population, in violation of rule governing presumptions, in action challenging at-large method of electing county school board and county commission under Voting Rights Act; any assumption made by defense expert that voter registration mirrored voting age population went to weight of testimony and was freely challengeable on cross-examination. Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b); Fed.Rules Evid.Rule 301, 28 U.S.C.A.

4 Cases that cite this headnote

[9] **Federal Courts** "Clearly erroneous" standard of review in general

When reviewing for clear error, so long as the district court's findings are plausible, Court of Appeals may not reverse the district court even if it would have decided the case differently.

[10] **Constitutional Law** Intentional or purposeful action requirement

A facially neutral law is unconstitutional under the Equal Protection Clause only if a discriminatory impact can be traced to a discriminatory purpose. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

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

Plaintiffs in both constitutional vote dilution cases and dilution cases under the Voting Rights Act must show that there is evidence that excluded groups have less opportunity to participate in the political process and to elect candidates of their choice. U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 2(b), 42 U.S.C.A. § 1973(b).

13 Cases that cite this headnote

[12] **Counties** Nature and constitution in general

To establish a constitutional vote dilution claim, plaintiffs had to show that: (1) the county's black population lacked an equal opportunity to participate in the political process and elect candidates of its choice; (2) this inequality of

opportunity resulted from the county's at-large voting scheme; and (3) a racially discriminatory purpose underlied the county's voting scheme. U.S.C.A. Const.Amends. 14, 15.

15 Cases that cite this headnote

[13] **Constitutional Law** Elections in general
Counties Nature and constitution in general
Education Redistricting; Voting Rights Act

At-large method of electing county school board and county commission did not dilute votes of black voters, in violation of their constitutional rights, absent showing that alternative system of districting could exist whereby black-minority vote could elect its preferred candidates, which was required to establish that alleged inequality of opportunity to participate in the political process and elect preferred candidates resulted from county's current electoral system. U.S.C.A. Const.Amends. 14, 15.

4 Cases that cite this headnote

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

To show that inequality of opportunity is caused by a particular electoral system, on claim of unconstitutional vote dilution, a plaintiff must establish that an alternative election scheme exists that would provide better access to the political process. U.S.C.A. Const.Amends. 14, 15.

12 Cases that cite this headnote

Attorneys and Law Firms

***1337** Neil Bradley, Cristina Correia, ACLU Foundation, Inc., Atlanta, GA, for Plaintiffs–Appellants.

Robert M. Fournier, Sarasota, FL, for Defendants–Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON and BIRCH, Circuit Judges, and OWENS[*], Senior District Judge.

Opinion

EDMONDSON, Circuit Judge:

Plaintiffs, black citizens of DeSoto County, brought suit, alleging that the current at-large method of electing the county school board and county commission unlawfully dilutes black-minority voting strength, under section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After a trial, the district court found that Plaintiffs had failed to prove vote dilution and entered judgment for Defendants. We affirm the judgment.

BACKGROUND

The DeSoto County commission and school board, pursuant to Florida law,[1] are each composed of five members. The members of each board, who serve four-year staggered terms, are required to live in five separate residency districts but are elected by an at-large, countywide vote. The elections are partisan, with a majority requirement in the primaries but not in the general election. No black person has ever run for a seat on the commission; only one has run (unsuccessfully) for the school board.

***1338** At the time of the 1990 census, blacks comprised 15.6 percent of the county's total population and 13.7 percent of the total voting age population.[2] The county, however, contains a substantial nonvoting, mostly nonresident population, housed in a state prison and a state mental institution: few of the mental institution patients are county residents; and the inmates, convicted felons, cannot vote under Florida law. *See* Fla. Const. art. 6, § 4; Fla. Stat. § 97.041(2)(b). Removing these institutionalized members of the population from the total voting age population, blacks—in 1990—comprised only 11.8 percent of the potential voters in the county.

At trial, Plaintiffs' experts testified that, using 1990 census data, Plaintiffs could produce election plans for the county, consisting of five single-member districts for each board with blacks constituting a majority of the noninstitutionalized voting population in one of the districts. But Defendants introduced evidence that, because of changes in the black and white populations since 1990, the creation of a majority-black

district was no longer possible in 1998. One of Defendants' experts compared the 1990 census data with 1991 voter registration data and calculated ratios of registered voters to voting age population in each proposed district; he then extrapolated, from 1998 voter registration data, the voting age population in 1998. From these calculations, he testified that blacks in 1998 could constitute only about 46 percent of the voting age population of Plaintiffs' proposed black-majority district. Another defense expert testified that considerable growth had occurred in the county since 1990, but not in the black population of the proposed black-majority district.[3]

Defendants also offered other evidence (not based on voter registration data) of the county's population growth. For example, a member of the county commission testified that, based on the commission's approval of new subdivisions, the southwest corner of the county was the major growth area: according to the witness, this area was not one with a high black population.

The district court entered judgment for Defendants, finding that Plaintiffs failed to establish their vote dilution claims. In particular, the district court found that Plaintiffs failed to show "discriminatory effects": failed to show that the county's at-large election system resulted in blacks having less opportunity to participate in the political process and elect candidates of their choice. Plaintiffs appeal.

THE VOTING RIGHTS ACT CLAIM

An electoral system violates section 2 of the Voting Rights Act if the system causes the members of a distinct racial group to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The Supreme Court has said that, to satisfy section 2's standard in a vote dilution case, plaintiffs must show (at a minimum) that: (1) "the minority group ... is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the minority group is politically cohesive; and (3) the white majority votes as a bloc sufficiently to defeat the minority group's preferred candidates. *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986). The district court, in this case, found that Plaintiffs failed to establish the first *Gingles* factor: "[W]hile the Plaintiffs demonstrated the existence of the first *Gingles* precondition as of 1990, the Defendants have established by a preponderance of the evidence that as of the date of trial it is no longer possible to create a minority- ***1339** controlled district in DeSoto County." The district court, therefore, rejected Plaintiffs' statutory claim. Plaintiffs contend that the district court's finding that Plaintiffs failed to establish the first *Gingles* factor was error because the district court should have never considered Defendants' evidence of post–1990 population changes. We cannot accept Plaintiffs' contention.

A.

[1] Plaintiffs first contend that the district court should have excluded Defendants' evidence of post–1990 population changes because the evidence contradicted a stipulation and several admissions agreed to by Defendants before trial.

In 1991, Defendants admitted that Plaintiffs' proffered plans indeed created five single-member districts with one majority-black district.[4] And, in an April 1998 pretrial statement, the parties stipulated that Plaintiffs had drawn two electoral schemes with a black-majority district.[5] Defendants never amended these admissions or the stipulation. Based on the admissions and stipulation, Plaintiffs contend that Defendants' evidence of post-census changes is barred because Defendants conclusively admitted that Plaintiffs could establish the required majority-minority district.

Before filing the April pretrial statement, Defendants disclosed that they expected to call two expert witnesses at trial. On 1 May 1998, pursuant to the preexisting pretrial order, Defendants informed Plaintiffs that, given new 1998 voter registration data, Defendants' experts would challenge the continued validity of the 1990 census figures in their testimony. Defendants explained that their experts would testify that blacks, by 1998, were no longer sufficiently geographically concentrated to permit the creation of a black-majority district. After this disclosure, Plaintiffs filed a motion in limine to exclude Defendants' proffered evidence; the district court—after a hearing—denied the motion. Plaintiffs never moved for a continuance.

Defendants did not seek to amend or to withdraw the admissions or stipulation. Instead, Defendants argued that their evidence of population changes did not contradict Defendants' earlier admissions and stipulation because the admissions and stipulation were tied to and, thus, limited to the 1990 census figures. The district court agreed with Defendants. The district court found that the admissions and

stipulation inherently were based on the use of 1990 census data.

The district court's conclusion that the pretrial stipulation was defined by the 1990 census data was no abuse of discretion.[6] *See generally* ***1340** *Pulliam v. Tallapoosa County Jail,* 185 F.3d 1182, 1185 (11th Cir.1999) (noting that trial court's interpretation of pretrial order is reviewed for abuse of discretion). The trial court is in the best position to interpret the scope of stipulations in the pretrial statement. *See Morrison v. Genuine Parts Co.,* 828 F.2d 708, 709 (11th Cir.1987) (noting that district court has broad discretion to decide whether to hold party to stipulation). We note that, in the April pretrial statement, Defendants expressly contended that Plaintiffs had not established the first *Gingles* factor because the 1990 census might not reflect the county's population in 1998. Therefore, in the light of the pretrial statement as a whole, the district court's decision that the stipulation was based on and limited to the 1990 census figures was not error.

Nor do we think the district court erred in construing the admissions as limited to the 1990 census.[7] We think, at the very least, ambiguity did exist about whether the admissions were absolute or limited to the 1990 census figures, figures which might or might not accurately describe the county's population at the time of trial.[8] *See Woods v. Robb,* 171 F.2d 539, 541–42 (5th Cir.1948). For example, one admission stated: "[I]n making [this] admission Defendants assume that Plaintiffs have accurately reported the figures for each of the districts.... If the figures shown in [the exhibit] turnout to be other than those Plaintiffs have shown, then Defendants reserve the right to supplement this answer accordingly." And, Plaintiffs' requests for admission specifically relied on exhibits created with figures from the 1990 census. *See Rolscreen Co. v. Pella Prods. of St. Louis, Inc.,* 64 F.3d 1202, 1210 (8th Cir.1995) (noting that conclusive effect of admission ***1341** "may not be appropriate where requests for admissions or the responses to them are subject to more than one interpretation" and that "[i]ssues change as a case develops, and the relevance of discovery responses is related to their context in the litigation").

[2] The scope and effect of admissions (like the scope and effect of stipulations) is a matter for determination by the trial court, in the exercise of its broad discretion.[9] Given the circumstances of this case, the district court did not abuse its discretion in interpreting the admissions and stipulation as limited to the 1990 census figures.

B.

[3] Plaintiffs also contend that, even if the admissions and stipulation did not bar the introduction of Defendants' post-census evidence, the district court erred in allowing Defendants' evidence to oppose the census figures.

[4] No one challenges the initial accuracy of the 1990 census; the trial, however, was in 1998. At trial, Defendants pointed to the lapse of time since the census and to the changed circumstances. The presumption is that census figures are continually accurate. *See Valdespino v. Alamo Heights Indep. Sch. Dist.,* 168 F.3d 848, 853–54 (5th Cir.1999). But this presumption is not irrebuttable.[10] The continuing accuracy of census figures is presumed only until the party challenging the census data overcomes the presumption with competent evidence to the contrary. *See id.* Although a burden rests on the party challenging the continuing accuracy of the census to introduce evidence to the contrary, we stress that the burden to establish the first *Gingles* factor remains, throughout the case, with the plaintiff. *See Gingles,* 106 S.Ct. at 2764. We conclude that the district court did not err in considering non-census data.

Plaintiffs claim that the district court erred in considering non-census evidence based on voter registration figures because, Plaintiffs say, registration data is an inherently unreliable measure of voting age population and cannot be used to contradict census figures. First, we note that there is no per se rule against the use of voter registration data in voting rights cases.[11] Although the Supreme Court has ***1342** written that voter registration data may be less probative than pure population data in voting cases, the Court has treated voter registration evidence as credible and as reliable. *See Burns v. Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 1297, 16 L.Ed.2d 376 (1966). We also have recognized the competence of this kind of data. *See Wyche v. Madison Parish Police Jury,* 635 F.2d 1151, 1161–62 (5th Cir.1981). Like most evidence presented by expert testimony, we think its admissibility has to be determined on a case-by-case basis by the district court. *See generally Daubert v. Merrell Dow Pharmaceuticals Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 2796–98, 125 L.Ed.2d 469 (1993). And, this court has previously said, in a voting rights case, that statistical evidence derived from a sampling method, using reliable statistical techniques, is admissible on the question

of determining the relevant population. *See Negron v. City of Miami Beach, Fla.,* 113 F.3d 1563, 1570 (11th Cir.1997). We see no reason why the evidence presented in this case —calculations of the county's population in 1998 derived from voter registration information—should be subject to a different analysis.

[5] Whether evidence derived from voter registration figures is sufficiently reliable to be admitted and considered is a determination in the discretion of the district court. *See generally Allison v. McGhan Medical Corp.,* 184 F.3d 1300, 1306 (11th Cir.1999) (citing *General Elec. Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)) (discussing review of admissibility of expert testimony). If the evidence is admissible, that voter registration data might not be as reliable as some other measures of population goes to the weight of the evidence, but does not preclude use of the figures by the district court.

Here, the district judge was presented with expert testimony, from both sides, on the reliability of Defendants' evidence. Defendants' expert spoke to the reliability of the registration data for the county, pointing out the lack of obstacles to registration. He stated that he believed that registration data would not underrepresent the black population in 1998 because the passage of the Motor Voter law,[12] if anything, would increase registration rates since 1991.[13] The district court's receipt and consideration of evidence on the demographic changes in the county was no abuse of discretion. The kinds of evidence introduced in this case are not unfit for the purpose of challenging the continuing accuracy of census data.

C.

[6] **[7]** **[8]** Next, we inquire whether the district court erred in finding no vote dilution for the section 2 claim in this case. We review the district court's finding of no vote dilution for clear error only. *See Gingles,* 106 S.Ct. at 2781. In the present case, Plaintiffs, using the 1990 census, proffered (at best) majority-minority districts with a black voting age majority of only about 54–57 percent. No one disputes ***1343** that there has been substantial population growth in the county since the 1990 census. Defendants showed that a considerable amount of that growth has been within the white population. Based on the post-census population data derived from voter registration figures, Defendants' experts concluded that the creation of a black-majority district was not feasible in 1998: (1) movement of the district lines would include more whites in the district, thus decreasing the black majority; and (2) the black population growth was geographically distant from the proposed district and could not be included to make a black-majority district.[14] Defendants also offered other evidence, not derived from voter registration figures, of the population changes and growth in the county.

In *Valdespino,* the Fifth Circuit upheld a district court's finding that the plaintiffs had failed to establish the first *Gingles* factor. 168 F.3d at 856. There, even though, according to the 1990 census, the plaintiffs could create a majority-minority district, the *Valdespino* defendants presented evidence, at the 1997 trial, that demographic changes since the 1990 census had made the creation of such a district impossible. The defendants' presentation included evidence that a large apartment complex in the district had closed and reopened with fewer residents, while, at the same time, residential development outside the district increased. *See id.* at 850–51. The Fifth Circuit concluded that the district court did not err in deciding that the defendants' figures demonstrated sufficient post-census demographic changes to raise considerable doubt that a majority-minority district could still be created and in deciding that the plaintiffs had not carried their burden of proof. *See id.* at 854, 856.

[9] The record, in this case, presents ample evidence of population growth in the county since 1990, particularly outside of Plaintiffs' proposed district. And, even using the 1990 census, Plaintiffs' proffered black-majority district was not one that was overwhelmingly black. Thus, we cannot say that the district court erred in this finding that Defendants' evidence undercut the presumption that the 1990 census reflected the truth about the county's population and population distribution in 1998.[15] On this record, the district court (considering all the evidence including the 1990 census) did not clearly err in finding and in concluding that Plaintiffs failed to show the existence of the black-majority district needed to establish their prima facie case of vote dilution.[16]

THE CONSTITUTIONAL CLAIMS

[10] Plaintiffs contend that, even if their statutory claim fails, the district court erred in rejecting their constitutional vote dilution claims.[17] Plaintiffs point out ***1344** that the district court found that a discriminatory purpose underlies the county's current at-large voting scheme. And, Plaintiffs

assert that the record shows that the county's black population lacks an equal opportunity to participate in the political process and elect candidates of its choice. Plaintiffs argue that they, therefore, have sufficiently established claims under the Fourteenth and Fifteenth Amendments.[18] We disagree.

[11] As an initial matter, we doubt that any plaintiff, challenging an electoral system like DeSoto County's, can establish a constitutional vote dilution claim where his section 2 claim has failed. Plaintiffs say that, after a claimant has proved discriminatory intent, he need only produce minimal evidence of injury resulting from the challenged electoral scheme to prevail under the Constitution. But, the Supreme Court, historically, has articulated the same general standard, governing the proof of injury, in both section 2 and constitutional vote dilution cases; plaintiffs, in both cases, must show that "there is evidence that excluded groups have 'less opportunity to participate in the political process and to elect candidates of their choice.' " *Compare Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 2809, 92 L.Ed.2d 85 (1986) (quoting *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272, 3279, 73 L.Ed.2d 1012 (1982)), *with Gingles,* 106 S.Ct. at 2763, *and* 42 U.S.C. § 1973(b). The pertinent issues seem the same (or almost the same) in both cases. And, even if the standards are not completely identical in application, we know that section 2 was intended to be more permissive than the constitutional standard. *See Solomon,* 899 F.2d at 1015 (Kravitch, J., specially concurring); *see also Lee County Branch of NAACP v. City of Opelika,* 748 F.2d 1473, 1478 n. 7 (11th Cir.1984) ("[I]f the plaintiffs cannot prevail under the generally more easily proved 'results' standard of section 2, it is unlikely that they could prevail on their constitutional claims in any event."). The parties have cited (and we have found) no case in which a circuit court has concluded that an at-large or multi-member-district electoral system, although not in violation of section 2, unconstitutionally dilutes minority voting strength.[19] In the absence of Supreme Court direction, therefore, we question, as a legal proposition, whether vote dilution can be established under the Constitution when the pertinent record has not proved vote dilution ***1345** under the more permissive section 2. But, we need not resolve this question today.

[12] **[13]** Even if we assume that it is possible, as a matter of law, to prevail on a constitutional claim where no section 2 violation can be in fact established, Plaintiffs here have not proved their constitutional claim. Briefly stated, to establish a constitutional vote dilution claim, Plaintiffs must show that: (1) the county's black population lacks an equal opportunity to participate in the political process and elect candidates of its choice; (2) this inequality of opportunity results from the county's at-large voting scheme; and (3) a racially discriminatory purpose underlies the county's voting scheme.[20] *Lucas v. Townsend,* 967 F.2d 549, 551 (11th Cir.1992); *see also Bandemer,* 106 S.Ct. at 2809. We will accept, for the purposes of this appeal, the district court's finding that Plaintiffs have shown discriminatory intent.[21] And, we will assume, for the sake of argument, that Plaintiffs' evidence demonstrates the absence of equal opportunity.[22] Plaintiffs, nonetheless, failed to establish their constitutional claims because the record fails to show that the inequality of opportunity results from the county's current electoral system. In other words, Plaintiffs have failed to establish causation.

[14] That a plaintiff, claiming a violation of his voting rights under the Fourteenth and Fifteenth Amendments, must show that an injury is caused by the government conduct he seeks to challenge is hardly a novel proposition. *See Kirksey v. Bd. of Supervisors of Hinds County,* 554 F.2d 139, 148 (5th Cir.1977) (inquiring whether reapportionment plan "will in fact have the effect of perpetuating the denial of access to the political process that was proved by plaintiffs to exist"); *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979) ***1346** (requiring that claimant show discriminatory impact traceable to discriminatory purpose); *see also Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 3327, 82 L.Ed.2d 556 (1984) (requiring equal protection plaintiff to show causation as element of standing). To show that inequality of opportunity is caused by a particular electoral system, a plaintiff must establish that "an alternative election scheme exists that would provide better access to the political process." *Burton v. City of Belle Glade,* 178 F.3d 1175, 1199 (11th Cir.1999); *see also Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 117 S.Ct. 1491, 1498, 137 L.Ed.2d 730 (1997); *Holder v. Hall,* 512 U.S. 874, 114 S.Ct. 2581, 2585, 129 L.Ed.2d 687 (1994); *Nipper v. Smith,* 39 F.3d 1494, 1533 (11th Cir.1994) (en banc).[23] As we have explained, "[I]f a minority cannot establish that an alternative election scheme exists that would provide better access to the political process, then the challenged voting practice is not responsible for the claimed injury." *Burton,* 178 F.3d at 1199; *see also Gingles,* 106 S.Ct. at 2766 (explaining if first *Gingles* factor is not shown, then "the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates").

Here, Plaintiffs failed to make the requisite showing of causation: Plaintiffs did not establish that an alternative system of districting could exist whereby the black-minority vote could elect its preferred candidates. The district court found that the creation of a black-majority district, in 1998, was not feasible. Plaintiffs, on appeal, argue that a black-majority district is not required; according to Plaintiffs, a "black-influence district," where a substantial black minority is coupled with sufficient white cross-over voting so that the black minority in fact can elect candidates of its choice, is sufficient. We, however, need not decide whether Plaintiffs' "influence district" theory is correct.[24] Plaintiffs never argued this theory to the district court.

Plaintiffs have failed to establish causation. Plaintiffs' contention that the district court erred in rejecting their constitutional claims, therefore, must fail.[25]

CONCLUSION

The district court dealt with the evidence without error. The case was fully tried. The district court was the finder of fact. The district court did not err in determining that Plaintiffs showed no lack of equal political opportunity that was caused by the county's electoral system. Plaintiffs failed to meet their burden. The judgment of the district court is AFFIRMED.

All Citations

204 F.3d 1335, 142 Ed. Law Rep. 59, 54 Fed. R. Evid. Serv. 246, 13 Fla. L. Weekly Fed. C 427

Footnotes

* Honorable Wilbur D. Owens, Jr., Senior U.S. District Judge for the Middle District of Georgia, sitting by designation.

1 *See* Fla. Const. art. 8, § 1(e); Fla. Stat. § 100 et seq.

2 The parties do not dispute that, for the purposes of this litigation, the appropriate category of voters is blacks.

3 This expert plotted on a map the location of each black registered voter and found that, since 1991, more black registered voters were living outside the proposed district, showing a dispersion of the county's black population.

4 For example, one admission stated: "Defendants admit that the plaintiffs five single-member district plan ... is one which has a maximum deviation of 6.2% and that the plan contains one district in which African Americans make up a majority of the voting age population."

5 In the April pretrial statement, the parties stipulated:

> Plaintiffs have drawn an election plan for De Soto County containing 5 single member districts, which includes one district in which African–Americans are 54.37 percent of the population 18 years of age and over and which has a total deviation of 0.16% from the "ideal" district. (i.e. a district containing exactly one fifth of the county's total population). Plaintiffs have also drawn an election plan for De Soto County containing 5 single member districts, which includes one district in which African–Americans are 57.33 percent of the population 18 years of age and over and which has a total deviation of 6.2 % from the "ideal" district.

The pretrial statement, however, also stated: "Defendants do not concede that plaintiffs have met or will be able to meet the first *Gingles* precondition.... The census figures are now eight years old and may no longer accurately reflect the present population percentages."

6 Plaintiffs argue that the district court's construction of the stipulation amounts to an amendment of the pretrial order and, therefore, is subject to the manifest injustice standard of Fed.R.Civ.P. 16(e). We disagree. The district court did not amend the pretrial statement, but construed it. Also, Defendants' disclosure of their experts' new testimony was submitted pursuant to the pretrial order.

7 Plaintiffs argue that the district court's construction of the admissions amounts to withdrawal and is subject to the unfair prejudice standard of Fed.R.Civ.P. 36. We do not agree. Defendants did not argue for, nor did the district court allow, withdrawal; the district court just construed the scope of the admission.

Plaintiffs in this case were not unfairly prejudiced by the introduction of Defendants' evidence of post–1990 population change. Defendants' experts were specifically identified in the 1 May disclosure: fifty days before trial. And, Plaintiffs did depose one of Defendants' experts before trial about the new evidence. *Cf. Bergemann v. United States,* 820 F.2d 1117, 1121 (10th Cir.1987) (finding no prejudice where party knew issue was contested). When the 1998 pretrial statement was filed, Plaintiffs already expected to call an expert to testify about the feasibility of creating a majority-black district. And, at trial, Plaintiffs presented an expert who, in fact, challenged Defendants' new evidence. Plaintiffs have not shown that they were unfairly prejudiced by having to respond to Defendants' new evidence. *See Smith v. First Nat'l Bank of Atlanta,* 837 F.2d 1575, 1577–78 (11th Cir.1988).

Also, if Plaintiffs had been surprised, they should have moved for a continuance. This court has repeatedly said that "the remedy for coping with surprise is not to seek reversal after an unfavorable verdict, but a request for continuance at the time the surprise occurs." *United States v. Battle,* 173 F.3d 1343, 1350 (11th Cir.1999) (citations omitted). Plaintiffs requested no continuance.

Plaintiffs also contend that Defendants should have amended formally their admissions. Plaintiffs cite *American Auto. Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.,* 930 F.2d 1117, 1119 (5th Cir.1991), and *Williams v. City of Dothan, Ala.,* 818 F.2d 755, 762, *modified on other grounds on denial of reh'g by* 828 F.2d 13 (11th Cir.1987), for the proposition that the district court is not free to reject an admission because it finds more "credible evidence." These cases are materially different from this case. In both cases, the court simply disregarded an admission; here, the court reasonably construed Defendants' admission as limited to the 1990 census figures.

8 Plaintiffs themselves characterized Defendants' admissions as tied to and limited to the validity of the 1990 census figures: "[D]efendants have admitted that 'African–Americans in DeSoto county are sufficiently geographically concentrated such that *utilizing 1990 census population information,* a single member district plan can be drawn (3)27' " (emphasis added). And, at least one admission stated: "Defendants' answer is subject to the further qualification that Defendants are not admitting that Plaintiffs have demonstrated that they can satisfy any of the three 'preconditions' of [*Gingles*]."

9 We are aware that the First Circuit, in one case, reviewed de novo a district court's interpretation of an admission. *See Talley v. United States,* 990 F.2d 695, 698–99 (1st Cir.1993) (stating that construction of documents is reviewed de novo). Because we review a district court's construction of stipulations and a district court's evidentiary rulings for abuse of discretion, we decline to adopt the standard of review that the First Circuit used. *See, e.g., Pulliam,* 185 F.3d at 1185; *Ad–Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.,* 37 F.3d 1460, 1463 (11th Cir.1994); *see also Milton v. Montgomery Ward & Co.,* 33 Cal.App.3d 133, 138, 108 Cal.Rptr. 726 (Cal.Ct.App.1973) (noting that trial court has broad discretion to determine relevancy and scope of admission).

10 In fact, the Supreme Court has acknowledged that census data are not perfect and are often outdated. *See Abrams v. Johnson,* 521 U.S. 74, 117 S.Ct. 1925, 1940, 138 L.Ed.2d 285 (1997); *see also Kirkpatrick v. Preisler,* 394 U.S. 526, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519 (1969) (other data may be considered in voting rights cases).

11 The Supreme Court has never precluded the use of voter registration data. *See Rollins v. Fort Bend Indep. Sch. Dist.,* 89 F.3d 1205, 1219 (5th Cir.1996) (noting that Supreme Court has not "held that voter registration is irrelevant: it is simply not the sole criterion"). And, neither have we. *See, e.g., Negron v. City of Miami Beach, Fla.,* 113 F.3d 1563, 1568 (11th Cir.1997).

Plaintiffs cite a special concurrence in *Solomon v. Liberty County, Fla.,* 899 F.2d 1012, 1018 (11th Cir.1990) (en banc) (Kravitch, J., specially concurring), for the proposition that voter registration figures should not be considered in the instant case. The *Solomon* en banc court, however, decided merely that the three *Gingles* factors had been established because, despite being only 45 percent of registered voters, the evidence showed that the minority population in the district was 51 percent of the voting age population. *Id.* at 1013 (per curiam). Moreover, Judge Kravitch never said that voter registration data was per se inadmissible evidence; she merely noted that the relevant criteria to consider is population, not the number of registered voters. *See id.* at 1018; *see also Johnson v. DeGrandy,* 512 U.S. 997, 114 S.Ct. 2647, 2656, 129

L.Ed.2d 775 (1994) (considering population as relevant criterion). In this case, Defendants and the district court, in fact, focused on the correct criteria: population. The use of evidence derived from voter registration data to show population is not, in itself, impermissible.

12 The Motor Voter law was enacted in 1993, in part, to increase the voter registration rates among minorities by allowing citizens to register at more places, including at driver's licensing facilities. *See* 42 U.S.C. § 1973gg(b)(1) (stating that purpose of Act is "to establish procedures that will increase the number of eligible citizens who register to vote").

13 Defendants' expert also observed the 66.1 percent registration rate among blacks within the proposed black-majority district (compared to the countywide white registration rate of 63.5 percent). Plaintiffs point out that black voter registration dropped in 1994, but Defendants' expert explained that the 1991 figures were based on inactive and active voter registration roles, whereas the 1994 figures were based purely on active registered voters.

14 Plaintiffs contend that the court impermissibly presumed that voter registration mirrored population, in violation of Fed.R.Evid. 301. We find this argument to be without merit. Any assumption made by Defendants' expert that voter registration mirrored voting age population went to the weight of the testimony and was freely challengeable on cross-examination.

15 At the motion in limine hearing, the district court, concluding that evidence of current population numbers would be relevant, said these words: "And I'm not saying we ignore the 1990 census." The 1990 census figures are facts. As evidence, they—even after Defendants introduced contrary evidence—retained probative force and could support inferences on the part of the fact finder. But the district court did not err in weighing the census figures against Defendants' evidence.

16 When reviewing for clear error: "As long as the district court's findings are plausible, we may not reverse the district court even if we would have decided the case differently." *United States v. Engelhard Corp.,* 126 F.3d 1302, 1305 (11th Cir.1997); *see generally Anderson v. Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

17 Whether vote dilution is cognizable at all under the Fourteenth and Fifteenth Amendments is uncertain. *See Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 n. 9 (11th Cir.1999).

18 Plaintiffs initially argue that, because the district court found a discriminatory purpose behind the county's electoral system, they have shown the existence of a de jure segregation system and, therefore, have established a claim under *United States v. Fordice,* 505 U.S. 717, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). We have noted previously that no court has applied *Fordice* outside of the education setting, *Burton v. City of Belle Glade,* 178 F.3d 1175, 1190 (11th Cir.1999), and we decline to do so for the first time in this case. Moreover, the government's discriminatory intent alone, without a causal connection between the intent and some cognizable injury to Plaintiffs, cannot entitle Plaintiffs to relief in this case: a facially neutral law "is unconstitutional under the Equal Protection Clause only if [a discriminatory] impact can be *traced* to a discriminatory purpose." *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979) (emphasis added). Therefore, for the reasons stated in this opinion, even if *Fordice* applies outside of the education setting, Plaintiffs cannot prevail on a *Fordice*-based theory in this case.

19 In *Holder v. Hall,* the Supreme Court, finding no section 2 violation, "remanded for consideration of respondent's constitutional [vote dilution] claim." 512 U.S. 874, 114 S.Ct. 2581, 2588, 129 L.Ed.2d 687 (1994). Plaintiffs cite this result for the proposition that the statute and the Constitution are not coextensive for vote dilution claims. We do not think this statement bears the weight Plaintiffs have placed on it. In *Holder,* the circuit court originally did not address the constitutional claims because it concluded that section 2 vote dilution had been proved. *Id.* at 2585. Because the circuit court had not addressed the issue, it was proper for the Supreme Court to remand rather than consider an issue not considered by the circuit court. *See Duignan v. United States,* 274 U.S. 195, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

20 We recognize that, in prior cases, we have said that, to prevail on a constitutional vote dilution claim, a plaintiff must show the existence of "discriminatory effects" and "a racially discriminatory purpose chargeable to the state." *Lucas v.*

Townsend, 967 F.2d 549, 551 (11th Cir.1992). Our articulation today of the constitutional standard does not alter the plaintiff's burden. We are not changing the law; we are explaining it. Case law makes apparent that the "discriminatory effects" requirement encompasses both inequality of opportunity and a causation element. *See id.* (requiring that discriminatory effect "results from" intentionally discriminatory electoral scheme); *see also Kirksey v. Bd. of Supervisors of Hinds County,* 554 F.2d 139, 148 (5th Cir.1977) (same). Causation is also implicit in the term "discriminatory *effects.*" *See* Random House Dictionary of the English Language 622 (2d ed. unabridged 1987) (defining effect as "something that is produced by an agency or cause; result; consequence"). We think, however, that, to avoid confusion, viewing causation and the existence of unequal opportunity as distinct elements (instead of merging these two concepts into a single "discriminatory effects" requirement) is the better approach: it promotes clarity.

When the district court, in this case, found no "discriminatory effects," we understand the court to have found no causation.

21 Defendants dispute the district court's finding of discriminatory intent. Given our disposition of this appeal, however, we need not address Defendants' contention.

22 Plaintiffs assert that their evidence, of (1) the black population's inability to elect consistently candidates of its choice and (2) the deterrence of blacks from seeking office in the county, is sufficient to establish that the black population lacks equal political opportunity. We need not decide, however, whether these factors (or either factor alone) are sufficient to establish a lack of equal opportunity; we assume that Plaintiffs have shown an inequality of opportunity. But, we do observe that Plaintiffs' argument about the deterrence of black candidacies is, in this case, nothing more than a variation of the argument that the county's black population cannot consistently elect the candidates of its choice. If the record indeed establishes that black candidates are deterred from seeking office in DeSoto County, it is only because they (according to Plaintiffs) cannot win. And, if black candidates cannot win, it (according to Plaintiffs' theory) is only because the black-minority vote, under the present system, is insufficient to elect them. For all practical purposes, therefore, Plaintiffs' deterrence theory comes down to the black minority's alleged inability to elect candidates of its choice.

23 "The early development of our voting rights jurisprudence in [equal protection] cases provided the basis for our analysis of vote dilution under the amended § 2...." *Holder,* 114 S.Ct. at 2592 n. 1 (Thomas, J., concurring in judgment); *see also League of United Latin American Citizens v. Clements,* 999 F.2d 831, 851 (5th Cir.1993) ("[T]he 1982 amendments to § 2 were intended to 'codify' the results test as employed in *White* and *Whitcomb.*"). Therefore, we are informed in our inquiry by prior decisions construing section 2.

24 The Supreme Court continually has declined to decide whether the "influence district" theory is sound. *See, e.g., Voinovich v. Quilter,* 507 U.S. 146, 113 S.Ct. 1149, 1155, 122 L.Ed.2d 500 (1993).

25 Plaintiffs also assert that the district court erred in considering Plaintiffs' two proposed districting plans (one with less deviation than the other, but covering similar areas of black concentration) as similar. The district court noted that, at trial, the parties focused on the district with less deviation. The district court also found that the black voting age population constituted a district majority in neither districting plan. We find no error in the district court's analysis. *See Davis v. Chiles,* 139 F.3d 1414, 1418 n. 8 (11th Cir.1998) (discussing proposals together where they generally raise same issues).

98 N.Y.2d 155, 773 N.E.2d 490, 746 N.Y.S.2d 125,
168 Ed. Law Rep. 438, 2002 N.Y. Slip Op. 04669

Kenneth P. LaValle et al., Appellants,

v.

Carl T. Hayden et al., as Regents of the Board of Regents of the University of the State of New York, et al., Respondents.

Court of Appeals of New York
2, 66
Argued April 24, 2002;

Decided June 6, 2002

CITE TITLE AS: LaValle v Hayden

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 30, 2001, which affirmed so much of an order and judgment (one paper) of the Supreme Court (Alan D. Oshrin, J.; op 182 Misc 2d 409), entered in Suffolk County, as granted a motion by defendants for summary judgment dismissing the complaint, denied a cross motion by plaintiffs for a declaration that the joint ballot provisions set forth in Education Law § 202 governing the election of members of the Board of Regents of the University of the State of New York violate the State Constitution, and declared that those provisions do not violate article XI of the State Constitution.

LaValle v Hayden, 282 AD2d 716, affirmed.

HEADNOTE

Constitutional Law
Validity of Statute
Election of Members of Board of Regents by Legislature

The joint ballot provisions of Education Law § 202 (1), (2), providing for an alternative means of electing members of the State Board of Regents, where the Senate and Assembly fail to elect by concurrent resolution, do not violate NY Constitution, article XI, §§ 1 and 2. The Constitution gives the Legislature control over the regents, and for more than two centuries the joint ballot has been an integral part of the procedure for selecting regents. The quintessential "legislative power," its lawmaking power, unlike the power to elect regents, is directly conferred to and vested in the Senate and the Assembly by the Constitution. The constitutional lawmaking prescription does not, however, negate or undermine the Legislature's ability to convene as a unicameral body, in a distinct, nonlawmaking capacity. The Legislature--whether functioning bicamerally, or sitting in joint session and acting unicamerally-- is nevertheless the "legislature" as it is understood in article XI.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Schools §§ 6-9.

McKinney's, Education Law § 202 (1), (2); NY Const, art XI, §§ 1, 2. ***156**

NY Jur 2d, Schools, Universities, and Colleges §§ 3, 575, 576, 579.

ANNOTATION REFERENCES

See ALR Index under Schools and Education.

POINTS OF COUNSEL

Hamburger, Maxson & Yaffe, LLP, Melville (*Richard Hamburger, David N. Yaffe* and *Lane T. Maxson* of counsel), for appellants.

I. Because the Constitution vests the Legislature with exclusive and plenary power over the regents, nothing short of a concurrent vote of both houses of the Legislature is constitutionally sufficient to elect regents. (*Matter of Anderson v Krupsak,* 40 NY2d 397; *People ex rel. Jackson v Potter,* 47 NY 375; *People v Carroll,* 3 NY2d 686; *Newell v People,* 7 NY 9; *Matter of Taylor v Sise,* 33 NY2d 357; *Matter of Hurowitz v Board of Elections of City of N.Y.,* 53 NY2d 531; *Gardner v Ginther,* 232 App Div 296, 257 NY 578; *Union Free School Dist. No. 22 of Towns of Hempstead & N. Hempstead v Wilson,* 281 App Div 419; *Matter of Board of*

Educ., Cent School Dist. No. 1 of Town of Grand Is. v Helsby, 64 Misc 2d 473, 37 AD2d 493, 32 NY2d 660; *Franklin Natl. Bank of Long Is. v Clark,* 26 Misc 2d 724.) II. The statutes and established practice of the Legislature preceding the enactment of the 1894 Constitution demonstrate that each and every "appointment" of a regent was performed only by the "Legislature" acting bicamerally. Therefore, any constitutionalization of existing law effectuated by the 1894 State Constitution necessarily confirms that the election of regents cannot be performed by the unicameral action of the Assembly and Senate. III. The Legislature may not delegate to a unicameral body its constitutionally conferred power to appoint regents bicamerally. (*Franklin Natl. Bank of Long Is. v Clark,* 26 Misc 2d 724; *People ex rel. Everson v Lorillard,* 135 NY 285; *Dorst v Pataki,* 90 NY2d 696; *Matter of Levine v Whalen,* 39 NY2d 510.)

Cravath, Swaine & Moore, New York City (*Frederick A.O. Schwarz, Jr.,* and *Mary Eaton* of counsel), and *Kathy A. Ahearn,* Albany, for Carl T. Hayden and others, respondents. I. NY Constitution article XI constitutionalizes election by joint ballot. (*People ex rel. Joyce v Brundage,* 78 NY 403.) II. NY Constitution article XI does *not* require appointment by concurrent resolution. (*Newell v People,* 7 NY 9; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27; *Matter* ***157** *of Taylor v Sise,* 33 NY2d 357; *Matter of Anderson v Krupsak,* 40 NY2d 397; *People v Molyneux,* 40 NY 113.) III. NY Constitution article III governs the legislative power, *not* the power of appointment. (*Lanza v Wagner,* 11 NY2d 317; *Shanker v Regents of Univ. of State of N.Y.,* 27 AD2d 84, 19 NY2d 951; *Matter of Dunkel v Rogers,* 279 App Div 44; *Immigration & Naturalization Serv. v Chadha,* 462 US 919.) IV. The presumption of constitutionality should be applied in favor of upholding Education Law § 202. (*Matter of McGee v Korman,* 70 NY2d 225; *Shanker v Regents of Univ. of State of N.Y.,* 27 AD2d 84; *Benson Realty Corp. v Beame,* 50 NY2d 994.)

Eliot Spitzer, Attorney General, New York City (*Melanie L. Oxhorn, Caitlin J. Halligan* and *Michael S. Belohlavek* of counsel), for State of New York and another, respondents. Education Law § 202's alternative joint ballot provisions do not violate article XI of the State Constitution because they do not delegate the Legislature's implied power to appoint regents, and because a delegation of that power would not be improper in any event. (*National Assn. of Ind. Insurers v State of New York,* 89 NY2d 950; *People v Tichenor,* 89 NY2d 769, 522 US 918; *Brady v State of New York,* 80 NY2d 596, 509 US 905; *Anthony v Town of Brookhaven,* 190 AD2d 21; *McPherson v Blacker,* 146 US 1; *Cohen v Cronin,* 39 NY2d 42; *Matter of Anderson v Krupsak,* 40 NY2d 397; *Marino v Weprin,* 155 Misc 2d 276; *Immigration & Naturalization Serv. v Chadha,* 462 US 919; *Matter of Koenig v Flynn,* 258 NY 292.)

OPINION OF THE COURT

Ciparick, J.

The question presented by this appeal is whether the joint ballot provisions of Education Law § 202, providing for an alternative means of electing members of the State Board of Regents, where the Senate and Assembly fail to elect by concurrent resolution, violate article XI, §§ 1 and 2--the Education Article--of the New York State Constitution. We say that they do not.

Plaintiffs Kenneth P. LaValle, a State Senator, and David H. Pearl, a retired teacher, commenced this action in Supreme Court seeking declaratory and injunctive relief against defendants, 14 individually named regents, the Board of Regents of the State of New York, Alexander F. Treadwell, the Secretary of State, and the State of New York. The underlying facts are undisputed. The Education Law provides guidelines ***158** for the election of state regents.[*] The Legislature must first attempt to elect regents by concurrent resolution. When the Senate and Assembly are deadlocked, the Legislature may use a "joint ballot" to elect regents. The individually named regent defendants were elected, on various dates, pursuant to the contested joint ballot method. Plaintiffs sought to enjoin defendant regents from assuming office, and additionally sought a declaration that the joint ballot provisions of Education Law § 202 (1) and (2) are unconstitutional. Following commencement of the action, defendants promptly moved to dismiss the action pursuant to CPLR 3211. Plaintiffs cross-moved for summary judgment. Supreme Court denied plaintiffs' motion, and granted defendants' motions dismissing the complaint. The Appellate Division affirmed. Plaintiffs now appeal as of right pursuant to CPLR 5601 (b) (1).

Plaintiffs contend that joint ballot elections violate the constitutional delegation of legislative authority over regents expressly provided in article XI, §§ 1 and 2 of the State Constitution. Specifically, plaintiffs argue that the unicameral legislative body attendant to the joint ballot does not constitute the "legislature" as required in article XI, § 2 because only the Senate and Assembly acting bicamerally constitute the "legislature" within the meaning of the Constitution. In light of the validated and extensive historical use of the joint ballot, at both the federal and state levels, plaintiffs' argument necessarily fails.

I.

The University of the State of New York is a corporate institution with roots that trace back to colonial America (***159** NY Const, art XI, § 2; L 1784, ch 51). The University's historical underpinnings provide useful insight into the resolution of this appeal.

In the wake of the Revolutionary War, a newly minted State Legislature sought to provide for a pervasive state education system. In 1784, the Legislature established the University of the State of New York (*see* L 1784, ch 51). The University derives from a colonial remnant, the "Governors of the College of the Province of New York in the city of New York in America" (*id.*). The College was specifically structured as a corporate entity, charged with overseeing local education. Apparently satisfied with the colonial model, the Legislature transferred "all the rights priviledges and immunities" of the former institution to the University (*id.*). The 1784 statute expressly continued the "corporate" institution King George II initiated in colonial America, transforming the colonial "college" into a functioning "university" (*see id.*).

Upon the creation of the University, the Legislature concomitantly created a governing body--the Board of Regents--empowered to maintain and secure the University's advancement (*id.; see also Shanker v Regents of Univ. of State of N.Y.,* 27 AD2d 84, 85 [3d Dept 1966], *affd on op below* 19 NY2d 951 [1967]). The regents were statutorily endowed with the "full power and authority to ordain and make ordinances and bye laws for the government of the several colleges" and to, among other things, "found schools and colleges" (L 1784, ch 51). Essentially, the regents governed and directed all aspects of the University's business.

Originally, the individual members of the Board of Regents were themselves named in the text of the statute. In effect, the enactment itself represented a legislative election of individual regents. In total, the 1784 statute named 24 individual regents, as well as a number of ex officio members statutorily granted a position on the board. Additionally, this statute granted the Governor a limited power to fill board vacancies as they occurred. This gubernatorial appointment method was ultimately replaced by the "joint ballot" in 1787.

Under the Articles of Confederation, each state was represented in Congress by "delegates" (Articles of Confederation art V). Article V expressly noted that delegates were to be appointed "in such manner as the legislatures of each state shall direct." New York chose the joint ballot. Article XXX of the first Constitution of New York, 1777, governed the appointment ***160** of "Delegates to ... Congress." Article XXX provided that delegates were to "be chosen by the joint ballot of the [state] senators and members of assembly so met together." The Legislature, in 1787, ultimately applied this same method to regents, abolishing the gubernatorial power to fill vacancies, and replacing it with the same process used to elect delegates--the joint ballot (L 1787, ch 82).

The new act provided that regent vacancies were to be "supplied by the legislature in the manner in which delegates to Congress are appointed" (L 1787, ch 82). Delegates were still elected in accordance with the joint ballot provision articulated in article XXX of the Constitution of 1777. Interest in the perpetual statutory election system sanctioned by the Legislature during the initial years of the regents' existence began to wane, and ultimately it was replaced when the Legislature enacted constitutional provisions concerning the University and the regents.

Article IX of the Constitution of 1894 expressly endorsed the establishment of the University and the regents. Two years prior, the United States Supreme Court, in *McPherson v Blacker* (146 US 1 [1892]), indirectly approved the use of the joint ballot as a valid and constitutional means of electing state electors. When New York's constitutional convention convened in 1894, the delegates were well aware of the use of the joint ballot on both the federal and state levels.

Article IX of the Constitution of 1894 stated that "the Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated" (NY Const of 1894, art IX, § 1). It embodied most of the prior statutory ideals and framework governing election of the regents and maintenance of the University. Article IX, § 2 "continued" the University, granting sole control of the University and regents to the Legislature. Implied in this grant of authority was the power to elect regents. Article IX was subsequently renumbered and transposed, in its entirety, to what is currently article XI of the State Constitution. Thus, for more than two centuries the joint ballot has been an integral part of the procedure for selecting regents. The framers of the 1894 Constitution knew this when they adopted the predecessor to article XI, § 2, "crystaliz[ing] into a constitutional mandate the settled policy of the State" (1894 Report of Comm on Educ and Funds Pertaining Thereto, at 5, reprinted in 1894 Doc and

Reports of NY Constitutional Convention, at 118). Plaintiffs' argument that this "policy" was ***161** merely intended to maintain the Legislature's authority over the regents, is too constricted. The better view is that the constitutional framers also intended to preserve the means to ensure continued effectiveness of the regents. This, in turn, would presuppose the continuation of a suitable means for electing regents in the event of legislative deadlock. Against this backdrop, we evaluate the constitutionality of the joint ballot.

II.

Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v University of State of N.Y.,* 14 NY2d 432, 438 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt" (*People v Tichenor,* 89 NY2d 769, 773 [1997]; *see also People v Pagnotta,* 25 NY2d 333, 337 [1969]). Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (*see Alliance of Am. Insurers v Chu,* 77 NY2d 573, 585 [1991]). These well-established principles guide our analysis.

Article XI, § 1 of the State Constitution expressly grants the "legislature" the power to promote and maintain the state educational system. Just as article IX of the 1894 Constitution did, article XI provides that the "legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1). Article XI, § 2 constitutionalizes the University of the State of New York, indicating that the

"corporation created in the year one thousand seven hundred eighty-four, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents."

The "legislature" is therefore constitutionally given authority and control over the University and the regents. The contemporary legislative exercise of this constitutionally conferred power is found in Education Law article 5.

Education Law article 5 provides an extensive statutory framework for the structure and organization of the University ***162** of the State of New York. Section 202 focuses exclusively on the University's governing body--the Board of Regents. It prescribes the proper structure and composition of the board (Education Law § 202 [1]). It provides that the "University of the State of New York shall be governed and all its corporate powers exercised by a board of regents the number of whose members shall at all times be four more than the number of the then existing judicial districts of the state and shall not be less than fifteen" (Education Law § 202 [1]). Relatedly, it also provides a mode of election for the regents. The Legislature must first attempt to elect regents by concurrent resolution (*see* Education Law § 202 [1]). Thereafter, if the Legislature cannot bicamerally agree on a candidate, a joint session must be convened using a "joint ballot" to elect the regent (*see id.*). Regent "vacancies" are filled in the same manner--primarily by concurrent resolution, or in the alternative, by joint ballot (Education Law § 202 [2]).

The Legislature, although typically, and necessarily functioning in its lawmaking capacity in the form of a bicameral body, can also function unicamerally when performing duties other than lawmaking (*see Matter of Anderson v Krupsak,* 40 NY2d 397 [1976]). The quintessential "legislative power," its lawmaking power, unlike the power to elect regents at issue here, is directly conferred to and "vested in the senate and assembly" (NY Const, art III, § 1). The Constitution itself thus prohibits the enactment of laws "except by the assent of a majority of the members elected to each branch of the legislature" (NY Const, art III, § 14).

The lawmaking prescription contained in article III does not, however, negate or undermine the Legislature's ability to convene as a unicameral body, in a distinct, nonlawmaking capacity. The Legislature--whether functioning bicamerally, or sitting in joint session and acting unicamerally--is nevertheless the "legislature" as it is understood in article XI (*Lanza v Wagner,* 11 NY2d 317, 333 [1962], *cert denied* 371 US 901 ["(T)he exercise of the power of appointment to public office is not a function of ... essentially legislative character ..."]). Similarly, under the Federal Constitution, not all legislative actions are "subject to the bicameralism ... requirement [ ]" (*Immigration & Naturalization Serv. v Chadha,* 462 US 919, 952 [1983]). Instead, whether legislative actions are "an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect'" (*id.* [citation ***163** omitted]). There is no constitutional proscription against the

Legislature acting unicamerally in a nonlawmaking capacity, and we are unwilling to impose one here.

The Legislature has chosen to exercise its constitutionally conferred authority by enacting valid legislation--Education Law § 202--to govern the election of regents. The alternative joint ballot method is neither constitutionally infirm nor statutorily defective. It is simply an alternative procedure, fashioned to avoid lengthy unproductive deadlocks in the appointment process. It provides the Legislature with an efficient means of filling empty seats promptly on the Board of Regents.

Our decision in *Matter of Anderson v Krupsak* (*supra*) further supports the result we reach today. In *Anderson,* we reviewed the legislative quorum requirements as they pertained to the joint ballot method of election prescribed in Education Law § 202. We held that "a quorum was simply a majority of the total membership of the unicameral body, without regard to whether those members come from the Senate or the Assembly" (*Anderson,* 40 NY2d at 405). In essence, "a quorum of the joint meeting was simply a majority of the single body" (*id.*). We did not require a Senate quorum. Moreover, in construing the unicameral quorum requirements, we implicitly acknowledged the validity of the Legislature acting as a unicameral body, sitting in joint session and functioning, constitutionally, in this nonlawmaking capacity. Indeed, we did so over a dissent urging the constitutional infirmity of the scheme (*see id.* at 406-408 [Gabrielli, J., dissenting]).

Finally, it should be noted that our approval of the joint ballot as a means of electing state officials is not without precedent. While historically used in the election of regents, the joint ballot is also used in other contexts (*see* Public Officers Law § 41; *see also Marino v Weprin,* 192 AD2d 174 [1993]). Public Officers Law § 41 affirmatively sanctions and adopts the joint ballot as the preferred means of filling vacancies in the elected offices of State Comptroller and Attorney General. It provides that

"[w]hen a vacancy occurs or exists, other than by removal, in the office of comptroller or attorney-general, or a resignation of either such officer to take effect at any future day shall have been made while the legislature is in session, the two houses thereof, *by joint ballot,* shall appoint a person to fill such actual or prospective vacancy" (Public Officers Law § 41 [emphasis added]). ***164**

We conclude that the New York State Senate and Assembly, meeting in a joint session as a unicameral body, constitute the Legislature as contemplated by article XI, §§ 1 and 2 of the New York State Constitution. Plaintiffs have thus failed to rebut, beyond a reasonable doubt, the presumption of constitutionality that favors the joint ballot provisions of Education Law § 202 (1) and (2).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Smith, Levine, Wesley, Rosenblatt and Graffeo concur.
Order affirmed, with costs. ***165**

Footnotes

* Education Law § 202 provides, in pertinent part, that

"1. ... Each regent shall be elected by the legislature by concurrent resolution in the preceding March, on or before the first Tuesday of such month. If, however, the legislature fails to agree on such concurrent resolution by the first Tuesday of such month, then the two houses shall meet in joint session at noon on the second Tuesday of such month and proceed to elect such regent by joint ballot.

"2. ... [If a] vacancy [in such office] occurs after the second Tuesday in March and before a resolution to adjourn sine die has been adopted by either house, then the vacancy shall be filled by concurrent resolution, unless the legislature fails to agree on such concurrent resolution within three legislative days after its passage by one house, in which case the two houses shall meet in joint session at noon on the next legislative day and proceed to elect such regent by joint ballots."

773 N.E.2d 490, 746 N.Y.S.2d 125, 168 Ed. Law Rep. 438, 2002 N.Y. Slip Op. 04669

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96 S.Ct. 2562
Supreme Court of the United States

MASSACHUSETTS BOARD OF RETIREMENT et al., Appellants,
v.
Robert D. MURGIA.

No. 74-1044
|
June 25, 1976.

Synopsis

Plaintiff, who was involuntarily retired from the uniformed branch of the Massachusetts state police pursuant to statute setting mandatory retirement age at 50, brought action to have the statute declared unconstitutional. The three-judge United States District Court for the District of Massachusetts, 376 F.Supp. 753, declared statute unconstitutional and void, and appeal was taken. The Supreme Court held that rationality, rather than strict scrutiny, was the proper standard in determining whether the statute violated equal protection, that the age classification was rationally related to furthering a legitimate state interest, i. e., protection of the public by assuring physical preparedness of its uniformed police, and that fact that the state chose not to determine fitness more precisely through individualized testing after age 50 did not mean that the objective of assuring physical fitness was not rationally furthered by the maximum age limitation and that the statute did not deny plaintiff equal protection, notwithstanding that he was physically and mentally capable of performing the duties of a uniformed officer.

Judgment reversed.

Mr. Justice Marshall dissented and filed opinion.

West Headnotes (13)

[1] Courts Previous Decisions in Same Case as Law of the Case

Supreme Court's prior summary treatment of issue whether establishment of mandatory retirement age for government employees violates equal protection did not foreclose the opportunity to subsequently consider more fully that question. U.S.C.A.Const. Amend. 14.

30 Cases that cite this headnote

[2] Constitutional Law Police and fire personnel

Rationality, rather than strict scrutiny, was the proper standard by which to test whether statute providing for compulsory retirement of Massachusetts uniformed state policemen at age 50 violated equal protection. M.G.L.A. c. 22 § 9A; c. 32 § 26(3), (3)(a); U.S.C.A.Const. Amend. 14.

70 Cases that cite this headnote

[3] Constitutional Law Strict scrutiny and compelling interest in general

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right, e. g., a right of uniquely private nature, the right to vote, right of interstate travel and rights guaranteed by the First Amendment, or operates to the peculiar disadvantage of a suspect class, e. g., alienage, race or ancestry. U.S.C.A.Const. Amend. 14.

477 Cases that cite this headnote

[4] Constitutional Law Public Employees and Officials

Right of governmental employment is not per se a fundamental right requiring strict scrutiny on equal protection challenge. U.S.C.A.Const. Amend. 14.

341 Cases that cite this headnote

[5] Constitutional Law Police and fire personnel

Class of uniformed state police officers over age of 50, i. e., the mandatory retirement age, did not

constitute a suspect class for purposes of equal protection analysis. U.S.C.A.Const. Amend. 14.

150 Cases that cite this headnote

[6] **Constitutional Law** Strict scrutiny and compelling interest in general

A "suspect class" requiring application of the strict scrutiny standard of equal protection analysis is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. U.S.C.A.Const. Amend. 14.

299 Cases that cite this headnote

[7] **Constitutional Law** Age

Old age does not, per se, define a discrete and insular group in need of extraordinary protection from the majoritarian political process; hence, legislative classifications based on age do not automatically call for application of the strict scrutiny standard of equal protection analysis. U.S.C.A.Const. Amend. 14.

209 Cases that cite this headnote

[8] **Constitutional Law** Equal protection

Constitutional Law Rational Basis Standard; Reasonableness

The rational basis standard of equal protection analysis is a relatively relaxed standard reflecting the court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one; under such standards, perfection in making the necessary classifications is not necessary and the classifications are presumed valid. U.S.C.A.Const. Amend. 14.

258 Cases that cite this headnote

[9] **Constitutional Law** Police and fire personnel

Public Employment Mandatory retirement

States Retirement

Massachusetts statute providing for mandatory retirement of uniformed state police officers at age 50 is not violative of equal protection guaranteed of Fourteenth Amendment since the classification rationally furthers a legitimate state interest, i. e., protection of the public by assuring physical preparedness of its uniformed police; since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age; also, there was no showing that statute had effect of excluding so few officers who were in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute. U.S.C.A.Const. Amend. 14.

179 Cases that cite this headnote

[10] **Constitutional Law** Police and fire personnel

Although uniformed Massachusetts police officer, who had reached mandatory retirement age of 50, was still physically and mentally capable of performing duties of his office, application of mandatory retirement statute to such officer did not deny equal protection of the laws. M.G.L.A. c. 22 § 9A; c. 32 § 26(3), (3)(a); U.S.C.A.Const. Amend. 14.

13 Cases that cite this headnote

[11] **Constitutional Law** Police and fire personnel

Fixing maximum retirement age for uniformed state police officers at age less than that set for other law enforcement personnel engaged in less demanding work does not violate equal protection. U.S.C.A.Const. Amend. 14.

6 Cases that cite this headnote

[12] **Public Employment** Mandatory retirement

States Retirement

Fact that Massachusetts, which requires a uniformed state police officer to retire on attaining age 50, chooses not to determine fitness

more precisely through individualized testing after age 50 does not mean that the objective of assuring physical fitness is not rationally furthered by a maximum age limitation but means only that, with regard to the interest of all concerned, the state perhaps may not have chose the best means to accomplish such purpose. M.G.L.A. c. 22 § 9A; c. 32 § 26(3), (3)(a); U.S.C.A.Const. Amend. 14.

42 Cases that cite this headnote

[13] Constitutional Law Perfect, exact, or complete equality or uniformity

Where rationality standard of equal protection analysis is the test, a State does not violate the guarantee merely because the classifications made by its laws are imperfect. U.S.C.A.Const. Amend. 14.

127 Cases that cite this headnote

Opinion

***308** ****2564** PER CURIAM.

[1] This case presents the question whether the provision of Mass.Gen.Laws Ann. c. 32, s 26(3)(a) (1969), that a uniformed state police officer "shall be retired . . . upon his attaining age fifty," denies appellee police officer equal protection of the laws in violation of the Fourteenth Amendment.[1]

***309** ****2565** Appellee Robert Murgia was an officer in the Uniformed Branch of the Massachusetts State Police. The Massachusetts Board of Retirement retired him upon his 50th birthday. Appellee brought this civil action in the United States District Court for the District of Massachusetts, alleging that the operation of s 26(3)(a) denied him equal protection of the laws and requesting the convening of a three-judge court under ***310** 28 U.S.C. ss 2281, 2284.[2] The District Judge dismissed appellee's complaint on the ground that the complaint did not allege a substantial constitutional question. D.C.Mass., 345 F.Supp. 1140 (1972). On appeal, the United States Court of Appeals for the First Circuit, in an unreported memorandum, set aside the District Court judgment and remanded the case with direction to convene a three-judge court. Upon a record consisting of depositions, affidavits, and other documentary material submitted by the parties, the three-judge court filed an opinion that declared s 26(3)(a) unconstitutional on the ground that "a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest," and enjoined enforcement of the statute. 376 F.Supp. 753, 754 (Mass.1974). We noted probable jurisdiction, 421 U.S. 974, 95 S.Ct. 1973, 44 L.Ed.2d 466 (1975), and now reverse.

The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel. As the District Court observed, "service in this branch is, or can be, arduous." 376 F.Supp., at 754. "(H)igh versatility is required, with few, if any, backwaters available for the partially superannuated." Ibid. Thus, "even (appellee's) experts concede that there is a general relationship between ***311** advancing age and decreasing physical ability to respond to the demands of the job." Id., at 755.

These considerations prompt the requirement that uniformed state officers pass a comprehensive physical examination biennially until age 40. After that, until mandatory retirement at age 50, uniformed officers must pass annually a more rigorous examination, including an electrocardiogram and tests for gastro-intestinal bleeding. Appellee Murgia had passed such an examination four months before he was retired, and there is no dispute that, when he retired, his excellent physical and mental health still rendered him capable of performing the duties of a uniformed officer.

The record includes the testimony of three physicians: that of the State Police ****2566** Surgeon, who testified to the physiological and psychological demands involved in the performance of uniformed police functions; that of an associate professor of medicine, who testified generally to the relationship between aging and the ability to perform under stress; and that of a surgeon, who also testified to aging and the ability safely to perform police functions. The testimony clearly established that the risk of physical failure, particularly in the cardiovascular system, increases with age, and that the number of individuals in a given age group incapable of performing stress functions increases with the age of the group. App. 77-78, 174-176. The testimony

also recognized that particular individuals over 50 could be capable of safely performing the functions of uniformed officers. The associate professor of medicine, who was a witness for the appellee, further testified that evaluating the risk of cardiovascular failure in a given individual would require a number of detailed studies. Id., at 77-78.

[2] In assessing appellee's equal protection claim, the District Court found it unnecessary to apply a strict-scrutiny test, see Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), for ***312** it determined that the age classification established by the Massachusetts statutory scheme could not in any event withstand a test of rationality, see Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Since there had been no showing that reaching age 50 forecasts even "imminent change" in an officer's physical condition, the District Court held that compulsory retirement at age 50 was irrational under a scheme that assessed the capabilities of officers individually by means of comprehensive annual physical examinations. We agree that rationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection. We disagree, however, with the District Court's determination that the age 50 classification is not rationally related to furthering a legitimate state interest.

I

[3] We need state only briefly our reasons for agreeing that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denies appellee equal protection. San Antonio School District v. Rodriguez, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right[3] or operates to the peculiar disadvantage of a suspect class.[4] Mandatory retirement at age 50 ***313** under the Massachusetts statute involves neither situation.

[4] This Court's decisions give no support to the proposition that a right of governmental employment Per se is fundamental. See San Antonio School District v. Rodriguez, supra; Lindsey v. Normet, 405 U.S. 56, 73, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972); Dandridge v. Williams, supra, 397 U.S. at 485, 90 S.Ct. at 1162. Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting ****2567** the availability of employment opportunities." Ibid.

[5] **[6]** **[7]** Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis. Rodriguez, supra, 411 U.S. at 28, 93 S.Ct. at 1294, observed that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a "discrete and insular" group, United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938), in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out ***314** our normal span. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.

Under the circumstances, it is unnecessary to subject the State's resolution of competing interests in this case to the degree of critical examination that our cases under the Equal Protection Clause recently have characterized as "strict judicial scrutiny."

II

[8] We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Dandridge v. Williams, supra, 397 U.S., at 485, 90 S.Ct., at 1162. Such action by a legislature is presumed to be valid.[5]

[9] **[10]** **[11]** In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally furthers the purpose identified by the State:[6] Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police.[7] ***315** Since physical ability generally declines **2568 with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective.[8] There is no indication ***316** that s 26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.[9]

[12] **[13]** That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose.[10] But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Dandridge v. Williams, 397 U.S., at 485, 90 S.Ct., at 1161.

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented ***317** and are beyond serious dispute.[11] But "(w)e do not decide today that the (Massachusetts statute) is wise, that it best fulfills the relevant social and economic objectives that (Massachusetts) might ideally espouse, or **2569 that a more just and humane system could not be revised." Id., at 487, 90 S.Ct., at 1162. We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws.

The judgment is reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice MARSHALL, dissenting.

Today the Court holds that it is permissible for the Commonwealth of Massachusetts to declare that members of its state police force who have been proved medically fit for service are nonetheless legislatively unfit to be policemen and must be terminated involuntarily "retired" because they have reached the age of 50. Although we have called the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure," Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915), the Court finds that the right to work is not a fundamental right. And, while agreeing that "the treatment of the aged in this Nation has not been wholly free of discrimination," Ante, at 2566, the Court holds that the elderly are not a ***318** suspect class. Accordingly, the Court undertakes the scrutiny mandated by the bottom tier of its two-tier equal protection framework, finds the challenged legislation not to be "wholly unrelated" to its objective, and holds, therefore, that it survives equal protection attack. I respectfully dissent.

I

Although there are signs that its grasp on the law is weakening, the rigid two-tier model still holds sway as the Court's articulated description of the equal protection test. Again, I must object to its perpetuation. The model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken or should undertake in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much. It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification. Marshall v. United States, 414 U.S. 417, 432-433, 94 S.Ct. 700, 709, 38 L.Ed.2d 618 (1974) (Marshall, J., dissenting); San Antonio School District v. Rodriguez, 411 U.S. 1, 98-110, 93 S.Ct. 1278, 1330, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91, 92 S.Ct. 254, 262, 30 L.Ed.2d 231 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-530, 90 S.Ct. 1153, 1178, 25 L.Ed.2d 491 (1970) (Marshall, J., dissenting). See also City of Charlotte v. Firefighters, 426 U.S. 283, 286, 96 S.Ct. 2036, 2038, 48 L.Ed.2d 636 (1976); Memorial Hospital v. Maricopa County, 415 U.S. 250, 253-254, 94 S.Ct. 1076, 1080, 39 L.Ed.2d 306

(1974); Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972); Kramer v. Union School Dist., 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969); Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).

Although the Court outwardly adheres to the two-tier model, it has apparently lost interest in recognizing further ***319** "fundamental" rights and "suspect" classes. See *San Antonio School District v. Rodriguez, supra* (rejecting education as a fundamental right); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (declining to treat women as a suspect class). In my view, this result is the natural consequence of the limitations of the Court's traditional equal protection analysis. If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute ****2570** always, or nearly always, see Korematsu v. United States,[1] 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.

But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld. See ***320** New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), the only modern case in which this Court has struck down an economic classification as irrational). It cannot be gainsaid that there remain rights, not now classified as "fundamental," that remain vital to the flourishing of a free society, and classes, not now classified as "suspect," that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forgo all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed "wholly irrelevant" to the legislative goal. McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1104, 6 L.Ed.2d 393 (1961).

While the Court's traditional articulation of the rational-basis test does suggest just such an abdication, happily the Court's deeds have not matched its words. Time and again, met with cases touching upon the prized rights and burdened classes of our society, the Court has acted only after a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded. Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); Frontiero v. Richardson, 411 U.S., at 691, 93 S.Ct., at 1772 (Powell, J., concurring in judgment); James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See San Antonio School District v. Rodriguez, supra, 411 U.S., at 98-110, 93 S.Ct., at 1330 (Marshall, J., dissenting).[2] ***321** These cases make clear that the Court has rejected, albeit Sub silentio, its most deferential statements of the rationality standard in assessing the validity under the Equal Protection Clause of much noneconomic legislation.

But there are problems with deciding cases based on factors not encompassed by the applicable standards. First, the approach ****2571** is rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges who, as a consequence, must assess the constitutionality of legislation before them on an Ad hoc basis. Second, and not unrelatedly, the approach is unpredictable and requires holding this Court to standards it has never publicly adopted. Thus the approach presents the danger that, as I suggest has happened here, relevant factors will be misapplied or ignored. All interests not "fundamental" and all classes not "suspect" are not the same; and it is time for the Court to drop the pretense that, for purposes of the Equal Protection Clause, they are.

II

The danger of the Court's verbal adherence to the rigid two-tier test, despite its effective repudiation of that test in the cases, is demonstrated by its efforts here. There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests. See

New Orleans v. Dukes, supra; Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Yet, the Court today not only invokes the minimal level of scrutiny, it wrongly adheres to it. Analysis ***322** of the three factors I have identified above the importance of the governmental benefits denied, the character of the class, and the asserted state interests demonstrates the Court's error.

Whether "fundamental" or not, " 'the right of the individual . . . to engage in any of the common occupations of life' " has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), quoting Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). As long ago as Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 4 S.Ct. 652, 28 L.Ed. 585 (1884), Mr. Justice Bradley wrote that this right "is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence . . . . This right is a large ingredient in the civil liberty of the citizen." Id., at 762, 4 S.Ct., at 657 (concurring opinion). And in Smith v. Texas, 233 U.S. 630, 34 S.Ct. 681, 58 L.Ed. 1129 (1914), in invalidating a law that criminally penalized anyone who served as a freight train conductor without having previously served as a brakeman, and that thereby excluded numerous equally qualified employees from that position, the Court recognized that "all men are entitled to the equal protection of the law in their right to work for the support of themselves and families." Id., at 641, 34 S.Ct., at 684.

"In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." Id., at 636, 34 S.Ct., at 682.

See also Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); ***323** Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); ****2572** Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Truax v. Raich,[3] 239 U.S., at 41, 36 S.Ct., at 10. Even if the right to earn a living does not include the right to work for the government, it is settled that because of the importance of the interest involved, we have always carefully looked at the reasons asserted for depriving a government employee of his job.

While depriving any government employee of his job is a significant deprivation, it is particularly burdensome when the person deprived is an older citizen. Once terminated, the elderly cannot readily find alternative employment. The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness. Ample clinical evidence supports the conclusion that mandatory retirement poses a direct threat to the health and life expectancy of the retired person,[4] and these consequences of termination for age e not disputed by appellants. ***324** Thus, an older person deprived of his job by the government loses not only his right to earn a living, but, too often, his health as well, in sad contradiction of Browning's promise: "The best is yet to be,/ The last of life, for which the first was made."[5]

Not only are the elderly denied important benefits when they are terminated on the basis of age, but the classification of older workers is itself one that merits judicial attention. Whether older workers constitute a "suspect" class or not, it cannot be disputed that they constitute a class subject to repeated and arbitrary discrimination in employment. See United States Department of Labor, The Older American Worker: Age Discrimination in Employment (1965); M. Barron, The Aging American 55-68 (1961). As Congress found in passing the Age Discrimination in Employment Act of 1967:

"(I)n the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs(.)

"(T)he setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons(.)

"(T)he incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave(.)" 81 Stat. 602, 29 U.S.C. s 621(a) (subsection numbers omitted).

See also Ante, at 2568 n. 11.

***325** Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and "quasi-suspect" classes such as women ****2573** or illegitimates. The elderly are protected not only by certain anti-discrimination legislation, but by legislation that provides them with positive benefits not enjoyed by the public at large. Moreover, the elderly are not isolated in society, and discrimination against them is not pervasive but is centered primarily in employment. The advantage of a flexible equal protection standard, however, is that it can readily accommodate such variables. The elderly are undoubtedly discriminated against, and when legislation denies them an important benefit employment I conclude that to sustain the legislation appellants must show a reasonably substantial interest and a scheme reasonably closely tailored to achieving that interest. Cf. San Antonio School District v. Rodriguez, 411 U.S. at 124-126, 93 S.Ct. at 1343 (Marshall, J., dissenting). This inquiry, ultimately, is not markedly different from that undertaken by the Court in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

Turning, then, to appellants' arguments, I agree that the purpose of the mandatory retirement law is legitimate, and indeed compelling, the Commonwealth has every reason to assure that its state police officers are of sufficient physical strength and health to perform their jobs. In my view, however, the means chosen, the forced retirement of officers at age 50, is so over-inclusive that it must fall.

All potential officers must pass a rigorous physical examination. Until age 40, this same examination must be passed every two years when the officer re-enlists and, after age 40, every year. Appellants have conceded that "(w)hen a member passes his re-enlistment or annual physical, he is found to be qualified to perform all of ***326** the duties of the Uniformed Branch of the Massachusetts State Police." App. 43. See *id.*, 52. If a member fails the examination, he is immediately terminated or refused re-enlistment. Thus, the only members of the state police still on the force at age 50 are those who have been determined repeatedly by the Commonwealth to be physically fit for the job. Yet, all of these physically fit officers are automatically terminated at age 50. Appellants do not seriously assert that their testing is no longer effective at age 50,[6] nor do they claim that continued testing would serve no purpose because officers over 50 are no longer physically able to perform their ***327** jobs.[7] Thus the Commonwealth is in the position of already individually testing its police officers for ****2574** physical fitness, conceding that such testing is adequate to determine the physical ability of an officer to continue on the job, and conceding that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.

Accordingly, I conclude that the Commonwealth's mandatory retirement law cannot stand when measured against the significant deprivation the Commonwealth's action works upon the terminated employees. I would affirm the judgment of the District Court.[8]

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Footnotes

1 Uniformed state police officers are appointed under Mass.Gen.Laws Ann. c. 22, s 9A (Supp.1976-1977), which provides:

> "Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police, together with such other employees as the governor may deem necessary for the proper administration thereof. . . . Said additional officers shall have and exercise within the commonwealth all the powers of constables, except the service of civil process, and of police officers and watchmen. . . . No person who has not reached his nineteenth birthday nor any person who has passed his thirtieth birthday shall be enlisted for the first

time as an officer of the division of state police, except that said maximum age qualification shall not apply in the case of the enlistment of any woman as such an officer."

In pertinent part c. 32, s 26(3), provides:

"(a) . . . Any . . . officer appointed under section nine A of chapter twenty-two . . . who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

"(b) Any . . . officer . . . who has performed service . . . for not less than twenty years and who has not attained . . . age fifty in the case of an officer appointed under the said section nine A, shall be retired by the state board of retirement in case the rating board, after an examination of such officer or inspector by a registered physician appointed by it, shall report in writing to the state board of retirement that he is physically or mentally incapacitated for the performance of duty and that such incapacity is likely to be permanent."

Since s 9A requires that new enlistees in the Uniformed Branch be no more than 30 years of age, few retirements are delayed past 50 until the expiration of 20 years' service.

The question presented in this case was summarily treated in Cannon v. Guste, 423 U.S. 918, 96 S.Ct. 257, 46 L.Ed.2d 245 (1975), aff'g No. 74-3211 (May 6, 1975, ED La.); Weisbrod v. Lynn, 420 U.S. 940, 95 S.Ct. 1319, 43 L.Ed.2d 420 (1975), aff'g 383 F.Supp. 933 (DC 1974); McIlvaine v. Pennsylvania, 415 U.S. 986, 94 S.Ct. 1583, 39 L.Ed.2d 884 (1974), dismissing appeal from 454 Pa. 129, 309 A.2d 801 (1973). Our cursory consideration in those cases does not, of course, foreclose this opportunity to consider more fully that question. See, E. g., Edelman v. Jordan, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974).

2 Jurisdiction was invoked pursuant to 28 U.S.C. s 1343, and declaratory and injunctive relief was sought under 28 U.S.C. ss 2201, 2202. The equal protection denial was alleged to constitute a violation of 42 U.S.C. s 1983. Appellee made no claim under the Federal Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. s 621 Et seq.

3 E. g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right of interstate travel); Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (rights guaranteed by the First Amendment); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (right to procreate).

4 E. g., Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (race); Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (ancestry).

5 See, E. g., San Antonio School District v. Rodriguez, 411 U.S. 1, 40-41, 93 S.Ct. 1278, 1300, 36 L.Ed.2d 16 (1973); Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911).

6 See San Antonio School District v. Rodriguez, supra, 411 U.S., at 17, 93 S.Ct., at 1288.

7 A special legislative commission's report preceding the enactment of the age-50 maximum for uniformed police stated: "The Division of State Police, by virtue of the nature of the work demanded of its members, undoubtedly requires comparatively young men of vigorous physique. The nature of the duties to be performed in all weathers is arduous in the extreme . . . . No argument is needed to demonstrate that men above middle life are not usually physically able to perform such duties." Mass.H.Doc. No. 1582, p. 8 (1938). With these considerations in mind, the State's Commissioner of Public Safety argued before the commission for provisions permitting retirement of state police at 45. The commission observed in response that it was "not prepared to say that the contention of the Commissioner of Public Safety, that (state police) over age forty-five should be eligible (for) retirement, is unsound as a matter of public policy." Ibid. The commission, however, deferred the problem of setting retirement ages for the state police to special study, their sole reason for not recommending age 45 being the anticipated pension costs to the State, not the reasonableness of the age with respect to job qualification. Id., at 7-9. Though the age-50 limitation was not specifically proposed by the commission,

but was ultimately enacted by the legislature after further study, Act of Aug. 12, 1939, c. 503, s 3 (1939), Mass.Acts & Resolves 737-738 (1939), it is apparent that the purpose of the limitation was to protect the public by assuring the ability of state police to respond to the demands of their jobs. See also Mass.H.Doc. No. 5316, pp. 16-17 (1967); Mass.H.Doc. No. 2500, pp. 21, 23-25 (1955). This purpose is also clearly implied by the State's maximum-age scheme, which sets higher mandatory retirement ages for less demanding jobs. See Mass. Gen.Laws Ann. c. 32, ss 1, 3(2)(g), 26(3)(a) (1966 and Supp.1975).

8 Appellee seems to have suggested in oral argument that Mass.Gen.Laws Ann. c. 32, ss 1, 3(2)(g), 26(3)(a), also deny equal protection through the job classification established by them. Tr. of Oral Arg. 14, 17-18. Any such argument, however, is unpersuasive. The sections do set a maximum retirement age for uniformed state officers which is less than that set for other law enforcement personnel. It has never been seriously disputed, if at all, however, that the work of uniformed state officers is more demanding than that of other state, or even municipal, law enforcement personnel. It is this difference in work demands that underlies the job classification. Mass.H.Doc. No. 2500, pp. 21-22 (1955).

9 Review of Massachusetts' maximum-age limitations by state legislative commissions has proceeded on the principle that "maximum retirement age for any group of employees should be that age at which the efficiency of a large majority of the employees in the group is such that it is in the public interest that they retire." Id., at 7.

10 Indeed, were it not for the existing annual individual examinations through age 50, appellee would concede the rationality of mandatory retirement at 50. Tr. of Oral Arg. 22-23. The introduction of individual examinations, however, hardly defeats the rationality of the State's scheme. In fact, it augments rationality since the legislative judgment to avoid the risk posed by even the healthiest 50-year-old officers would be implemented by annual individual examinations between ages 40 and 50 which serve to eliminate those younger officers who are not at least as healthy as the best 50-year-old officers.

11 E. g., M. Barron, The Aging American (1961); Cameron, Neuroses of Later Maturity, in Mental Disorders in Later Life 201 (O. Kaplan, 2d ed. 1956); Senate Special Committee on Aging Developments in Aging: 1971 and January-March 1972, S.Rep.No.92-784, pp. 48-53 (1972); Hearings before the Subcommittee on Retirement and the Individual of the Senate Special Committee on Aging, 90th Cong., 1st Sess., pts. 1 and 2, pp. 36-46, 87-100, 121-127, 212-217, 464-471 (1967).

1 Some classifications are so invidious that they should be struck down automatically absent the most compelling state interest, and by suggesting the limitations of strict-scrutiny analysis I do not mean to imply otherwise. The analysis should be accomplished, however, not by stratified notions of "suspect" classes and "fundamental" rights, but by individualized assessments of the particular classes and rights involved in each case. Of course, the traditional suspect classes and fundamental rights would still rank at the top of the list of protected categories, so that in cases involving those categories analysis would be functionally equivalent to strict scrutiny. Thus, the advantages of the approach I favor do not appear in such cases, but rather emerge in those dealing with traditionally less protected classes and rights. See Infra, at 2570-2573.

2 See also Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1 (1972).

3 See Board of Regents v. Roth, 408 U.S. 564, 587, 92 S.Ct. 2701, 2714, 33 L.Ed.2d 548 (1972) (Marshall, J., dissenting). Appellee makes no such claim; nor does he allege that procedural due process requires that he be afforded a hearing prior to termination.

4 See American Medical Association, Committee on Aging, Retirement, A Medical Philosophy and Approach; M. Barron, The Aging American 76-86, and sources cited (1961). Because, as one former AMA president bluntly put it, "(d)eath comes at retirement," quoted in M. Barron, Id., at 76, the AMA has formally taken a position against involuntary retirement and has submitted an Amicus brief in this case to inform us of the medical consequences of the practice.

5 R. Browning, Rabbi Ben Ezra, stanza 1.

6 There may be an age at which passing a physical examination provides no substantial guarantee that the officer is fit for service for the coming year. In that case, the test has lost its predictive ability. There is no showing that age 50 marks such a line although the appellants ask us to hypothesize that it does and indeed the evidence seems contrary to that supposition. First, among officers aged 40-49, who undergo yearly examinations, there is no general trend of increasing

rejections with age nor any suggestion that those who passed the examination served in less than a satisfactory manner. 376 F.Supp. 753, 756 (Mass.1974).

This evidence presents no reason to assume that testing suddenly loses its predictive ability after age 50. The only relevant studies presented are contrary to appellants' assumption. These studies support the conclusion that airline pilots should be terminated at age 60 because after That age medical examinations lose their predictive ability. See Air Line Pilots Assn., Int'l v. Quesada, 276 F.2d 892 (CA2 1960).

The suggestion that age 50 is not the critical point for predictive ability is also supported by the national experience. Appellee has produced a study of the laws of the 50 States that shows that Massachusetts' age-50 retirement law prescribes the earliest retirement age in the Nation, and that no other State requires its state police to retire before age 55. Brief for Appellee 37 n. 14.

In short, I refuse to hypothesize that testing after age 50 loses its predictive ability when the appellants have introduced absolutely nothing that supports this position.

7 Indeed, the appellants have conceded that "(a)ny individual member of the Uniformed Branch . . . whose age is fifty years or more may be capable of performing the physical activity required of the Uniformed Branch . . . depending upon his individual physical condition." App. 44. See Id., at 52.

8 The Court's conclusion today does not imply that all mandatory retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically fit police force, not a mentally alert or manually dexterous work force. That the Court concludes it is rational to legislate on the assumption that physical strength and well-being decrease significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental or manual ability. Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today.

New York Official Reports

100 A.D.3d 1052, 953 N.Y.S.2d 339, 2012 N.Y. Slip Op. 07236

**1 In the Matter of County of Nassau et al., Respondents-Appellants, et al., Petitioners

v

State of New York et al., Respondents, and New York State Board of Elections et al., Appellants-Respondents.

Supreme Court, Appellate Division, Third Department, New York
November 1, 2012

CITE TITLE AS: Matter of County of Nassau v State of New York

HEADNOTES

Elections
Board of Elections
Capacity of Single Election Commissioner to Bring Suit—Claims Raising Issues Affecting Board of Elections as Whole

Parties
Capacity to Sue
Municipality's Challenge to Constitutionality of State Statute Requiring Use of Electronic Voting Systems—Municipality Not Forced to Violate a Constitutional Proscription

Paul M. Collins, New York State Board of Elections, Albany, for appellants-respondents.
John Ciampoli, County Attorney, Mineola, for respondents-appellants.
Eric T. Schneiderman, Attorney General, Albany (Andrew B. Ayers of counsel), for State of New York, respondent.
Davidoff, Malito & Hutcher, LLP, Garden City (Daniel J. Fischer of Koley Jessen, PC, LLO, Omaha, Nebraska, pro hac vice), for Election Systems & Software, respondent.

Peters, P.J. Appeals (1) (transferred to this Court by order of the Appellate Division, Second Department) from that part of an order of the Supreme Court (Woodard, J.), entered July 23, 2010 in Nassau County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted petitioners' motion for immediate discovery, (2) (transferred to this Court by order of the Appellate Division, Second Department) from an order of said court, entered October 14, 2010 in Nassau County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted a motion by respondent Election Systems & Software for an order of confidentiality, and (3) from a judgment of the Supreme Court (Lynch, J.), entered June 24, 2011 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted certain respondents' motions to dismiss the petition.

In 2002, in order to improve the accessibility of voting systems to disabled voters, Congress enacted the Federal Help America Vote Act (hereinafter HAVA) (*see* 42 USC § 15301 *et seq.*). In an effort to comply with HAVA, the Legislature enacted the Election Reform and Modernization Act of 2005 (hereinafter ERMA) (*see* L 2005, ch 181), which, as later amended, requires the replacement of lever voting machines with electronic optical scan voting systems (*see* L 2007, ch 506, § 1; Election Law §7-202). Petitioners, believing that electronic voting systems are vulnerable to "hacking, tampering, manipulation and malfunction," resisted efforts by respondent State Board of Elections (hereinafter SBOE) and respondent State of New York to replace lever voting machines with an electronic system manufactured by respondent Election Systems & Software (hereinafter ESS).

Due, in part, to such resistance, the United States Depart **1053** ment of Justice commenced an action against the SBOE and the State in 2006 seeking an injunction requiring compliance with HAVA. The parties to that action reached an agreement, and the District Court for the Northern District of New York (Sharpe, J.) issued a remedial order placing the State and the SBOE under various conditions, including a timeline for compliance. The deadline for compliance was extended twice but, by March 2010, the State and the SBOE were still not in compliance with HAVA due to petitioners' continued failure to implement the new voting machines. Shortly thereafter, the State and the SBOE applied for and were granted an injunction directing petitioners to cease their interference with efforts to comply with the District Court's previous orders and to take actions necessary to implement the new voting machines.[1] **2

Around that same time, petitioners commenced this combined proceeding pursuant to CPLR article 78 and action for declaratory judgment in Supreme Court, Nassau County, seeking, among other things, a declaration that ERMA is unconstitutional, claiming that electronic voting systems are susceptible to tampering and thus create the risk of "disenfranchisement and subversion of the democratic process." Petitioners thereafter sought an order expediting discovery with respect to various documents, software, access codes and other materials associated with the electronic voting systems which they claimed were necessary to "reveal[ ] the weaknesses and vulnerabilities of the new machines." Supreme Court (Woodard, J.) granted the motion, and the State and the SBOE appeal from the order. Subsequently, ESS was granted intervenor status for the limited purpose of protecting its intellectual property and trade secrets and successfully moved for a confidentiality order. Petitioners appeal from that order.

While those appeals were pending, the State and the SBOE each moved to dismiss the petition contending, among other things, that petitioners lacked legal capacity to challenge the constitutionality of ERMA. After venue of the proceeding was transferred to Albany County,[2] Supreme Court (Lynch, J.) determined that petitioners lacked capacity to pursue their claims and, accordingly, dismissed the petition. Petitioners County of Nassau and John A. DeGrace, in his capacity as Nas ***1054** sau County Republican Commissioner of Elections, appeal from that order.

We first address the appeal from Supreme Court's judgment dismissing the petition based on petitioners' lack of capacity to sue. As petitioners Nassau County Board of Elections (hereinafter NCBOE) and William T. Biamonte, the Nassau County Democratic Commissioner of Elections, have not joined in the appeal from that order, we consider only the issue of capacity with respect to the County and DeGrace (*see Hecht v City of New York*, 60 NY2d 57, 62 [1983]; *Matter of Sanders v Slater*, 53 AD3d 716, 717 n 1 [2008]). We find that DeGrace lacks the capacity to unilaterally maintain the instant appeal. Election Law § 3-212 (2) requires that all actions of local boards of elections be approved by a majority vote of the commissioners. As the claims in this proceeding raise issues affecting the NCBOE as a whole, as opposed to those alleging a political imbalance on the NCBOE or otherwise relating to the representational rights of the political parties thereon, the pursuit of the instant appeal is an "action" of the NCBOE requiring approval of a majority of the commissioners (*see Matter of Graziano v County of Albany*, 3 NY3d 475, 480 [2004]). In the absence of any proof that such approval has been given, DeGrace lacks the capacity to maintain the present appeal on behalf of the NCBOE (*see id.* at 480; *Matter of Mohr v Schroeder*, 86 NY2d 786, 788 [1995], *revg* 216 AD2d 926 [1995], *for the reasons stated in* 162 Misc 2d 584 [1994]; *Gagliardo v Colascione*, 153 AD2d 710, 710 [1989], *lv denied* 74 NY2d 609 [1989]). As such, his appeal must be dismissed (*see Matter of Bridgham v Tutunjian*, 84 AD2d 853, 853 [1981]). ****3**

The only issue that remains, therefore, is whether the County has capacity to challenge the constitutionality of ERMA.[3] We hold that it does not. "[C]apacity concerns a litigant's power to appear and bring its grievance before the court" (*Matter of Graziano v County of Albany*, 3 NY3d at 478-479 [internal quotation marks and citation omitted]; *see Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41 [2005]). As purely creatures of the State, municipal enti ***1055** ties generally "cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants" (*City of New York v State of New York*, 86 NY2d 286, 290 [1995]; *see County of Albany v Hooker*, 204 NY 1, 10 [1912]; *Matter of County of Oswego v Travis*, 16 AD3d 733, 735 [2005]). Thus, municipalities and other local government entities lack capacity to attack actions by the State and the Legislature on constitutional grounds unless they properly invoke one of the four recognized exceptions to the rule (*see City of New York v State of New York*, 86 NY2d at 289-293; *Matter of New York Blue Line Council, Inc. v Adirondack Park Agency*, 86 AD3d 756, 758 [2011], *appeal dismissed sub nom. Matter of Clinton County v Adirondack Park Agency,* 17 NY3d 947 [2011], *lv denied sub nom. Matter of Clinton County v Adirondack Park Agency*, 18 NY3d 806 [2012]; *New York State Assn. of Small City School Dists., Inc. v State of New York*, 42 AD3d 648, 649 [2007]). Here, the County asserts " 'that if [it is] obliged to comply with the State statute [it] will by that very compliance be forced to violate a constitutional proscription' " (*City of New York v State of New York*, 86 NY2d at 292, quoting *Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283, 287 [1977]; *see Matter of County of Oswego v Travis*, 16 AD3d at 735), thereby coming within an exception.[4]

However, the County cannot claim that, by complying with ERMA, *it* will be forced to violate a constitutional prohibition, because it is the NCBOE—not the County—that is responsible for the implementation of the requirements of ERMA. Indeed, nowhere is it alleged in the petition/

complaint that the County plays any role in the administration of ERMA or the ****4** selection of voting machines.[5] Rather, the petition/complaint specifically alleges that it is the NCBOE that "is responsible for carrying out the elections in Nassau County," which responsibility includes, among other things, "[s]electing new voting systems approved by the [SBOE] and ERMA." And, the Election Law confirms that it is the local board of elections that is charged with the selection and implementation of voting systems and machines (*see* Election Law §§ 3-226, 7-200 [1]; 7-208). Notably, in this regard, the NCBOE does not act on behalf of the County, but is rather an independent political body separate and distinct from the County (*see Matter of Reynolds*, 202 NY 430, 441 [1911]; ***1056** *Matter of Daly v Board of Elections of City of N.Y.*, 254 App Div 914, 914 [1938], *affd* 279 NY 743 [1939]). Inasmuch as the County has neither alleged nor demonstrated that it plays any role in implementing the statute it seeks to challenge, it cannot be said that the County itself will be forced to violate a constitutional proscription if obliged to comply with the statute. Thus, having failed to bring its claims within any recognized exception to the general rule that municipalities lack capacity to sue the State, the action on behalf of the County was properly dismissed (*see City of New York v State of New York*, 86 NY2d at 295).

With respect to the appeals from the two intermediate discovery orders, those appeals must be dismissed. "[T]he right to appeal from a nonfinal order terminates upon the entry of a final judgment" (*State of New York v Joseph*, 29 AD3d 1233, 1234 n [2006], *lv denied* 7 NY3d 711 [2006]; *see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Cunningham v Anderson*, 85 AD3d 1370, 1371 [2011], *lv dismissed and denied* 17 NY3d 948 [2011]). Furthermore, as the interlocutory orders do not "necessarily affect[ ]" the final judgment, the appeal from the final judgment does not bring them up for review (CPLR 5501 [a] [1]; *see generally Matter of Cicardi v Cicardi*, 263 AD2d 686, 686 [1999]).

Rose, Spain and McCarthy, JJ., concur. Ordered that the appeals from the orders entered July 23, 2010 and October 14, 2010 are dismissed, without costs. Ordered that the judgment is affirmed, without costs. **[Prior Case History: 2010 NY Slip Op 31420(U).]**

FOOTNOTES

Footnotes

1 The order granting the SBOE preliminary relief was affirmed by the Second Circuit Court of Appeals (*United States v New York State Bd. of Elections*, 312 Fed Appx 353 [2d Cir 2008]).

2 As a result of venue being transferred to Albany County, the Second Department transferred the appeals from the expedited discovery order and confidentiality order to this Court.

3 The petition also challenged the SBOE's 2009 certification of the electronic voting system as arbitrary and capricious, claiming that the voting system disregards voter intent by not counting the vote where the voter "overvotes" or "undervotes," and that it would be nearly impossible to install the machines prior to the fall 2010 election. However, the fall 2010 election has long since passed, and the voting system that is the subject of these claims is no longer in use and a new version has since been certified. As such, these claims are now moot (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

4 Petitioners do not claim the applicability of any of the other exceptions to the rule.

5 In fact, with respect to the constitutional claims raised in the petition, the only specific mention of the County—as opposed to the NCBOE—is that it is a municipal corporation organized under the laws of New York.

50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400

In the Matter of Hearst Corporation et al., Appellants, v. John J. Clyne, as Judge of the County Court of Albany County, et al., Respondents.

Court of Appeals of New York
Argued March 27, 1980;

decided July 3, 1980

CITE TITLE AS: Matter of Hearst Corp. v Clyne

SUMMARY

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 16, 1979, which, in a proceeding pursuant to CPLR article 78, dismissed a petition to declare illegal the closing of a courtroom to the press by respondents without a hearing during the entry of a guilty plea by a defendant and to enjoin respondents from granting such closure orders in the future without a hearing.

In March of 1979, respondent County Court Judge was conducting a joint suppression hearing in the criminal case of two defendants who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Petitioner newspaper reporter knew the hearings were closed and the courtroom doors locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could. On March 7, during one of these periodic observations, the reporter noticed the attorney for one of the defendants standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress, she tried the courtroom door but found it locked. She then learned that the Judge, behind closed doors, had heard and granted a motion to close a proceeding during which one of the defendants was expected to enter a plea, which he did do during the proceeding. The Judge refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding. On March 12, prior to trial, the other defendant also entered a plea of guilty before respondent Judge. Thereafter, he permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding. The Appellate Division concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition.

The Court of Appeals reversed and remitted to the Appellate ***708** Division for dismissal, holding, in an opinion by Judge Wachtler, that the case is moot and that there is no sufficient reason for the court to consider the merits of the appeal since the court has recently set forth the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and the press.

Matter of Hearst Corp. v Clyne, 71 AD2d 966, reversed.

HEADNOTES

Appeal
Academic and Moot Questions

(1) Although an appeal will generally be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment, the exception to the doctrine of mootness permits the courts to preserve for review cases which involve: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues. Accordingly, an appeal from an order dismissing a petition to declare illegal the closing of a courtroom to the press by respondent County Court Judge without a hearing during the entry of a guilty plea by a defendant and to enjoin respondent from granting such closure in the future without a hearing, must be dismissed as moot where the plea was concluded and the transcript of said proceeding furnished to the petitioners, a newspaper and a newspaper reporter, before they brought said

petition, since the rights of the parties cannot be affected by the determination of the appeal; moreover, no sufficiently useful purpose would be served by retaining the appeal notwithstanding its mootness, since the Court of Appeals has recently set forth the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and the press.

Crimes
Right to Public Trial

(2) All judicial proceedings, both civil and criminal, are presumptively open to the public; moreover, a proceeding at which a criminal defendant enters a plea of guilty is a substitute for a trial.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

4 NY Jur 2d, Appellate Review §§301, 326, 327, 348

10 Carm-Wait 2d, Appeals in General §§ 70:262, 70:297, 70:298; 11 Carm-Wait 2d, Appeals to the Court of Appeals § 71:112

Judiciary Law §4

5 Am Jur 2d, Appeal and Error §§ 761-763, 768; 21 Am Jur 2d, Criminal Law §§ 257-262; 75 Am Jur 2d, Trial § 42

Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 151, 154

2 Am Jur Proof of Facts 495, Bias or Prejudice ***709**

1 Am Jur Trials 303, Controlling Trial Publicity

ANNOTATION REFERENCES

Right of accused to have press or other media representatives excluded from criminal trial. 49 ALR3d 1007.

Propriety of exclusion of press or other media representatives from civil trial. 79 ALR3d 401.

POINTS OF COUNSEL

Peter L. Danziger for appellants. I. The Sixth Amendment of the United States Constitution guarantees petitioners the right to attend guilty plea proceedings. *(People v Selikoff,* 35 NY2d 227; *Henderson v Morgan,* 426 US 637; *Boykin v Alabama,* 395 US 238; *People v Gina M. M.,* 40 NY2d 595; *People v Seaton,* 19 NY2d 404; *Matter of Oliver,* 333 US 257; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368.) II. The First and Fourteenth Amendments of the United States Constitution guarantee petitioners the right to attend plea proceedings. *(Gannett Co. v De Pasquale,* 443 US 368; *New York Times Co. v Sullivan,* 376 US 254; *Mills v Alabama,* 384 US 214; *Gitlow v New York,* 268 US 652; *Landmark Communications v Virginia,* 435 US 829; *Houchins v KQED, Inc.,* 438 US 1; *Nebraska Press Assn. v Stuart,* 427 US 539; *Saxbe v Washington Post Co.,* 417 US 843.) III. Petitioners' right to attend a plea proceeding is guaranteed by the freedom of speech and press clause of the New York State Constitution. *(Matter of Madole v Barnes,* 20 NY2d 169; *East Meadow Community Concerts Assn. v Board of Educ.,* 19 NY2d 605; *Matter of Figari v New York Tel. Co.,* 32 AD2d 434; *Pickering v Board of Educ.,* 391 US 563; *People v Jones,* 47 NY2d 409; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Matter of Oliver v Postel,* 30 NY2d 171; *Matter of United Press Assns. v Valente,* 308 NY 71; *Matter of New York Times Co. v Starkey,* 51 AD2d 60.) IV. The common law of New York recognizes the right of petitioners to attend plea proceedings. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245; *People v Jones,* 47 NY2d 409; *People v Jones,* 87 Misc 2d 931, 57 AD2d 1082, 44 NY2d 76; *Matter of Rudd v Hazard,* 266 NY 302; *Crain v United States,* 162 US 625; *Maryland v Baltimore Radio Show,* 338 US 912.) V. Section 4 of the Judiciary Law of this State requires that guilty plea proceedings remain open ***710** to the public. *(Matter of O'Connell,* 90 Misc 2d 555; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245; *Matter of United Press Assns. v Valente,* 308 NY 71; *Matter of Oliver v Postel,* 30 NY2d 171; *Craig v Harney,* 331 US 367; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368.) VI. Closure of the plea proceeding without granting petitioners an opportunity to be heard violated petitioners' constitutional, statutory and common-law rights. *(People v Hinton,* 31 NY2d 71; *United States v Bell,* 464 F2d 667, 409 US 991; *Carroll v Princess Anne,* 393 US 175; *Stuart v Palmer,* 74 NY 183; *Near v Minnesota,* 283 US 697; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Freedman v Maryland,* 380 US 51; *United States v Schiavo,* 504 F2d 1, cert den *sub nom. Ditter v Philadelphia Newspapers,* 419 US 1096; *Matter of New York Times Co. v Starkey,* 51 AD2d 60.)

Robert G. Lyman, County Attorney (William J. Conboy, II, of counsel), for John J. Clyne, respondent. I. This appeal

must be dismissed upon the ground that no substantial constitutional question is directly involved. *(Matter of Westchester Rockland Newspapers v Leggett,* 70 AD2d 1066.) II. This proceeding presents neither questions likely to recur nor issues of sufficient importance and interest to justify this court's entertaining same. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Matter of Oliver v Postel,* 30 NY2d 171; *People v Jelke,* 308 NY 56.) III. These petitioners-appellants waived any rights which they may have had to object to the closure in issue. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368.) IV. The plea proceeding at issue herein was in fact a pretrial proceeding and not the equivalent of a trial. *(Boykin v Alabama,* 395 US 238; *People v Serrano,* 15 NY2d 304; *People v Seaton,* 19 NY2d 404; *People v Gina M. M.,* 40 NY2d 595; *People ex rel. Steckler v Warden of City Prison,* 259 NY 430; *Maurer v People,* 43 NY 1; *People v Anderson,* 16 NY2d 282; *People v Jones,* 87 Misc 2d 931, 57 AD2d 1082, 44 NY2d 76.) V. The order of exclusion at issue herein was a necessary and proper exercise of judicial discretion. VI. The trial court in the plea proceeding at issue had the inherent power to close the courtroom. VII. The closure at issue herein did not deprive petitioners-appellants of any due process.

Sol Greenberg, District Attorney (George H. Barber of counsel), for Sol Greenberg, respondent. I. A criminal defendant ***711** and the people of the State of New York are entitled to the unimpaired right of a fair trial. *(Sheppard v Maxwell,* 384 US 333; *Nebraska Press Assn. v Stuart,* 427 US 539; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 443 US 368; *Matter of Murchison,* 349 US 133; *People v McLaughlin,* 150 NY 365; *Estes v Texas,* 381 US 532; *People v Thomas,* 47 NY2d 37.) II. The Sixth Amendment does not require public attendance at a guilty plea. *(Marshall v United States,* 360 US 310; *Michelson v United States,* 335 US 469; *Matter of Rudd v Hazard,* 266 NY 302.) III. The First Amendment does not guarantee public attendance at a guilty plea. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370.) IV. The New York State Constitution does not require public access to a guilty plea. *(People v Nicholas,* 35 AD2d 18.) V. There are exceptions to the general rule in New York that trials should be public. *(Matter of Rudd v Hazard,* 266 NY 302.) VI. Section 4 of the Judiciary Law does not require all Criminal Court proceedings to be public. *(Matter of Oliver v Postel,* 30 NY2d 171; *United Press Assns. v Valente,* 308 NY 71; *People v Nicholas,* 35 AD2d 18; *People v Rickenbacker,* 50 AD2d 566.) VII. The closure of the guilty plea proceeding without notice was proper and necessary. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370; *People v Darden,* 34 NY2d 177; *People v Devine,* 80 Misc 2d 641.) VIII. In the event courtroom was not closed and defendant Du Bray could not obtain a fair trial in Albany County, he would have been required to request a change of venue or surrender his right to a jury trial. *(Marshall v United States,* 360 US 310; *Michelson v United States,* 335 US 469; *Patterson v Colorado,* 205 US 454; *Sheppard v Maxwell,* 384 US 333.) IX. There was no alternative that would have preserved the fair trial rights of defendant Du Bray other than the closure of the courtroom during defendant Marathon's guilty plea. *(Nebraska Press Assn. v Stuart,* 427 US 539.)

Robert C. Bernius for Binghamton Press Company, Inc., and others, *amici curiae.* I. This court should articulate specific guidelines which disfavor *in camera* proceedings. *(People v Jones,* 47 NY2d 409; *Matter of Oliver,* 333 US 257; *United States v Cianfrani,* 573 F2d 835; *Levine v United States,* 362 US 610; *Reynolds v United States,* 98 US 145; *Estes v Texas,* 381 US 532; *Sheppard v Maxwell,* 384 US 333; *Nebraska Press Assn. v Stuart,* 427 US 539; *People v Hinton,* 31 NY2d 71.) II. *Amici's* guidelines achieve the appropriate balance. *(United States v Cores,* 356 US 405; *People v Goldswer,* 39 NY2d 656; ***712** *People v Moore,* 46 NY2d 1; *People v Briggs,* 38 NY2d 319; *Pennekamp v Florida,* 328 US 331; *Carroll v Princess Anne,* 393 US 175; *Shuttlesworth v Birmingham,* 394 US 147; *Fuentes v Shevin,* 407 US 67; *Mullane v Central Hanover Bank & Trust Co.,* 339 US 306; *Boddie v Connecticut,* 401 US 371.) III. *Amici's* guidelines are constitutionally mandated. *(Duncan v Louisiana,* 391 US 145; *Shapiro v Thompson,* 394 US 618; *Poe v Ullman,* 367 US 497; *Harper v Virginia Bd. of Elections,* 383 US 663; *Matter of Winship,* 397 US 885; *Moore v East Cleveland,* 431 US 494; *Yick Wo v Hopkins,* 118 US 356.)

OPINION OF THE COURT

Wachtler, J.

The petitioners in this article 78 proceeding are the publisher of the Albany *Times-Union,* a daily newspaper, and Shirley Armstrong, a reporter for that newspaper. The respondent, John J. Clyne, is a Judge of the Albany County Court.

In March of 1979 Judge Clyne was conducting a joint suppression hearing in the criminal case of Alexander Marathon and William Du Bray, who had been indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. The hearings were closed to the public and press on the motion of the defendants, without objection by the prosecutor and without a hearing. Armstrong, the court reporter for the *Times-Union,* knew the hearings were closed and the courtroom doors

locked, but was sufficiently interested in the proceedings to periodically walk by the courtroom to observe whatever she could.

On March 7, during one of these periodic observations, Armstrong noticed the attorney for Du Bray, one of the codefendants, standing outside the courtroom door. On the assumption that something other than a suppression hearing was in progress Armstrong tried the courtroom door but found it locked. She then learned from Du Bray's attorney that Judge Clyne, behind closed doors, had heard and granted a motion to close a proceeding during which Marathon was expected to enter a plea. The reporter, Armstrong, then knocked on the courtroom door. There was no response. After about 15 minutes the doors opened and she learned from Judge Clyne that Marathon had indeed entered a guilty plea. ***713** The Judge, however, refused petitioners' request for a transcript of the plea proceeding or to direct the court stenographer to read back the minutes of the proceeding.

On March 12, prior to trial, the other defendant, Du Bray, also entered a plea of guilty before Judge Clyne. Thereafter Judge Clyne permitted the petitioners to obtain a copy of the transcript of the closed plea proceeding; that transcript has now been furnished to them and forms a part of the record on this appeal.

The transcript of the closed proceeding held March 7, which is the sole concern of this appeal, indicates that at the very commencement of the already closed suppression hearing which had been adjourned from March 5, Marathon's attorney orally moved to close the courtroom to all persons except Marathon, his attorney, and court personnel. The District Attorney joined the motion. Without taking evidence or hearing argument from anyone Judge Clyne immediately granted the motion, even excluding the codefendant Du Bray and his attorney from the courtroom, and had the doors secured. In sworn testimony Marathon then confessed his own participation in the crime for which he was indicted, inculpated his codefendant Du Bray, and was permitted to enter a plea of guilty to one count of the indictment.

The petitioners brought this proceeding seeking a declaration that the closure of the plea taking was illegal, and for an injunction prohibiting such closures in the future unless members of the press are afforded an opportunity to be heard.

The Appellate Division concluded that the closure was a proper exercise of the trial court's discretion and dismissed the petition. Petitioners appealed. We conclude that the case is moot and that there is no sufficient reason for this court to consider the merits of the appeal; however, for the reasons which follow, the order of the Appellate Division should be reversed and remitted for dismissal.

It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal *(Matter of State Ind. Comm.,* 224 NY 13, 16; *California v San Pablo & Tulare R. R.,* 149 US 308, 314-315). This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological ***714** strictures which inhere in the decisional process of a common-law judiciary.

Our particular concern on this appeal is with that facet of the principle which ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances. In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment. On the facts of the instant case, where the underlying plea proceeding had been long concluded and the transcript had been furnished to the petitioners at the time this action was commenced (cf. *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 436) we conclude that the rights of the parties cannot be affected by the determination of this appeal and it is therefore moot. Because we conclude that the appeal is moot it may not properly be decided by this court unless it is found to be within the exception to the doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable (see *Roe v Wade,* 410 US 113, 125).

(1)In this court the exception to the doctrine of mootness has been subject over the years to a variety of formulations.[1] However, examination of the cases in which our court has found an exception to the doctrine discloses three common factors: (1) a likelihood of repetition, either between the ***715** parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues. After careful review we are

persuaded that the case before us presents no questions the fundamental underlying principles of which have not already been declared by this court, and that this case is, therefore, not of the class that should be preserved as an exception to the mootness doctrine.

We acknowledge, as we have before, the very substantial character of the interests represented by the petitioners in this proceeding. We also note that questions such as the one posed may occasionally escape review. It is for this reason that on occasion we have entertained appeals even though the issues in the particular controversy have been resolved. However, as our court only recently has set forth in some detail the requirements that must be fulfilled before a judicial proceeding in this State may be closed to the public and press, no sufficiently useful purpose would be served in this instance by our retaining the appeal notwithstanding that the underlying controversy is now moot.

(2)It has, of course, long been the law in this State that all judicial proceedings, both civil and criminal, are presumptively open to the public (Judiciary Law, § 4; *Lee v Brooklyn Union Pub. Co.,* 209 NY 245) and that a proceeding at which a criminal defendant enters a plea of guilty is indisputedly a substitute for a trial *(People ex rel. Carr v Martin,* 286 NY 27, 32). Indeed, in *Matter of Gannett Co. v De Pasquale* (43 NY2d 370) it was only by distinguishing the pretrial and evidentiary nature of the proceeding at issue that this court could conclude that such a proceeding should ordinarily be closed to the public and press *(Gannett, supra,* at p 380). We were careful to note in *Gannett* (at p 378) that, "In the case now before us, the Trial Judge was not presiding over a trial on the merits".

In *Matter of Westchester Rockland Newspapers v Leggett,* (48 NY2d 430, supra.;*),* which was decided by this court after the decision of the Appellate Division in the instant case and which was obviously not available to inform either the trial or the appellate court, the issue was closure of a pretrial competency hearing. In that case even the pretrial nature of the proceeding was considered insufficient to nullify the presumption that all judicial proceedings are to be open. Thus the dissent is flatly incorrect in its statement that by dismissing ***716** this appeal for mootness we are disposed to permit trials to be closed to the public on the same basis as pretrial proceedings. On the contrary, we have distinguished between pretrial and trial closures and expressed our consciousness of the danger inherent in permitting too casual a closure of even pretrial proceedings: "At the present time, in fact in most criminal cases, there are only pretrial proceedings. Thus if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors" *(Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 440).

(1)Our decisions in *Gannett (supra)* and *Leggett (supra)* laid down the procedural framework within which the possibility of closure must be considered.[2] We conclude, therefore, that inasmuch as the principles governing fair trial- free press issues which might have been developed by consideration of the instant case have already been largely declared by our decisions in *Gannett* and *Leggett,* in this instance there is no sufficient reason to depart from the normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.

More than that, we are convinced that there is a good reason in the circumstances of this case not to entertain this appeal for the purpose of extrapolating or refining the principles which we have declared. The closing of the plea hearing here occurred while the appeal from our *Gannett* decision was pending before the United States Supreme Court and some months before our decision in the *Leggett* case.[3] We cannot conclude that the trial court would have followed the procedures which he did or that he would necessarily have reached the same conclusion had our decision in *Leggett* preceded the hearing. While we can anticipate that the implementation of the principles that we have declared will not always be easy, we have no reason to question the readiness or capacity of the ***717** Judges at nisi prius to seek to implement them appropriately with diligence, faithfulness and imagination. We conceive our jurisprudential role in this field as one of supervising and monitoring the dispositions made by our lower courts after we declare the applicable principles, rather than retrospectively appraising conduct of Trial Judges that preceded our declarations.

Other considerations also support our conclusion that this appeal should not be entertained. We are concerned with the vitality and fundamental soundness of our jurisprudence.

The engine of the common law is inductive reasoning. It proceeds from the particular to the general. It is an experimental method which builds its rules in tiny increments, case-by-case. It is cautious advance always a step at a time. The essence of its method is the continual testing and retesting

of its principles in "those great laboratories of the law, the courts of justice" (Smith, Jurisprudence, p 21).[4]

Conscious judicial restraint is essential--its absence diminishes the craftsmanship of the courts and debases the judicial product. A common-law Judge will not reach to decide a question not properly before him. Nor will he attempt to state a broad rule except when absolutely required--and then it will be cast in terms which permit it to be moulded in light of the experience of those who must work with it. A newly articulated rule should not be immediately recast "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible" *(Smith,* Jurisprudence, p 21).

Finally, it must be explicitly stated that in dismissing the present appeal as moot we express no view on the merits. Our disposition here is not to be read as any withdrawal from, addition to, or elaboration on our opinions in *Gannett* and *Leggett.* It is entirely incorrect to suggest otherwise. Nor should our dismissal be interpreted as presaging a disposition to decline on grounds of mootness to entertain appeals in future fair-trial, free-press cases. We recognize, of course, that cases in this area of the law, because of considerations of timing, would often, even usually, evade review if appeals were uniformly to be dismissed for mootness. We shall continue ***718** to resolve each case in this field on the basis of its individual characteristics and merits, only one aspect of which will be its mootness, if moot it is.

Concluding as we do that the appeal is moot and not of a character which should be preserved for review, the appeal should be dismissed. In this case, however, because the Appellate Division had no opportunity to consider the matter in light of our decision in *Leggett (supra)* we should reverse and remit with directions to dismiss solely on the ground of mootness, in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent (see *Matter of Adirondack League Club v Board of Black Riv. Regulating Dist.,* 301 NY 219, 223; cf. *United States v Munsingwear,* 340 US 36, 39; *United States v Alaska S. S. Co.,* 253 US 113, 115).

Meyer, J.

(Concurring).

I concur fully in Judge Wachtler's opinion and write only because where the dissent finds implications in that opinion which "do not bode well for the future of public trials in this State" (p 723), I find in the dissent suggestions which, if they become the governing rule, may adversely affect the individual's right to a fair trial.

I, of course, do not suggest that the media are to be regularly, or even often, excluded from the courtroom. What I am urging is that the problem must be analyzed not in terms of categories and classifications but of the rights affected, and that, without a very much clearer demonstration that the public's interest cannot be reasonably protected without infringing individual rights than has been made, the rights of the individual on trial may not be subordinated to the rights of the public to know what goes on in a courtroom or how the system of justice is functioning.

The genius of the American constitutional experiment has been the protections it affords individuals against oppression by the majority, whether in the form of star chamber proceedings or of stadium trials, the result of either of which is an equally foregone conclusion. Important as it is that justice *appear* to the public to be done, in final analysis the public is grossly disserved if it not *in fact* be done in each individual case.

Resolution of the instant case, were it to be decided on the merits, would turn not on whether the taking of a guilty plea is the equivalent of a trial or more nearly a preliminary ***719** proceeding, or whether the fair trial rights at stake were those of the pleading defendant or his codefendant. The fact is, as both we and the United States Supreme Court have recognized, that there are occasions when parts of trials, as well as of pretrial proceedings, may constitutionally be closed *(Gannett Co. v De Pasquale,* 443 US 368, 388, n 19, and cases cited; *People v Jones,* 47 NY2d 409; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 377-378, affd 443 US 368), though as we have made clear the discretion to do so is to be "sparingly exercised and then, only when unusual circumstances necessitate it" *(People v Hinton,* 31 NY2d 71, 76; accord: *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 441). Closure during trial, moreover, will usually be to protect some interest of a third person or the public, rather than of the person on trial[1] (to protect the public interest in not revealing the identity of an informer, *People v Jones, supra; People v Hinton, supra;* see Proposed Code of Evidence for the State of New York, § 510; to protect the life of a witness or shield him or her from embarrassment, *People v Hagan,* 24 NY2d 395, cert den 396 US 886; *People v Smallwood,* 31 NY2d 750; *United States ex rel. Smallwood*

v La Valle, 377 F Supp 1148, affd 508 F2d 837, cert den 421 US 920; see Judiciary Law, § 4; to protect the interests of the defendant and the public in orderly trial, *United States ex rel. Orlando v Fay,* 350 F2d 967).

Nor can I accept the dissent's assumption that there is an "absence of prejudice" to codefendant Du Bray in permitting Marathon's guilty plea to be taken in open court. Short of publishing a confession by Du Bray before it has been ruled admissible, nothing could be more devastating to his rights than Marathon's accusatory words. Given in a plea proceeding, such words are usually the *quid pro quo* for some favor of the law, generally a lesser sentence. To permit such information to get to potential jurors without the prophylaxis of cross-examination pointedly indicating the self-serving nature of the accusation is materially to disadvantage such a codefendant, for cross-examination when it does occur will be less effective than it would have been had the accusation not come to the jury in advance of trial and with the imprimatur of the press. ***720** It is possible to disadvantage such a codefendant in an additional way which cannot be known before trial. It is not unknown for a person in Marathon's position to recant when called to testify at his codefendant's trial. In such a case his statement about the codefendant at his own guilty plea "may be received only for the purpose of impeaching" him "and does not constitute evidence in chief" (CPL 60.35, subd 2). While the Trial Judge must so instruct the jury (id.*),* such an instruction, of questionable psychological value in any event,[2] will be even less effective than usual because the accusation came to the jury in advance of trial and with the imprimatur of the press.

The problem that arises when the issue is discussed in terms of categories rather than effect on individual rights is well illustrated by the present case. The dissent sees the closure here involved as casting "a veil of secrecy over the major component of the criminal justice system" (p 728) and the fact that the pleading defendant might implicate his codefendant as insufficient justification for closure (p 727). In my view there is a ready means of protecting the public's interest in the Marathon- Du Bray trials without sacrificing Du Bray's clear right not to have the jury pool for his trial, scheduled to begin a few days later, tainted by media accounts of Marathon's plea statements implicating him, and the number of plea proceedings in which, to protect the rights of a codefendant, closure of part or all of the plea proceeding might occur is an insignificant part of the criminal justice system. So far as the record and briefs reveal (including the brief of *amici* which catalogues a number of recent closures) this is the first such case.

The tension between public and individual interests that arises over an issue such as whether by closing so much of a plea proceeding as relates to him a codefendant should be protected against revelation in advance of his trial of the pleading defendant's accusations against him, arises not because of the presence of media representatives in the courtroom, but because it is a constitutional absolute that what transpires in open court is public property and may be immediately ***721** disseminated. Responsible media often will delay publication nonetheless,[3] but quite properly are unwilling to permit the invasion of First Amendment rights that would be involved in permitting the courts to tell them when they can publish. Yet, just as not all Judges are exemplars of their craft, neither are all editors able to perceive in their highly competitive profession the value to individual rights of delaying publication. The antidote for the nonexemplary Judge is to keep courtrooms open to the fullest extent consistent with individual rights. The antidote for the unresponsive or irresponsible editor is to close the courtroom when there is a real probability that publication of what is to be revealed in the courtroom will materially prejudice the defendant on trial, because in no other constitutionally acceptable way can his rights be protected.

I, of course, do not ignore the existence of procedures such as change of venue, change of venire, continuance, waiver of jury, sequestration, some of which are discussed by the Supreme Court in *Nebraska Press Assn. v Stuart* (427 US 539, 563), as alternatives to prior restraint. But I cannot accept the concept that these possibilities, most of which[4] involve denigration of defendant's constitutional protections are acceptable alternatives (cf. *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 444, supra.;*; Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 380, affd 443 US 368, supra.;).

In my view the Bills of Rights set forth in article I of the New York State Constitution and the first 10 amendments to the United States Constitution become a mockery when, because of publicity, a court must say to a man on trial for his life or for his liberty, you are entitled to a speedy trial, but not yet. You are entitled to trial by a jury, unless you fear that pretrial publicity has so adversely affected the impartiality of those who will be called as potential jurors that you ***722** dare not risk the result. You are entitled to a trial by a jury of your neighbors, but not those nearby. You are entitled to

confront and cross-examine witnesses, but not those whose testimony is given through the newspapers. You are entitled to exclude improperly seized matter from the jury as evidence, but not as a news story. The more is this so when what we deal with is not prior restraint on publication as in *Stuart,* but denial of access for a limited time as to a limited part of the proceeding, and when we impose upon the defendant seeking closure not only the burden of showing that such procedures will not "dispel prejudice", but also what impact the prejudicial information will have on the jury pool, in light of its size, the extent of the media coverage and the effect of that coverage on the public at large (see *Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 447 [Cooke, Ch. J., concurring]). Bearing in mind that "none are more lowly-- none more subject to potential abuse--and none with more at stake than those who have been indicted and face criminal prosecution in our courts" (ibid., at p 444 [Wachtler, J., majority opn]), I conclude that the required showing presses to the outer limits of, if it does not exceed, due process requirements for all but the wealthy defendant.

Delayed access does not affect the rights of the public or of the media in any similar way. As suggested in *Gannett* (43 NY2d, at p 381) and ordered in *Westchester Rockland Newspapers* (48 NY2d, at p 445), a full transcript of the plea proceeding in this matter was made and was furnished to appellant as soon as the danger to Du Bray's interest was past. Perhaps consideration should be given to (1) equipping one courtroom in each courthouse with videotape equipment so that any closed portion of a trial or pretrial proceeding can be recorded in a way that will make available to the media with all the nuances of voice and gesture exactly what transpired while the courtroom was closed, (2) requiring that any closed proceeding be held in that courtroom and videotaped in its entirety, (3) putting the operation of the videotape equipment and the retention of the tapes in the hands of a public commission independent of the courts or other members of the criminal justice system and subject to court order only as to time of release, which would, in any event, be required to be not later than a few days after the trial of defendant or a codefendant ends (cf. Uniform Rules of Criminal Procedure, rule 714, 10 ULA 317). Though no objective evidence of which ***723** I am aware indicates the need for the procedure suggested, I recognize the importance of assuring our citizens that the judicial process is above suspicion, and believe any resulting inconvenience to the system to be more than offset if we thereby assure the constitutional rights of individuals accused.

Use of the suggested procedure together with the preliminary hearing mandated by the *Gannett* and *Westchester Rockland Newspapers* cases will preserve both the rights of the public (and the media in the interest of the public) to the free flow of information about the courts and the "most fundamental of all freedoms,"[5] the right of an accused individual to a fair trial.

Chief Judge Cooke

(Dissenting).

A majority of the court today in effect sanctions the exclusion of the public and the press from a guilty plea proceeding in a criminal case. Because closure of a plea proceeding is tantamount to closure of a trial itself, and because the tacit implications of the court's decision do not bode well for the future of public trials in this State, I must respectfully dissent.[1]

The present article 78 proceeding stems from a criminal proceeding in Albany County. In September of 1978, Alexander Marathon and William Du Bray were indicted for the crimes of robbery in the first degree, burglary in the first degree and grand larceny in the second degree. Although the case did attract media attention, the publicity does not appear to have been substantial. Nonetheless, when a joint suppression hearing was convened on March 5, 1979, defendants moved for exclusion of the public. The court granted the motion, without objection by the prosecutor, and without conducting a hearing, and ordered the doors to the courtroom locked.

During the course of the closed suppression hearing, defendant Marathon decided to enter a guilty plea. While the courtroom was still locked, and the public and reporters barred, Marathon's counsel moved to close the courtroom during the plea proceeding. The District Attorney joined in the motion, and the Judge again ordered closure, stating only ***724** that "In the exercise of discretion and in the interests of justice, I will close the courtroom at this time to all non-Court personnel". Later the court explained that it closed the plea proceeding because it was likely that Marathon would implicate Du Bray, rendering it difficult to select an impartial jury when Du Bray came to trial.

Petitioner Armstrong, a reporter for the Albany *Times-Union,* was aware of the closed suppression hearing, and allegedly made periodic checks of the courtroom where she believed the hearing was being conducted. She first learned of the

closed plea proceeding from the attorney for Du Bray, who was excluded from the proceeding and was standing outside the courtroom.

Ms. Armstrong visited the Judge in his chambers, and he confirmed that a guilty plea had been entered. The Judge indicated that a transcript of the proceeding would be available in a few days, but denied Ms. Armstrong's request to have the stenographer read the minutes to her. The next day, petitioners delivered a letter to the Judge protesting the closure and requested either an immediate transcript or an order directing the court reporter to relate the minutes of the proceeding. This request was denied.

On the following Monday, Du Bray entered a plea of guilty. Ms. Armstrong was then permitted to purchase a copy of the minutes taken at Marathon's plea. Shortly thereafter, this proceeding was instituted.

At the outset, I cannot agree that the proceeding should be dismissed for mootness. As the court has but recently reaffirmed regarding closure orders, "we have traditionally retained jurisdiction, despite a claim of mootness, because of the importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 436-437). By now rejecting this exception to the mootness doctrine, the majority has provided a precedent to effectively insulate closure orders from legal challenge. Indeed, since we have previously cautioned trial courts against staying the criminal proceeding while collateral review of a closure order proceeds *(Matter of Merola v Bell,* 47 NY2d 985, 987- 988), the closure order will be moot and evade review in all but the rarest of instances.

No persuasive reason has been given for now overruling the ***725** mootness exception for closure orders so recently recited and recognized in *Matter of Gannett Co. v De Pasquale* (43 NY2d 370, affd 443 US 368) and *Westchester Rockland.*[2] Indeed, the majority furnishes no explanation whatsoever as to why the mootness exception applied in those cases falls short of reaching the situation in this matter, but notes somewhat cryptically that future cases may or may not be moot. Perhaps more unsettling is the absence of guidelines by which to evaluate mootness in these proceedings. If the court is unwilling to apply the mootness exception here, where a novel and not insubstantial issue is presented, it is difficult to predict when the exception will again be invoked. Such *ad hoc,* unexplained decision making is not in harmony with the best interests of our system of jurisprudence.

Nor do I agree that the "principles governing fair trial-free press issues *** have already been largely declared by our decisions in *Gannett"* (majority opn, at p 716) and in *Westchester Rockland Newspapers v Leggett (supra,* at pp 439-442). Undoubtedly, *Westchester Rockland* and *Gannett* establish the procedural and substantive rules to be followed when dealing with a motion to close *pretrial* proceedings. Those guidelines do not cover the situation here, as a guilty plea proceeding is simply not *pretrial* in nature. Rather, it is a substitute for and the legal and practical equivalent of the trial itself. A plea of guilty establishes "guilt of the crime charged as incontrovertibly as a verdict of a jury upon a trial" *(People ex rel. Carr v Martin,* 286 NY 27; see, e.g., *People v Krennen,* 264 NY 108, 109; *People ex rel. Hubert v Kaiser,* 206 NY 46, 53). The plea is in itself a conviction (e.g., *People v Jones,* 44 NY2d 76, 82-83, citing *Boykin v Alabama,* 359 US 238). "Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence" *(Kercheval v United States,* 274 US 220, 223). Thus, ***726** by stating that *Westchester Rockland* and *Gannett* are controlling, the court is effectively holding that trials may be closed to the public on the same basis as pretrial proceedings.

And the court may not sidestep this significant issue by merely asserting that *Westchester Rockland* recognized a distinction between trial and pretrial proceedings, for the fact remains that *Westchester Rockland* articulated substantive standards for only pretrial proceedings. Today's decision must be construed as indorsing the application of those same standards to trial closures, and thereby sustaining the constitutionality of excluding the public and press from a trial itself. The fallacy in this holding is demonstrated by the Supreme Court's retention of jurisdiction--at least for the present--in a case where the trial was closed to the public *(Richmond Newspapers v Virginia,* 448 US ___, 48 USLW 3241). That action signals a strong possibility that the closing of a trial presents a substantial Federal constitutional question, even after *Gannett* upheld pretrial closure. It is thus difficult to fathom the majority's efforts to avoid a question with such momentous constitutional and societal impact.[3]

This is especially disturbing because the rationale for excluding the public from pretrial proceedings does not justify closure of plea hearings.[4] This court has a number of times reviewed the serious conflict which gave rise to

the pretrial closure controversy. On the one hand, the public is possessed of a right to open judicial proceedings.[5] Not only is this right deeply rooted in our history *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 445, supra.; [concurring opn]), but it is mandated by the clear long-standing command of the Legislature: "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the ***727** same" (Judiciary Law, § 4). At the same time, there are instances, however rare, where pretrial publicity may effectively destroy the accused's right to a fair trial (see *Sheppard v Maxwell,* 384 US 333). The precise point at which the public right to know must give way to the defendant's right to a fair trial has and will continue to spark lively debate (compare *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 443-444, with id., at pp 445-448, supra.;).

But we can all agree as to the possible source of the potential prejudice at pretrial suppression hearings. Because the very purpose of such proceedings is to determine the admissibility of evidence, they "are often a potent source for the revelation of evidence which is both highly prejudicial to the defendant's case and not properly admissible at trial" *(Matter of Westchester Rockland Newspapers v Leggett, supra,* at p 439). If the hearing is open, and the case is well publicized, it is possible that the evidence will be disclosed to potential jurors but ultimately excluded from use at trial. This could subvert the very purpose of the hearing.

By contrast, none of these possible dangers attend when the plea proceeding is opened to public view. Given a defendant's voluntary decision to admit his guilt in open court, and the fact that the plea proceeding will quickly ripen into a conviction, the possibility of a defendant's rights being impaired by the presence of the public and the press is almost nonexistent. And, even if it be assumed that concern for a codefendant's rights would ever warrant closure of a plea, the *mere* fact that the pleading defendant *might* implicate his cohort is insufficient justification. It is true, of course, that the defendant's statements at the plea, if they implicate the codefendant, would be prejudicial. But all evidence which suggests guilt is highly prejudicial. This does not mean that all inculpatory evidence must be enjoined from pretrial disclosure. The narrow rationale for considering closure of the suppression hearing is that the damaging evidence may prove to be inadmissible at trial. There is no reason to suppose that the evidence uncovered at a plea hearing would be inadmissible at the later trial of a codefendant. Indeed, more often than not, the defendant who pleaded can probably be expected to testify at the codefendant's trial--possibly for the prosecution, possibly for the defense. It follows that there is no *ipso facto* basis for overriding the command of section 4 of the Judiciary Law with respect to plea proceedings. ***728**

In addition to the absence of prejudice, the public has a compelling stake in open plea proceedings. "Publicity, not secrecy, in arraignment, plea and judgment is part of our tradition" *(Matter of Rudd v Hazard,* 266 NY 302, 307). Especially in modern times, when guilty pleas account for most criminal dispositions, it is particularly egregious to close the courtroom doors on these proceedings. In some areas of the State, guilty pleas make up three fourths of all criminal dispositions (Twenty-Second Ann Report of NY Judicial Conference, 1977, p 56). And, in any calendar year, guilty pleas may constitute 90-95% of all convictions obtained State-wide (see id., at p 58). To exclude the public from plea proceedings of codefendants is thus to exclude the public from the workings of a substantial part of the criminal justice system.[6]

The beneficial aspects of an open criminal justice system have been often enough discussed to need no repetition here (see, e.g., *Gannett Co. v De Pasquale,* 443 US 368, 407, 421-422, 427-433, supra.; [Blackmun, J., concurring and dissenting]; Friendly, Crime and Publicity; Note, The Right to Attend Criminal Hearings, 78 Col L Rev 1308). But it would not be amiss to note that if the plea is insulated from public view, the public may be deprived of their most effective method of determining whether elected officials are enforcing the law "with vigor and impartiality" *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 437, supra.;). And, casting a veil of secrecy over the major component of the criminal justice system may well lead our citizens to view the judicial process with a suspicious eye (see *People v Hinton,* 31 NY2d 71, 73, supra.;). It is not enough that justice be done. It must be perceived as being done in the eyes of the public.

Finally, it bears emphasis that the closure motion in the present case was entertained in secret, with no representative of the public or media afforded an opportunity to voice opposition. Moreover, the motion was granted in summary fashion without any showing in support of it. These procedures cannot be sanctioned *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 442, supra.;). The majority's explanation--that closure occurred prior to the *Westchester Rockland* case--is unacceptable. Even prior to *Westchester Rockland* it was clear that closure could not be ordered absent some ***729** showing of potential prejudice

(Matter of Gannett Co. v De Pasquale, 43 NY2d 370, 376-381, affd 443 US 368, supra.;). Here, there was none. And, it had also been stated in *Gannett* that "the courts should of course afford interested members of the news media an opportunity to be heard *** to determine the magnitude of any genuine public interest" (43 NY2d, at p 381). Since the closure in this case occurred after the procedural guidelines in *Gannett* were promulgated, the majority's explanation of the improprieties does not bear scrutiny. Thus, the procedural irregularities alone would warrant reversal.

Accordingly, the judgment of the Appellate Division should be reversed.

Judges Jasen, Gabrielli, Jones and Fuchsberg concur with Judge Wachtler; Judge Meyer concurs in a separate opinion; Chief Judge Cooke dissents and votes to reverse in another opinion.

Judgment reversed, without costs, and matter remitted to the Appellate Division, Third Department, with directions to dismiss the proceeding solely on the ground of mootness.

***730**

Footnotes

1 "[N]ovel and important question of statutory construction" *(Le Drugstore Etat Unis v New York State Bd. of Pharmacy,* 33 NY2d 298, 301); "of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well" *(East Meadow Community Concerts Assn. v Board of Educ.,* 18 NY2d 129, 135); "only exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest will justify a departure from our general practice" *(Matter of Lyon Co. v Morris,* 261 NY 497, 499); question of "importance and interest and because of the likeliness that they will recur" *(Matter of Jones v Berman,* 37 NY2d 42, 57); "question of general interest and substantial public importance is likely to recur" *(People ex rel. Guggenheim v Mucci,* 32 NY2d 307, 310); question "of major importance and [that] will arise again and again" *(Matter of Rosenbluth v Finkelstein,* 300 NY 402, 404); questions of "general interest, substantial public importance and likely to arise with frequency" *(Matter of Gold v Lomenzo,* 29 NY2d 468, 476); "importance of the question involved, the possibility of recurrence, and the fact that orders of this nature quickly expire and thus typically evade review" *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 437); "crystalizes a recurring and delicate issue of concrete significance" *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 376).

2 In *Gannett* we stated that in determining the propriety of closure in a particular case the court "should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" (43 NY2d 370, 381). That precatory language in *Gannett* was the foundation for the mandate of *Leggett (supra,* at p 442) which spelled out in as much detail as a common-law court may, the procedure to be followed by a trial court which is confronted with a request for closure of a criminal proceeding.

3 We also note that the appeal in *Richmond Newspapers v Virginia* (448 US ___, 48 USLW 3241) is now pending before the Supreme Court.

4 (Cf. Cardozo, The Nature of the Judicial Process, p 25: "This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seem to have behind them the power and pressure of the moving glacier.")

1 Hearings preliminary in nature (e.g., suppression) are sometimes permitted during trial. For purposes of present discussion they should be classed as preliminary, but as indicated in the text the difference is not determinative. What is determinative is the effect on individual rights of what will be revealed.

2 For Mr. Justice Jackson that such an instruction could overcome the prejudice involved was a "naive assumption" which "all practicing lawyers know to be unmitigated fiction" *(Krulewitch v United States,* 336 US 440, 453 [concurring opn]; see, also, *Bruton v United States,* 391 US 123, 128-136; *Jackson v Denno,* 378 US 368, 388; Kalven & Zeisel, American Jury, p 128).

3 That effective news reporting is possible notwithstanding delay is clear from the *New York Times'* handling of the *Franzese* case *(United States v Franzese,* 392 F2d 954, vacated in part and remanded *sub nom. Giordano v United States,* 394 US 310). In that case the *Times* honored the Trial Judge's request and withheld until conclusion of the trial reporting on what occurred in the courtroom out of the presence of the jury. It then printed a roundup story concerning the trial, including the material earlier withheld *(New York Times,* March 4, 1967, p 28, cols 4-8).

4 Sequestration is the exception, but it involves a potential of jury resentment at being locked up for the duration of the trial which makes it likewise unacceptable as an alternative (cf. *Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 444, supra.;).

5 *(Estes v Texas,* 381 US 532, 540: "We have always held that the atmosphere essential to the preservation of a fair trial--the most fundamental of all freedoms--must be maintained at all costs.")

1 It should never be forgotten that the concept of a public trial has its genesis in concern for protection of the accused (see *People v Hinton,* 31 NY2d 71; *Gannett Co. v De Pasquale,* 443 US 368, 406 [Blackmun, J., concurring and dissenting]).

2 As the majority correctly notes, the mootness exception recognized in *Gannett* and *Leggett* applies in instances where an important issue is capable of recurring while evading review *(Matter of Westchester Rockland Newspapers v Leggett,* 48 NY2d 430, 436-437, supra.;*; Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, 376, supra.;*;* see *Matter of Carr v New York State Bd. of Elections,* 40 NY2d 556, 559; see, also, *Matter of United Press Assns. v Valente,* 308 NY 71, 76). Since *Leggett* presented an issue substantially similar to *Gannett,* the retention of jurisdiction in *Leggett* apparently represents a policy decision by the court to continue to apply the mootness exception in closure cases. Alternatively, the court may have viewed *Leggett* as presenting a novel question, even after *Gannett.* Under either rationale, the mootness exception applies here.

3 It is also difficult to understand how the majority can find this proceeding moot and yet effectively rule on the merits of the trial closure. By finding *Westchester Rockland* controlling, as discussed, the majority has held that a trial may constitutionally be closed, in instances not previously permitted.

4 The two are not the same but are separate and distinct and they do not mix or merge. A justifiable closure of the suppression hearing did not envelop the plea for by nature and law there was a cessation of the former before the initiation of the latter.

5 In *People v Hinton* (31 NY2d 71, supra.;*),* it was well stated at page 73: "Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly and not to be unjustly condemned *** and concomitantly serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified by the Inquisition, Star Chamber and *lettre de cachet* *** Not only the defendant himself, but also the public at large has a vital stake in the concept of a public trial."

6 Even more troubling is the possibility of closure of a plenary trial where one defendant is to be tried separately from and before his codefendant.

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41 N.Y.2d 283, 360 N.E.2d 1086, 392 N.Y.S.2d 403

In the Matter of Charles Jeter et al., Respondents, v. Ellenville Central School District et al., Respondents, Board of Education of the City of Yonkers et al., Appellants-Respondents, and Board of Education, City School District of the City of New Rochelle, Respondent- Appellant.

Court of Appeals of New York
Argued January 3, 1977;

decided February 15, 1977

CITE TITLE AS: Matter of Jeter v Ellenville Cent. School Dist.

HEADNOTES

Schools
liability for cost of instruction--pupils placed in family homes.

(1) Paragraph a of subdivision 5 of section 3202 of the Education Law (as amd by L 1974, ch 919) is to be interpreted as imposing the cost of instruction of pupils placed in family homes at board by social services districts and State agencies on the school ***284** district in which the pupil resided at the time the social services district or State agency assumed responsibility for his support and maintenance, provided that such cost of instruction shall continue to be borne by any social services district or State agency which assumed responsibility for tuition costs prior to January 1, 1974.

(2) The proviso in paragraph a which refers to any social services district or State agency "which assumed responsibility for tuition costs for any such pupil" refers only to districts and agencies that, prior to January 1, 1974 assumed responsibility for tuition costs of welfare beneficiaries in addition to or as distinguished from responsibility for general support and maintenance. Use of the terms "support and maintenance" and "tuition costs" in close proximity supports the conclusion that the references were to assumptions of different responsibilities.

(3) Arguments addressed to the economic and political wisdom of the cost allocation scheme of the statute are disputations outside the scope of judicial review.

(4) While the New York City Board of Education and Department of Social Services and the Board of Education of the City of Yonkers have procedural standing to be heard on questions of statutory interpretation, they do not have the substantive right to raise constitutional challenges as to due process and equal protection.

(5) There is no warrant in the statute or its legislative history for a presumption that the school district in which the pupil resided immediately before his transfer to the receiving school district is the municipal entity responsible for payment of the cost of instruction to the receiving district.

Matter of Jeter v Ellenville Cent. School Dist., 50 AD2d 366, affirmed.

SUMMARY

Cross appeals, by appellants-respondents as of right on constitutional grounds, and by respondent-appellant by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 15, 1976, which modified, on the law and the facts, and, as modified, affirmed an order and judgment of the Supreme Court at Special Term (John L. Larkin, J.; opn 81 Misc 2d 511), entered in Ulster County, (1) converting the proceeding pursuant to CPLR article 78 into an action for a declaratory judgment, (2) declaring subdivision 5 of section 3202 of the Education Law constitutional, (3) ordering that all social services districts and State departments were to comply with the express terms of subdivision 5 of section 3202 of the Education Law by immediately forwarding reimbursement for tuition as required by statute, if tuition payments were made prior to January 1, 1974, (4) declaring that the school district in which each child resided immediately prior to his transfer to the school district of present residence was the body responsible for the reimbursement for tuition required by the statute,

and (5) declaring that no district in the State may refuse to admit any pupil to a full course of elementary or secondary education because of its failure to receive reimbursement for the cost of instruction as mandated by ***285** subdivision 5 of section 3202 of the Education Law. The modification consisted of striking the decretal paragraph which imposed immediate liability upon the school district in which a child resided at the time of his transfer to the school district seeking tuition.

POINTS OF COUNSEL

W. Bernard Richland, Corporation Counsel (Alfred Weinstein, L. Kevin Sheridan and *Joseph F. Bruno* of counsel), for New York City Board of Education and another, appellants.

Eugene J. Fox, Corporation Counsel (Howard Most of counsel), for Board of Education of City of Yonkers, appellant-respondent.

Peter M. Fishbein and *Robert S. Ellenport,* New York City, for Board of Education, City School District of City of New Rochelle, respondent-appellant.

Gerald Harris, County Attorney (Jonathan Lovett of counsel), White Plains, for Westchester County Department of Social Services, respondent.

OPINION OF THE COURT

Jones, J.

We hold that paragraph a of subdivision 5 of section 3202 of the Education Law is to be interpreted as imposing the cost of instruction of pupils placed in family homes at board by social services districts and State departments and agencies on the school district in which the pupil resided at the time the district, department or agency assumed responsibility for his support and maintenance, provided that the cost of instruction shall continue to be borne by any district, department or agency which had assumed responsibility for tuition costs (as distinguished from support and maintenance) prior to January 1, 1974. The attacks aimed by appellants at paragraph a as so interpreted must be rejected.

The statutory provision with which we deal is a portion of the section of the Education Law that establishes the right to free public education for resident pupils and sets forth details of making education available to nonresident pupils, including allocation of the cost of such education. Paragraph a was added to subdivision 5 of section 3202 by chapter 867 of the Laws of 1973 with a view to relieving school districts of the financial burden of educating pupils who are placed in family homes within the district at board from other school districts, a burden to which the districts furnishing the educational services had been subjected under prior law. Paragraph a, as amended by chapter 919 of the Laws of 1974, now provides in relevant part: "The cost of instruction of pupils placed in ***286** family homes at board by a social services district or a state department or agency shall be borne by the school district in which each such pupil resided at the time the social services district or state department or agency assumed responsibility for the support and maintenance of such pupil; provided, however, that such cost of instruction shall continue to be borne while such pupil remains under the age of twenty-one years, by any social services district or state department or agency which assumed responsibility for tuition costs for any such pupil prior to January one, nineteen hundred seventy-four."

This litigation, instituted to compel provision of public education for particular children residing in foster homes in Ellenville Central School District, was subsequently expanded and parties added to permit a broad determination of responsibility for the cost of such instruction under the quoted statutory subdivision. The courts below have given a literal meaning to the language of paragraph a of Education Law, section 3202, subdivision 5, and have upheld its constitutionality.

We first address the issue of statutory interpretation pressed by the City School District of the City of New Rochelle. This appellant would have us read the defining phrase in the proviso at the end of the quoted statutory sentence--"which assumed responsibility for tuition costs for any such pupil"--as referable not to tuition costs but to the assumption of responsibility for support and maintenance of the pupil. The result of such an interpretation would be to relieve all school districts of educational costs of pupils who had become public charges prior to January 1, 1974, rather than to limit such relief only to those public charges for whom a social welfare district or State department or agency had assumed responsibility for tuition costs (as distinguished from support and maintenance) prior to that date. We reject this suggestion. In our view the language of the subdivision facially and literally draws an unmistakable distinction between responsibility of a social services district or a State department or agency for "support and maintenance" and for "tuition costs". Use of the different terms in such close proximity within the same sentence gives strong support to

the conclusion that the references were to assumptions of different responsibilities. We find nothing in the legislative history to which our attention is drawn which would suggest, let alone compel, a contrary ***287** legislative meaning, intention or purpose (cf. *New York State Bankers Assn. v Albright,* 38 NY2d 430, esp 435-438, and cases cited). Accordingly, we agree that the proviso at the end of the first sentence of paragraph a of Education Law, section 3202, subdivision 5, must be held to refer only to social services districts and State departments and agencies that, prior to January 1, 1974, assumed responsibility for the tuition costs of welfare beneficiaries in addition to or as distinguished from responsibility for their general support and maintenance.

As to challenges to the validity of the paragraph in general, we first observe that very much of the extensive arguments advanced by the parties is addressed to the economic and political wisdom of the cost allocation scheme set out in the statute, a realm of disputation which is quite outside the scope of judicial review *(Montgomery v Daniels,* 38 NY2d 41, 53; cf. *People v Broadie,* 37 NY2d 100, 118). The New York City Board of Education and Department of Social Services and the Board of Education of the City of Yonkers seek also to mount attacks of varying degrees of plausibility and relevance under the due process and equal protection clauses of our State and Federal Constitutions. While these units of municipal government have procedural standing to participate in the present litigation (and thus to be heard, for instance, on questions of statutory interpretation), they do not have the substantive right to raise these constitutional challenges. *(Williams v Mayor,* 289 US 36; *Trenton v New Jersey,* 262 US 182; *City of New York v Richardson,* 473 F2d 923, 929, cert den *sub nom. Lavine v Lindsay,* 412 US 950; *Lindsay v Wyman,* 372 F Supp 1360, 1366; *Triplett v Tiemann,* 302 F Supp 1239, 1242; *Matter of County of Cayuga v McHugh,* 4 NY2d 609, 616; *Black Riv. Regulating Dist. v Adirondack League Club,* 307 NY 475, 488, app dsmd 351 US 922; *Robertson v Zimmermann,* 268 NY 52, 64; see Right of municipality to invoke constitutional provisions against acts of State Legislature, Ann., 116 ALR 1037.) This is not an instance in which the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription (cf. *Board of Educ. v Allen,* 20 NY2d 109, affd 392 US 236).

Finally, we agree with the Appellate Division that, whatever may be the practical problems of administration engendered by the present statutory formulation, and understandable ***288** as is the temptation to offer judicial assistance in their minimization, there is no warrant in this statute nor in its legislative history for the erection of the presumption fashioned by Supreme Court that the school district in which the pupil resided immediately before his transfer to the receiving school district is the municipal entity responsible for payment of the cost of instruction to the receiving district. Again, if relief be needed or desired, address must be to the Legislature and the Appellate Division properly excised the provision of the judgment that implemented the novel presumption.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Breitel and Judges Jasen, Gabrielli, Wachtler, Fuchsberg and Cooke concur.
Order affirmed, without costs.

New York Official Reports

80 N.Y.2d 70, 600 N.E.2d 191, 587 N.Y.S.2d 560

In the Matter of Martin Wolpoff et al., Respondents,

v.

Mario M. Cuomo, Individually and as Governor of the State of New York, et al., Respondents, and Saul Weprin, Individually and as Speaker of the New York State Assembly, et al., Appellants.

In the Matter of Reeves Dixon et al., Respondents,

v.

Mario M. Cuomo, Individually and as Governor of the State of New York, et al., Respondents, and Ralph Marino, Individually and as Temporary President and Majority Leader of the New York State Senate, Intervenor-Appellant.

Court of Appeals of New York
219, 220
Argued June 29, 1992;

Decided June 30, 1992

CITE TITLE AS: Matter of Wolpoff v Cuomo

SUMMARY

Appeal, in the first above-entitled proceeding, on constitutional grounds, from a judgment of the Supreme Court (Alan J. Saks, J.), entered June 16, 1992 in Bronx County in a proceeding pursuant to NY Constitution, article III, § 5 and McKinney's Unconsolidated Laws of NY § 4221 (L 1911, ch 773, § 1), which declared unconstitutional a redistricting plan for the New York State Senate (L 1992, chs 76, 77, 78), and annulled a redistricting plan for the New York State Assembly (L 1992, chs 76, 77, 78) as violative of the requirement in NY Constitution, article III, § 5 that the Senate and Assembly be redistricted by the same law.

Appeal, in the second above-entitled proceeding, on constitutional grounds, from a judgment of the Supreme Court (Leland DeGrasse, J.), dated June 15, 1992 and entered in New York County in a proceeding pursuant to NY Constitution, article III, § 5 and McKinney's Unconsolidated Laws of NY § 4221 (L 1911, ch 773, § 1), which declared Laws of 1992 (chs 76, 77, 78) unconstitutional insofar as they set forth a redistricting plan for the New York State Senate.

HEADNOTES

Legislature
Apportionment of Legislature--Constitutionality of Senate Redistricting Plan

(1) Laws of 1992 (chs 76, 77, 78), which embody a redistricting plan for the State Senate that results in 28 of 61 Senate districts crossing county lines, 23 counties being divided and 4 pairs of bi-county districts, are constitutional. The presumption of constitutionality that attaches to the redistricting plan has not been overcome. The Senate redistricting plan does not unduly depart from the State Constitution's requirements regarding contiguity, compactness and integrity of counties (NY Const, art III, §4) in its ***71** compliance with Federal mandates for apportionment substantially on an equal population basis.

Legislature
Apportionment of Legislature--Constitutionality of Senate Redistricting Plan--Constitutional Requirements Regarding Integrity of Counties

(2) Laws of 1992 (chs 76, 77, 78), which embody a redistricting plan for the State Senate that results in 28 of 61 Senate districts crossing county lines, 23 counties being divided and 4 pairs of bi-county districts, do not unduly depart from the State Constitution's requirements regarding integrity of counties (NY Const, art III, §4) in its compliance with Federal mandates for apportionment substantially on an equal population basis. Notwithstanding that the Senate redistricting plan technically violates the express language of the State Constitution, more than enough evidence has been put forth to support the argument that any such violation was minimized and that the district lines were drawn as they were in order to comply with Federal statutory and constitutional requirements. Although the Senate plan compromises the

integrity of 23 counties, a detailed defense of the proposed plan has been presented that is grounded in a complex analysis of population trends and voting patterns, and the way in which both must be accommodated in order to comply with Federal requirements. While the number of divided counties in the new plan and the four bi-county pairings are troubling, it is not appropriate for the Court of Appeals to substitute its evaluation of the relevant statistical data for that of the Legislature. In balancing State and Federal requirements, the State Constitution has been complied with as far as practicable, and it cannot be concluded on this record that the Legislature acted in bad faith in approving this redistricting plan.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Elections, §§ 12-29.

NY Const, art III, §4.

NY Jur 2d, Elections, §§8-10.

ANNOTATION REFERENCES

Constitutionality of State legislative apportionment--Supreme Court cases. 77 L Ed 2d 1496.

POINTS OF COUNSEL

Michael A. Carvin and *Charles J. Cooper,* of the District of Columbia Bar, admitted *pro hac vice,* and *Gregg M. Mashberg* for Ralph Marino, appellant in the first above-entitled proceeding and intervenor-appellant in the second above-entitled proceeding.

I. The rulings below directly conflict with this Court's decisions in *Schneider* and *Bay Ridge. (Matter of Schneider v Rockefeller,* 31 NY2d 420; *Bay Ridge Community* ***72** *Council v Carey,* 103 AD2d 280, 66 NY2d 657; *Gaffney v Cummings,* 412 US 735; *Sincock v Roman,* 233 F Supp 615; *Wells v Rockefeller,* 311 F Supp 48, 398 US 901; *Bush v Martin,* 251 F Supp 484; *Mahan v Howell,* 410 US 315; *Cook v Luckett,* 735 F2d 912; *Black Political Task Force v Connolly,* 679 F Supp 109; *Travis v King,* 552 F Supp 554.)

II. The courts below erred by ignoring the Voting Rights Act. *(Thornburg v Gingles,* 478 US 30; *Meek v Metropolitan Dade County,* 908 F2d 1540, 918 F2d 184; *Jeffers v Clinton,* 730 F Supp 196; *Major v Treen,* 574 F Supp 325; *Jordan v Winter,* 604 F Supp 807; *Carstens v Lamm,* 543 F Supp 68; *Goddard v Babbitt,* 536 F Supp 538; *Kirksey v Board of Supervisors,* 554 F2d 139; *Moore v Leflore County Bd. of Election Commrs.,* 502 F2d 621; *Garza v County of Los Angeles,* 756 F Supp 1298, 918 F2d 763.)

III. The courts below improperly reversed the presumption of constitutionality and impermissibly struck down a legislative enactment on the basis of unresolved factual disputes. *(Matter of Fay,* 291 NY 198; *People ex rel. Henderson v Board of Supervisors,* 147 NY 1; *Matter of Richardson [Stark],* 307 NY 269.)

IV. The 1992 State Senate plan is constitutional.

V. Petitioners' other claims are without merit. *(Matter of Sherrill v O'Brien,* 188 NY 185; *Matter of Reynolds,* 202 NY 430; *Ince v Rockefeller,* 290 F Supp 878.)

VI. If the Senate plan is struck down, the Assembly plan must also fall. *(Matter of Orans,* 45 Misc 2d 616, 15 NY2d 339; *Upham v Seamon,* 456 US 37; *White v Weiser,* 412 US 783; *Matter of Sherrill v O'Brien,* 188 NY 185; *Matter of Dowling,* 219 NY 44.)

VII. If this Court finds the enactment unconstitutional, the remedy is to provide the Legislature with an opportunity to correct the constitutional deficiencies. *(Matter of Burns v Flynn,* 155 Misc 742, 245 App Div 799, 268 NY 601; *Matter of Tishman v Sprague,* 293 NY 42; *Matter of Dowling,* 219 NY 44; *Matter of Sherrill v O'Brien,* 188 NY 185; *Chapman v Meier,* 420 US 1; *Reynolds v Sims,* 377 US 533; *Wise v Lipscomb,* 437 US 535; *Connor v Finch,* 431 US 407; *Burns v Richardson,* 384 US 73; *Bandemer v David,* 603 F Supp 1479, 478 US 109.)

C. Daniel Chill, Elaine M. Reich and *Lawrence D. Bernfeld* for Saul Weprin, appellant in the first above-entitled proceeding and respondent in the second above-entitled proceeding.

I. There was no controversy before Justice Saks regarding Assembly districts. Thus, the court below has issued an impermissible advisory opinion concerning Assembly district lines. *(Prasher v United States Guar. Co.,* 1 NY2d 584; *New York* ***73** *Pub. Interest Research Group v Carey,* 42 NY2d 527; *Matter of Richardson,* 247 NY 401.)

II. The bill contains a severability clause and hence the unconstitutionality of the Senate lines does not, ipso facto, invalidate the Assembly lines. *(People ex rel. Henderson v Board of Supervisors,* 147 NY 1; *People ex rel. Carter v Rice,* 135 NY 473; *Matter of Sherrill v O'Brien,* 188 NY 185; *People ex rel. Alpha Portland Cement Co. v Knapp,* 230 NY 48; *Matter of Dowling,* 219 NY 44; *Matter of Fay,* 291 NY 198; *WMCA, Inc. v Lomenzo,* 377 US 633; *Reynolds v Sims,* 377 US 533; *Thornburg v Gingles,* 478 US 30; *United Jewish Orgs. v Carey,* 430 US 144.)

III. Any master appointed by the court below would, as a matter of law, be limited to consideration of the Assembly plan passed by the Legislature. *(Reynolds v Sims,* 377 US 533; *Connor v Finch,* 431 US 407; *Chapman v Meier,* 420 US 1; *White v Weiser,* 412 US 783; *Maryland Comm. v Tawes,* 377 US 656; *Wise v Lipscomb,* 437 US 535; *Upham v Seamon,* 456 US 37; *Burton v Hobbie,* 543 F Supp 235, 459 US 961.)

Stanley Kalmon Schlein for Martin Wolpoff and others, respondents in the first above-entitled proceeding.

I. The New York State Constitution requires a finding that the Senate plan is unconstitutional. *(Matter of Sherrill v O'Brien,* 188 NY 185; *Mahan v Howell,* 410 US 315.)

II. New York State constitutional requirements must be met and such requirements only give way to the *minimal* extent required by Federal supremacy. *(Reynolds v Sims,* 377 US 533; *Matter of Orans,* 15 NY2d 339; *Matter of Schneider v Rockefeller,* 31 NY2d 420; *Mahan v Howell,* 410 US 315; *Gaffney v Cummings,* 412 US 735; *White v Regester,* 412 US 755; *Flateau v Anderson,* 537 F Supp 257.)

III. The Senate plan cannot be defended on the basis of "one man one vote" requirements. *(Gaffney v Cummings,* 412 US 735; *White v Regester,* 412 US 755; *Mahan v Howell,* 410 US 315; *Brown v Thompson,* 462 US 835.)

IV. The current Senate plan cannot be defended on the basis of voting rights requirements.

V. The Senate plan and its defenders are attempting to mislead the courts and the public. *(Bay Ridge Community Council v Carey,* 66 NY2d 657; *United Jewish Orgs. v Carey,* 430 US 144.)

VI. Respondent Cuomo has effectively confessed judgment, undoing the validity of his acts.

VII. Appellant's rejoinders in the proceedings below were entirely inapposite.

VIII. Appellant can draw no comfort from the district lines of the past decade.

IX. The decision should be affirmed because it is based on factualfindings ***74** which are not subject to review at this level. *(Matter of Mercorella v Benza,* 37 NY2d 792. X. Appellants are not entitled to an automatic stay and any stay already in effect ought be lifted forthwith, in the interests of justice.

Robert Abrams, Attorney-General (Richard Rifkin, Jerry Boone, Joel Graber and *Dennis Safran* of counsel), for Mario M. Cuomo and others, respondents in the first and second above-entitled proceedings.

I. The Court has subject matter jurisdiction of these direct appeals pursuant to CPLR 5601 (b) (2). *(Matter of Orans,* 45 Misc 2d 616, 15 NY2d 339, *appeal dismissed sub nom. Rockefeller v Orans,* 383 US 10.)

II. The Assembly lines should not have been stricken. *(Matter of Orans,* 15 NY2d 339; *Upham v Seamon,* 456 US 37; *White v Weiser,* 412 US 783; *Reynolds v Sims,* 377 US 533.)

III. This Court should exercise its jurisdiction to review and determine the constitutionality of the Senate's lines. *(Baker v Carr,* 369 US 186; *People ex rel. Carter v Rice,* 135 NY 473; *Matter of Sherrill v O'Brien,* 188 NY 185; *Matter of Dowling,* 219 NY 44; *Reynolds v Sims,* 377 US 533; *WMCA, Inc. v Lomenzo,* 377 US 633; *Matter of Orans,* 17 NY2d 601; *Matter of Schneider v Rockefeller,* 31 NY2d 420; *Wise v Lipscomb,* 437 US 535.)

George F. Carpinello for Manfred Ohrenstein and another, respondents in the first and second above-entitled proceedings.

I. Petitioners have made a prima facie showing that the 1992 Senate reapportionment plan violates article III, § 4 of the New York State Constitution.

II. Requiring the Legislature to honor article III, § 4 to the extent practicable is the only means the people have to limit partisan gerrymandering. *(Matter of Sherrill v O'Brien,* 188 NY 185; *Matter of Smith v Board of Supervisors,* 148 NY 187; *Matter of Dowling,* 219 NY 44; *Matter of Richardson [Stark],* 307 NY 269; *WMCA, Inc. v Lomenzo,* 377 US 633; *Reynolds v Sims,* 377 US 533; *Matter of Orans,* 15 NY2d 339; *Glinski v Lomenzo,* 16 NY2d 27; *Matter of Schneider v Rockefeller,* 31 NY2d 420; *Bay Ridge Community Council v Carey,* 103 AD2d 280, 66 NY2d 657.)

III. Defendant Marino's defenses to the 1992 plan have been demonstrated to be factually without merit. *(Mahan v Howell,* 410 US 315; *Brown v Thompson,* 462 US 835.)

Theodore S. Steingut, Jerome Tarnoff, Peter J. Kiernan, Allison M. Walsh and *L. Banks Tarver* for Reeves Dixon and others, respondents in the second above-entitled proceeding.

I. The 1992 Senate plan violates State constitutional apportionment ***75** provisions concerning integrity of county lines, contiguity, compactness and gerrymandering. *(Matter of Sherrill v O'Brien,* 188 NY 185; *Matter of Orans,* 15 NY2d 339; *Reynolds v Sims,* 377 US 533; *WMCA, Inc. v Lomenzo,* 377 US 633; *Matter of Schneider v Rockefeller,* 31 NY2d 420; *Bay Ridge Community Council v Carey,* 115 Misc 2d 433, 103 AD2d 280; *Davis v Bandemer,* 478 US 109; *Matter of Dowling,* 219 NY 44.)

II. The State constitutional apportionment provisions are controlling, absent unavoidable conflict with Federal law. *(Reynolds v Sims,* 377 US 533; *Matter of Schneider v Rockefeller,* 31 NY2d 420; *Matter of Orans,* 15 NY2d 339; *WMCA, Inc. v Lomenzo,* 377 US 633; *Mahan v Howell,* 410 US 315; *White v Regester,* 412 US 755; *Gaffney v Cummings,* 412 US 735.)

III. The 1992 Senate plan's violations of State constitutional law are not unavoidably necessary to comply with Federal law. *(Martin v Edwards Labs.,* 60 NY2d 417; *Property Clerk v Scricca,* 140 Misc 2d 433; *Jeffers v Clinton,* 730 F Supp 196; *Rybicki v State Bd. of Elections,* 574 F Supp 1082; *Gunn v Chickasaw County,* 705 F Supp 315; *United Jewish Orgs. v Wilson,* 510 F2d 512, *affd on other grounds sub nom. United Jewish Orgs. v Carey,* 430 US 144; *Mirrione v Anderson,* 717 F2d 743, 465 US 1036.)

OPINION OF THE COURT

Chief Judge Wachtler.

On March 9, 1992, the New York State Legislature voted to adopt a redistricting plan for the Senate and the Assembly (Senate Bill S 7280). On May 4, 1992, the Governor signed the plan, as approved and later amended, into law (L 1992, chs 76, 77, 78). Within days, two separate challenges to the redistricting plan were mounted in State court, pursuant to article III, § 5 of the State Constitution and section 4221 of McKinney's Unconsolidated Laws of NY (L 1911, ch 773, § 1). The first of these, *Wolpoff v Cuomo,* was commenced by order to show cause filed in Supreme Court, Bronx County, on or about May 8, 1992. Petitioners, four residents and registered voters of Bronx County, claimed that the plan for redistricting the Senate violated article III, § 4 of the State Constitution. Petitioners alleged that the Senate redistricting plan unconstitutionally fragments Bronx County into six separate Senate districts, only two of which are contained wholly within Bronx County, despite the fact that by virtue of population, Bronx County could support four wholly self-contained Senate districts. ***76**

The second action, *Dixon v Cuomo,* was commenced in Supreme Court, New York County, by order to show cause filed on or about May 18, 1992. Petitioners, nine registered voters residing in proposed Senate districts throughout the State, similarly alleged violations of article III, § 4 of the State Constitution. In their petition, they contended that the Senate redistricting plan "is a rank partisan and personal-interest gerrymander" that unnecessarily fragments counties throughout the State and creates districts that are neither compact nor contiguous.

In *Wolpoff,* the Senate Majority Leader, a named party, had the case removed to Federal court pursuant to 28 USC § 1443 (2). The United States District Court, Southern District of New York, however, sent the case back to State court *(Wolpoff v Cuomo,* 792 F Supp 964). Appeal of this remand order to the United States Court of Appeals for the Second Circuit is set for the week of July 13, 1992. A temporary stay of the remand order expired on June 9, and oral argument was heard on the petition in Supreme Court, Bronx County, on June 12. That afternoon, the State court struck down the Senate redistricting plan as violative of the State Constitution in that it "excessively, gratuitously and without supervening need dictated by federal law, disregards the integrity of county boundaries in the creation of Senatorial districts." The court struck down the Assembly plan as well, based on the requirement in article III, § 5 that the Senate and the Assembly be redistricted by the same law.

Meanwhile, the Majority Leader, who was not a named party in *Dixon v Cuomo,* moved to intervene in that case and his request was granted, but was conditioned upon his agreement not to seek removal of the case to Federal court. On June 15, Supreme Court, New York County, having considered the arguments in *Dixon v Cuomo,* similarly declared the redistricting plan unconstitutional.

The Majority Leader appealed pursuant to CPLR 5601 (b) (2). In addition, the Assembly Speaker has filed a direct appeal challenging the decision in *Wolpoff* to invalidate the Assembly plan along with the Senate plan, even though the Assembly plan had not been challenged.

In the interim, a three-Judge Federal court issued its Per Curiam opinion, acknowledging its "independent obligation" in such matters, but also declaring that it was "fully cognizant of the primacy of the state legislature and state judiciary" ***77** in redistricting *(Fund for Accurate & Informed Representation v Weprin,* US Dist Ct, ND NY, June 19, 1992).

We begin our analysis by turning to the constitutional provision implicated by this litigation. Article III, § 4 of the State Constitution states that "each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and ... shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county."

In *Matter of Orans* (15 NY2d 339), we considered the continued vitality of article III, § 4 in light of the United States Supreme Court decisions in *Reynolds v Sims* (377 US 533) and related cases, in which the Court had held that both houses of a State Legislature, by virtue of the Equal Protection

Clause of the Fourteenth Amendment, must be apportioned substantially on an equal population basis. We recognized in that case that redistricting plans could no longer be based solely upon county lines without running afoul of *Reynolds v Sims,* and that "the integrity of all the counties in these respects cannot be complete" *(Matter of Orans, supra,* at 351). We stated at that time, however, that "the historic and traditional significance of counties in the districting process should be continued where and as far as possible" *(id.,* at 352).

Redistricting plans must also comply with the requirements of the Federal Voting Rights Act (42 USC § 1973 *et seq.).* 42 USC § 1973 (b) specifically provides that a voting rights violation occurs if "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of a [protected] class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." It should be noted that the Senate redistricting plan at issue in this case was reviewed for compliance with the Voting Rights Act by the United States Department of Justice and was subsequently approved.

The issue before us on these appeals is not whether the Senate redistricting plan technically violates the express language of the State Constitution. No one disputes that such a technical violation has occurred, and in *Matter of Orans,* we recognized that such violations were inevitable if the Legislature ***78** was to comply with Federal constitutional requirements. Indeed, each of the four alternative plans submitted by the petitioners technically violates the State Constitution as well. Rather, we examine the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements. The test is whether the Legislature has "unduly departed" from the State Constitution's requirements regarding contiguity, compactness and integrity of counties *(Matter of Schneider v Rockefeller,* 31 NY2d 420, 429) in its compliance with Federal mandates. "[I]t is not our function to determine whether a plan can be worked out that is superior to that set up by [the Legislature]. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions" *(id.,* at 427). A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional " 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " *(Matter of Fay,* 291 NY 198, 207).

This is no simple endeavor. We first address petitioners' concerns regarding the integrity of counties. An examination of the redistricting plan reveals the following: 28 Senate districts out of 61 cross county lines; 11 minor counties and 12 major counties are divided. For purposes of the current plan, a minor county has fewer than 294,925 citizens, which is the figure obtained by dividing the State's citizen population (17,990,455) by the number of Senate seats (61). Further, and apparently for the first time in State history, there are four pairs of bi-county districts. Thus, two separate Senate districts cross the county line between Nassau County and Suffolk County, another two districts cross between Bronx County and New York County, another two between Bronx County and Westchester County and another two between Orange County and Ulster County. We note that the plan challenged here is not markedly different from the plan upheld in *Schneider, (supra).* In *Schneider,* 26 out of 60 Senate districts crossed county lines, splitting 9 minor counties and 10 major counties.

The Majority Leader has marshaled a considerable amount of statistical and demographic data to support his contention that these districts were drawn in a "good faith effort" *(Matter of Schneider v Rockefeller, supra,* at 428) to comply with ***79** *Reynolds v Sims* and the Voting Rights Act and not for partisan political reasons, as petitioners argue. In support of his argument that the Legislature's motives were benign, he points to the fact that for purposes of the United States Supreme Court equal population mandates, the Senate plan has a maximum population deviation of 4.29% from the ideal, which is well below the 16.4% deviation held acceptable by the United States Supreme Court in *Mahan v Howell* (410 US 315).

Petitioners, by contrast, have submitted four alternative plans, all of which have higher population deviations, but all of which divide fewer counties. In addition, none of the proffered alternative plans create pairs of bi-county districts, as does the current plan. Petitioners contend that the Legislature could have drafted a plan that had a higher, but still acceptable, population deviation and thereby done less damage to the integrity of county lines.

We are not here to determine whether the Legislature complied with the Federal Voting Rights Act. The Justice Department has already determined that the plan meets

Federal requirements in that regard. Nor is it our role to assess the equal population deviations contained in the plans before us and determine which plan best balances Federal equal population and State constitutional directives. We are here to decide whether in complying with Federal mandates, the Legislature unduly undermined article III, § 4 of the State Constitution. That an alternative plan might have been devised that conflicted less with article III, § 4 but did greater violence to the equal representation principle is no basis for rejecting the Senate plan. Further, we cannot focus solely on the challenged districts and ignore the fact that a redistricting plan must form an integrated whole.

(1) Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard. We are hesitant to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own. Having considered the competing demographic and statistical data submitted by all of the parties in these cases, we find that the petitioners have not overcome the presumption of constitutionality that attaches to the redistricting plan. ***80**

(2) Notwithstanding the technical deficiencies of the Senate redistricting plan, we find that respondent has put forth more than enough evidence to support his argument that any such violation was minimized and that the district lines were drawn as they were in order to comply with Federal statutory and constitutional requirements. The Senate plan indeed compromises the integrity of 23 counties, as petitioners have noted. But respondent has countered petitioners' allegations with a detailed defense of the proposed plan that is grounded in a complex analysis of population trends and voting patterns, and the way in which both must be accommodated in order to comply with Federal requirements. Although we are troubled by the number of divided counties in the new plan and by the four bi-county pairings, it is not appropriate for us to substitute our evaluation of the relevant statistical data for that of the Legislature. We are satisfied that in balancing State and Federal requirements, the respondent has complied with the State Constitution as far as practicable, and we cannot conclude on this record that the Legislature acted in bad faith in approving this redistricting plan. Having made that determination, our review is ended *(Matter of Schneider v Rockefeller, supra,* at 428-429).

(1) We have considered the petitioners' compactness and contiguity claims, and we find them to be without merit. Accordingly, in each case, the judgment of Supreme Court should be reversed, without costs, the petition dismissed, and judgment granted declaring chapters 76, 77 and 78 of the Laws of 1992 constitutional.

Titone, J.

(Dissenting). The issue here is, quite simply, the degree to which our State constitutional antigerrymandering provisions still have vitality in light of the evolving body of Federal law that both demands proportional representation *(see, e.g., Mahan v Howell,* 410 US 315; *Reynolds v Sims,* 377 US 533) and prohibits State apportionment plans that dilute minority voting strength (42 USC § 1973 [a], [b]; *see, Thornburg v Gingles,* 478 US 30). The majority has held that in this case the former must give way to the values reflected by the latter. Since I conclude that it is possible under these facts to reconcile the requirements of Federal law with those of article III, § 4 of our State Constitution without completely eviscerating the latter, I dissent.

Article III, § 4 of the State Constitution requires, among other things, that Senate district lines be drawn so that "no ***81** county shall be divided ... except to make two or more [S]enate districts wholly [within the] county." It has long been recognized that absolute adherence to this constitutional command is impossible in light of modern Federal equal-population mandates and the existence of several counties whose populations are insufficient to support even a single senatorial district. Accordingly, this Court has held that the Constitution is satisfied when "the Legislature has made a good-faith effort to comply with ... the equal-population principle ... and has not *unduly* departed from our State constitutional command that the integrity of counties be preserved" *(Matter of Schneider v Rockefeller,* 31 NY2d 420, 428-429 [emphasis supplied]).

The standard for judicial review in this context is thus one akin to the notion of reasonableness. Under *Schneider,* what appears to be an unconditional constitutional directive may be satisfied as long as any departures therefrom are fairly justifiable in view of the other legal and practical constraints to which the redistricting process is subject. Hence, while the strict county-integrity rule has been eased by precedent, the Legislature is not free to disregard it simply because it can point to other, legally sanctioned goals as the motivating force or benign motive behind its final product.

And, contrary to the majority's suggestion, the Legislature is not the sole arbiter of whether an appropriate balance has been struck between the strictures of that rule and the sometimes competing values of population equality and enhancement of minority voting strength. As important and deserving as those values unquestionably are, the Legislature is duty-bound to accommodate them *within* our own constitutional framework, and the courts have both the right and the obligation to ensure that the demands of the State Constitution are, to the extent practicable, respected *(Matter of Sherrill v O'Brien,* 188 NY 185, 203- 204; *see Matter of Schneider v Rockefeller, supra,* at 427 ["(o)ur duty is ... to determine whether the legislative plan substantially complies with the ... State Constitution"]). Viewed against these principles, the redistricting plan at issue here cannot be upheld.

The plan petitioners have challenged contains 28 out of a total of 61 Senate districts that cross county lines other than to create two or more districts wholly within the divided counties. A total of 11 minor and 12 major counties have been divided. Populous Kings and New York Counties are each divided by no less than three districts. Bronx County, which ***82** has sufficient population to encompass four whole Senate districts, is instead given only two wholly intra-county districts and is then divided by four additional cross-county districts. Moreover, the plan contains four bi- county districts, i.e., pairs of districts where both contain parts of the same two counties, a phenomenon which, according to petitioners, is unprecedented. Thus, it cannot be disputed that the challenged plan represents a drastic departure from the constitutional goal of respecting the integrity of county lines.

Contrary to the majority's analysis this derogation of the constitutional rule cannot be justified on the basis of the competing commands of the Federal equal-population requirement and the Voting Rights Act. As revealed by petitioners' submissions, at least four alternative plans exist that satisfy all of the requirements of Federal law while dividing fewer counties and containing *no* bi-county districts. These plans establish that the Legislature's county-dividing choices were not dictated by practical necessity.

Respondents' efforts to combat the inferences to be drawn from the existence of these less divisive alternative plans are unavailing. First, relying on language in *Matter of Schneider v Rockefeller (supra,* at 427), respondents contend that the existence of alternative plans is not sufficient to overcome the presumption of constitutionality that ordinarily cloaks legislation and is, in fact, not even a proper subject for judicial consideration. The argument, however, misconstrues the *Schneider* analysis, which merely concluded that "it is not [the court's] function to determine whether a plan can be worked out that is superior to that set up by [the challenged plan]" *(id.,* at 427). Here, the alternative plans were not submitted as alternative or superior plans, but rather as a means of disproving respondents' contention that the Legislature's wholesale disregard for county integrity was compelled by the need to comply with Federal equal protection principles. Viewed in that context, the alternative plans provide a legitimate and, indeed, highly persuasive argument for holding the enacted plan unconstitutional.

Respondents next contend that the alternative plans petitioners submitted are an unsatisfactory ground for invalidating the enacted plan because although all four of them satisfy Federal requirements, they each contain average population deviations that are higher than the over-all percentage deviation ***83** contemplated by the enacted plan. In *Reynolds v Sims (supra,* at 577, 579), the Supreme Court set down the basic principle that local legislators should be elected from districts that are "as nearly of equal population as is practicable," but also stated that some "deviations" "based on legitimate considerations incident to the effectuation of ... rational state policy" are permissible. On the basis of *Reynolds* and its progeny, this Court held in *Matter of Schneider v Rockefeller (supra,* at 428) that the Legislature is entitled to draw districts that cross county lines in order to minimize deviations from the one-person-one-vote principle and that "the choice of maximum population equality [is] a [valid] guiding principle." Respondents invoke the latter pronouncement in support of their contention that the Legislature was entitled to adopt a plan that was more divisive than the alternatives because they were acting to advance the goal of minimizing population deviations. The argument is, at best, misguided.

Since *Schneider* was decided, the United States Supreme Court has held that a "rational state policy of respecting the boundaries of political subdivisions" is a valid ground for departing somewhat from the strict one-person-one-vote rule and that a "16-odd percent maximum deviation" was within "tolerable limits" *(Mahan v Howell,* 410 US 315, 328-329, *supra). Mahan* thus establishes that compliance with Federal law may be achieved even though the redistricting plan does not purport to *minimize* population deviations, as long as some other satisfactory State value, including preserving the integrity of local political subdivisions, was the motivating reason *(accord, Brown v Thomson,* 462 US 835; *White v*

Regester, 412 US 755; *Gaffney v Cummings,* 412 US 735). Additionally, *Mahan* refutes any argument respondents might make that they had to ignore county borders to the extent they did in order to comply with Federal law.

Furthermore, inasmuch as *Schneider* predates *Mahan,* that case can no longer be regarded as controlling to the extent that it suggests judicial tolerance for redistricting plans that freely divide counties in order to maximize population equality. Now that *Mahan* has established that Federal law does not require State Legislatures to maximize equality without regard to other local concerns, the Court's view of what constitutes an "undue" incursion on the county-integrity principle ***84** must necessarily change.[1] In the final analysis, the guiding principle continues to be the prescriptions contained in the State Constitution, and those prescriptions must be obeyed except to the extent that they are directly in conflict with the dictates of Federal law.

Finally, respondents' reliance on the Federal Voting Rights Act to justify the Legislature's departure from article III, § 4's requirements is unpersuasive. While the Legislature was unquestionably required to guard against an apportionment plan that could dilute the voting strength of minority voters, respondents have not shown in specific terms how that goal necessitated the number and extent of county divisions that were adopted here.

In short, because the plan the Legislature adopted departs dramatically from State constitutional mandates and was not necessitated by Federal law, petitioners have made a prima facie showing that the Senate redistricting plan "unduly departed from our State constitutional command that the integrity of counties be preserved" *(Matter of Schneider v Rockefeller, supra,* at 428-429). Further, that constitutional command is not merely an outdated relic of another time that may be relegated to a secondary status or even disregarded entirely in light of modern Federal principles. Article III, § 4 was designed specifically to prevent "the possibility of unfair division of the State into ... district[s] so as to result in party or individual advantage" *(Matter of Sherrill v O'Brien, supra,* at 203; *see,* 3 Lincoln, Constitutional History of New York, at 135, 204, 218). That concern is as valid today as it was just before the turn of this century, when the Constitution of 1894 containing the present provision's predecessor was adopted *(see,* McKinney's Cons Laws of NY, Book 2, NY Const, art III, §4, Historical Note, at 40). Indeed, even a brief review of the challenged plan's treatment of Bronx County makes clear that the practice of gerrymandering is far from a dead letter.

With a population of 1,203,789, Bronx County is entitled to four wholly contained Senate districts. If the Legislature had drawn four whole Senate districts wholly enclosed within the ***85** County's borders, the percentage deviation from a perfect one-person-one-vote ratio would be only 2%, a figure well within the "tolerable limits" contemplated in *Mahan v Howell (supra).* Furthermore, the ethnic make-up of the Bronx readily lends itself to district formation that would advance the values to be promoted by the Voting Rights Act. With a population that is 43% Hispanic, 31% African-American and 26hite, Bronx County could accommodate two wholly contained districts that are nearly 85% combined minority with a majority of Hispanics, one district that is nearly 85% combined minority with a majority of African-Americans and one district that would contain most of the County's non-minority population. The fact that the Legislature chose to criss-cross the County's borders repeatedly, giving it only two intra-county Senate districts and dividing the remainder of its population among four inter-county Senate districts belies any serious claim that the present redistricting plan was motivated solely by a legislative desire to comply with Federal mandates.

I am particularly concerned that the tolerance the majority has today expressed for a plan that all but disregards the integrity of county borders will be read by many as a signal that our State constitutional provisions no longer represent serious constraints on the critically important redistricting process. Certainly, although the majority has made passing reference to " 'the historic and traditional significance of counties in the districting process' " (majority opn, at 77, quoting *Matter of Orans,* 15 NY2d 339, 352, *supra),* there is little in its analysis or result that suggests any real commitment to that principle. Inasmuch as I deem this constitutionally prescribed principle to be important to the integrity of our redistricting system and inasmuch as the principle could have been accommodated within a Federally satisfactory plan, I am compelled to dissent from the Court's decision to uphold the plan the Legislature enacted and vote instead to affirm the judgments below.[2] ***86**

Judges Simons, Hancock, Jr., and Bellacosa concur with Chief Judge Wachtler; Judge Titone dissents and votes to affirm in a separate opinion; Judge Kaye taking no part

In each case: Judgment reversed, etc. ***87**

Footnotes

1 Respondents' reliance on *Bay Ridge Community Council v Carey* (103 AD2d 280, *affd* 66 NY2d 657) as a post-*Mahan* decision that supports their position is misplaced, since *Bay Ridge* was concerned principally with Assembly districts, as to which there is no effective constitutional rule requiring respect for county lines *(see,* 103 AD2d, at 285, citing *Matter of Orans,* 15 NY2d 339, 351).

2 Inasmuch as the Senate plan and the Assembly plan were enacted as part of the same law, the former's constitutional infirmity operates to invalidate the latter as well *(see, Matter of Orans,* 15 NY2d 339, *supra).*

71 N.Y.2d 729, 525 N.E.2d 710, 530 N.Y.S.2d 64

William L. McGowan et al., Respondents,

v.

Karen S. Burstein et al., Constituting the Civil Service Commission of the State of New York, Appellants.

Court of Appeals of New York
126
Argued April 21, 1988;

decided June 2, 1988

CITE TITLE AS: McGowan v Burstein

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 12, 1987, which, with two Justices dissenting, modified, on the law, and, as modified, affirmed an order of the Supreme Court (Daniel H. Prior, Jr., J.), entered in Albany County, (1) denying a motion by plaintiffs for summary judgment, (2) denying a cross motion by defendants for summary judgment, (3) granting plaintiffs' alternative request for a preliminary injunction, and (4) preliminarily enjoining defendants from employing zone scoring with respect to written civil service examinations without prior court approval or consent of the plaintiffs, together with a demonstration of the justification for its use. The modification consisted of granting summary judgment in plaintiffs' favor and declaring that zone scoring violates NY Constitution, article V, § 6 and 4 NYCRR 67.1 (b) and (c).

McGowan v Burstein, 130 AD2d 123, reversed.

HEADNOTES

Civil Service
Examinations
Constitutionality of Zone Scoring of Competitive Examinations

(1) NY Constitution, article V, § 6, which requires that, as far as practicable, the merit and fitness of candidates for appointments and promotions in the civil service be ascertained by competitive examination, does not mandate an absolute prohibition of zone scoring, a grading method which assigns a single grade to a range of raw scores. Competitiveness is not a constitutional end in itself. Merit selection is the overarching constitutional goal and command; the competitive examination is the preferred means of compliance, but it is not a coequal--and certainly not a competing--goal. It would be perverse to sanctify rank ordering of exam scores in a quest to maximize competitiveness if, as a result, other considerations relevant to merit and fitness are discounted or swept aside. Moreover, it is no answer to suggest that in those rare cases where certain necessary attributes cannot be assessed by a written examination, then the position should not be included in the competitive class. The constitutional preference for competitive examinations commends a middle ground which incorporates both competitive testing and consideration of untestable attributes, where both are necessary for a complete evaluation of merit and fitness. Such flexibility provides an incentive for defendants to include a doubtful position in the constitutionally favored competitive class. ***730**

Civil Service
Examinations
Zone Scoring of Competitive Examinations

(2) Inasmuch as the Regulations of the State Civil Service Commission with respect to competitive examinations do not make rank order inviolate, defendant Commissioners' interpretation of their regulations, including 4 NYCRR 67.1 (b), (c) which require that "the relative order of scores [be] maintained", to allow for zone scoring of competitive examinations is neither irrational nor arbitrary and should be upheld.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Civil Service, § 45.

Carmody-Wait 2d, Proceeding against Body or Officer § 145:108.

CLS, NY Const, art V, §6; 4 NYCRR 67.1.

NY Jur 2d, Civil Rights, §61; Civil Servants and Other Public Officers and Employees, §§261, 312 *et seq.*

POINTS OF COUNSEL

Robert Abrams, Attorney-General (O. Peter Sherwood, Peter H. Schiff and *Daniel M. Smirlock* of counsel), for appellants. I. Zone scoring per se does not violate the merit and fitness requirement of article V, § 6 of the New York Constitution. *(Berkman v City of New York,* 812 F2d 52; *Kirkland v New York State Dept. of Correctional Servs.,* 711 F2d 1117, *cert denied sub nom. Althiser v New York State Dept. of Correctional Servs.,* 465 US 1005; *Guardians Assn. v Civil Serv. Commn.,* 630 F2d 79; *People ex rel. Sweet v Lyman,* 157 NY 368; *Matter of Altman v Lang,* 44 Misc 2d 751, 23 AD2d 820, 17 NY2d 464; *Matter of Sloat v Board of Examiners,* 274 NY 367; *Matter of Katz v Hoberman,* 28 NY2d 530; *Matter of Grossman v Rankin,* 43 NY2d 493; *People ex rel. Schau v McWilliams,* 185 NY 92; *Matter of Firshein v Reavy,* 263 App Div 490, 289 NY 712.) II. Zone scoring is necessary to achieve compliance with title VII of the Federal Civil Rights Act of 1964. *(Griggs v Duke Power Co.,* 401 US 424; *Connecticut v Teal,* 457 US 440; *Bushey v New York State Civ. Serv. Commn.,* 733 F2d 220; *Kirkland v New York State Dept. of Correctional Servs.,* 374 F Supp 1361, 520 F2d 420, 531 F2d 5, 429 US 823, 1124, 482 F Supp 1179, 628 F2d 796, *cert denied sub nom. Fitzpatrick v Kirkland,* 450 US 980; *Kirkland v New York State Dept. of Correctional Servs.,* 711 F2d 1117, *cert denied sub nom. Althiser v New York State Dept. of Correctional Servs.,* 465 US 1005.) III. Zone scoring does not violate 4 NYCRR 67.1 (b) and (c). *(People ex rel. Knowles v Smith,* 54 ***731** NY2d 259; *Matter of Sun Beach Real Estate Dev. Corp. v Anderson,* 98 AD2d 367, 62 NY2d 965.) IV. The relief ordered by the court below is an impermissible judicial intrusion on the operations of the civil service system. *(Matter of Firshein v Reavy,* 262 App Div 490, 289 NY 712; *Matter of New York State Inspection, Sec. & Law Enforcement Employees v Cuomo,* 64 NY2d 233.)

Jeffrey R. Armstrong and *Marjorie E. Karowe* for respondents. I. Zone scoring competitive exams violates the New York State Constitution. *(Hale v Worstell,* 185 NY 247; *Matter of Burke v Axelrod,* 90 AD2d 577; *Matter of Fink v Finegan,* 270 NY 256; *Matter of Young v Trussel,* 42 Misc 2d 108; *People ex rel. Crummey v Palmer,* 152 NY 217; *Matter of Montero v Lum,* 68 NY2d 253; *Matter of Holcombe v Gusty,* 51 AD2d 868; *Matter of Cassidy v Municipal Civ. Serv. Commn.,* 37 NY2d 526; *Palmer v Board of Educ.,* 276 NY 222, 682.) II. Zone scoring violates Civil Service Law § 61 and civil service regulations. *(Matter of Jackson v Poston,* 40 AD2d 19; *Matter of Wipfler v Klebes,* 284 NY 248; *Matter of Corwin v Farrell,* 303 NY 61; *Matter of Sikich v Hughes,* 274 App Div 675; *Amico v Erie County Legislature,* 36 AD2d 415; *Matter of Ruddy v Connelie,* 61 AD2d 372; *People ex rel. Schau v McWilliams,* 185 NY 93.) III. Affirmative action requirements are not in conflict with State competitive exam regulations. *(Guardians Assn. v Civil Serv. Commn.,* 630 F2d 79, 452 US 940.)

Peter L. Zimroth, Corporation Counsel (Elizabeth Dvorkin and *Edward F. X. Hart* of counsel), for City of New York, *amicus curiae.*

Because zone scoring can be used in a manner that is consistent with the State constitutional requirement of merit and fitness selection, it is constitutional per se. *(City Council v Taxpayers for Vincent,* 466 US 789; *People v Ferber,* 57 NY2d 256; *Matter of Fay,* 44 NY2d 137, *appeal dismissed sub nom. Buck v Hunter,* 439 US 1059; *Matter of Sontag v Bronstein,* 33 NY2d 197; *Matter of Bridgman v Kern,* 257 App Div 420, 282 NY 375; *Matter of Oback v Nadel,* 57 NY2d 620; *Matter of Acosta v Lang,* 13 NY2d 1079; *Teamsters v United States,* 431 US 324; *Association Against Discrimination in Employment v City of Bridgeport,* 647 F2d 256, 455 US 988; *Dothard v Rowlinson,* 433 US 321.)

OPINION OF THE COURT

Chief Judge Wachtler.

Article V, § 6 of our State Constitution requires that, as far ***732** as practicable, the merit and fitness of candidates for appointments and promotions in the civil service be ascertained by competitive examination. The primary question presented by this appeal is whether, consistent with this constitutional requirement, such examinations may be subject to zone scoring, a grading method which assigns a single grade to a range of raw scores. The letter grades A-F or a pass/fail grading system are familiar, but extreme, illustrations. A more subtle example is the practice of rounding scores in the range from 88.6% to 88.9%, for instance, up to 89%.

Plaintiffs, representatives of a large number of the State's public employees, claim that the practice renders examinations scored in such a manner noncompetitive and

therefore unconstitutional. We note at the outset, because it is critical to our analysis, that the attack is a facial one.

Supreme Court denied the parties' cross motions for summary judgment, but granted plaintiffs' alternative request for a preliminary injunction. The court concluded that defendants had apparently employed zone scoring in a manner that allowed subjective factors other than merit and fitness to enter the selection process, in violation of the Constitution. The court therefore enjoined defendants from using the technique without prior court approval or consent of the plaintiffs, together with a demonstration of the justification for its use.

(1, 2) The Appellate Division, with two Justices dissenting, found the practice "presumptively unconstitutional" and modified by granting summary judgment in plaintiffs' favor and declaring that zone scoring violates the State Constitution and certain of defendants' regulations (130 AD2d 123, 127). We now reverse.

Preliminarily, we note our agreement with the courts below that zone scoring poses a threat to the competitive examination process that serves as the foundation of the merit system. The use of overly broad zones could negate the competitiveness of the test, allow too much room for the subjective judgments of appointing authorities and invite personal and political influence into the selection process. Any practice with such potential must be approached with skepticism.

However, the broadside nature of plaintiffs' challenge bears emphasis. Plaintiffs are not challenging zone scoring as applied to any particular civil service examination; nor do they limit their challenge to the use of overbroad zones or allege a specific instance of favoritism resulting from the practice. ***733** Instead, they seek a declaration that zone scoring is per se violative of the State Constitution and ask that the practice be permanently enjoined. To sustain their challenge, as so framed, plaintiffs must demonstrate that zone scoring in any degree and in every conceivable application would be unconstitutional. They have not carried this burden.

Article V, § 6, the constitutional basis for the challenge, provides as follows: "Appointments and promotions in the civil service of the state * * * shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive". New York was the first State to constitutionalize the merit and fitness requirement, a reflection of our citizens' insistence that competence, rather than cronyism, should determine civil service appointments *(see, Hale v Worstell,* 185 NY 247, 251; *see also, Matter of Montero v Lum,* 68 NY2d 253, 258).

The Department of Civil Service, which the defendant Commissioners oversee, is the agency charged with the task of implementing the merit system (Civil Service Law §§ 5, 6). The Department must determine what knowledge, skills and abilities are required for a given position, assess whether the relevant attributes can be measured by a competitive examination and, if so, develop, administer and grade a test from which those characteristics may be discerned. In addition, as defendants point out, care must be taken that success on the examination does not depend on factors that are unrelated to the candidate's fitness for the position, not only because fitness is the object of the merit system, but also because such factors may discriminate among equally qualified candidates along ethnic, racial or sexual lines, in violation of the State Human Rights Law (Executive Law § 296) and the Federal Civil Rights Act of 1964 (42 USC § 2000e *et seq.).* The complex, highly technical, and sometimes even competing nature of these functions justifies considerable judicial deference to the Commission's greater ability to assess whether, to what extent, and in what manner merit and fitness should be measured by competitive examinations *(see, Matter of Grossman v Rankin,* 43 NY2d 493; *People ex rel. Moriarity v Creelman,* 206 NY 570, 575; *People ex rel. Schau v McWilliams,* 185 NY 92, 98-99)

It appears that defendants zone score exams rarely, and then primarily when the use of strict rank ordering would, in ***734** their view, overemphasize certain skills and preclude adequate consideration of other necessary attributes. For example, the position being tested for may require a variety of testable skills, but it may also require, in equal or greater measure, oral communication skills, the ability to interact with others, or some other characteristic which cannot be readily and reliably measured by a written examination. In this and similar situations, defendants assert, the Constitution permits a grading system such as zone scoring which discounts marginal and perhaps statistically insignificant degrees of success on the written examination, when necessary to accommodate adequate consideration of other relevant criteria. We agree that the Constitution does not mandate an absolute prohibition of such testing and grading techniques.

The competitive examination is favored by the Constitution because it provides, presumably, an objective and verifiable measurement of the candidates' merit *(Matter of Fink v Finegan,* 270 NY 356, 363). We acknowledged in *Matter of Cassidy v Municipal Civ. Serv. Commn.* (37 NY2d 526), however, that examination scores are often unable to reflect all aspects of a candidate's fitness for a position and, for that reason, that it was desirable and constitutionally permissible for the appointing authority to be given room to consider the unmeasurable traits necessary for fulfillment of the duties. On that basis, we upheld, against a constitutional challenge, Civil Service Law § 61, which permits the appointment of any 1 of 3 persons with the highest standing on the eligibility list.

Implicit in that decision and in the constitutional language is the understanding that competitiveness is not a constitutional end in itself. Merit selection is the overarching constitutional goal and command; the competitive examination is the preferred means of compliance, but it is not a coequal--and certainly not a competing--goal. It would be perverse to sanctify rank ordering of exam scores in a quest to maximize competitiveness if, as a result, other considerations relevant to merit and fitness are discounted or swept aside *(see, Matter of Sloat v Board of Examiners,* 274 NY 367, 373).

It is no answer to suggest, as plaintiffs do, that in those rare cases where certain necessary attributes cannot be assessed by a written examination, then the position should not be included in the competitive class. The constitutional preference ***735** for competitive examinations, on which plaintiffs hinge much of their argument, provides sufficient reason to shun such an all or nothing approach. That preference commends a middle ground which incorporates both competitive testing and consideration of untestable attributes, where both are necessary for a complete evaluation of merit and fitness *(Matter of Fink v Finegan, supra,* at 362). Such flexibility provides an incentive for defendants to include a doubtful position in the constitutionally favored competitive class.

(1) We hold, therefore, that article V, § 6 of the New York Constitution does not require a blanket prohibition of the use of zone scoring in competitive civil service examinations. As the issue is now framed, it would be inappropriate for us to speculate as to what standards should govern the use of zone scoring. Those considerations are best measured against specific facts, such as the breadth of the zones used, the justification for their use advanced by the Department of Civil Service, the qualifications required for the position in issue, and the extent to which a particular selection process, viewed as a whole, may lack objectivity and invite consideration of impermissible factors. This facial challenge does not provide us with the necessary background to render such an assessment.

(2) As for plaintiffs' claim that zone scoring violates defendants' own requirement that "the relative order of scores [be] maintained" (4 NYCRR 67.1 [b], [c]), we note only that defendants, quite obviously, interpret their regulations, including the cited ones, as allowing for zone scoring. In light of the numerous other adjustments to raw scores plainly contemplated by the regulations, some of which can result in inversion of the relative rank order *(see, e.g.,* 4 NYCRR 67.1 [f]), it is clear that the regulations do not make rank order inviolate. Thus, defendants' interpretation is neither irrational nor arbitrary and should be upheld *(see, Matter of Howard v Wyman,* 28 NY2d 434, 438).

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiffs' motion for summary judgment denied, defendants' motion for summary judgment granted, and judgment granted in favor of defendants declaring that defendants' use of the zone scoring technique on competitive civil service examinations is not per se violative of NY Constitution, article V, § 6 or 4 NYCRR 67.1 (b) and (c). ***736**

Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order reversed, with costs, plaintiffs' motion for summary judgment denied, defendants' motion for summary judgment granted and judgment granted in favor of defendants in accordance with the opinion herein. ***737**

427 F.Supp.3d 286
United States District Court, N.D. New York.

Frank J. MEROLA, Plaintiff,

v.

Andrew M. CUOMO et al., Defendants.

1:19-cv-899 (GLS/TWD)
|
Signed 12/13/2019

Synopsis

Background: County clerk brought action against State of New York to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license. State moved to dismiss, and clerk sought preliminary injunction.

Holdings: The District Court, Gary L. Sharpe, Senior District Judge, held that:

[1] clerk had standing to challenge DLAPA as preempted by federal law, but

[2] clerk lacked capacity to sue under New York law to challenge DLAPA.

Motions granted in part and denied in part.

West Headnotes (9)

[1] **Federal Courts** Pleadings and motions
Federal Courts Evidence; Affidavits

When standing is lacking, the court's subject matter jurisdiction is implicated and the proper method for seeking dismissal on that basis is under rule governing subject matter jurisdiction, which would allow for the submission and consideration by the court of matters outside the pleadings. Fed. R. Civ. P. 12(b)(1).

1 Case that cites this headnote

[2] **Federal Civil Procedure** In general; injury or interest

Where standing is questioned, even under a rule that would ordinarily require the court to exclude matters presented outside of the pleadings, like rules governing dismissal for failure to state a claim and judgment on the pleadings, the district court is authorized to consider matters outside the pleadings and make findings of fact when necessary. Fed. R. Civ. P. 12(b)(6), 12(c).

[3] **Federal Civil Procedure** Judgment on the Pleadings

The standard for addressing a motion for judgment on the pleadings is the same as that for a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6), 12(c).

[4] **Federal Courts** Evidence; Affidavits
Federal Courts Weight and sufficiency

Under motion to dismiss for lack of subject matter jurisdiction, the standard of review is similar to that of motion to dismiss for failure to state a claim, except that the court may refer to evidence outside the pleadings and a plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists. Fed. R. Civ. P. 12(b)(1), 12(b)(6).

1 Case that cites this headnote

[5] **Federal Civil Procedure** In general; injury or interest

Standing is a threshold question, which should be addressed at the outset of the litigation.

1 Case that cites this headnote

[6] **Election Law** Citizenship
Federal Preemption Motor vehicles; highways

County clerk had standing to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license, as preempted by federal law; clerk took oath of office in which he swore to support United States Constitution and the New York Constitution, and clerk alleged complying with DLAPA would require him to violate the Supremacy Clause as well as State constitutional proscription on voting by non-citizens. U.S. Const. art. 6, § 2; N.Y. Vehicle and Traffic Law §§ 201, 508.

[7] **Municipal Corporations** Capacity to sue or be sued in general

Under New York law, municipalities, and, by extension, their officers, lack capacity to sue the State because they are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents.

[8] **Municipal Corporations** Capacity to sue or be sued in general

An exception to the general rule barring local governmental challenges to State legislation is when the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.

[9] **Counties** Capacity to sue or be sued in general

Public Employment Actions by employees, officers, and agents

County clerk lacked capacity to sue under New York law to challenge New York's Driver's License Access and Privacy Act (DLAPA), which, among other things, expanded approved forms of identification accepted for obtaining driver's license, since complying with DLAPA would not force clerk to violate the Supremacy Clause or State constitutional proscription against disenfranchisement, and county board of elections was tasked with reviewing and examining voting applications and verification of voters' identities. U.S. Const. art. 6, § 2; N.Y. Vehicle and Traffic Law §§ 201, 508; N.Y. Election Law § 5-210(8)-(9).

1 Case that cites this headnote

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MEMORANDUM-DECISION AND ORDER

Gary L. Sharpe, Senior District Judge

I. Introduction

To the dissatisfaction of the parties and public-at-large, courts are at times unable to pass upon the merits of a case for one ***288** reason or another. There are various reasons why the ultimate question for which parties seek judicial review cannot be broached. This is such a case. It should be noted that cases like this one, where the court is constrained to dismiss without deciding the legal issues at play — here, a challenge to New York's Driver's License Access and Privacy Act (DLAPA),[1] more commonly referred to as the "Green Light Law" — does not mean in the vernacular that the "law

is legal," despite what any politician may claim, (Dkt. No. 27, Attach. 7 at 2). Indeed the court has not and cannot pass upon that question no matter how compelling the arguments are on one side or the other. With that caveat in mind, the court turns to the issues now before it.

[1] **[2]** Pending are a motion for a preliminary injunction filed by plaintiff Frank J. Merola, Clerk of the County of Rennselaer, New York, and a cross motion to dismiss pursuant to Rule 12(c) of the Federal Rules of Civil Procedure[2] filed by defendants Andrew M. Cuomo, Governor of the State of New York, Letitia A. James, Attorney General of the State of New York, and Mark J.F. Schroeder, Commissioner of the New York State Department of Motor Vehicles (DMV) (hereinafter collectively referred to as "the State"). (Dkt. Nos. 27, 30.)[3] For the reasons that follow, the State's cross motion to dismiss is granted, and Merola's motion for a preliminary injunction is denied as moot.

II. Background[4]

The DLAPA, which goes into effect on December 14, 2019, modifies sections 201, ***289** 502, and 508 of the New York Vehicle and Traffic Law. *See* L. 2019, ch 37. The amendments alter the New York State driver's licensing scheme in three material ways that are at issue here by: (1) forbidding disclosure or sharing of applicant information except under limited circumstances; (2) expanding the approved forms of identification accepted for obtaining a driver's license; and (3) requiring prompt notice to an individual about whom a request for information was made by "any agency that primarily enforces immigration law." *Id.* §§ 2-6. Some county clerks throughout the State of New York, like Merola, are required to perform DMV functions, such as the issuance of driver's licenses. *See* N.Y. Veh. & Traf. Law § 205(1).

Broadly speaking, Merola challenges the DLAPA as prempted by federal law. (Compl. ¶¶ 40, 78, Dkt. No. 1.) He contends that he confronts a dilemma: comply with the DLAPA and violate the United States Constitution and expose himself to federal criminal liability, or refuse to comply with the DLAPA and be subject to removal from office and a loss of funding. (Compl. ¶ 77; Dkt. No. 32 at 5-6.) The State promotes this legislation as advancing "public safety and economic growth." (Dkt. No. 30, Attach. 1 at 1.)

Some sixteen days before this action was commenced, a near-identical case was commenced in the United States District Court for the Western District of New York, involving a similar challenge to the DLAPA. (*Kearns v. Cuomo*, Dkt. No. 1, 1:19-cv-902.) The plaintiff there, Michael Kearns, is the Clerk of Erie County, and he brought his action against the same defendants named in this matter. (*See generally id.*) That action has since been dismissed for lack of standing and an appeal is pending with the Second Circuit. *See Kearns v. Cuomo*, 415 F.Supp.3d 319 (W.D.N.Y. 2019), *appeal docketed*, No. 19-3769 (2d Cir. Nov. 13, 2019).

III. Standards of Review

[3] "The standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Wright v. Monroe Cmty. Hosp.*, 493 F. App'x 233, 234 (2d Cir. 2012) (internal quotation marks and citation omitted). For a full discussion of the governing standard, the court refers the parties to its prior decision in *Ellis v. Cohen & Slamowitz, LLP*, 701 F. Supp. 2d 215, 218 (N.D.N.Y. 2010), *abrogated on other grounds by Altman v. J.C. Christensen & Assocs., Inc.*, 786 F.3d 191 (2d Cir. 2015).

[4] As mentioned above, *see supra* note 2, to the extent that standing is challenged, the State's motion is properly considered under Rule 12(b)(1). Under Rule 12(b)(1), the standard of review is similar to that of Rule 12(b)(6), except that the court "may refer to evidence outside the pleadings ... [and a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citations omitted).

IV. Discussion

A. Cross Motion to Dismiss

The State makes a handful of arguments in support of its cross motion to dismiss. (Dkt. No. 30, Attach. 1.) Two of them urge dismissal for the threshold issues of lack of standing and capacity, while the others go to the merits of Merola's claims. (*Id.* at 9-35.)

***290** *i. Standing*

[5] Standing is a "threshold question," which should be addressed at the outset of the litigation. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). The broad contours of standing — an injury-in-fact, causation, and redressability, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) — and the finer points were discussed at length in *Kearns v. Cuomo*, 415 F.Supp.3d 319, 2019 WL 5849513, but Merola's sole theory of standing here is different from that proffered in *Kearns*. (Dkt. No. 32 at 3-9.)

Relying on *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), and *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), Merola contends that he "unquestionably [has] established oath-of-office standing to pursue his claims in his official capacity as County Clerk." (Dkt. No. 32 at 3.)[5] While the State attempted to get out in front of this theory in its memorandum of law filed in support of its cross motion, it primarily focused on other bases of standing, or the lack thereof. (Dkt. No. 30, Attach. 1 at 11-20.) That is, in part, the fault of the briefing schedule, which was set to accommodate the sensitive timing issues in this case, and the State has not had the opportunity[6] to address Merola's specific contentions about oath-of-office standing raised in his response. In any case, the State argues that compliance with the DLAPA is not at odds with either the Federal or State Constitutions. (*Id.* at 19.) It claims further that Merola's subjective belief that his compliance would violate the Federal Constitution is insufficient, and his argument about the adverse consequences that would befall him (removal from office and loss of licensing revenue) are "highly speculative and premature." (*Id.* at 19-20.)

In *Allen*, the Supreme Court indicated, in dicta, the existence of standing where a plaintiff who "ha[s] taken an oath to support the United States Constitution" is "in the position of having to choose between violating [his] oath and taking a step—refusal to comply with [a challenged state statute]—that would be likely to bring [his] expulsion from office and also" a loss of funding. 392 U.S. at 241 n.5, 88 S.Ct. 1923. This doctrine, sometimes called the " 'dilemma' theory of standing," has been recognized by the Supreme Court, Second Circuit, and other Circuits in subsequent cases, although it is infrequently invoked. *Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. N.Y. State Teachers Ret. Sys.*, 60 F.3d 106, 112 (2d Cir. 1995); *see* ***291** *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *Aguayo*, 473 F.2d at 1100.

[6] Here, Merola took an oath of office in which he "solemnly sw[ore] that [he] w[ould] support the constitution of the United States, and the constitution of the State of New York, and that [he] w[ould] faithfully discharge the duties of the office ..., according to the best of [his] ability." (Dkt. No. 27, Attach. 2 ¶ 8.) He argues that the only requirement he need meet in order to establish oath-of-office standing is his good faith belief that compliance with the DLAPA would require him to violate the Federal Constitution. (Dkt. No. 32 at 5.) Merola disputes the applicability of *Finch v. Mississippi State Med. Association, Inc.*, 585 F.2d 765, 774 (5th Cir. 1978), *modified*, 594 F.2d 163 (5th Cir. 1979), relied upon by the State, (Dkt. No. 30, Attach. 1 at 19-20), which held that a mere belief that a statute violates the constitution is insufficient to establish standing, *see Finch*, 585 F.2d at 774, as at odds with *Allen* and *Aguayo*, and not binding on this court in any event, (Dkt. No. 32 at 6). Alternatively, Merola argues that he has adequately demonstrated a realistic threat of removal from office or the loss of funding should those requirements be deemed a part of the test for oath-of-office standing by this court. (*Id.* at 6-7.) Because the briefing is lacking on the finer points, and Merola has made a colorable argument for standing based on his oath of office, (*id.* at 5-6), dismissal on this ground would be inappropriate at this juncture.

ii. Capacity

The State contends that Merola lacks capacity to sue under New York law and that he cannot demonstrate that he should benefit from an exception to the general bar preventing municipalities and their officers from challenging state legislation. (Dkt. No. 30, Attach. 1 at 9-11.) In opposition, Merola argues that the DLAPA would require him to violate a federal constitutional proscription, namely the Supremacy Clause, as well as a state constitutional proscription "on voting by non-citizens," and that he, therefore, has capacity to sue despite the general bar against suits by municipal officers. (Dkt. No. 32 at 9.) Because Merola lacks capacity as discussed below, dismissal is required.

[7] **[8]** Capacity, juxtaposed with standing, "is conceived to be a party's personal right to litigate in a federal court." 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1542 (3d ed. Supp. 2019). The "[c]apacity to sue or be sued is determined," as relevant here, "by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). In New York, municipalities, and, by extension, their officers,

lack capacity to sue because they "are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York v. New York*, 86 N.Y.2d 286, 290, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995). There are limited "exceptions to the general rule barring local governmental challenges to State legislation," only one of which is at issue here: "where 'the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription.' " *Id.* at 291-92, 631 N.Y.S.2d 553, 655 N.E.2d 649 (quoting *In re Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403, 360 N.E.2d 1086 (1977) (citing *Board of Education of Central School District No. 1 v. Allen*, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (1967), *aff'd*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968))); *see* ***292** *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 185 Misc. 2d 704, 708, 713 N.Y.S.2d 908 (Sup. Ct. 2000), *aff'd as modified*, 282 A.D.2d 166, 723 N.Y.S.2d 262 (3d Dep't 2001).

Merola contends that his compliance with the DLAPA will force him to violate proscriptions in both the Federal and State Constitutions. (Dkt. No. 32 at 9.) He snarkily points the finger at the State for "not surprisingly, fail[ing] to provide a single citation for the unsupportable argument that the Supremacy Clause is not a 'constitutional proscription.' " (*Id.*) While his observation is true, it is similarly true that he failed to cite contrary authority. Insofar as his one-sentence State Constitution argument is concerned, which is best described as half-hearted, Merola provides no citation to where in the State Constitution the "proscription on voting by non-citizens," (*id.*), exists, leaving the court to guess.

While the court is loathe to engage in semantics, it is necessary here. A "proscription" is a prohibition or "an imposed restraint or restriction." Merriam Webster's Collegiate Dictionary (10th ed. 1997). Anecdotally, New York courts have interpreted constitutional or statutory proscriptions to be something expressly forbidden and along the lines of "no (blank) shall (blank)." *See, e.g., Bellanca v. N.Y. State Liquor Auth.*, 54 N.Y.2d 228, 230-31, 445 N.Y.S.2d 87, 429 N.E.2d 765 (1981) (referring to an older version of N.Y. Alco. Bev. Cont. Law § 106(6-a)'s prohibition against topless dancing as a "blanket *proscription* against all topless dancing" as well as New York State Constitution Art. 1, § 8's prohibition against any law abridging speech as a proscription (emphasis added)); *accord Weiner v. McCord*, 264 A.D.2d 864, 866, 694 N.Y.S.2d 807 (3d Dep't 1999) (considering the following language: "No member of this state shall be disfranchised" as an express constitutional proscription).

With this interpretation in mind, Merola's first argument carries no weight. Indeed, the Supremacy Clause contains no proscription whatsoever. The Clause in its entirety provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. No proscription is evident, unlike, for example, the First Amendment's "Congress shall make no law ...," *id.* amend. I, or the Fourth Amendment's proclamation that the right against unreasonable searches "shall not be violated," *id.* amend. IV. The list of federal constitutional proscriptions is long, but it does not include the Supremacy Clause and, therefore, cannot support Merola's assertion.

[9] Merola's argument about the State Constitution fares no better. As mentioned above, no citation is provided to the supposed "proscription on voting by non-citizens." (Dkt. No. 32 at 9.) However, Article I, § 1 of the New York State Constitution provides:

> No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever ***293** there is no contest or contests for such nominations or election as may be prescribed by general law.

If this is the wellspring of the proscription referenced by Merola, it does not help his cause. The language contains a proscription, *see Weiner*, 264 A.D.2d at 866, 694 N.Y.S.2d 807 — a prohibition against disenfranchisement — but it is not what Merola claims it to be: *a proscription on voting by non-citizens.*[7] The court by no means intends to intimate that the DLAPA results in disenfranchisement, but, even if it did along the lines of Merola's argument, his claim that "as the State agent offering voter registration" he would be required "to violate the State Constitution proscription on voting by

non-citizens," (Dkt. No. 32 at 9), is steps removed and wholly speculative. The DLAPA requires no such conduct by Merola. This is chiefly so because any prospective non-citizen voter licensed to drive under the DLAPA would have to affirmatively lie about his or her eligibility to vote. (Dkt. No. 30, Attach. 1 at 4-5.) Ultimately, the county board of elections is tasked with review and examination of voting applications and verification of the applicant's identity. *See* N.Y. Elec. Law § 5-210(8)-(9). For obvious reasons, it cannot be said that Merola would be forced to violate the State Constitution's proscription against disenfranchisement in the event that such a person engages in criminal conduct. For all of these reasons, Merola cannot demonstrate that he has capacity to sue under the constitutional proscription exception, and dismissal is required.

B. Preliminary Injunction

Because dismissal is required given Merola's lack of capacity to bring suit, his motion for a preliminary injunction, (Dkt; No. 27), is denied as moot.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the State of Connecticut's letter motion seeking permission to file an amicus curiae brief (Dkt. No. 33) is **GRANTED**; and it is further

ORDERED that the State's letter motion seeking permission to respond to the United States' memorandum of law (Dkt. No. 35) is **DENIED**; and it is further

ORDERED that the State's cross motion to dismiss (Dkt. No. 30) is **GRANTED**, and the complaint (Dkt. No. 1) is **DISMISSED**; and it is further

ORDERED that Merola's motion for a preliminary injunction (Dkt. No. 27) is **DENIED** as moot; and it is further

ORDERED that the Clerk close this case; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

All Citations

427 F.Supp.3d 286

Footnotes

1 *See* L. 2019, ch 37.

2 Without any explanation why they may be properly considered on a Rule 12(c) motion, the State submitted affidavits and attached exhibits from two Department of Motor Vehicle employees for the purpose of providing background information. (Dkt. No. 30, Attachs. 2-6.) The matters presented outside of the pleadings must be excluded from consideration absent any argument why they may be properly considered without conversion to summary judgment. *See* Fed. R. Civ. P. 12(d); *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (explaining that the complaint includes any attached written instrument, materials incorporated by reference, and documents integral to the complaint). It is unclear why the State moved for dismissal pursuant to Rule 12(c) only. (Dkt. No. 30, Attach. 1 at 1.) When standing is lacking, the court's subject matter jurisdiction is implicated and the proper method for seeking dismissal on that basis is Rule 12(b)(1), which would allow for the submission and consideration by the court of matters outside the pleadings. In any case, where standing is questioned, even under a rule that would ordinarily require the court to exclude matters presented outside of the pleadings, like Rule 12(b)(6) or (c), "the district court is authorized to consider matters outside the pleadings and make findings of fact when necessary." *First Capital Asset Mgmt. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 378 (S.D.N.Y. 2002) (citations omitted), *on reconsideration*, 219 F. Supp. 2d 576 (S.D.N.Y. 2002), *aff'd sub nom. First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004). For this reason, the court has considered Merola's declaration, which was submitted in conjunction with his preliminary injunction motion, (Dkt. No. 27, Attach. 2), to the extent that it bears on the standing question.

3 The court has also considered an amicus curiae brief filed by the Attorney General of Connecticut on behalf of the State of Connecticut and joined by California, the District of Columbia, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington, (Dkt. No. 33, Attach. 1), and a memorandum of law filed by the United States as intervenor

pursuant to Rule 5.1(c) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a) to defend the constitutionality of 8 U.S.C. §§ 1373 and 1644, (Dkt. No. 34). The amicus curiae brief and United States' memorandum of law present arguments that are ultimately not germane to the disposition of the case.

4 In addition to the court's prior Summary Order, (Dkt. No. 22 at 1-2), the Decision and Order in *Kearns v. Cuomo*, 415 F.Supp.3d 319, 323-25, 2019 WL 5849513, at *2-3 (W.D.N.Y. 2019), *appeal docketed*, No. 19-3769 (2d Cir. Nov. 13, 2019), includes relevant background information.

5 Merola makes no effort to oppose the several other arguments, largely overlapping with those that formed the basis of the dismissal for lack of standing in *Kearns*, which have also been advanced by the State here. (*Compare* Dkt. No. 30, Attach. 1 at 11-20, *with* Dkt. No. 32 at 3-9.) In addition, Merola, who brings this action only in his official capacity, has requested leave to amend to add individual capacity claims in the event the court "deems it necessary and appropriate." (Dkt. No. 32 at 8 n.5.) The court does not engage in such hand-holding. If Merola was inclined to seek leave to amend, he should have done so consistent with the Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(a)(4). Additionally, it is not clear how Merola would establish standing by bringing his causes of action in his individual capacity. Indeed, *Kearns* soundly rejected individual standing under nearly identical circumstances. *See* 415 F.Supp.3d at 330-36, 2019 WL 5849513, at *6-12.

6 Despite the limitations of the briefing schedule, the State did not request permission to file an otherwise unpermitted reply in further support of its cross motion, which is contemplated by the Local Rules of Practice. *See* N.D.N.Y. L.R. 7.1(c).

7 The court is left to guess at whether Merola intends to suggest that watering down the vote with ineligible voters who fraudulently register disenfranchises lawful voters. Just like his failure to elaborate upon his argument about where in the State Constitution the proscription exists, he has not adequately explained his argument in this regard, which is a basis to reject it.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Alabama Legislative Black Caucus v. Alabama, U.S.Ala., March 25, 2015

115 S.Ct. 2475
Supreme Court of the United States

Zell MILLER, et al., Appellants,
v.
Davida JOHNSON et al.
Lucious ABRAMS, Jr., et al., Appellants,
v.
Davida JOHNSON et al.
UNITED STATES, Appellant,
v.
Davida JOHNSON et al.

Nos. 94–631, 94–797, and 94–929.
|
Argued April 19, 1995.
|
Decided June 29, 1995.

Synopsis
Georgia residents brought action challenging constitutionality of redistricting legislation in seeking injunction against its further use in congressional elections. A three-judge panel of the United States District Court for the Southern District of Georgia determined that redistricting plan violated equal protection principles, 864 F.Supp. 1354. Appeal was taken. The Supreme Court, Justice Kennedy, held that: (1) bizarre shape was not threshold requirement of claim of racial gerrymandering under *Shaw* ; (2) allegation that race was legislature's dominant and controlling rationale in drawing district lines was sufficient to state claim under *Shaw* ; and (3) Georgia's congressional redistricting plan violates the equal protection clause.

Affirmed and remanded.

Justice O'Connor concurred and filed opinion.

Justice Stevens dissented and filed opinion.

Justice Ginsburg dissented and filed an opinion in which Justices Stevens and Breyer joined and in which Justice Souter joined in part.

West Headnotes (46)

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

Allegation, that state's redistricting plan, on its face, has no rational explanation save as an effort to separate voters on basis of race, is sufficient to state claim upon which relief can be granted under equal protection clause. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

4 Cases that cite this headnote

[2] **Constitutional Law** Race, National Origin, or Ethnicity

Central mandate of equal protection clause of Fourteenth Amendment is racial neutrality in governmental decisionmaking. U.S.C.A. Const.Amend. 14, § 1.

16 Cases that cite this headnote

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

Racial and ethnical distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination under Equal Protection Clause; this rule obtains with equal force regardless of race of those burdened or benefited by particular classification. U.S.C.A. Const.Amend. 14, § 1.

14 Cases that cite this headnote

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

Laws classifying citizens on basis of race cannot be upheld unless they are narrowly tailored to achieve compelling state interest. U.S.C.A. Const.Amend. 14, § 1.

15 Cases that cite this headnote

[5] **Constitutional Law** Electoral Districts

Equal protection principles governed state's drawing of congressional districts. U.S.C.A. Const.Amend. 14.

[6] **Constitutional Law** Race, National Origin, or Ethnicity

Equal protection principles apply not only to legislation that contains explicit racial distinctions, but also to laws neutral on their face but unexplainable on grounds other than race. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

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

Redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny under equal protection clause that is given to other state laws classifying citizens by race. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[8] **Election Law** In general; covered jurisdictions

Election Law Acts requiring preclearance

Preclearance mechanism of Voting Rights Act applies to congressional redistricting plans and requires that proposed change not have purpose and will not have effect of denying or abridging, on account of race or color, right to vote. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

3 Cases that cite this headnote

[9] **Election Law** In general; covered jurisdictions

Purpose of § 5 of Voting Rights Act has always been to insure that no voting-procedure changes would be made that lead to retrogression in position of racial minorities with respect to their effective exercise of the electoral franchise. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

6 Cases that cite this headnote

[10] **Constitutional Law** Elections

Residents of challenged voting district had standing to bring equal protection challenge to redistricting legislation which resulted in creation of the district. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

2 Cases that cite this headnote

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

Allegation that race was the overriding and predominant factor in Georgia's redistricting legislation was sufficient to state claim upon which relief could be granted under equal protection clause, regardless of whether challenged district's shape was so bizarre that it was unexplainable other than on basis of race. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

17 Cases that cite this headnote

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

Racial gerrymandering claim under *Shaw* differs analytically from vote dilution claim; whereas "vote dilution claim" alleges that state has enacted particular voting scheme as purposeful device to minimize or cancel out voting potential of racial or ethnic minorities, that is, action disadvantaging voters of particular race, essence of equal protection claim recognized in *Shaw* is that state has used race as basis for separating voters into districts. U.S.C.A. Const.Amend. 14.

44 Cases that cite this headnote

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

Just as state may not, absent extraordinary justification, segregate citizens of race in its public parks, golf courses, and schools, it may not separate its citizens into different voting districts on the basis of race. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[14] **Constitutional Law** Discrimination and Classification

At the heart of Constitution's guarantee of equal protection lies the simple command that government must treat citizens as individuals rather than as components of racial, religious, sexual, or national classes. U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

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

Race-based assignments of voters to districts embody stereotypes that treat individuals as product of their race, thereby evaluating their thoughts and efforts, their very worth as citizens, according to criterion barred to the government by history and by the Constitution. U.S.C.A. Const.Amend. 14.

13 Cases that cite this headnote

[16] **Jury** Race

Race cannot be a proxy for determining juror bias or competence. U.S.C.A. Const.Amend. 14.

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

Race-based districting by state legislatures demands close judicial scrutiny under equal protection clause. U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

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

Bizarre shape of voting district is not threshold requirement of bringing claim, under *Shaw*, that state has used race as basis for separating voters into districts; shape is relevant not because bizarreness is necessary element of the constitutional wrong or threshold requirement of proof, but rather, because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was legislature's dominant and controlling rationale in drawing its district lines. U.S.C.A. Const.Amend. 14.

39 Cases that cite this headnote

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

Parties may rely on evidence other than bizarreness of district shape in order to establish that legislature has engaged in race-based districting. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

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

Statutes are subject to strict scrutiny under equal protection clause not only when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by racial purpose or object. U.S.C.A. Const.Amend. 14.

15 Cases that cite this headnote

[21] **Constitutional Law** Discrimination and Classification

Conspicuous pattern of discrimination is not a necessary predicate to violation of equal protection clause. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

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

Federal court review of state's districting legislation represents serious intrusion on most vital of local functions inasmuch as it is well

settled that reapportionment is primarily duty and responsibility of the state.

28 Cases that cite this headnote

[23] **Constitutional Law** Equal protection

Although race-based decisionmaking is inherently suspect, good faith of state legislature must be presumed until claimant makes showing sufficient to support allegation of race-based decisionmaking. U.S.C.A. Const.Amend. 14.

14 Cases that cite this headnote

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

Courts, in assessing sufficiency of equal protection challenge to districting plan, must be sensitive to complex interplay of forces that enter legislature's redistricting calculus; for example, redistricting legislatures will almost always be aware of racial demographics, but it does not follow that race predominates in redistricting process. U.S.C.A. Const.Amend. 14.

27 Cases that cite this headnote

[25] **Constitutional Law** Intentional or purposeful action requirement

"Discriminatory purpose," as used in context of equal protection analysis, implies more than intent as volition or intent as awareness of consequences; it implies that the decisionmaker selected or reaffirmed particular course of action at least in part because of, not merely in spite of, its adverse effects. U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

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

Evidentiary difficulty in distinguishing between awareness of racial considerations and motivation by them, together with sensitive nature of redistricting and presumption of good faith which must be accorded legislative enactments, require courts to exercise extraordinary caution in adjudicating claim that state has drawn voting district lines on basis of race. U.S.C.A. Const.Amend. 14.

26 Cases that cite this headnote

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

On claim that state has drawn district lines on basis of race, plaintiff's burden is to show, either through circumstantial evidence of district's shape and demographics or through more direct evidence going to legislative purpose, that race was predominant factor motivating legislature's decision to place significant number of voters within or without particular district; to make this showing, plaintiff must prove that legislature subordinated to racial considerations traditional race-neutral districting principles, including, but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests. U.S.C.A. Const.Amend. 14.

223 Cases that cite this headnote

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

Election Law Gerrymandering of equipopulous districts

State can defeat claim that district has been gerrymandered on racial lines by showing that traditional districting principles or other race-neutral considerations are the basis for challenged redistricting legislation and are not subordinated to race. U.S.C.A. Const.Amend. 14.

109 Cases that cite this headnote

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

In context of racial gerrymandering claim, court must recognize traditional race-neutral districting principles and other race-neutral considerations and must always recognize intrusive potential of judicial intervention into the legislative realm when assessing, under Federal Rules of Civil Procedure, the

adequacy of plaintiff's showing at various stages of litigation and determining whether to permit discovery or trial to proceed. U.S.C.A. Const.Amend. 14; Fed.Rules Civ.Proc.Rules 12(b, e), 26(b)(2), 56, 28 U.S.C.A.

25 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

District court did not clearly err in finding that, unless it was narrowly tailored to serve compelling state interest, Georgia's redistricting plan violated equal protection clause, given irregular shape of congressional district containing nearly 80% of district's total African-American population in outlying appendages, together with evidence showing that Georgia legislature was motivated by predominant, overriding desire to create a third majority-black district. U.S.C.A. Const.Amend. 14.

52 Cases that cite this headnote

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

State could not refute claim of racial gerrymandering by demonstrating compliance with traditional districting principles, or by mere recitation of purported communities of interest, where those factors were subordinated to racial objectives. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Georgia's redistricting plan, for which race was predominant, overriding factor in drawing district lines, violated equal protection clause. U.S.C.A. Const.Amend. 14.

29 Cases that cite this headnote

[33] **Constitutional Law** Voting and political rights

To satisfy strict scrutiny test for redistricting legislation challenged on equal protection grounds, state must demonstrate that its districting legislation is narrowly tailored to achieve compelling interest. U.S.C.A. Const.Amend. 14.

28 Cases that cite this headnote

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

Constitutional Law Affirmative action in general

There is significant state interest, for purposes of equal protection analysis, in eradicating the effects of past racial discrimination. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

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

Election Law Gerrymandering of equipopulous districts

Election Law Acts requiring preclearance

Georgia's interest in complying with Justice Department's preclearance demands was not “compelling,” and thus did not justify use of racial gerrymandering to create black-majority congressional district, where, under correct reading of Voting Rights Act, such preclearance requirements were not necessary. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

8 Cases that cite this headnote

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

Compliance with federal antidiscrimination laws cannot justify race-based districting legislation absent showing that challenged legislation

was reasonably necessary under constitutional reading and application of those laws. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

4 Cases that cite this headnote

[37] **Constitutional Law** Affirmative action in general

When state governmental entities seek to justify race-based remedies to cure effects of past discrimination, court does not accept government's mere assertion that remedial action is required, but rather, insists on strong basis in evidence of the harm being remedied. U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

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

Election Law Method of apportionment

Presumptive skepticism of all racial classifications prohibits court from accepting on its face Justice Department's conclusion that racial districting is necessary under Voting Rights Act; thus, when state relies on Department's determination that race-based districting is necessary, judiciary retains independent obligation in adjudicating consequent equal protection challenges to ensure that state's actions are narrowly tailored to achieve compelling interest. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

24 Cases that cite this headnote

[39] **Constitutional Law** To executive in general

Judiciary may not surrender, to the executive branch, its role in enforcing constitutional limits on race-based official action. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[40] **Election Law** Purpose and construction in general

Statutes Attorney General

It is inappropriate for court engaged in constitutional scrutiny of redistricting legislation to accord deference to Justice Department's interpretation of Voting Rights Act. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

7 Cases that cite this headnote

[41] **Election Law** Purpose and construction in general

Statutes Attorney General

When Justice Department's interpretation of Voting Rights Act compels race-based districting, interpretation by definition raises such "serious constitutional question," as should not receive deference. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

9 Cases that cite this headnote

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

United States Equality of representation and discrimination; Voting Rights Act

Georgia's proposed redistricting legislation creating two black-majority congressional districts where only one had existed before was "ameliorative" and, therefore, should not have been rejected by Justice Department, absent showing that new apportionment itself so discriminated on basis of race or color as to violate the Constitution. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

11 Cases that cite this headnote

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

Redistricting plan which is "ameliorative," meaning increasing number of majority-minority districts, cannot violate Voting Rights Act

unless new apportionment itself so discriminates on basis of race or color as to violate the Constitution. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

1 Case that cites this headnote

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

State has burden, under Voting Rights Act, to prove nondiscriminatory purpose for refusing to maximize number of majority-minority districts. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

5 Cases that cite this headnote

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

State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support inference that plan so discriminates on basis of race or color as to violate the Constitution. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

2 Cases that cite this headnote

[46] **Constitutional Law** Fifteenth Amendment

Congress' exercise of its Fifteenth Amendment authority, even when otherwise proper, still must consist with the letter and spirit of Constitution. U.S.C.A. Const.Amend. 15.

****2480** *Syllabus*[*]

***900** In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, this Court articulated the equal protection principles that govern a State's drawing of congressional districts, noting that laws that explicitly distinguish between individuals on racial grounds fall within the core of the Equal Protection Clause's prohibition against race-based decisionmaking, that this prohibition extends to laws neutral on their face but unexplainable on grounds other than race, and that redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny given to other state laws that classify citizens by race. Georgia's most recent congressional districting plan contains three majority-black districts and was adopted after the Justice Department refused to preclear, under § 5 of the Voting Rights Act (Act), two earlier plans that each contained only two majority-black districts. Appellees, voters in the new Eleventh District—which joins metropolitan black neighborhoods together with the poor black populace of coastal areas 260 miles away—challenged the district on the ground that it was a racial gerrymander in violation of the Equal Protection Clause as interpreted in *Shaw.* The District Court agreed, holding that evidence of the state legislature's purpose, as well as the district's irregular borders, showed that race was the overriding and predominant force in the districting determination. The court assumed that compliance with the Act would be a compelling interest, but found that the plan was not narrowly tailored to meet that interest since the Act did not require three majority-black districts.

Held: Georgia's congressional redistricting plan violates the Equal Protection Clause. Pp. 2485–2494.

(a) Parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding a district's geometry and makeup nor required to make a threshold showing of bizarreness. A district's shape is relevant to *Shaw*'s equal protection analysis not because bizarreness is a necessary element of the constitutional ***901** wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was a legislature's dominant and controlling rationale in drawing district ****2481** lines. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters based on race, but where the district is not so bizarre, parties may rely on other evidence to establish race-based districting. The very stereotypical assumptions the Equal Protection Clause forbids underlie the argument that the Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting involves racial consideration. While redistricting usually implicates a political calculus in which various interests compete for recognition, it does not follow that individuals of the same race share a single political interest. Nor can the analysis used to assess the vote dilution

claim in *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229, be applied to resuscitate this argument. Pp. 2485–2488.

(b) Courts must exercise extraordinary caution in adjudicating claims that a State has drawn race-based district lines. The plaintiff must show, whether through circumstantial evidence of a district's shape and demographics or more direct evidence of legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. P. 2488.

(c) The District Court applied the correct analysis here, and its finding that race was the predominant factor motivating the Eleventh District's drawing was not clearly erroneous. It need not be decided whether the district's shape, standing alone, was sufficient to establish that the district is unexplainable on grounds other than race, for there is considerable additional evidence showing that the state legislature was motivated by a predominant, overriding desire to create a third majority-black district in order to comply with the Justice Department's preclearance demands. The District Court's well-supported finding justified its rejection of the various alternative explanations offered for the district. Appellants cannot refute the claim of racial gerrymandering by arguing the legislature complied with traditional districting principles, since those factors were subordinated to racial objectives. Nor are there tangible communities of interest spanning the district's hundreds of miles that can be called upon to rescue the plan. Since race ***902** was the predominant, overriding factor behind the Eleventh District's drawing, the State's plan is subject to strict scrutiny and can be sustained only if it is narrowly tailored to achieve a compelling state interest. Pp. 2488–2490.

(d) While there is a significant state interest in eradicating the effects of past racial discrimination, there is little doubt that Georgia's true interest was to satisfy the Justice Department's preclearance demands. Even if compliance with the Act, standing alone, could provide a compelling interest, it cannot do so here, where the district was not reasonably necessary under a constitutional reading and application of the Act. To say that the plan was required in order to obtain preclearance is not to say that it was required by the Act's substantive requirements. Georgia's two earlier plans were ameliorative and could not have violated § 5 unless they so discriminated on the basis of race or color as to violate the Constitution. However, instead of grounding its objections on evidence of a discriminatory purpose, the Justice Department appears to have been driven by its maximization policy. In utilizing § 5 to require States to create majority-minority districts whenever possible, the Department expanded its statutory authority beyond Congress' intent for § 5: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. The policy also raises serious constitutional concerns because its implicit command that States may engage in presumptive unconstitutional race-based districting brings ****2482** the Act, once upheld as a proper exercise of Congress' Fifteenth Amendment authority, into tension with the Fourteenth Amendment. Pp. 2490–2494.

864 F.Supp. 1354 (S.D.Ga.1994), affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 2497. STEVENS, J., filed a dissenting opinion, *post*, p. 2497. GINSBURG, J., filed a dissenting opinion, in which STEVENS and BREYER, JJ., joined, and in which SOUTER, J., joined except as to Part III–B, *post*, p. 2499.

Attorneys and Law Firms

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Drew S. Days, III, Washington, DC, for appellant in No. 94–929.

***903** A. Lee Parks, Atlanta, GA, for appellees.

Opinion

Justice KENNEDY delivered the opinion of the Court.

[1] The constitutionality of Georgia's congressional redistricting plan is at issue here. In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on

the basis of race. The question we now decide is whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced ***904** in *Shaw,* and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling governmental interest.

I

A

[2] **[3]** **[4]** The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. Its central mandate is racial neutrality in governmental decisionmaking. See, *e.g., Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 191–192, 85 S.Ct. 283, 287–288, 13 L.Ed.2d 222 (1964); see also *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Though application of this imperative raises difficult questions, the basic principle is straightforward: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.... This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 291, 98 S.Ct. 2733, 2748, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). This rule obtains with equal force regardless of "the race of those burdened or benefited by a particular classification." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 722, 102 L.Ed.2d 854 (1989) (plurality opinion) (citations omitted); *id.,* at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) ("I agree ... with Justice O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"); see also *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 2111, 132 L.Ed.2d 158 (1995); *Bakke, supra,* at 289–291, 98 S.Ct., at 2747–2748 (opinion of Powell, J.). Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest. See, *e.g., Adarand,* at 227, 115 S.Ct., at 2113; *Croson, supra,* at 494, 109 S.Ct., at 722 (plurality opinion); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 280, and n. 6, 106 S.Ct. 1842, 1847, 1850, and n. 6, 90 L.Ed.2d 260 (1986) (plurality opinion).

****2483** **[5]** **[6]** **[7]** ***905** In *Shaw v. Reno, supra,* we recognized that these equal protection principles govern a State's drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task. Our analysis began from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Id.,* at 642, 113 S.Ct., at 2824. This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but " 'unexplainable on grounds other than race.' " *Id.,* at 644, 113 S.Ct., at 2825 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977)). Applying this basic equal protection analysis in the voting rights context, we held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' ... demands the same close scrutiny that we give other state laws that classify citizens by race." 509 U.S., at 644, 113 S.Ct., at 2825 (quoting *Arlington Heights, supra,* at 266, 97 S.Ct., at 563).

This litigation requires us to apply the principles articulated in *Shaw* to the most recent congressional redistricting plan enacted by the State of Georgia.

B

[8] **[9]** In 1965, the Attorney General designated Georgia a covered jurisdiction under § 4(b) of the Voting Rights Act (*Act*), 79 Stat. 438, as amended, 42 U.S.C. § 1973b(b). 30 Fed.Reg. 9897 (1965); see 28 CFR pt. 51, App.; see also *City of Rome v. United States,* 446 U.S. 156, 161, 100 S.Ct. 1548, 1553, 64 L.Ed.2d 119 (1980). In consequence, § 5 of the Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964. 42 U.S.C. § 1973c. The preclearance mechanism applies to ***906** congressional redistricting plans, see, *e.g., Beer v. United States,* 425 U.S. 130, 133, 96 S.Ct. 1357, 1360, 47 L.Ed.2d 629 (1976), and requires that the proposed change "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect

to their effective exercise of the electoral franchise." *Beer, supra,* at 141, 96 S.Ct., at 1363.

Between 1980 and 1990, one of Georgia's 10 congressional districts was a majority-black district, that is, a majority of the district's voters were black. The 1990 Decennial Census indicated that Georgia's population of 6,478,216 persons, 27% of whom are black, entitled it to an additional eleventh congressional seat, App. 9, prompting Georgia's General Assembly to redraw the State's congressional districts. Both the House and the Senate adopted redistricting guidelines which, among other things, required single-member districts of equal population, contiguous geography, nondilution of minority voting strength, fidelity to precinct lines where possible, and compliance with §§ 2 and 5 of the Act, 42 U.S.C. §§ 1973, 1973c. See App. 11–12. Only after these requirements were met did the guidelines permit drafters to consider other ends, such as maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents. *Id.,* at 12.

A special session opened in August 1991, and the General Assembly submitted a congressional redistricting plan to the Attorney General for preclearance on October 1, 1991. The legislature's plan contained two majority-minority districts, the Fifth and Eleventh, and an additional district, the Second, in which blacks comprised just over 35% of the voting age population. Despite the plan's increase in the number of majority-black districts from one to two and the absence of any evidence of an intent to discriminate against minority voters, 864 F.Supp. 1354, 1363, and n. 7 (SD Ga.1994), the ***907** Department of Justice refused preclearance on January 21, 1992. App. 99–107. The Department's objection letter noted a concern that Georgia had created only two majority-minority districts, ****2484** and that the proposed plan did not "recognize" certain minority populations by placing them in a majority-black district. *Id.,* at 105, 105–106.

The General Assembly returned to the drawing board. A new plan was enacted and submitted for preclearance. This second attempt assigned the black population in Central Georgia's Baldwin County to the Eleventh District and increased the black populations in the Eleventh, Fifth, and Second Districts. The Justice Department refused preclearance again, relying on alternative plans proposing three majority-minority districts. *Id.,* at 120–126. One of the alternative schemes relied on by the Department was the so-called "max-black" plan, 864 F.Supp., at 1360, 1362–1363, drafted by the American Civil Liberties Union (ACLU) for the General Assembly's black caucus. The key to the ACLU's plan was the "Macon/Savannah trade." The dense black population in the Macon region would be transferred from the Eleventh District to the Second, converting the Second into a majority-black district, and the Eleventh District's loss in black population would be offset by extending the Eleventh to include the black populations in Savannah. *Id.,* at 1365–1366. Pointing to the General Assembly's refusal to enact the Macon/Savannah swap into law, the Justice Department concluded that Georgia had "failed to explain adequately" its failure to create a third majority-minority district. App. 125. The State did not seek a declaratory judgment from the District Court for the District of Columbia. 864 F.Supp., at 1366, n. 11.

Twice spurned, the General Assembly set out to create three majority-minority districts to gain preclearance. *Id.,* at 1366. Using the ACLU's "max-black" plan as its benchmark, *id.,* at 1366–1367, the General Assembly enacted a plan that

> ***908** "bore all the signs of [the Justice Department's] involvement: The black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges; Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah; and the plan as a whole split 26 counties, 23 more than the existing congressional districts." *Id.,* at 1367. See Appendix A, *infra*, following p. 2494.

The new plan also enacted the Macon/Savannah swap necessary to create a third majority-black district. The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political, and economic makeup of the Eleventh District tells a tale of disparity, not community. See 864 F.Supp. at 1376–1377, 1389–1390; Plaintiff's Exh. No. 85, pp. 10–27 (report of Timothy G. O'Rourke, Ph.D.). As the appendices to this opinion attest,

> "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." 864 F.Supp., at 1389 (footnote omitted).
>
> "The dense population centers of the approved Eleventh District were all majority-black, all at the periphery of the district, and in the case of Atlanta, Augusta and

Savannah, all tied to a sparsely populated rural core by even less populated land bridges. Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way." *Id.,* at 1367 (footnote omitted).

***909** The Almanac of American Politics has this to say about the Eleventh District: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County." M. Barone & G. Ujifusa, Almanac of American Politics 356 (1994). Georgia's plan included three majority-black districts, though, and received Justice Department preclearance on April 2, 1992. Plaintiff's Exh. No. 6; see 864 F.Supp., at 1367.

****2485** **[10]** Elections were held under the new congressional redistricting plan on November 4, 1992, and black candidates were elected to Congress from all three majority-black districts. *Id.,* at 1369. On January 13, 1994, appellees, five white voters from the Eleventh District, filed this action against various state officials (Miller Appellants) in the United States District Court for the Southern District of Georgia. *Id.,* at 1369, 1370. As residents of the challenged Eleventh District, all appellees had standing. See *United States v. Hays,* 515 U.S. 737, 744–745, 115 S.Ct. 2431, 2436, 132 L.Ed.2d 635 (1995). Their suit alleged that Georgia's Eleventh District was a racial gerrymander and so a violation of the Equal Protection Clause as interpreted in *Shaw v. Reno.* A three-judge court was convened pursuant to 28 U.S.C. § 2284, and the United States and a number of Georgia residents intervened in support of the defendant-state officials.

A majority of the District Court panel agreed that the Eleventh District was invalid under *Shaw,* with one judge dissenting. 864 F.Supp. 1354 (1994). After sharp criticism of the Justice Department for its use of partisan advocates in its dealings with state officials and for its close cooperation with the ACLU's vigorous advocacy of minority district maximization, the majority turned to a careful interpretation of our opinion in *Shaw.* It read *Shaw* to require strict scrutiny whenever race is the "overriding, predominant force" in the redistricting process. ***910** 864 F.Supp., at 1372 (emphasis deleted). Citing much evidence of the legislature's purpose and intent in creating the final plan, as well as the irregular shape of the district (in particular several appendages drawn for the obvious purpose of putting black populations into the district), the court found that race was the overriding and predominant force in the districting determination. *Id.,* at 1378. The court proceeded to apply strict scrutiny. Though rejecting proportional representation as a compelling interest, it was willing to assume that compliance with the Act would be a compelling interest. *Id.,* at 1381–1382. As to the latter, however, the court found that the Act did not require three majority-black districts, and that Georgia's plan for that reason was not narrowly tailored to the goal of complying with the Act. *Id.,* at 1392–1393.

Appellants filed notices of appeal and requested a stay of the District Court's judgment, which we granted pending the filing and disposition of the appeals in this litigation, *Miller v. Johnson,* 512 U.S. 1283, 115 S.Ct. 36, 129 L.Ed.2d 932 (1994). We later noted probable jurisdiction. 513 U.S. 1071, 115 S.Ct. 713, 130 L.Ed.2d 620 (1995); see 28 U.S.C. § 1253.

II

A

[11] Finding that the "evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved," the District Court held that race was the predominant, overriding factor in drawing the Eleventh District. 864 F.Supp., at 1374; see *id.,* at 1374–1378. Appellants do not take issue with the court's factual finding of this racial motivation. Rather, they contend that evidence of a legislature's deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw.* They argue that, regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race, and that ***911** appellees failed to make that showing here. Appellants' conception of the constitutional violation misapprehends our holding in *Shaw* and the equal protection precedent upon which *Shaw* relied.

[12] **[13]** **[14]** **[15]** **[16]** **[17]** *Shaw* recognized a claim "analytically distinct" from a vote dilution claim. 509 U.S., at 652, 113S.Ct., at 2830; see *id.,* at 649–650, 113 S.Ct., at 2828. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device "to minimize or cancel out the voting potential of racial or ethnic minorities," *Mobile v. Bolden,* 446 U.S. 55, 66, 100 S.Ct. 1490, 1499, 64 L.Ed.2d 47 (1980) (citing cases), an action disadvantaging voters of a particular race, the essence

of the equal protection claim recognized in *Shaw* is that the ****2486** State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam),* buses, *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam),* golf courses, *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam),* beaches, *Mayor of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam),* and schools, *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class." ' " *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (quoting *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 U.S. 1073, 1083, 103 S.Ct. 3492, 3498, 77 L.Ed.2d 1236 (1983)); cf. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) (" 'injury in fact' " was "denial of equal treatment ..., not the ultimate inability to obtain the benefit"). When the State assigns voters on the basis of race, it engages in ***912** the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw, supra,* at 647, 113 S.Ct., at 2827; see *Metro Broadcasting, supra,* at 636, 110 S.Ct., at 3046 (KENNEDY, J., dissenting). Race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Metro Broadcasting, supra,* at 604, 110 S.Ct., at 3029 (O'CONNOR, J., dissenting) (citation omitted); see *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("Race cannot be a proxy for determining juror bias or competence"); *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category"). They also cause society serious harm. As we concluded in *Shaw:*

> "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny." *Shaw, supra,* at 657, 113 S.Ct., at 2832.

[18] **[19]** Our observation in *Shaw*of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before thereis a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district'sappearance (or, to be more precise, its appearance in combination withcertain demographic evidence) can give rise to an equal protection claim, 509 U.S., at 649, 113 S.Ct., at 2828, a holding that bizarreness was athreshold showing, as appellants believe ***913** it to be. Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barringaccepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary elementof the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its districtlines. The logical implication, as courts applying *Shaw* have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting. See *Shaw v. Hunt,* 861 F.Supp. 408, 431 (EDNC 1994); *Hays v.* ****2487** *Louisiana,* 839 F.Supp. 1188, 1195 (WD La.1993), vacated, 512 U.S. 1230, 114 S.Ct. 2731, 129 L.Ed.2d 853 (1994); but see *DeWitt v. Wilson,* 856 F.Supp. 1409, 1413 (ED Cal.1994).

[20] **[21]** Our reasoning in *Shaw* compels this conclusion. We recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object. 509 U.S., at 644, 113 S.Ct., at 2825. In the rare case, where the effect of government action is a pattern " 'unexplainable on grounds other than race,' " *ibid.* (quoting *Arlington Heights,* 429 U.S., at 266, 97 S.Ct., at 563), "[t]he evidentiary inquiry is ... relatively easy," *Arlington Heights, supra,* at 266, 97 S.Ct., at 563 (footnote omitted). As early as *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886),

the Court recognized that a laundry permit ordinance was administered in a deliberate way to exclude all Chinese from the laundry business; and in *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), the Court concluded that the redrawing of Tuskegee, Alabama's municipal boundaries left no doubt that the plan was designed to exclude blacks. Even in those cases, however, it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation. Patterns of discrimination as conspicuous as these are rare, and ***914** are not a necessary predicate to a violation of the Equal Protection Clause. Cf. *Arlington Heights, supra,* at 266, n. 14, 97 S.Ct., at 563, n. 14. In the absence of a pattern as stark as those in *Yick Wo* or *Gomillion,* "impact alone is not determinative, and the Court must look to other evidence" of race-based decisionmaking. *Arlington Heights, supra,* at 266, 97 S.Ct., at 563 (footnotes omitted).

Shaw applied these same principles to redistricting. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race." *Shaw, supra,* at 646–647, 113 S.Ct., at 2826 (quoting *Gomillion, supra,* at 341, 81 S.Ct., at 127). In other cases, where the district is not so bizarre on its face that it discloses a racial design, the proof will be more "difficul[t]." 509 U.S., at 646, 113 S.Ct., at 2826. Although it was not necessary in *Shaw* to consider further the proof required in these more difficult cases, the logical import of our reasoning is that evidence other than a district's bizarre shape can be used to support the claim.

Appellants and some of their *amici* argue that the Equal Protection Clause's general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations. Underlying their argument are the very stereotypical assumptions the Equal Protection Clause forbids. It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens," *Metro Broadcasting,* 497 U.S., at 636, 110 S.Ct., at 3046 (KENNEDY, J., dissenting), the precise use of race as a proxy the Constitution prohibits. Nor can the argument that districting cases are excepted from standard equal protection precepts be resuscitated by ***915** *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), where the Court addressed a claim that New York violated the Constitution by splitting a Hasidic Jewish community in order to include additional majority-minority districts. As we explained in *Shaw,* a majority of the Justices in *UJO* construed the complaint as stating a vote dilution claim, so their analysis does not apply to a claim that the State has separated voters on the basis of race. 509 U.S., at 652, 113 S.Ct., at 2829. To the extent any of the opinions in that "highly fractured decision," *id.,* at 651, 113 S.Ct., at 2829, can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything ****2488** but our strictest scrutiny, those views ought not be deemed controlling.

In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness. Today's litigation requires us further to consider the requirements of the proof necessary to sustain this equal protection challenge.

B

[22] **[23]** **[24]** **[25]** **[26]** **[27]** **[28]** **[29]** Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975); see, *e.g., Voinovich v. Quilter,* 507 U.S. 146, 156–157, 113 S.Ct. 1149, 1156–1157, 122 L.Ed.2d 500 (1993); *Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993). Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, *e.g., Adarand,* 515 U.S., at 218, 115 S.Ct., at 2108 (citing *Bakke,* 438 U.S., at 291, 98 S.Ct., at 2748 (opinion of Powell, J.)), until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed, see *id.* at 318–319, 98 S.Ct., at 2762–2763 (opinion of Powell, J.). The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex ***916** interplay of forces that enter a legislature's redistricting calculus.

Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. *Shaw, supra,* at 646, 113 S.Ct., at 2826; see *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (" '[D]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines." *Shaw, supra,* 515 U.S., at 647, 113 S.Ct., at 2827. These principles inform the plaintiff's burden of proof at trial. Of course, courts must also recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil ***917** Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed. See, *e.g.,* Fed.Rules Civ.Proc. 12(b) and (e), 26(b)(2), 56; see also *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

[30] In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it was ****2489** "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. 864 F.Supp., at 1375; see *id.,* at 1374–1376. Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer. See Appendix B, *infra*, at 2496; see also App. 133. Although this evidence is quite compelling, we need not determine whether it was, standing alone, sufficient to establish a *Shaw* claim that the Eleventh District is unexplainable other than by race. The District Court had before it considerable additional evidence showing that the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district in the Second. 864 F.Supp., at 1372, 1378.

The court found that "it became obvious," both from the Justice Department's objection letters and the three preclearance rounds in general, "that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda." *Id.,* at 1366, n. 11; see *id.,* at 1360–1367; see also *Arlington Heights,* 429 U.S., at 267, 97 S.Ct., at 564 ("historical ***918** background of the decision is one evidentiary source"). It further found that the General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands. The court supported its conclusion not just with the testimony of Linda Meggers, the operator of "Herschel," Georgia's reapportionment computer, and "probably the most knowledgeable person available on the subject of Georgian redistricting," 864 F.Supp., at 1361, 1363, n. 6, 1366, but also with the State's own concessions. The State admitted that it " 'would not have added those portions of Effingham and Chatham Counties that are now in the [far southeastern extension of the] present Eleventh Congressional District but for the need to include additional black population in that district to offset the loss of black population caused by the shift of predominantly black portions of Bibb County in the Second Congressional District which occurred in response to the Department of Justice's March 20th, 1992, objection letter.' " *Id.,* at 1377. It conceded further that "[t]o the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of that district." *Ibid.* And in its brief to this Court,

the State concedes that "[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district." Brief for Miller Appellants 30. Hence the trial court had little difficulty concluding that the Justice Department "spent months demanding purely race-based revisions to Georgia's redistricting plans, and that Georgia spent months attempting to comply." 864 F.Supp., at 1377. On this record, we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District; and in any event we conclude the court's finding is not clearly erroneous. Cf. *Wright v. Rockefeller,* 376 U.S. 52, 56–57, 84 S.Ct. 603, 605, 11 L.Ed.2d 512 (1964) (evidence presented "conflicting inferences" and therefore "failed to ***919** prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines").

[31] In light of its well-supported finding, the District Court was justified in rejecting the various alternative explanations offered for the district. Although a legislature's compliance with "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" may well suffice to refute a claim of racial gerrymandering, *Shaw,* 509 U.S., at 647, 113 S.Ct., at 2827, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives. Georgia's Attorney General objected to the Justice Department's demand for three majority-black districts on the ground that to do so the ****2490** State would have to "violate all reasonable standards of compactness and contiguity." App. 118. This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts, and justified the District Court's finding that "every [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate." 864 F.Supp., at 1384; see *id.,* at 1364, n. 8; *id.,* at 1375 ("While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level").

Nor can the State's districting legislation be rescued by mere recitation of purported communities of interest. The evidence was compelling "that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." *Id.,* at 1389–1390. A comprehensive report demonstrated the fractured political, social, and economic interests within the Eleventh District's black population. See Plaintiff's Exh. No. 85, pp. 10–27 (report of Timothy G. O'Rourke, Ph.D.). It is apparent that it was not alleged ***920** shared interests but rather the object of maximizing the district's black population and obtaining Justice Department approval that in fact explained the General Assembly's actions. 864 F.Supp., at 1366, 1378, 1380. A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw,* 509 U.S., at 646, 113 S.Ct., at 2826. But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates. *Id.,* at 647, 113 S.Ct., at 2827; cf. *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns").

[32] Race was, as the District Court found, the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations. 864 F.Supp., at 1372, 1378. As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review.

III

[33] **[34]** **[35]** **[36]** Tosatisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compellinginterest. *Shaw, supra,* at 653–657, 113 S.Ct., at 2830–2832; see also *Croson,* 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); *Wygant,* 476 U.S., at 274, 280, and n. 6, 106 S.Ct., at 1847, 1850, and n. 6 (plurality opinion); cf. *Adarand,* 515 U.S., at 227, 115 S.Ct., at 2114. There is a "significant state interest in eradicating the effects of past racial discrimination." *Shaw, supra,* at 656, 113 S.Ct., at 2831. The State does not argue, however, that it created the Eleventh District to remedy past discrimination, and with good ***921** reason: There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands. 864 F.Supp., at 1378

("[T]he only interest the General Assembly had in mind when drafting the current congressional plan was satisfying [the Justice Department's] preclearance requirements"); *id.,* at 1366; compare *Wygant, supra,* at 277, 106 S.Ct., at 1848 (plurality opinion) (under strict scrutiny, State must have convincing evidence that remedial action is necessary before implementing affirmative action), with *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993) (under rational-basis review, legislature need not " 'actually articulate at any time the purpose or rationale supporting its classification' ") (quoting *Nordlinger v. Hahn,* 505 U.S. 1, 15, 112 S.Ct. 2326, 2334, 120 L.Ed.2d 1 (1992)). Whether or not in some cases compliance with the Act, standing ****2491** alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw,* compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. See 509 U.S., at 653–655, 113 S.Ct., at 2830–2831. The congressional plan challenged here was not required by the Act under a correct reading of the statute.

The Justice Department refused to preclear both of Georgia's first two submitted redistricting plans. The District Court found that the Justice Department had adopted a "black-maximization" policy under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State made the "Macon/Savannah trade" and created a third majority-black district. 864 F.Supp., at 1366, 1380. It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Act.

[37] **[38]** **[39]** ***922** We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied. See, *e.g., Shaw, supra,* at 656, 113 S.Ct., at 2831–2832; *Croson, supra,* at 500–501, 109 S.Ct., at 725; *Wygant, supra,* at 276–277, 106 S.Ct. at 1848 (plurality opinion). "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson, supra,* at 501, 109 S.Ct., at 725. Our presumptive skepticism of all racial classifications, see *Adarand, supra,* at 223–224, 115 S.Ct., at 2110–2111, prohibits us as well from accepting on its face the Justice Department's conclusion that racial districting is necessary under the Act. Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest. See *Shaw, supra,* at 654, 113 S.Ct., at 2830–2831. Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so. See, *e.g., United States v. Nixon,* 418 U.S. 683, 704, 94 S.Ct. 3090, 3105, 41 L.Ed.2d 1039 (1974) (judicial power cannot be shared with Executive Branch); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"); cf. *Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962) (Supreme Court is "ultimate interpreter of the Constitution"); *Cooper v. Aaron,* 358 U.S. 1, 18, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5 (1958) ("permanent and indispensable feature of our constitutional system" is that "the federal ***923** judiciary is supreme in the exposition of the law of the Constitution").

[40] **[41]** For the same reasons, we think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases, see, *e.g., Presley v. Etowah County Comm'n,* 502 U.S. 491, 508–509, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992), and cases cited therein, we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions. ****2492** *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 574–575, 108 S.Ct. 1392, 1396–1397, 99 L.Ed.2d 645 (1988). When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question, see, *e.g., Bakke,* 438 U.S., at 291, 98 S.Ct., at 2748 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect" under the Equal Protection Clause), and should not receive deference.

[42] **[43]** Georgia's drawing of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5. Wherever a plan is "ameliorative," a term we have used to describe plans increasing the number of majority-minority districts, it "cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer,* 425 U.S., at 141, 96 S.Ct., at 1363. Georgia's first and second proposed plans increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%). These plans were "ameliorative" and could not have violated § 5's nonretrogression principle. *Ibid.* Acknowledging as much, see Brief for United States 29; 864 F.Supp., at 1384–1385, the United States now relies on the fact that the Justice Department may object to a state proposal either on the ground that it has a prohibited purpose or a prohibited effect, see, *e.g.,* ***924** *Pleasant Grove v. United States,* 479 U.S. 462, 469, 107 S.Ct. 794, 798, 93 L.Ed.2d 866 (1987). The Government justifies its preclearance objections on the ground that the submitted plans violated § 5's purpose element. The key to the Government's position, which is plain from its objection letters if not from its briefs to this Court, compare App. 105–106, 124–125 with Brief for United States 31–33, is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district.

[44] **[45]** The Government's position is insupportable. "[A]meliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." Days, Section 5 and the Role of the Justice Department, in B. Grofman & C. Davidson, Controversies in Minority Voting 56 (1992). Although it is true we have held that the State has the burden to prove a nondiscriminatory purpose under § 5, *e.g., Pleasant Grove, supra,* at 469, 107 S.Ct., at 798, Georgia's Attorney General provided a detailed explanation for the State's initial decision not to enact the max-black plan, see App. 117–119. The District Court accepted this explanation, 864 F.Supp., at 1365, and found an absence of any discriminatory intent, *id.,* at 1363, and n. 7. The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan "so discriminates on the basis of race or color as to violate the Constitution," *Beer, supra,* at 141, 96 S.Ct., at 1363; see *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion), and thus cannot provide any basis under § 5 for the Justice Department's objection.

Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that ***925** policy, see Brief for United States 35, and seems to concede its impropriety, see Tr. of Oral Arg. 32–33, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans.[*] One of the two ****2493** Department of Justice line attorneys overseeing the Georgia preclearance process himself disclosed that " 'what we did and what I did specifically was to take a ... map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength.' " 864 F.Supp., at 1362, n. 4. In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

Section 5 was directed at preventing a particular set of invidious practices that had the effect of "undo[ing] or defeat[ing] the rights recently won by nonwhite voters." ***926** H.R.Rep. No. 91–397, p. 8 (1969). As we explained in *Beer v. United States,*

> " 'Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory.... Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory." ' " 425 U.S., at 140, 96 S.Ct., at 1363 (quoting H.R.Rep. No. 94–196, pp. 57–58 (1975) (footnotes omitted)).

[46] Based on this historical understanding, we recognized in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities

with respect to their effective exercise of the electoral franchise." 425 U.S., at 141, 96 S.Ct., at 1363. The Justice Department's maximization policy seems quite far removed from this purpose. We are especially reluctant to conclude that § 5 justifies that policy given the serious constitutional concerns it raises. In *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), we upheld § 5 as a necessary and constitutional response to some States' "extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.,* at 335, 86 S.Ct., at 822 (footnote omitted); see also *City of Rome v. United States,* 446 U.S., at 173–183, 100 S.Ct., at 1559–1564. But our belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not ***927** mean they can be justified in the circumstances of this litigation. And the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, *Katzenbach, supra,* at 327, 337, 86 S.Ct., at 818, 823, into tension with the Fourteenth Amendment. As we recalled in *Katzenbach* itself, Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must " 'consist with the letter and spirit of the constitution.' " 383 U.S., at 326, 86 S.Ct., at 817 (quoting *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)). We need not, however, resolve these troubling and difficult constitutional questions today. There is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises. See, *e.g., DeBartolo Corp. v.* ****2494** *Florida Gulf Coast Trades Council,* 485 U.S., at 575, 108 S.Ct., at 1397.

IV

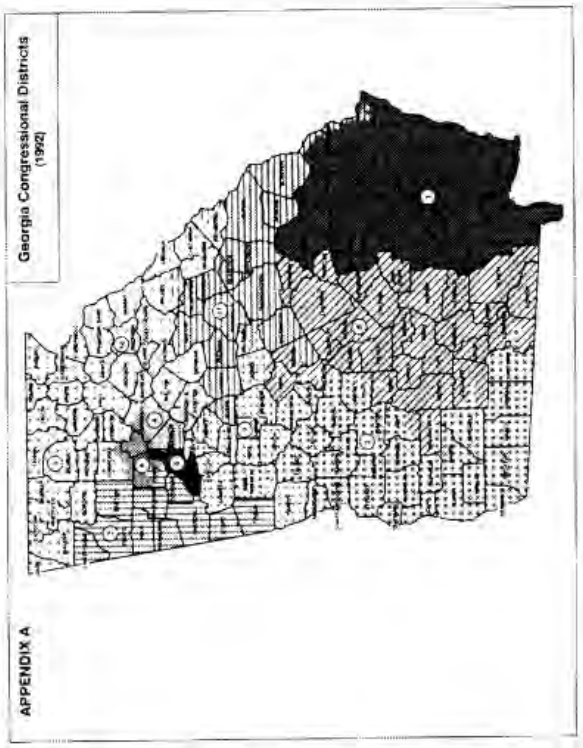
The Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. "If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 630–631, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660 (1991). It takes a shortsighted and ***928** unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

* * *

The judgment of the District Court is affirmed, and the cases are remanded for further proceedings consistent with this decision.

It is so ordered.

****2495**



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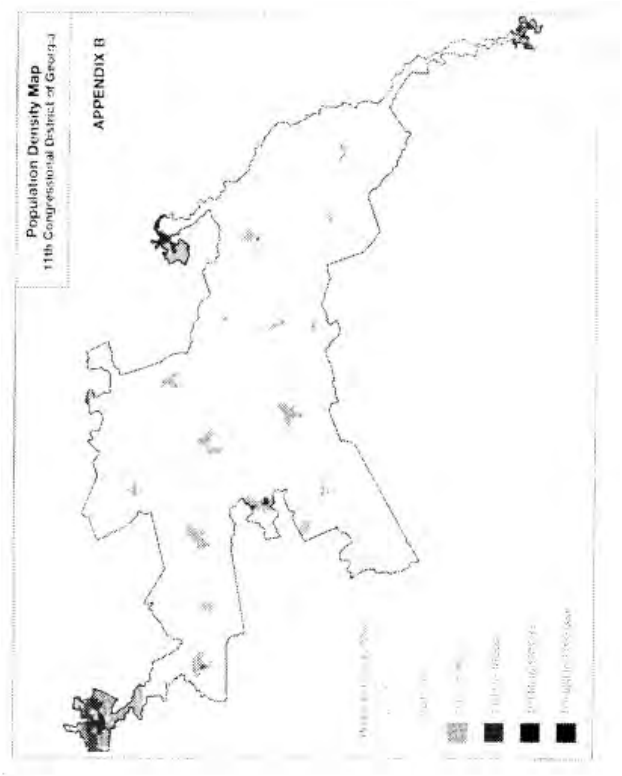


**2497 Justice O'CONNOR, concurring.

I understand the threshold standard the Court adopts—that "the legislature subordinated traditional race-neutral districting principles ... to racial considerations," *ante,* at 2488—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.

Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been *929 considered in the redistricting process. See *Shaw v. Reno,* 509 U.S. 630, 646, 113 S.Ct. 2816, 2826, 125 L.Ed.2d 511 (1993); *ante,* at 2488. But application of the Court's standard helps achieve *Shaw* 's basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.

Justice STEVENS, dissenting.

Justice GINSBURG has explained why the District Court's opinion on the merits was erroneous and why this Court's law-changing decision will breed unproductive litigation. I join her excellent opinion without reservation. I add these comments because I believe the appellees in these cases, like the appellees in *United States v. Hays,* 515 U.S. 737, 115 Ct. 2431, 132 L.Ed.2d 635, have not suffered any legally cognizable injury.

In *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the Court crafted a new cause of action with two novel, troubling features. First, the Court misapplied the term "gerrymander," previously used to describe grotesque line-drawing by a dominant group to maintain or enhance its political power at a minority's expense, to condemn the efforts of a majority (whites) to share its power with a minority (African-Americans). Second, the Court dispensed with its previous insistence in vote dilution cases on a showing of injury to an identifiable group of voters, but it failed to explain adequately what showing a plaintiff must make to establish standing to litigate the newly minted *Shaw* claim. Neither in *Shaw* itself nor in the cases decided today has the Court coherently articulated what injury this cause of action is designed to redress. Because appellees have alleged no legally cognizable injury, they lack standing, and these cases should be dismissed. See *Hays,* 515 U.S., at 750–751, 115 S.Ct., at 2439 (STEVENS, J., concurring in judgment).

Even assuming the validity of *Shaw,* I cannot see how appellees in these cases could assert the injury the Court attributes to them. Appellees, plaintiffs below, are white *930 voters in Georgia's Eleventh Congressional District. The Court's conclusion that they have standing to maintain a *Shaw* claim appears to rest on a theory that their placement in the Eleventh District caused them " 'representational harms.' " *Hays,* at 744, 115 S.Ct., at 2436, cited *ante,* at 2485. The *Shaw* Court explained the concept of "representational harms" as follows: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw,* 509 U.S., at 648, 113 S.Ct., at 2827. Although the *Shaw* Court attributed representational harms solely to a message

sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Appellees' standing, **2498 in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race " 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Ante,* at 2486 (quoting *Shaw,* 509 U.S., at 647, 113 S.Ct., at 2827). This generalization, as the Court recognizes, is "offensive and demeaning." *Ante,* at 2486.

In particular instances, of course, members of one race may vote by an overwhelming margin for one candidate, and in some cases that candidate will be of the same race. "Racially polarized voting" is one of the circumstances plaintiffs must prove to advance a vote dilution claim. *Thornburg v. Gingles,* 478 U.S. 30, 56–58, 106 S.Ct. 2752, 2769–2770, 92 L.Ed.2d 25 (1986). Such a claim allows voters to allege that gerrymandered district lines have impaired their ability to elect a candidate of their own race. The Court emphasizes, however, that a so-called *Shaw* claim is " 'analytically distinct' from a vote dilution claim," *ante,* at 2485 (quoting *Shaw,* 509 U.S., at 652, 113 S.Ct., at 2830). Neither in *Shaw,* nor in *Hays,* nor in the instant cases has the Court answered the *931 question its analytic distinction raises: If the *Shaw* injury does not flow from an increased probability that white candidates will lose, then how can the increased probability that black candidates will win cause white voters, such as appellees, cognizable harm?[1]

The Court attempts an explanation in these cases by equating the injury it imagines appellees have suffered with the injuries African-Americans suffered under segregation. The heart of appellees' claim, by the Court's account, is that "a State's assignment of voters on the basis of race," *ante,* at 2487, violates the Equal Protection Clause for the same reason a State may not "segregate citizens on the basis of race in its public parks, *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam),* buses, *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam),* golf courses, *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam),* beaches, *Mayor of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam),* and schools, *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." *Ante,* at 2486. This equation, however, fails to elucidate the elusive *Shaw* injury. Our desegregation cases redressed the *exclusion* of black citizens from public facilities reserved for whites. In these cases, in contrast, any voter, black or white, may live in the Eleventh District. What appellees contest is the *inclusion* of too many black voters in the district as drawn. In my view, if appellees allege no vote dilution, that inclusion can cause them no conceivable injury.

The Court's equation of *Shaw* claims with our desegregation decisions is inappropriate for another reason. In each of those cases, legal segregation frustrated the public interest in diversity and tolerance by barring African-Americans *932 from joining whites in the activities at issue. The districting plan here, in contrast, serves the interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates. See *post,* at 2506 (GINSBURG, J., dissenting). "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 243, 115 S.Ct., at 2120 (STEVENS, J., dissenting); see also *id.,* at 247–248, n. 5, 115 S.Ct., at 2122–2123, n. 5. That racial integration of the sort attempted by Georgia now appears more vulnerable to judicial challenge than some policies alleged to perpetuate racial bias, cf. *Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), is anomalous, to say the least.

Equally distressing is the Court's equation of traditional gerrymanders, designed to maintain or enhance a dominant group's power, with a dominant group's decision to share **2499 its power with a previously underrepresented group. In my view, districting plans violate the Equal Protection Clause when they "serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community." *Karcher v. Daggett,* 462 U.S. 725, 748, 103 S.Ct. 2653, 2668–2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring). In contrast, I do not see how a districting plan that favors a politically weak group can violate equal protection. The Constitution does not mandate any form of proportional representation, but it certainly permits a State to adopt a policy that promotes fair representation of different groups. Indeed, this Court squarely so held in *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973):

> "[N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise *933 within tolerable population limits, because it undertakes, not to

minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Id.,* at 754, 93 S.Ct., at 2332.

The Court's refusal to distinguish an enactment that helps a minority group from enactments that cause it harm is especially unfortunate at the intersection of race and voting, given that African-Americans and other disadvantaged groups have struggled so long and so hard for inclusion in that most central exercise of our democracy. See *post,* at 2500–2501 (GINSBURG, J., dissenting). I have long believed that treating racial groups differently from other identifiable groups of voters, as the Court does today, is itself an invidious racial classification. Racial minorities should receive neither more nor less protection than other groups against gerrymanders.[2] *A fortiori,* racial minorities should not be less eligible than other groups to benefit from districting plans the majority designs to aid them.

I respectfully dissent.

***934** Justice GINSBURG, with whom Justice STEVENS and Justice BREYER join, and with whom Justice SOUTER joins except as to Part III–B, dissenting.

Legislative districting is highly political business. This Court has generally respected the competence of state legislatures to attend to the task. When race is the issue, however, we have recognized the need for judicial intervention to prevent dilution of minority voting strength. Generations of rank discrimination against African–Americans, as citizens and voters, account for that surveillance.

Two Terms ago, in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), this Court took up a claim "analytically distinct" from a vote dilution claim. *Id.,* at 652, 113 S.Ct., at 2830. *Shaw* authorized judicial intervention in "extremely irregular" apportionments, *id.,* at 642, 113 S.Ct., at 2824, in which the legislature cast aside traditional districting practices to consider race alone—in the *Shaw* case, to create a district in North Carolina in which African–Americans would compose a majority of the voters.

Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours "predominant[ly] motivat[ed]" by race: "[S]trict scrutiny" will be triggered not ****2500** only when traditional districting practices are abandoned, but also when those practices are "subordinated to"—given less weight than—race. See *ante,* at 2488. Applying this new "race-as-predominant-factor" standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices. Because I do not endorse the Court's new standard and would not upset Georgia's plan, I dissent.

I

At the outset, it may be useful to note points on which the Court does not divide. First, we agree that federalism and the slim judicial competence to draw district lines weigh ***935** heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures. See *ante,* at 2488; *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination...."). Second, for most of our Nation's history, the franchise has not been enjoyed equally by black citizens and white voters. To redress past wrongs and to avert any recurrence of exclusion of blacks from political processes, federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilutes minority voting strength. See, *e.g., Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Third, to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines. See Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After *Shaw v. Reno,* 92 Mich.L.Rev. 483, 496 (1993) ("compliance with the [Voting Rights Act] and *Gingles* necessarily requires race-conscious districting"). Finally, state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together. See *Shaw,* 509 U.S., at 646, 113 S.Ct., at 2826 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Therefore, the fact that the Georgia General Assembly took account of race in drawing district lines—a fact not in dispute—does not render the State's plan invalid. To offend the Equal

Protection Clause, all agree, the legislature had to do more than consider race. How much more, is the issue that divides the Court today.

***936** A

"We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier,* 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975); see also *ante,* at 2488. The Constitution itself allocates this responsibility to States. U.S. Const., Art. I, § 2; *Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 1081, 122 L.Ed.2d 388 (1993).

"Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White v. Weiser,* 412 U.S. 783, 795–796, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335 (1973). District lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task.

B

Federal courts have ventured into the political thicket of apportionment when necessary to secure to members of racial minorities equal voting rights—rights denied in many States, including Georgia, until not long ago.

The Fifteenth Amendment, ratified in 1870, declares that the right to vote "shall not be denied ... by any State on account of ****2501** race." That declaration, for generations, was often honored in the breach; it was greeted by a near century of "unremitting and ingenious defiance" in several States, including Georgia. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). After a brief interlude of black suffrage enforced by federal troops but accompanied by rampant violence against blacks, Georgia held a constitutional convention in 1877. Its purpose, according to the convention's leader, was to " 'fix it so that the people shall rule and the Negro shall never be heard from.' " McDonald, Binford, & Johnson, Georgia, in Quiet Revolution in the South 68 (C. Davidson ***937** & B. Grofman eds. 1994) (quoting Robert Toombs). In pursuit of this objective, Georgia enacted a cumulative poll tax, requiring voters to show they had paid past as well as current poll taxes; one historian described this tax as the "most effective bar to Negro suffrage ever devised." A. Stone, Studies in the American Race Problem 354–355 (1908).

In 1890, the Georgia General Assembly authorized "white primaries"; keeping blacks out of the Democratic primary effectively excluded them from Georgia's political life, for victory in the Democratic primary was tantamount to election. McDonald, Binford, & Johnson, *supra,* at 68–69. Early in this century, Georgia Governor Hoke Smith persuaded the legislature to pass the "Disenfranchisement Act of 1908"; true to its title, this measure added various property, "good character," and literacy requirements that, as administered, served to keep blacks from voting. *Id.,* at 69; see also *Katzenbach,* 383 U.S., at 310, 86 S.Ct., at 809 (tests of this order were "specifically designed to prevent Negroes from voting"). The result, as one commentator observed 25 years later, was an " 'almost absolute exclusion of the Negro voice in state and federal elections.' " McDonald, Binford, & Johnson, *supra,* at 70 (quoting R. Wardlaw, Negro Suffrage in Georgia, 1867–1930, p. 69 (unpublished 1932)).

Faced with a political situation scarcely open to self-correction—disenfranchised blacks had no electoral influence, hence no muscle to lobby the legislature for change—the Court intervened. It invalidated white primaries, see *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and other burdens on minority voting. See, *e.g., Schnell v. Davis,* 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949) *(per curiam)* (discriminatory application of voting tests); *Lane v. Wilson,* 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) (procedural hurdles); *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915) (grandfather clauses).

It was against this backdrop that the Court, construing the Equal Protection Clause, undertook to ensure that apportionment ***938** plans do not dilute minority voting strength. See, *e.g., Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Wright v. Rockefeller,* 376 U.S. 52, 57, 84 S.Ct. 603, 605–606, 11 L.Ed.2d 512 (1964). By enacting the Voting Rights Act of 1965, Congress heightened federal judicial involvement in apportionment, and also fashioned a role for the Attorney General. Section 2 creates a federal right of action to challenge vote dilution. Section 5 requires States with a history of discrimination

to preclear any changes in voting practices with either a federal court (a three-judge United States District Court for the District of Columbia) or the Attorney General.

These Court decisions and congressional directions significantly reduced voting discrimination against minorities. In the 1972 election, Georgia gained its first black Member of Congress since Reconstruction, and the 1981 apportionment created the State's first majority-minority district.[1] This voting district, however, was not gained easily. Georgia created it only after the United States District Court for the District of Columbia refused to preclear a predecessor apportionment plan that included no such district—an omission due in part to the influence of Joe Mack Wilson, then Chairman of the Georgia House Reapportionment Committee. ****2502** As Wilson put it only 14 years ago, " 'I don't want to draw nigger districts.' " *Busbee v. Smith,* 549 F.Supp. 494, 501 (DC 1982).

II

A

Before *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), this Court invoked the Equal Protection Clause to justify intervention in the quintessentially political task of legislative districting in two circumstances: to enforce the one-person-one-vote requirement, see *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); and ***939** to prevent dilution of a minority group's voting strength, see *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Wright,* 376 U.S., at 57, 84 S.Ct., at 605–606.[2]

In *Shaw,* the Court recognized a third basis for an equal protection challenge to a State's apportionment plan. The Court wrote cautiously, emphasizing that judicial intervention is exceptional: "Strict judicial scrutiny" is in order, the Court declared, if a district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 509 U.S., at 642, 113 S.Ct., at 2824.

"[E]xtrem[e] irregular[ity]" was evident in *Shaw,* the Court explained, setting out this description of the North Carolina voting district under examination:

> "It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods. Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that ' "[i]f you drove down the interstate with both car ***940** doors open, you'd kill most of the people in the district." ' Washington Post, Apr. 20, 1993, p. A4. The district even has inspired poetry: 'Ask not for whom the line is drawn; it is drawn to avoid thee.' Grofman, Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the *Only* Thing'?, 14 Cardozo L.Rev. 1237, 1261, n. 96 (1993) (internal quotation marks omitted)." *Shaw,* Id., at 635–636, 113 S.Ct., at 2820–2821 (some citations and internal quotation marks omitted).

The problem in *Shaw* was not the plan architects' consideration of race as relevant in redistricting. Rather, in the Court's estimation, it was the virtual exclusion of other factors from the calculus. Traditional districting practices were cast aside, the Court concluded, with race alone steering placement of district lines.

B

The record before us does not show that race similarly overwhelmed traditional districting practices in Georgia. Although the Georgia General Assembly prominently considered race in shaping the Eleventh District, race did not crowd out all other factors, as the Court found it did in North Carolina's delineation of the *Shaw* district.

In contrast to the snake-like North Carolina district inspected in *Shaw,* Georgia's Eleventh District is hardly "bizarre," "extremely irregular," or "irrational on its face." ****2503** *Id.,* at 642, 644, 658, 113 S.Ct., at 2824, 2825, 2848. Instead, the Eleventh District's design reflects significant consideration of "traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial

reasons." 864 F.Supp. 1354, 1397, n. 5 (SD Ga.1994) (Edmondson, J., dissenting); cf. *ante,* at 2489 ("geometric shape of the Eleventh District may not seem bizarre on its face"). The district covers a core area in central and eastern ***941** Georgia, and its total land area of 6,780 square miles is about average for the State. Defendant's Exh. 177, p. 4.[3] The border of the Eleventh District runs 1,184 miles, in line with Georgia's Second District, which has a 1,243–mile border, and the State's Eighth District, with a border running 1,155 miles. See 864 F.Supp., at 1396 (Edmondson, J., dissenting).[4]

Nor does the Eleventh District disrespect the boundaries of political subdivisions. Of the 22 counties in the district, 14 are intact and 8 are divided. See Joint Exh. 17. That puts the Eleventh District at about the state average in divided counties. By contrast, of the Sixth District's five counties, none are intact, *ibid.,* and of the Fourth District's four counties, just one is intact. *Ibid.*[5] Seventy-one percent of the Eleventh District's boundaries track the borders of political subdivisions. See 864 F.Supp., at 1396 (Edmondson, J., dissenting). Of the State's 11 districts, 5 score worse than the Eleventh District on this criterion, and 5 score better. ***942** See Defendant's Exh. 177, p. 4.[6] Eighty-three percent of the Eleventh District's geographic area is composed of intact counties, above average for the State's congressional districts. 864 F.Supp., at 1396 (Edmondson, J., dissenting).[7] And notably, the Eleventh District's boundaries largely follow precinct lines.[8]

Evidence at trial similarly shows that considerations other than race went into determining the Eleventh District's boundaries. For a "political reason"—to accommodate the request of an incumbent State Senator regarding the placement of the precinct in which his son lived—the DeKalb County portion of the Eleventh District was drawn to include a particular (largely white) precinct. 2 Tr. 187, 202. The corridor through Effingham County was substantially narrowed at the request of a (white) State Representative. 2 Tr. 189–190, 212–214. In Chatham County, the district was trimmed to exclude ****2504** a heavily black community in Garden City because a State Representative wanted to keep the city intact inside the neighboring First District. 2 Tr. 218–219. The Savannah extension was configured by "the narrowest means possible" to avoid splitting the city of Port Wentworth. 4 Tr. 172–174, 175–178, 181–183.

***943** Georgia's Eleventh District, in sum, is not an outlier district shaped without reference to familiar districting techniques. Tellingly, the district that the Court's decision today unsettles is not among those on a statistically calculated list of the 28 most bizarre districts in the United States, a study prepared in the wake of our decision in *Shaw.* See Pildes & Niemi, 92 Mich.L.Rev., at 565.

The Court suggests that it was not Georgia's Legislature, but the U.S. Department of Justice, that effectively drew the lines, and that Department officers did so with nothing but race in mind. Yet the "Max–Black" plan advanced by the Attorney General was not the plan passed by the Georgia General Assembly.[9] See 864 F.Supp., at 1396–1397, n. 5 (Edmondson, J., dissenting) ("The Max–Black plan did influence to some degree the shape of the ultimate Eleventh District.... [But] the actual Eleventh is *not* identical to the Max–Black plan. The Eleventh, to my eye, is significantly different in shape in many ways. These differences show ... consideration of other matters beyond race....").[10]

And although the Attorney General refused preclearance to the first two plans approved by Georgia's Legislature, the State was not thereby disarmed; Georgia could have demanded relief from the Department's objections by instituting a civil action in the United States District Court for the District of Columbia, with ultimate review in this Court. Instead of pursuing that avenue, the State chose to adopt the plan here in controversy—a plan the State forcefully defends ***944** before us. We should respect Georgia's choice by taking its position on brief as genuine.

D

Along with attention to size, shape, and political subdivisions, the Court recognizes as an appropriate districting principle, "respect for ... communities defined by actual shared interests." *Ante,* at 2488. The Court finds no community here, however, because a report in the record showed "fractured political, social, and economic interests within the Eleventh District's black population." *Ante,* at 2490.

But ethnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life. As stated in a classic study of ethnicity in one city of immigrants:

> "[M]any elements—history, family and feeling, interest, formal organizational life—operate to keep much of New York life channeled within the bounds of the ethnic group....
>
> "... The political realm ... is least willing to consider [ethnicity] a purely private affair....
>
> . . . . .
>
> "[P]olitical life itself emphasizes the ethnic character of the city, with its balanced tickets and its special appeals...." N. Glazer & D. Moynihan, Beyond the Melting Pot 19–20 (1963).

See also, *e.g.,* E. Litt, Beyond Pluralism: Ethnic Politics in America 2 (1970) ("[E]thnic forces play a surprisingly persistent role in our politics."); Ethnic Group Politics, Preface ix (H. Bailey & E. Katz eds. 1969) ("[E]thnic identifications do exist and ... one cannot really understand the American political ****2505** process without giving special attention to racial, religious and national minorities.").

To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our ***945** Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example. See, *e.g.,* S. Erie, Rainbow's End: Irish–Americans and the Dilemmas of Urban Machine Politics, 1840–1985, p. 91 (1988) (describing Jersey City's "Horseshoe district" as "lumping most of the city's Irish together"); Coveted Landmarks Add a Twist to Redistricting Task, Los Angeles Times, Sept. 10, 1991, pp. A1, A24 ("In San Francisco in 1961, ... an Irish Catholic [State Assembly member] 'wanted his district drawn following [Catholic] parish lines so all the parishes where he went to baptisms, weddings and funerals would be in his district'...."); Stone, Goode: Bad and Indifferent, Washington Monthly, July–Aug. 1986, pp. 27, 28 (discussing "The Law of Ethnic Loyalty— ... a universal law of politics," and identifying "predominantly Italian wards of South Philadelphia," a "Jewish Los Angeles district," and a "Polish district in Chicago"). The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.

III

To separate permissible and impermissible use of race in legislative apportionment, the Court orders strict scrutiny for districting plans "predominantly motivated" by race. No longer can a State avoid judicial oversight by giving—as in this case—genuine and measurable consideration to traditional districting practices. Instead, a federal case can be mounted whenever plaintiffs plausibly allege that other factors carried less weight than race. This invitation to litigate against the State seems to me neither necessary nor proper.

A

The Court derives its test from diverse opinions on the relevance of race in contexts distinctly unlike apportionment. ***946** See *ante,* at 2485–2486.[11] The controlling idea, the Court says, is " 'the simple command [at the heart of the Constitution's guarantee of equal protection] that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.' " See *ante,* at 2485 (quoting *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting)) (some internal quotation marks omitted). But cf. *Strauder v. West Virginia,* 100 U.S. 303, 307, 25 L.Ed. 664 (1880) (pervading purpose of post-Civil ****2506** War Amendments was to bar discrimination against once-enslaved race).

***947** In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then "reconcile the competing claims of [these] groups." *Davis v. Bandemer,* 478 U.S. 109, 147, 106 S.Ct. 2797, 2818, 92 L.Ed.2d 85 (1986) (O'CONNOR, J., concurring in judgment).

That ethnicity defines some of these groups is a political reality. Until now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices. See *supra,* at 2504–2505. If Chinese–Americans and Russian–Americans may seek and secure group recognition in the delineation of voting districts, then African–Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause." See *Shaw,* 509 U.S., at 679, 113 S.Ct., at 2845 (STEVENS, J., dissenting).[12]

B

Under the Court's approach, judicial review of the same intensity, *i.e.,* strict scrutiny, is in order once it is determined that an apportionment is predominantly motivated by race. It matters not at all, in this new regime, whether the apportionment dilutes or enhances minority voting strength. As very recently observed, however, "[t]here is no moral or ***948** constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 243, 115 S.Ct., at 2120 (STEVENS, J., dissenting).

Special circumstances justify vigilant judicial inspection to protect minority voters—circumstances that do not apply to majority voters. A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. See *supra,* at 2500–2502. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. Cf. *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 783, n. 4, 82 L.Ed. 1234 (1938) (referring to the "more searching judicial inquiry" that may properly attend classifications adversely affecting "discrete and insular minorities"). The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislators. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests.

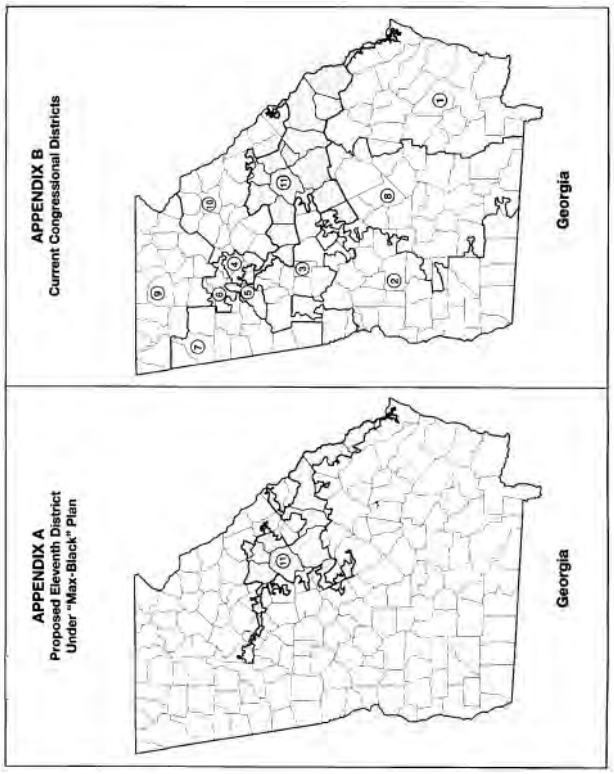
State legislatures like Georgia's today operate under federal constraints imposed by the Voting Rights Act—constraints justified by history and designed by Congress to make once-subordinated people free and equal citizens. But these federal constraints do not leave majority voters in need of extraordinary judicial solicitude. The Attorney General, who administers the Voting Rights Act's preclearance requirements, is herself a political actor. She has a duty to enforce the law Congress passed, and she is no doubt aware of the political cost of venturing too far to the detriment of majority voters. Majority voters, furthermore, can press the State to seek judicial review if the Attorney General refuses to preclear a plan that the voters favor. Finally, the Act is itself a political measure, subject to modification in the political process.

****2507** ***949** C

The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines. See *supra,* at 2500. But today's decision is a counterforce; it opens the way for federal litigation if "traditional ... districting principles" arguably were accorded less weight than race. See *ante,* at 2488. Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw,* to provide a safe harbor. See 509 U.S., at 647, 113 S.Ct., at 2827 ("[T]raditional districting principles such as compactness, contiguity, and respect for political subdivisions ... are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."). In view of today's decision, that is no longer the case.

Only after litigation—under either the Voting Rights Act, the Court's new *Miller* standard, or both—will States now be assured that plans conscious of race are safe. Federal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted. The reapportionment plan that resulted from Georgia's political process merited this Court's approbation, not its condemnation. Accordingly, I dissent.

****2508**



**2509

All Citations

515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762, 63 USLW 4726, 95 Daily Journal D.A.R. 8495, 95 Daily Journal D.A.R. 8496, 95 Daily Journal D.A.R. 8504, 95 Daily Journal D.A.R. 8506

Footnotes

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

* See 864 F.Supp. 1354, 1361 (SD Ga.1994) (quoting Rep. Tyrone Brooks, who recalled on the Assembly Floor that " 'the Attorney General ... specifically told the states covered by the Act that wherever possible, you must draw majority black districts, wherever possible' "); *id.,* at 1362–1363, and n. 4 (citing 3 Tr. 23–24: Assistant Attorney General answering "Yes" to question whether "the Justice Department did take the position in a number of these cases, that if alternative plans demonstrated that more minority districts could be drawn than the state was proposing to draw ... that did, in fact, violate Section 2 of the Voting Rights Act?"); 864 F.Supp., at 1365–1366; *id.,* at 1366, n. 11 ("[I]t became obvious that [the Justice Department] would accept nothing less than abject surrender to its maximization agenda"); *id.,* at 1368 ("It apparently did not occur to [the Justice Department] that increased 'recognition' of minority voting strength, while perhaps admirable, is properly tempered with other districting considerations"); *id.,* at 1382–1383 (expressing doubts as to the constitutionality of [the Justice Department's] " 'maximization' policy"); *id.,* at 1383, n. 35 (citing other courts that have "criticize[d] [the Justice Department's] maximization propensities").

1 White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw:* the stigma blacks supposedly suffer when assigned to a district because of their race. See *Hays,* 515 U.S., at 744, 115 S.Ct., at 2436; cf. *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 247–248, n. 5, 115 S.Ct., at 2122–2123, n. 5 (STEVENS, J., dissenting).

2 "In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in

the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." *Cousins v. City Council of Chicago,* 466 F.2d 830, 852 (CA7 1972) (Stevens, J., dissenting).

1 Georgia's population is approximately 27 percent black. 864 F.Supp. 1354, 1385 (SD Ga.1994).

2 In the vote dilution category, *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), was a pathmarker. There, the city of Tuskegee redrew its boundaries to exclude black voters. This apportionment was unconstitutional not simply because it was motivated by race, but notably because it had a dilutive effect: It disenfranchised Tuskegee's black community. See *id.,* at 341, 81 S.Ct., at 127 ("The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections.").

3 Georgia's First, Second, and Eighth Districts each have a total area of over 10,100 square miles. 864 F.Supp., at 1396 (Edmondson, J., dissenting).

4 Although the Eleventh District comes within 58 miles of crossing the entire State, this is not unusual in Georgia: The Ninth District spans the State's entire northern border, and the First, Second, and Eighth Districts begin at the Florida border and stretch north to almost the middle of the State. See *ibid.* (Edmondson, J., dissenting). In the 1980's, Georgia's Eighth District extended even farther, in an irregular pattern from the southeast border with Florida to nearly the Atlanta suburbs. See App. 80.

5 The First District has 20 intact counties and parts of 2 others. The Second District has 23 intact counties and parts of 12 others. The Third District has 8 intact counties and parts of 8 others. The Fifth District is composed of parts of 4 counties. The Seventh District has 10 intact counties and part of 1 county. The Eighth District has 22 intact counties and parts of 10 others. The Ninth District has 19 intact counties and part of 1 other. The Tenth District has 16 intact counties and parts of 3 others. See Joint Exh. 17.

6 The Sixth District scores lowest, with just 45 percent of its boundaries following political subdivision lines. The Ninth District rates highest, with 91 percent. Defendant's Exh. 177, p. 3.

7 On this measure, only three districts—the First, Seventh, and Ninth—rate higher than the Eleventh District. Excluding the Fifth and Sixth Districts, which contain no intact counties, the scores range from about 30 percent for the Fourth District to 97 percent for the Seventh District. *Id.,* at 4.

8 The Court turns the significance of this fact on its head by stating: " 'While the boundaries of the Eleventh do indeed follow many precinct lines, this is because Ms. Meggers designed the Eleventh District along racial lines, and race data was most accessible to her at the precinct level.' " *Ante,* at 2490 (quoting 864 F.Supp., at 1384). To this curious comment, one can only demur. Yes, Georgia's plan considered race, but by following precinct lines, it did so in an altogether proper way, *i.e.,* without disregarding traditional districting practices.

9 Appendixes A, B, and C to this opinion depict, respectively, the proposed Eleventh District under the "Max–Black" plan, Georgia's current congressional districts, and the district in controversy in *Shaw.*

10 Indeed, a "key" feature, *ante,* at 2484, of the "Max–Black" plan—placing parts of Savannah in the Eleventh District—first figured in a proposal adopted by Georgia's Senate even before the Attorney General suggested this course. 864 F.Supp., at 1394, n. 1 (Edmondson, J., dissenting).

11 I would follow precedent directly on point. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) *(UJO),* even though the State "deliberately used race in a purposeful manner" to create majority-minority districts, *id.,* at 165, 97 S.Ct., at 1010 (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.), seven of eight Justices participating voted to uphold the State's plan without subjecting it to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that the districting diluted the majority's voting strength. See *ibid.* (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.); *id.,* at 179–180, 97 S.Ct., at 1016–1017 (Stewart, J., concurring in judgment, joined by Powell, J.).

Nor is *UJO* best understood as a vote dilution case. Petitioners' claim in *UJO* was that the State had "violated the Fourteenth and Fifteenth Amendments by *deliberately revising its reapportionment plan along racial lines.*" *Id.,* at 155, 97 S.Ct., at 1005 (opinion of White, J., joined by Brennan, Blackmun, and STEVENS, JJ.) (emphasis added). Petitioners themselves stated: " 'Our argument is ... that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.' " *Id.,* at 154, n. 14, 97 S.Ct., at 1004, n. 14 (quoting Brief for Petitioners, O.T. 1976, No. 75–104, p. 6, n. 6) (emphasis in Brief for Petitioners).

Though much like the claim in *Shaw,* the *UJO* claim failed because the *UJO* district adhered to traditional districting practices. See 430 U.S., at 168, 97 S.Ct., at 1011 (opinion of White, J., joined by REHNQUIST and STEVENS, JJ.) ("[W]e think it ... permissible for a State, *employing sound districting principles such as compactness and population equality,* ... [to] creat[e] districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity of creating districts* in which they will be in the majority.") (emphasis added).

12 Race-conscious practices a State may elect to pursue, of course, are not as limited as those it may be required to pursue. See *Voinovich v. Quilter,* 507 U.S. 146, 156, 113 S.Ct. 1149, 1156, 122 L.Ed.2d 500 (1993) ("[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true....") (citation omitted).

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462 F.Supp.3d 368
United States District Court, S.D. New York.

NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED PEOPLE, SPRING VALLEY BRANCH; Julio Clerveaux; Chevon Dos Reis; Eric Goodwin; Jose Vitelio Gregorio; Dorothy Miller; and Hillary Moreau, Plaintiffs,

v.

EAST RAMAPO CENTRAL SCHOOL DISTRICT, Defendant.

No. 17-CV-8943 (CS)
|
Signed 05/25/2020

Synopsis
Background: Interest group and minority registered voters brought action against school district, alleging that the election system that school district used to elect members of its board of education resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA).

Holdings: The District Court, Cathy Seibel, J., held that:

[1] population of Black and Latino voters in school district was sufficiently large and geographically compact to constitute a majority in at least one single-member district under a ward system;

[2] district's Black and Latino communities were politically cohesive, and white majority voted sufficiently as a bloc to enable it usually to defeat minority-preferred candidates;

[3] election system through which a bloc of white Orthodox and Hasidic Jewish voters were usually able to defeat preferred candidates of Black and Latino minority voters resulted in minority vote dilution in violation of VRA; and

[4] school district was enjoined from holding any further elections under its at-large system, and was ordered to propose a compliant remedial plan that divided the district into nine voting wards – one for each board seat.

Injunction ordered.

West Headnotes (32)

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

To establish that the minority vote is diluted in violation of the Voting Rights Act of 1965, a plaintiff must show that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Lack of electoral success is evidence of vote dilution under Voting Rights Act of 1965 (VRA), but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

If a plaintiff satisfies preconditions to a minority vote dilution claim under Voting Rights Act of 1965 (VRA), the court must then examine the totality of the circumstances, including by assessing the following non-exclusive factors: (1) the history of voting-related discrimination in the political subdivision, (2) the extent to which voting is racially polarized, (3) the extent to which voting practices enhance the opportunity for discrimination, (4) the exclusion of members of the minority group from candidate slating processes, (5) the extent to which minority group

members bear the effects of past discrimination in areas such as education, employment, and health, (6) the use of overt or subtle racial appeals in political campaigns, and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction, as well as two factors that might have probative value in some cases: (8) the responsiveness of elected officials to the needs of the minority community and (9) whether the policy underlying the use of the contested practice or structure is tenuous. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

1 Case that cites this headnote

[4] **Election Law** Weight and sufficiency

Plaintiffs alleging a minority vote dilution claim under Voting Rights Act of 1965 (VRA) must prove preconditions and vote dilution under the totality of the circumstances by a preponderance of the evidence. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Voting Rights Act of 1965 (VRA) does not confer on blacks and Latinos a right to be elected in numbers equal to their proportion in the population or insulate minority candidates from defeat at the polls. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

A violation of the Voting Rights Act of 1965 (VRA) can be proved by showing discriminatory effect alone, without showing a specific intent to discriminate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Diverse minority groups can be combined to meet litigation requirements under Voting Rights Act of 1965 (VRA), provided they are shown to be politically cohesive. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[8] **Education** Redistricting; Voting Rights Act

Population of Black and Latino voters in school district was sufficiently large and geographically compact to constitute a majority in at least one single-member district under a ward system, supporting claim that election system that school district used to elect members of its board of education resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA); demography expert demonstrated that it was possible to create three majority-Black districts or four, if Black and Latinos were combined, and Black and Latino voters were voting cohesively. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Where a significant number of minority group members usually vote for the same candidates, the minority group is politically cohesive and satisfies precondition for establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

[10] **Election Law** Weight and sufficiency

Plaintiffs can rely on both statistical and anecdotal evidence to show political cohesion as required to establish precondition for establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[11] **Election Law** Weight and sufficiency

Whether a candidate is minority preferred, for purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA),

cannot be proven by anecdotal evidence but rather only by statistical evidence showing that a candidate received support from more than 50% of minority voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

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

Evidence of minority candidates' success does not necessarily negate a finding of bloc voting for purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA), particularly if elections are shown usually to be polarized or the success of minority candidates in particular elections can be explained by special circumstances, such as the absence of an opponent or incumbency. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

For purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA), a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. a minority vote dilution claim under Voting Rights Act of 1965 (VRA).

[14] **Education** Redistricting; Voting Rights Act

School district's Black and Latino communities were politically cohesive, and white majority voted sufficiently as a bloc to enable it usually to defeat minority-preferred candidates, supporting claim that election system that school district used to elect members of its board of education resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA); while voters did not self-report their race, plaintiffs' experts used ecological statistical models to estimate racial voting patterns, relying on software that used individual-level data, including a voter's surname, geographic location, and the racial composition of the voter's census tract or block to generate the probability that an individual belonged to a racial particular group, and witnesses anecdotally perceived minority cohesion and a large white voting bloc. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

1 Case that cites this headnote

[15] **Education** Redistricting; Voting Rights Act

Election system that school district used to elect members of its board of education, through which a bloc of white Orthodox and Hasidic Jewish voters were usually able to defeat preferred candidates of politically cohesive Black and Latino minority voters who were numerous enough to constitute a majority in as many as four single-member districts, resulted in minority vote dilution in violation of the Voting Rights Act of 1965 (VRA); voting was highly racially polarized in a community where public school students were almost all black or Latino and students attending private schools were almost all white, district held at-large, staggered, off-cycle elections with numbered posts, slating organization in the white, private school community consistently guaranteed election outcomes, victories by candidates of color were arranged by slating organization for the sake of appearance, numerous board decisions privileged private school interests or harmed public education, and some board members had tenuous reasons for wanting to maintain status quo. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

For purposes of establishing a minority vote dilution claim under Voting Rights Act of 1965 (VRA), whether a white voting bloc may be explained as an expression of political partisanship is properly considered under factor requiring the court to consider the extent to which voting is racially polarized, but the fact

that divergent voting patterns may logically be explained by a factor other than race does not end the inquiry, nor does it require plaintiffs to prove racial bias in community. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

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

Even where there is a strong correlation between political partisanship and the voting behavior of Blacks and Whites, plaintiffs can still prevail on a minority vote dilution claim under Voting Rights Act of 1965 (VRA) under the totality of the circumstances where minority voters' failure to elect representatives of their choice is not best explained by partisan politics. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

An inference of racial animus is unnecessary to establish a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

A possible race-neutral explanation for racial polarization is not dispositive of a minority vote dilution claim under Voting Rights Act of 1965 (VRA); possible explanations other than race are considered as one aspect of the totality of the circumstances. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

In considering a minority vote dilution claim under Voting Rights Act of 1965 (VRA), it is proper to explore whether white support for minority candidates can be explained as manipulating the election of a "safe" minority candidate, or by other special circumstances; the issue is not simply whether a candidate is a member of a minority community, but whether the candidate is minority preferred, because if a successful minority candidate is not minority preferred, that is evidence of racial polarization, not the lack thereof. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

2 Cases that cite this headnote

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

A system that provides only a theoretical avenue for minority candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate contributes to a minority vote dilution violation under the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

In considering the factor asking whether members of the minority group have been denied access to any candidate slating process, for purposes of a minority vote dilution claim under Voting Rights Act of 1965 (VRA), a "slating" organization that selects and endorses a group or slate of candidates can be formal or informal. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Where minority voters do not have any choice in determining what issues or candidates should or should not be endorsed by the slating organization, the slating process is racially exclusive, supporting a minority vote dilution claim under Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

For purposes of a minority vote dilution claim under Voting Rights Act of 1965 (VRA), a racially exclusive slating process is not made inclusive by the selection and election of a few minority candidates who may not be true representatives of the minority population. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

In considering whether members of the minority group have been denied access to any candidate slating process, for purposes of a minority vote dilution claim under Voting Rights Act of 1965 (VRA), the question is not simply whether minority candidates get on the ballot, but whether minorities have any substantial input into the slating process. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Where minority group members suffer effects of prior discrimination and the level of minority participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation to establish a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA); rather, the burden falls to defendant to show that the cause is something else. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Appeals in political campaigns can be racial, supporting a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA), when they operate on heightened racial tension, or when a candidate sends campaign materials to white constituents that suggest that an opponent is a person of color. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Racial appeals in political campaigns need not be permanent or pervasive to support a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

The election of a few minority candidates does not necessarily foreclose the possibility of dilution of the minority vote in violation of the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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

Special circumstances surrounding minority elections, such as unopposed races and appointment prior to election, weigh against a finding of minority success in elections in an action alleging minority vote dilution under the Voting Rights Act of 1965 (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[31] **Election Law** Weight and sufficiency

In some cases, evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group has probative value to establish a claim for minority vote dilution under the Voting Rights Act of 1965 (VRA); "unresponsiveness" includes failure to respond to complaints of racial discrimination, failure to identify concerns of the minority community, scarcity of outreach sessions in the minority community, failure to respond to unequal school resources and disparate discipline and educational opportunities, and failure to provide

bilingual translations of official forms. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[32] Injunction Redistricting and reapportionment

Upon successful claim of minority vote dilution in violation of Voting Rights Act of 1965 (VRA), occurring as a result of at-large election system used by school district wherein a bloc of white Orthodox and Hasidic Jewish voters were usually able to defeat preferred candidates of Black and Latino minority voters who were numerous enough to constitute a majority in as many as four single-member districts, district court would enjoin school district from holding any further elections under its at-large system, including the elections currently scheduled, and order school district to propose a compliant remedial plan that divided the district into nine voting wards – one for each board seat. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

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DECISION AND ORDER

Seibel, J.

1. This case involves a challenge to the election system that the East Ramapo Central School District (the "District") uses to elect members of its Board of Education (the "Board"). Plaintiffs allege that the election system results in vote dilution – that is, that it affords black and Latino residents "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," ***374** *Thornburg v. Gingles*, 478 U.S. 30, 36, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (internal quotation marks omitted) – in violation of section 2 of the Voting Rights Act of 1965 ("VRA" or the "Act"), which provides, in pertinent part, that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 52 U.S.C. § 10301(a) ("Section 2"). Following a bench trial held on January 22, February 10-14, 18-21, and 24-27, and March 3, 5, and 24, 2020, I make the following findings of fact and conclusions of law.

I. BACKGROUND

A. Plaintiffs

2. Plaintiff National Association for the Advancement of Colored People, Spring Valley Branch ("NAACP") is a racial justice organization that includes District residents. (PX 288 ¶ 3.)[1]

3. Plaintiffs Julio Clerveaux, Chevon Dos Reis, Eric Goodwin, and Dorothy Miller are minority registered voters in the District.[2] In 2017, Dos Reis and Goodwin ran for the Board and believe they were supported by the "public school community," a group of residents interested in improving public schools after past budget cuts. Both lost to white candidates by a margin of approximately 5,000 votes. (PX 279 ¶¶ 25, 64 (Dos Reis); PX 281 ¶¶ 23, 59 (Goodwin); JPTO at 10.) Since 2008, every candidate for whom Dos Reis, Clerveaux, Goodwin, and Miller voted in a contested Board election lost. (PX 279 ¶ 11 (Dos Reis); PX 280 ¶ 9 (Clerveaux); PX 281 ¶ 9 (Goodwin); PX 282 ¶ 11 (Miller).)

B. Defendant

4. The District is a "highly segregated," (Tr. at 514:17-20 (Cooper)),[3] political subdivision of New York State located in Rockland County that in the 2017-2018 school year served approximately 8,843 public school students at fourteen schools and approximately 29,279 private school students, (JPTO at 4; PX 372 ¶ 24).[4] The District's population is approximately 65.7% white, 19.1% black, 10.7% Latino, and 3.3% Asian. (PX 244A ¶ 4.)[5] Most white residents live in

majority-white neighborhoods, and most minority residents live in majority-minority neighborhoods, according to data from the American Community Survey, which is a survey of 2% of households performed by the Census Bureau every year for five years, generating results for 10% of U.S. households. ***375** (Tr. at 256:14-257:7 (Barreto).)[6] Of the white residents in the District, 69.4% live in block groups that are 80% or more white and 33.03% live in block groups that are 95% or more white. Of the minority residents in the District – who are concentrated in and around Hillcrest, Spring Valley, and Nanuet – 55.7% live in block groups that are 83.6% to 98.2% minority. (PX 244A ¶¶ 28-29 & fig.8; *id.* ¶¶ 32-33 & fig.9; *see* Tr. at 512:7-23; 514:14-16 (Cooper).) A "block group" is a collection of several blocks. (*See* note 17 below.)

5. Public school students are almost all black or Latino (92%), and students attending private schools located in the District are almost all white (98%). (JPTO at 4; PX 372 ¶ 24.)[7] Most witnesses acknowledged the existence of a "private school community," consisting of white Orthodox and Hasidic Jews who educate their children in yeshivas, and a "public school community," consisting of all races but primarily black and Latino persons, and virtually all witnesses involved in District elections used those terms. (Tr. at 612:15-614:6 (Castor); *id.* at 1238:11-14 (Germain); *id.* at 2560:11-14 (Charles-Pierre); PX 257 at 191:18-192:2 (Russell); PX 286 ¶ 12 (Price); PX 279 ¶ 58 (Dos Reis); Tr. at 655:25-656:10, 657:17-20 (same); PX 283 ¶¶ 40-41, 67 (Fields); PX 281 ¶¶ 20, 62 (Goodwin); PX 282 ¶¶ 11-15 (Miller); PX 288 ¶¶ 9, 37 (Trotman); Tr. at 1373:20-22 (same); *see* Tr. at 725:5-16, 730:14-17 (Board member Joel Freilich identifying himself as member of "private school community" and someone else as member of "public school community"); *id.* at 997:1-6 (Rabbi Hersh Horowitz discussing "private" and "public school community" vote totals); *id.* at 1896:6-24 (former Board member Suzanne Young-Mercer was on "public school team" but received support from "private school community" including Orthodox and Hasidic voters); *id.* at 1942:5-21 (public school advocate Oscar Cohen identifying public school community as "people of all races" and private school community as Orthodox and ultra-Orthodox); *id.* at 1082:15-18 (Board member Yehuda Weissmandl using term "public school community"); *id.* at 1523:12-14 (Board member Harry Grossman acknowledging "public school advocates" spoke at Board meetings); *id.* at 2479:10-24 (influential community leader Rabbi Yehuda Oshry vetted candidates by ensuring they would be responsive to needs of "Jewish community besides the public school").)

6. The District is governed by nine Board members whose responsibilities include selecting the Superintendent of Schools and approving District personnel, setting a budget and levying taxes, establishing District policies, and evaluating and communicating the "progress and needs of the District to the community, educational governing boards and legislators." (PX 259 ***376** at 1; JPTO at 5.)[8] To register to vote in elections for Board members and to vote on the annual school budget and other ballot referenda in the District, a person must be a United States citizen, a resident of the District for at least thirty days, eighteen years of age or older, and either registered for District elections or registered to vote in general elections in Rockland County. (JPTO at 5.) Board elections are not held with other local, state, or federal elections (that is, they are off cycle), and they are staggered such that three seats – each having a three-year term – are open each year (although on occasion an extra seat will be open if a Board member resigns, dies, or is removed). (*Id.*) Each candidate runs for an individual numbered seat that is elected at large, meaning that all eligible voters in the District cast votes in each race. (*Id.*)[9] Candidates can reside anywhere in the District. (PX 257 at 38:5-8.)

7. A table summarizing the results of Board elections from 2008 through 2018 is set out below, including the year, the candidates, the candidates' races ("W" indicating white, "B" indicating black, and "L" indicating Latino), and the number of votes each received.

Table 1: Summary of Board Elections: 2008-2018. (JPTO at 12 tbl.1.)

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Yr.	Seat 1			Seat 2			Seat 3			Seat 4	TOTAL VOTE COUNT
2008	Aaron Wieder (W) (6,261)*	Steve White (W) (2,415)		Moshe Hopstein (W) (6,533)*			Nathan Rothschild (W) (5,103)*				9,163
2009	Morris Kohn (W) (8,768)*	Leonardo Vera (L) (4,548)		Carolyn Watson (W) (366)	Margaret Hatton (W) (4,236)	Eliyahu Solomon (W) (8,578)*	Emilia White (B) (4,149)	Richard Stone (W) (9,224)*			13,708
2010	Antonio Luciano (W) (7,622)	Moses Freidman (W) (7,926)*		Stephen Price (W) (13,612)*			Suzanne Young-Mercer (B) (13,839)*				16,056
2011	Moshe Hopstein (W) (9,904)*	M. Hatton (W) (7,907)		Yehuda Weissmandl (W) (9,923)*	A. Luciano (W) (7,909)		Daniel Schwartz (W) (9,947)*	Carole Anderson (B) (7,818)		Joanne Thompson (B) (13,958)*	18,206
2012	Hiram Rivera (L) (6,315)	Jacob Lefkowitz (W) (8,474)*		Kim Foskew (W) (6,276)*	E. Solomon (W) (8,460)*		Yonah Rothman (W) (8,521)*	J. Thompson (B) (6,335)			15,091
2013	Maraluz Corado (L) (6,806)*	Margaret Tuck (B) (5,244)		Eustache Clerveaux (B) (5,085)	Pierre Germain (B) (6,899)*		Robert Forrest (B) (5,175)	Bernard Charles (B) (6,633)*			12,317
2014	M. Hopstein (W) (2,388)*			Harry Grossman (W) (2,652)*			Yakov Engel (W) (2,381)*			Y. Weissmandl (W) (2,379)*	4,998
2015	Sabrina Charles-Pierre (B) (4,600)	Jacob Lefkowitz (W) (6,380)*	Alan Jones (B) (468)	Y. Rothman (W) (6,523) *	Natashia Morales (L) (4,864)		S. White (W) (4,615)	Yisroel Eisenbach (W) (556)	Juan Pablo Ramirez (L) (6,293)*		11,694
2016	B. Charles (B) (7,973)*	K. Foskew (W) (3,972)		P. Germain (B) (7,860)*	Jean Fields (B) (4,137)		Y. Weissmandl (W) (7,626)*	N. Morales (L) (4,401))		S. Charles-Pierre (B) (5,014)*	12,311
2017	Alexandra Manigo (W) (4,964)	Mark Berkowitz (W) (9,158)*		Eric Goodwin (B) (4,910)	H. Grossman (W) (9,137)*		Joel Frielich (W) (9,530)*	Chevon Dos Reis (L) (4,503)			14,348
2018	S. Charles-Pierre (B) (9,180)*			Yoel Trieger (W) (7,179)*	Miriam Moster (W) (1,996)		E. Weissmandl (W) (6,977)*	Joselito Cintron (L) (2,308)			9,714

*Key: An * denotes the election winner, Bold denotes the incumbent candidate*

C. Legal Standard

[1] 8. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. To establish that the minority vote is diluted, a plaintiff must show that (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive," and (3) "the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances ... – usually to defeat the minority's preferred ***378** candidate," (together, the "*Gingles* preconditions"). *Id.* at 50-51, 106 S.Ct. 2752 (citation omitted). These "showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in larger white voting population." *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993).

[2] **[3]** 9. "Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Johnson v. De Grandy*, 512 U.S. 997, 1011-12, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). Thus, if a plaintiff satisfies the *Gingles* preconditions, the court must then examine the totality of the circumstances, including by assessing the following factors identified by the U.S. Senate in Section 2's legislative history: (1) " 'the history of voting-related discrimination in the ... political subdivision,' " (2) " 'the extent to which voting ... is racially polarized,' " (3) the extent to which voting practices " 'enhance the opportunity for discrimination,' " (4) " 'the exclusion of members of the minority group from candidate slating processes,' " (5) " 'the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health,' " (6) " 'the use of overt or subtle racial appeals in political campaigns,' " and (7) " 'the extent to which members of the minority group have been elected to public office in the jurisdiction,' " as well as two factors that might have probative value in some cases: (8) the responsiveness of elected officials to the needs of the minority community and (9) whether " 'the policy underlying the ... use of the contested practice or structure is tenuous.' " *Goosby*, 180 F.3d at 491-92 (quoting *Gingles*, 478 U.S. at 44-45, 106 S.Ct. 2752). "The list of factors is neither comprehensive nor exclusive." *NAACP, Inc. v. City of Niagara Falls*, 65 F.3d 1002, 1008 (2d Cir. 1995) (internal quotation marks omitted). "[N]o specified number of factors need be proved, and ... it is not necessary for a majority of the factors to favor one position or another." *Goosby*, 180 F.3d at 492.

[4] **[5]** 10. Plaintiffs must prove the *Gingles* preconditions and vote dilution under the totality of the circumstances by a preponderance of the evidence. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 443 (N.D.N.Y. 2003). "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Niagara Falls*, 65 F.3d at 1019 n.21 (internal quotation marks omitted). But Section 2 does not confer on blacks and Latinos "a right to [be] elected in numbers equal to their proportion in the population" or insulate minority candidates from defeat at the polls. 52 U.S.C. § 10301(b).

[6] 11. In 1982, Congress amended the VRA to make clear that the Act does not require plaintiffs to show a specific intent to discriminate. *See* S. Rep. No. 97-417, at 2, 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 179, 205. "The amendment was largely a response to [the Supreme] Court's plurality opinion in *Mobile v. Bolden*," 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which held that "minority

voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Gingles*, 478 U.S. at 35, 106 S.Ct. 2752. Congress adopted the Court's " 'results test,' " applied in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and "ma[d]e clear that a violation could be proved by showing discriminatory effect alone," ***379** *Gingles*, 478 U.S. at 35, 106 S.Ct. 2752, while also establishing that the VRA did not confer on minorities the right to win elections, *see* 52 U.S.C. § 10301(b). Accordingly, there is "inherent tension" between the results test and § 10301(b) "because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Gingles*, 478 U.S. at 84, 106 S.Ct. 2752 (O'Connor, J., concurring). But it is clear that the VRA prohibits voting practices that result in vote dilution even if such dilution was not intended. *See id.* at 70-71, 106 S.Ct. 2752 (majority opinion).

[7] 12. "[D]iverse minority groups can be combined to meet VRA litigation requirements," *Arbor Hill*, 281 F. Supp. 2d at 445, provided they are shown to be politically cohesive, *see Pope v. County of Albany*, No. 11-CV-736, 2011 WL 3651114, at *3 (N.D.N.Y. Aug. 18, 2011), *aff'd*, 687 F.3d 565 (2d Cir. 2012); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 374-75 (S.D.N.Y.), *aff'd*, 543 U.S. 997, 125 S.Ct. 627, 160 L.Ed.2d 454 (2004).

II. DISCUSSION

A. First *Gingles* Precondition

[8] 13. The first *Gingles* precondition is satisfied because the population of black and Latino voters in the District is sufficiently large and geographically compact to constitute a majority in at least one single-member district under a ward system. Specifically, Plaintiffs' demography expert William Cooper has demonstrated that the demographics of the District allow for the creation of (1) three majority-black (or majority-minority) wards or (2) four majority-minority wards, if the District's black and Latino voters are combined into a single minority population. (PX 244A ¶ 3; *id.* ¶¶ 55-67 & figs.15-16 (Cooper's illustrative plan showing that black population is sufficiently large and geographically compact to create three majority-minority districts); *id.* ¶¶ 68-82 & figs.17-18 (Cooper's illustrative plan showing that population of blacks and Latinos combined is sufficiently large and geographically compact to create four majority-minority districts).)[10] Although Defendant stipulated only that black voters alone are sufficiently numerous and geographically compact to constitute a majority in at least one potential election district, (JPTO at 14), it does not provide evidence to dispute that it is possible to create three majority-black districts, (*see* Doc. 555 ¶¶ 21-25), or four, if black and Latinos can be combined.[11] Further, Defendant concedes that combining minority groups is permissible " 'where the statistical ***380** evidence is that the minority groups vote cohesively for the same candidates.' " (*Id.* ¶ 37 (quoting *Reed v. Town of Babylon*, 914 F. Supp. 843, 848 (E.D.N.Y. 1996)); *see id.* ¶ 25.) As discussed below in connection with the Court's analysis of the second *Gingles* precondition, (*see* ¶¶ 26-27 below), black and Latino voters are sufficiently cohesive within and across those groups for them to be combined, (Tr. at 289:2-9; *id.* at 289:21-24 (Barreto) ("Black and Latino voters voted for the same candidates. So it wasn't as though blacks were voting for one candidate and Latinos are voting for a third. Black and Latino voters were also voting cohesively with each other.")).[12] Accordingly, the population of minority voters in the District is sufficiently large and geographically compact to constitute a majority in four single-member districts under a ward system.

B. Second and Third *Gingles* Preconditions

[9] **[10]** 14. Where a "significant number of minority group members usually vote for the same candidates," the minority group is politically cohesive and satisfies the second *Gingles* precondition. *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. Plaintiffs can rely on both statistical and anecdotal evidence to show political cohesion. *Pope v. County of Albany*, 94 F. Supp. 3d 302, 333 (N.D.N.Y. 2015).

[11] **[12]** **[13]** 15. Where the majority votes as a bloc and usually defeats the minority-preferred candidate absent special circumstances, the third *Gingles* precondition is satisfied. *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. Whether a candidate is minority preferred cannot be proven by anecdotal evidence but rather only by statistical evidence showing that a candidate received support from more than 50% of minority voters. *Niagara Falls*, 65 F.3d at 1018-19. "[E]vidence [of minority candidates' success] does not necessarily negate a finding of bloc voting, particularly if elections are shown usually to be polarized or the success of minority candidates in particular elections can be explained by special circumstances, such as the absence of an opponent or incumbency.' " *Pope*, 687 F.3d at 582 (internal quotation marks and alteration omitted). "Courts have disregarded elections won by minorities after the

initiation of a voting rights suit, where Anglos preferred the minority candidate, or manipulated the election of a safe minority candidate or provided unusual organized political support or campaigned to insure the election of a minority candidate." *Aldasoro v. Kennerson*, 922 F. Supp. 339, 375-76 (S.D. Cal. 1995) (citations omitted); *see Ruiz v. City of Santa Maria*, 160 F.3d 543, 557-58 (9th Cir. 1998) (*per curiam*) ("special circumstances" include majority support for minority-preferred candidates intended to thwart litigation). "[A] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57, 106 S.Ct. 2752.

***381 [14]** 16. Plaintiffs contend that the District's black and Latino communities are politically cohesive and that the white majority votes as a bloc in Board elections so that no minority-preferred candidate has won a contested election since 2007. For the reasons stated below, I find that Plaintiffs are correct and that they have satisfied the second and third *Gingles* preconditions.

17. Plaintiffs' expert in political science and statistical analysis, Dr. Matthew Barreto, (*see* Tr. at 154:5-11), used accurate and scientifically validated methods to identify and analyze racially polarized voting in the District. He is a professor of political science and Chicana/o studies at the University of California, Los Angeles, and the co-founder of a successful political and electoral consulting firm called Latino Decisions. (PX 242B at 44; Tr. at 150:1-3, 151:11-14.)[13] Dr. Barreto has published extensively and recently on voting, race, and statistical methods, including four books and sixty journal articles and book chapters, (*see* PX 242B at 45-48), and has been honored with research awards and fellowships, (*id.* at 49-50). He has published with many of the other leading experts in this field and is up to date on the newest, most innovative methods. He teaches courses on the VRA, racial and ethnic politics, electoral politics, demographics, and statistical analysis. (Tr. at 151:18-152:7.) In sum, Dr. Barreto is extremely well credentialed and at the leading edge of political science and statistical analysis with respect to racially polarized voting and voting estimates. I found him to be entirely credible.

18. Defendant's political science expert, Dr. John Alford, is a professor of political science at Rice University. (*Id.* at 2146:9-10.) He has testified as an expert approximately thirty to forty times in VRA cases, primarily for defendants. (*Id.* at 2146:19-23, 2147:4-7, 2264:23-2265:5.) He teaches courses on voting behavior in elections and, in those courses, covers material on racial voting patterns, (*id.* at 2264:5-8), but he has not published a paper on racially polarized voting, taught any courses on minority politics or voting behavior, or written about a Section 2 case in an academic publication, (*id.* at 2263:25-2264:16). He has not published any peer-reviewed articles using methods of ecological inference or involving surname analysis, and his last article on geocoding analysis was published thirty years ago. (*Id.* at 2263:9-23.) And he is not (nor does he consider himself to be) an expert in the area of race and ethnicity politics. (*Id.* at 2264:17-19.) His testimony, while sincere, did not reflect current established scholarship and methods of analysis of racially polarized voting and voting estimates.

19. In New York, voters do not self-report their race, so voting patterns have to be estimated. To perform this estimation, Dr. Barreto and his colleague Dr. Loren Collingwood used ecological statistical models that "attempt to draw an inference regarding how groups voted using aggregate ecological data." (PX 242A ¶ 7.)[14] Dr. Barreto used two ecological inference ("EI") methods to analyze various data sets.[15] The first method, King's ***382** Ecological Inference ("King's EI"), identifies patterns between the racial make-up of voters in certain precincts and the number of votes candidates received at the corresponding polling places. (*See* PX 242B at 5, 10-11.) The second method, row by column ("RxC"), is an improved EI technique that can generate estimates for more racial groups and more candidates. (*Id.* at 11.) Dr. Barreto's results were consistent across every methodology:

> Across a variety of analyses that Dr. Collingwood and I performed, we found strong and consistent evidence that blacks and Latinos are politically cohesive and that they consistently vote for the candidates which lose elections.
>
> We found strong and consistent evidence that white voters vote cohesively as a bloc[ ] and that they vote for candidates that have won every single election.

(Tr. at 155:6-12.)

20. Of the various data sets that could be used as EI input, Dr. Barreto primarily relied on Bayesian Improved Surname Geocoding ("BISG") data. "BISG is a methodology that uses individual-level data, including a voter's surname, geographic location, and the racial composition of the voter's census tract or block to generate the probability that an individual belongs to a particular group where self-reported

information is not available." (PX 242B at 15.) Starting with the list of actual voters in each election (the "voter file"), Dr. Barreto used the "Who Are You" or "WRU" software package created by scholars Kosuke Imai and Kabir Khanna to estimate the probability that each voter was white, black, Latino, or other using a surname list[16] and geolocation data from the decennial census.[17] (PX 242A ¶ 7; Tr. at 166:13-20, 168-11-172:11; PX 305_0008-09; *see* PX 269 (Kosuke Imai & Kabir Khanna, *Improving Ecological Inference by Predicting Individual Ethnicity from Voter Registration Records*, 24 Pol. Analysis 263 (2016)).)[18]

21. The first step of the BISG analysis plugs in a race estimate based on the voter's surname – for example, census data that shows that of individuals with the surname Jackson, 39% are white and 53% are black. The next step looks at the voter's census block. If, for example, voter Jackson lives on a block that is 80% black and 20% white, that increases the likelihood that voter Jackson is black and makes an estimation of voter Jackson as black more reliable. The software calculates the probability that someone with a 53%-probable black surname who lives in an 80%-black census block is actually ***383** black. (Tr. at 168:9-170:10, 170:24-172:11.)[19]

22. After Dr. Barreto estimated voter race probabilities, he aggregated those probabilities to the precinct level to estimate the racial make-up of each precinct. (*See id.* at 185:23-186:4.) Through a statistical package and method called eiCompare, Dr. Barreto then used both King's EI and RxC to estimate voting preference by race and compared the results. (*Id.* at 164:1-11, 165:5-18.) He used both ecological inference methods because they enabled him to see if the results were consistent across the models and provided "more evidence, more data points [to] take in to draw [his] conclusion." (*Id.* at 287:22-288:7.)

23. The use of BISG has been extensively validated by experts. Dr. Barreto first used surname and geocoding analysis on voter files around 2003 and has continued to use and publish about that method since. (*Id.* at 170:16-23.) In 2009, scientists from the RAND Corporation evaluated the census surname list and geocoding information from the census at the block level and found that the probability that self-reported race matched with a BISG race estimate (that is, "concordance") was 95% for Hispanics and 93% for blacks and whites. (DX 101 at 70, 78.) In 2016, RAND published a second article that describes how BISG can produce estimates of racial disparities within populations with a concordance of 90 to 96%. (PX 274 at 2; Tr. at 181:13-24, 182:5-183:1.) Many respected scholars have used and validated BISG in the political science context and across a variety of disciplines. (Tr. at 192:2-14; *see* PX 269 (validating BISG with results of Florida presidential election);[20] PX 367 (2015 article using surname and geocoding data purchased from data vendor Catalist LLC to estimate race of voting populations in nationwide elections to calculate turnout differences between racial groups); PX 369 at 223-26 (2018 book validating accuracy of Catalist data); PX 368 at 5-6, 13 (2016 article using BISG to estimate voter race and King's EI to estimate precinct-level votes and racial voting preferences); PX 370 (2020 article using BISG race estimates to estimate differences in political campaign contributions across racial groups); *see also* PX 274 at 1 (BISG "can produce accurate estimates of racial/ethnic disparities within populations served when self-reported data are lacking" in health-care context); *id.* at 5 (citing fifteen validation studies and peer-reviewed articles using surname and geocoding analysis); Tr. at 182:19-183:10, 183:20-184:6 (Barreto) (PX 274 summarized validation studies using surname and geocoding analysis); PX 305_0014 (citing peer-reviewed articles on health care and epidemiology); DX 209 at 3 (using BISG in consumer-protection context).) The political science articles were peer reviewed and published in leading journals. (Tr. at 189:23-191:11, 192:2-14.) And both of Defendant's experts, Dr. Alford and demographer Dr. Peter Morrison, have advocated for the use of surname and geocoding analysis to derive racial estimates by geographic unit. (*See* DX 67-02 ***384** ¶ 26 (Dr. Alford suggesting that flaws in Plaintiffs' previous expert's preliminary report could have been corrected if that expert had "estimated voter turnout by race using surnames and voter sign-in records," citing the Imai & Khanna article); DX 99 at 12 n.21 (article co-authored by Dr. Morrison noting availability of BISG to "assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by a geographic unit such as a voting precinct").)[21]

24. Dr. Barreto applied BISG in the manner proposed in the academic literature – not by attempting to assign individuals to racial categories, but by aggregating individual race estimates to create precinct-level demographic estimates. (Tr. at 185:13-186:4; PX 242A ¶ 7; PX 305_0012; PX 274 at 2-3.) He then used that data as an input to the EI models, which is "exactly the same" as how other scholars have used BISG in the health-care and campaign-donation contexts. (Tr. at 2728:7-23.) Defendant contends that Dr. Barreto did not identify support in the academic literature for using BISG

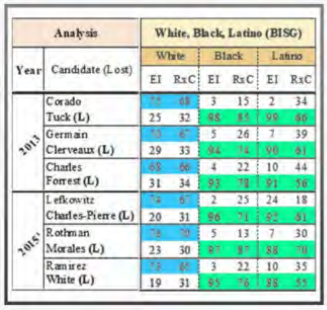
race estimates as an EI input, (*see* Doc. 555 ¶ 107(c)), but his methodology is supported, as described in paragraph 23 above. And Dr. Barreto did not simply estimate a probability distribution for each individual (*e.g.*, a 60% probability that voter X is white, a 30% probability that voter X is black, etc.), as Defendant suggests, (*see* Doc. 555 ¶ 107(b)); rather, he aggregated his estimations to the precinct level as described in the literature, (PX 242A ¶ 7; *see* Tr. at 187:13-21).

25. BISG is particularly reliable for use in the District because of its unique characteristics. BISG models work best in places "where there's more differentiation between names and more differentiation between racial populations of neighborhoods," like the District. (Tr. at 201:18-24.) The District has large populations of Hispanic voters with very commonly occurring Spanish surnames and large populations of white voters with very commonly occurring white surnames. (*Id.* at 202:7-11.) Black and Hispanic surnames rarely overlap, so BISG is still highly precise even in neighborhoods where blacks and Hispanics live together. (*Id.* at 203:23-204:2; *see id.* at 208:5-10.) The District's neighborhoods are racially segregated to "a very high degree," (*id.* at 202:18-20), and many approach 100% white or 100% minority, (*id.* at 210:4-17, 212:20-217:5, 217:25-218:4). And even in neighborhoods where blacks and Latinos live together in the same census block groups, census blocks are more highly segregated, lending confidence to BISG results, which rely on census block data. (*Id.* at 1673:2-1675:19; *see* PX 300; PX 301.) For all these reasons, BISG is likely to provide accurate, reliable estimates in the District.

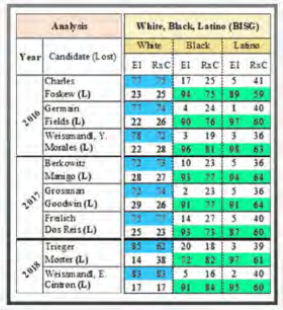
26. Dr. Barreto's King's EI and RxC analyses using BISG data showed that white voters were highly cohesive and consistently voted for the winning candidate in every election. Black and Latino voters were also highly cohesive, both as individual groups and when considered together,[22] and they consistently voted for the losing ***385** candidate. In every contested election, "the candidates who were preferred by a cohesive white voting bloc[ ] beat the candidates preferred by blacks and Latinos." (Tr. at 289:14-290:1; *see* PX 242A ¶¶ 8, 10, 12, 16; PX 243 ¶ 32.) Dr. Alford conceded that white voters are cohesive, concluding that "[a]ll of the results from all of the data sources and all of the methods show the same stable level of 70-80% white support for one candidate in each contest" and that "it is clear that whites are voting cohesively." (DX 13 at 23.)

27. A table summarizing Dr. Barreto's results is set out below.[23]

Table 2: BISG Results for White, Black, and Latino Voters. (PX 305_0049.)



Analysis		White, Black, Latino (BISG)					
		White		Black		Latino	
Year	Candidate (Lost)	EI	RxC	EI	RxC	EI	RxC
2013	Corado	[illegible]	68	3	15	2	34
	Tuck (L)	25	32	95	85	99	66
	Germain	[illegible]	67	5	26	7	39
	Clerveaux (L)	29	33	94	74	96	61
	Charles	[illegible]	66	4	22	10	44
	Forrest (L)	31	34	93	78	91	56
2015	Lefkowitz	[illegible]	67	2	25	24	18
	Charles-Pierre (L)	20	31	96	71	67	81
	Rothman	[illegible]	70	5	13	7	30
	Morales (L)	23	30	97	87	88	70
	Ramirez	[illegible]	66	3	22	10	35
	White (L)	19	31	95	76	88	55



Analysis		White, Black, Latino (BISG)					
		White		Black		Latino	
Year	Candidate (Lost)	EI	RxC	EI	RxC	EI	RxC
2010	Charles	[illegible]	[illegible]	17	25	5	41
	Foskew (L)	23	25	93	75	89	59
	German	[illegible]	74	4	24	1	40
	Fields (L)	22	26	80	76	97	60
	Weissmandl, Y.	[illegible]	72	3	19	3	36
	Morales (L)	22	28	96	81	98	63
2017	Berkowitz	[illegible]	[illegible]	10	23	5	36
	Mango (L)	28	27	93	77	96	64
	Grossman	[illegible]	74	2	23	5	36
	Goodwin (L)	29	26	91	77	95	64
	Frnlich	[illegible]	[illegible]	14	27	5	40
	Des Rets (L)	25	23	93	73	87	60
2018	Trieger	[illegible]	62	20	18	3	39
	Monter (L)	14	38	72	82	97	61
	Weissmandl, E.	[illegible]	83	5	16	2	40
	Cimron (L)	17	17	91	84	95	60

The numbers in the columns labeled "White," "Black," and "Latino" represent the estimated percentage of each racial group that voted for each candidate. This analysis showed high levels of racially polarized voting in every contested election. White support for the winning candidates ranged from 62-85%. Black support for losing candidates ranged from 71-98%, and Latino support for losing candidates ranged from 55-99%. (*Id.*)[24]

28. Dr. Barreto validated his analysis using other methodologies to "see if the data all stack[ ] up and point[ ] in the same direction," (Tr. at 162:14-16), and each method supported his conclusions.

- First, he purchased a data set from a private consulting company called Catalist LLC ("Catalist"), which provides data, analytics, and modeling to political campaigns, civic organizations, and research institutions. (PX ***386** 258 at 21:9-17 (deposition of designated Catalist witness); *see* Tr. at 242:1-6 (Barreto).) Catalist's database of over 240 million voters includes first name, surname, census, and self-reported data. (PX 258 at 52:6-18, 61:19-63:7; Tr. at 245:15-246:9.) Dr. Barreto has used the Catalist data set in the past and found it to be extremely accurate, (Tr. at 242:9-14), it has won awards for accuracy from political and commercial consulting groups, (*id.* at 252:1-3), and it is a highly successful commercial product on which campaigns and others rely, all of which suggest that its results are reliable. Other experts have also relied on and validated Catalist's data, including in VRA cases. (*See* PX 367 at 102; PX 369 at 223-224; *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 598-99 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016); *Veasey v. Perry*, 71 F. Supp. 3d 627, 661-63 (S.D. Tex.

2014), *vacated and rev'd in part on other grounds sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).) Dr. Barreto compared Catalist's estimates of voter race from the District's 2017 elections with his own results and found both methodologies produced similar results, which gave him more confidence in his conclusions. (PX 242A ¶ 18; Tr. at 254:21-24, 291:15-24.)

- Second, he used a different data set – citizen voting age population data from the Census Bureau ("CVAP data") – to perform King's EI and RxC analyses, both of which also showed racially polarized voting with white voters always voting cohesively for the winning candidate (and a combined "non-white" group of voters always voting for the loser). (Tr. at 291:25-292:20, 293:16-294:9; PX 242B at 25-26.)[25]

- Third, Dr. Barreto generated white voter estimates using CVAP and subtracted those estimates from the total votes for each candidate to estimate nonwhite votes, (Tr. at 296:16-25), which also showed voter cohesion, (*id.* at 300:14-22; PX 242B at 16-25).[26]

- Fourth, Dr. Barreto examined the 2012 U.S. presidential election and concluded that it was also highly racially polarized, with whites and minorities "voting in opposite directions," (Tr. at 306:17-307:17), which further supported his conclusions.

***387** • Fifth, as additional backup for his results, he analyzed the surnames from nomination petitions and found that white voters supported the winning candidates and black and Latino voters supported the losing candidates. (*Id.* at 357:20-358:15.)

In sum, by performing ecological inference on BISG-generated data, Dr. Barreto proved consistent white voting cohesion for the winning candidates and consistent minority voting cohesion for the losing candidates, and the other methods he employed supported these conclusions. (*Id.* at 352:23-353:14.)

29. There is also anecdotal evidence of minority cohesion under the second *Gingles* precondition that supports Dr. Barreto's conclusions.[27] Witnesses called by both sides perceive a large white voting bloc of Orthodox and Hasidic people whose children attend private schools voting for the "private school community" slate, and black and Latino people whose children attend public schools voting for the "public school community" slate. (*Id.* at 1238:11-14, 1849:1-4, 2560:11-14; PX 243 ¶ 55 n.71; *id.* ¶¶ 58-65; PX 257 at 191:18-192:2; PX 286 ¶ 12.) Many witnesses referred to the private and public school communities and testified that the public school community's slate always loses. (*See* PX 279 ¶ 11; PX 280 ¶¶ 7-9; PX 281 ¶¶ 9, 60-62; PX 282 ¶¶ 11-15; PX 283 ¶¶ 67, 69-70; PX 288 ¶ 6; Tr. at 1818:5-9; *see also* ¶ 5 above.)

30. Defendant concedes that whether Plaintiffs have satisfied the second and third *Gingles* preconditions hinges on whether BISG is a good data input. (Doc. 555 ¶ 99 ("[T]he Court's main task is to decide whether it agrees with Dr. Barreto that using BISG generated race estimates as the demographic data input for an EI:RxC analysis is better than using ... CVAP.").) I find that, given the unique characteristics of the District, BISG is a better data set than CVAP for use as an input for ecological inference, and Dr. Barreto therefore used the superior methodology. Defendant's expert Dr. Alford relied on CVAP, which is less reliable here for three reasons.

31. First, CVAP is less precise. BISG begins with the actual voter file – that is, the names of the individuals who actually voted – whereas a CVAP data set contains all eligible voters in the District, whether they voted or not. In addition, CVAP data come from the American Community Survey. (Tr. at 255:15-21.) Because that Survey only accounts for 2% of the population over each of five years, CVAP requires an inference to apply the 10% sample to the whole population, which can introduce bias. (*Id.* at 256:23-257:7, 282:7-18.) Using CVAP data, Dr. Alford was not able to draw definitive conclusions about minority voter cohesion or the existence of racially polarized voting. (*Id.* at 2271:17-19 (Alford could neither conclude nor rule out that minorities were voting cohesively); *see id.* at 2158:2-2166:17, 2268:13-16.)

32. Second, there is a misalignment between the voter precincts analyzed and the census block-group data from which the CVAP data set is pulled. To analyze voters in a given precinct, experts would want data from that specific precinct. But CVAP data provide racial proportions within census block groups, which almost never correspond to the voter precincts. Because the BISG data set begins with the voter ***388** file, it contains the actual voters within in each precinct. (*Id.* at 257:8-259:11.) "CVAP has ... 'geographic misalignment' between census boundaries and precinct boundaries, whereas BISG has the exact same alignment." (*Id.* at 257:16-18.)

33. Third, because CVAP data sets do not contain information on actual voters, voter turnout must be estimated, which

fails to reliably produce the precinct-by-precinct estimates required for EI analysis. (*Id.* at 264:11-19.) Although the District has 60,000 eligible voters, only about 13,000 to 14,000 people actually vote, so using CVAP introduces "noise ... influencing who is in a precinct." (*Id.* at 259:20-260:1.) Both King's EI and RxC can estimate turnout and incorporate it into the choice percentage, (PX 242B at 18), but such estimations do not produce results that are as reliable as the results produced by BISG.

- As to King's EI, Dr. Barreto testified that a double-equation approach is necessary to help account for "turnout issues," (Tr. at 2707:13-15), such as "substantial difference in turnout across racial groups," (PX 364 at 611 (article by Dr. Barreto and Dr. Bernard Grofman explaining that double regression can mitigate turnout problem)), as there is in the District.[28] Such an approach would estimate voter turnout and make adjustments to CVAP data before estimating voter choice. (Tr. at 2708:19-24.) But even using a double-equation approach would not "solve[ ] the problem CVAP has," and the voter file would still be the better data source. (Tr. at 2711:8-2712:20; *see* PX 364 at 607-08.). In other words, the turnout estimated by EI is not as accurate without a double-equation approach, and even with such an approach, is not as accurate as using the voter file, which BISG uses.

- The experts disagree about precisely how turnout is estimated by RxC. Dr. Alford testified that RxC estimates turnout "simultaneously," (Tr. at 2209:22-2210:6), by including "a category that didn't vote," which "estimate[s] for each racial group at each precinct ... the proportion that are not voting," (*id.* at 2208:17-22).[29] Dr. Barreto testified that the software package that runs RxC can be programmed to estimate turnout by race at the precinct level, (*id.* at 2715:1-8), but that it would require "a formula or a model that just predicted voter turnout" using a different set of commands and specifications before candidate choice can be estimated, (*id.* at 2715:9-21).

In any event, it does not appear that Dr. Alford properly accounted for turnout. It seems that he did not perform a double-equation regression, (*id.* at 2711:3-7), or include a voter turnout model in his RxC script, (*id.* at 2716:2-16, 2717:25-2718:5). He variously claimed that he performed a double regression on the CVAP data before running EI analysis, (*id.* at 2292:2-9), and that the double regression was happening ***389** automatically within RxC to estimate turnout at the precinct level, (*id.* at 2208:4-15). But Dr. Barreto testified that Dr. Alford's scripts used a single-equation approach that introduced error by mixing turnout estimates with candidate choice estimates. (*Id.* at 2717:25-2720:17.) Thus, although Dr. Alford suggested that inclusion of a no-vote (or abstained) category in RxC, rather than just estimating votes for candidate 1 and candidate 2, would solve the problem of CVAP not accounting for turnout, Dr. Barreto explained that turnout by racial group should be estimated first, without "mixing it with the candidate choice," (*id.* at 2720:2), and then used to adjust the input variable in the voter-choice model, (*id.* at 2720:8-11). But Dr. Alford did not do a separate calculation. He used unadjusted CVAP as the input variable to estimate votes for candidate 1, candidate 2, and no-vote, and then calculated the percentage of votes for candidate 1 and candidate 2 as a percentage of all votes. (*Id.* at 2714:2-2723:11.) He did not "chang[e] the input variable ... to account for the turnout rate. [He] just transform[ed] it into a share." (*Id.* at 2721:17-19.) For all these reasons, Dr. Alford's conclusions based on CVAP, (*see id.* at 2158:2-2166:17), are not as reliable as Dr. Barreto's conclusions based on BISG.

34. Indeed, in criticizing the methodology of Plaintiffs' previous expert, Dr. Alford also admitted that CVAP was not a "good data set" for EI because it did not use "the number of *actual voters* from each racial group," (DX 62 ¶ 24 (emphasis in original); *see* Tr. at 2335:4-17), and opined (citing the Imai and Khanna article) that BISG-like analysis could correct for CVAP's flaws, (DX 62 ¶ 26 & n.17; *see* Tr. at 2236:14-2337:13). He acknowledged that CVAP "assumes, without justification, that racial groups vote in proportion to their size," but black and Latino voters typically have significantly lower turnout than white voters. (DX 62 ¶ 24.)

35. The District's criticisms of Dr. Barreto and of BISG are unpersuasive. First, Dr. Alford testified that the accepted practice for political scientists is to reject results that do not report a 95% confidence interval. (Tr. at 2169:22-2170:15.) Dr. Alford testified that where a result has a wide confidence interval (for example, 11% to 88% support for a candidate), the likelihood of the point estimate (for example, 52%), is lower than it would be were the confidence interval narrower. (*Id.* at 2167:6-2168:19.)[30] He contends that such an interval means that he "can't reject the possibility that ... the actual value [of support for a candidate] might have been 49 percent" because the confidence interval goes below 50%. (*Id.* at 2168:4-12.) But Dr. Barreto credibly explained why reliance on confidence intervals is not required and, moreover, why the

confidence intervals he did report, (*see* PX 242B at 34-42, PX 242A at 40-47), do not undermine his conclusions.[31] The use of 95% ***390** confidence intervals "depends entirely on the type of question you're asking and the type of research inquiry you're doing" and is more helpful when testing samples of data rather than using the voter file. (Tr. at 347:14-348:19.) He testified that there is no consensus around their use, and while some scholars rely on them, others provide point estimates, examine patterns, and draw conclusions from those. (*Id.* at 348:20-349:2.) Because Dr. Barreto's BISG scripts calculated racial probabilities rather than race predictions and error rates, based on instruction from the academic literature, (*id.* at 218:14-25), using probability terminology rather than "strict confidence interval testing" was more appropriate, (*id.* at 1683:10-1684:5).[32] Drawing conclusions "about patterns of point estimates," as in BISG analysis, "does not require a 95 percent statistical test." (*Id.* at 347:16-18.) Accordingly, Defendant's argument that voters' preference cannot be determined with 95% confidence where a confidence interval goes below 50%, (*see* Doc. 555 ¶ 65; Tr. at 2167:4-2168:3), is unavailing. Further, the reported confidence intervals for the CVAP analyses, the presidential election, and the 2017 BISG analysis do not undermine Dr. Barreto's conclusions. None of the confidence intervals for white voters crossed 50%. (Tr. at 1683:3-9; *see* PX 242A at 40-47; PX 242B at 34-42.) The intervals for black voters did not cross 50% for twelve of the fourteen races, and for the other two races, the lower "tail" of the distribution that could fall below 50% is still very close to 50%, indicating that the outcome of voter support below 50% is unlikely to occur. (Tr. at 350:20-351:2, 1679:2-21, 1681:24-1682:10; PX 242 B at 41; PX 242A at 42.) The point estimate patterns of Latino voting show preference for the losing candidate in all contests, and in the "handful of elections where the confidence intervals for Latinos did cross below 50 percent," in no instance "was there a majority probability that this event would occur," and "the most likely outcome for all of our data ... was cohesiveness in support of the candidate who lost." (Tr. at 351:3-14; *see id.* at 1684:12-1685:9.) As Dr. Barreto explained, the better practice would be to determine the probability that any results would cross the 50% threshold rather than to reject the results out of hand. (*See id.* at 341:11-24, 343:4-11.) Indeed, Dr. Alford admitted that point estimates are the most likely outcomes, that "similar results repeating year after year" would constitute a "pattern," and that in another case, he did not rely on confidence intervals where voting patterns were consistent. (*Id.* at 2351:20-23, 2354:6-8, 2357:12-2358:9.) Dr. Barreto's results were all consistent with each other and with the anecdotal evidence year after year. For all of these reasons, I find Dr. Barreto's analyses credible and reliable.

36. The District also contends that Dr. Barreto did not use BISG the way the literature instructs. It offered the testimony of Dr. Morrison, who contributed to the 2009 article about BISG, but his main purpose was to ensure that the demography was correct, and he did not perform any statistical analysis in connection with that article. (*Id.* at 68:19-21, 69:2-4.) Dr. Morrison ***391** is not a political scientist. (*See id.* at 10:8-17.) Accordingly, his criticism that Dr. Barreto misused BISG rings hollow because Dr. Barreto credibly explained that he applied BISG the way political scientists use it: to generate probabilities, aggregate them to the precinct level, and use those estimates as the input for EI, not to assign a race to an individual person. (*Compare id.* at 21:17-25 (Morrison's description), *with id.* at 187:13-21 (Barreto's description).)[33] Dr. Morrison also opined that BISG would not work well in the District because "one's immediate neighborhood location does little to improve an estimate of one's race/ethnicity." (DX 70 ¶ 35.) To whatever extent that could be true in some localities, it is not true in the District, in which housing is highly racially segregated, even at the block-to-block level, as discussed above. In sum, Dr. Morrison's critiques do not undermine Dr. Barreto's credibility or the accuracy of his results.

37. In an attempt to attack Dr. Barreto's results based on Catalist data, the District pointed to a small percentage – about 1.4% – of names that were anomalies or appear to have been miscoded. Assuming those names were all coded in error, they would be well within validation rates for Catalist's model. (Tr. at 1685:18-1686:4.) This criticism, as well as the criticism that two people with the same last name and address were coded with different race probabilities, (*id.* at 2255:6-2257:5),[34] amount to cherry-picking and do not undermine the evidence that Catalist's database is highly reliable – as evidenced by, among other things, its success in the commercial marketplace. In any event, Dr. Barreto's Catalist-based results are a helpful cross-check that lend confidence to his conclusions, but his opinion does not rise and fall with the fidelity of every individual entry in Catalist's database.

38. Finally, the District argues that there were problems with Dr. Barreto's scripts. As an initial matter, both Dr. Alford and Dr. Barreto relied on someone else to run the scripts – neither performed the technical analysis himself – and neither side called those individuals. As Dr. Barreto explained, Dr.

Collingwood programmed the scripts according to Imai and Khanna's instructions and the code from their WRU package. (*Id.* at 237:8-19.) Drs. Barreto and Collingwood did not manipulate the scripts. (*Id.* at 1675:20-1676:17.) Dr. Alford claimed that his assistant had difficulty getting the scripts to run, but did not offer a clear explanation of why or what happened and did not undermine Dr. Barreto's credible testimony that Defendant had "everything ... needed to run the replication." (*Id.* at 234:15-17.) Moreover, Dr. Alford testified that his colleague Dr. Randy Stevenson said he was able to get the scripts to run, (*id.* at 2348:4-2349:14), and the District produced the results, (*id.* at 233:19-234:6). Accordingly, these criticisms are unpersuasive.

***392** 39. This may be the first time that voter-preference estimates based on BISG have been admitted into evidence at a VRA trial. But that is no reason to reject a recently developed, reliable method of analysis. There must always be a first time. The method has been endorsed by respected social scientists in leading publications. At least one other court has found such evidence reliable enough to be admitted in a bench trial involving a Section 2 challenge to an at-large voting system, *see* *United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 612-13 (E.D. Mich. 2019), although the case settled before trial, *see* No. 17-CV-10079, 2019 WL 2647355 (E.D. Mich. June 6, 2019), *motion for relief from judgment denied*, 2020 WL 127953 (E.D. Mich. Jan. 10, 2020). And the Court is convinced that in the circumstances of this case, it is a strong and reliable method for estimating voter preference, minority-group cohesion, bloc voting, and racial polarization. Using that method, as confirmed by a variety of other methods, Plaintiffs have proven that black and Latino voters are politically cohesive within and across those groups and that the white majority votes as a bloc to routinely defeat the minority's preferred candidates.

40. Thus, Plaintiffs have satisfied the *Gingles* preconditions.

III. THE TOTALITY OF THE CIRCUMSTANCES

A. Senate Factor 1

[15] 41. The first Senate Factor examines "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36-37, 106 S.Ct. 2752 (internal quotation marks omitted). There is no evidence of official discrimination in the District. Accordingly, this factor favors Defendant.

B. Senate Factor 2

[16] **[17]** **[18]** 42. Senate Factor 2 "requires the Court to consider 'the extent to which voting in the elections of the State or political subdivision is racially polarized.' " *Pope*, 94 F. Supp. 3d at 342 (quoting *Goosby*, 180 F.3d at 491). Whether a white voting bloc may be explained as "an expression of political partisanship" is properly considered under this factor, *Goosby*, 180 F.3d at 493, but "[t]he fact that divergent voting patterns may logically be explained by a factor other than race does not end the inquiry, nor does it require plaintiffs to prove racial bias in community," *Pope*, 94 F. Supp. 3d at 342 (internal quotation marks omitted).

> [E]ven if proof of a race-neutral cause of divergent voting patterns is forthcoming, the defendant does not automatically triumph. Instead, the court must determine whether, based on the totality of the circumstances, the plaintiffs have proven that the minority group was denied meaningful access to the political system on account of race.

Goosby v. Town Bd. of Hempstead, 956 F. Supp. 326, 355 (E.D.N.Y. 1997) (internal quotation marks and alterations omitted), *aff'd*, 180 F.3d 476. Even where Senate Factor 2 favors a municipality because of a "strong correlation between political partisanship and the voting behavior of blacks and whites," plaintiffs can still prevail under the totality of the circumstances where minority voters' "failure to elect representatives of their choice ... is not best explained by partisan politics." *Id.* At least one court has held that where the influence of race and of political affiliation on voting patterns "are too closely related to isolate and measure for effect ... the evidence fails to demonstrate that race-neutral ***393** factors explain the voting polarization" in the locality. *United States v. Charleston County*, 316 F. Supp. 2d 268, 304 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004).[35]

[19] 43. The District cites cases that hold that "[u]nless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution." *Nipper v. Smith*, 39 F.3d 1494, 1523-24 (11th Cir. 1994); *see* *Solomon*, 221 F.3d at 1225. But that does not mean that a possible race-neutral explanation for racial polarization is dispositive. As described above, the Second Circuit has not followed such an all-or-nothing approach but instead considers possible explanations other than race as one

aspect of the totality of the circumstances. *See Goosby*, 180 F.3d at 493.

44. Plaintiffs have shown high levels of racially polarized voting in the District, as described above in connection with the Court's *Gingles* analysis. (*See* ¶¶ 26-27 above.) That showing is confirmed by witness testimony. For example:

- Sabrina Charles-Pierre is a black woman who was appointed to fill a vacancy on the Board after the Board came under pressure from a state-imposed monitor of the District[36] to appoint a public school parent, (*see* Tr. at 2576:14-24; PX 81_0047 (Grossman told Charles-Pierre that Weissmandl said, "The only reason [Charles-Pierre] is there and ran unopposed is because the board wants to do what [the state-appointed monitor] said," which was to "[h]ave at least one [public] school parent."); *see also* PX 156_0014-15 (monitor report recommending that all candidates for at least one Board seat must be parents of public school students and selected by other public school parents)), and was thereafter re-elected with the support of the private school community, (*see* PX 81_0016-18, 29, 35, 40). According to Charles-Pierre, between 2015 and 2018, in every single contested Board election, the preferred candidates of black and Hispanics lost to the other candidates. (Tr. at 2572:15-22.) She also agreed that the white majority had all of the electoral power, (*id.* at 2579:11-14, 2670:12-24), which was obvious because a candidate supported by the overwhelming majority of black and Hispanic voters could still lose by 4,000 votes, (*id.* at 2571:16-22). Other Board members ***394** and private school community leaders corroborate Charles-Pierre's observations and confirm that the white bloc is determinative of electoral success. Former Board member Yonah Rothman wrote in a WhatsApp group chat called "School Board Support Group" that included private school advocates, "If private school really wanted [Charles-Pierre's] seat she would have lost the election like the rest of them." (PX 80 at 427.) Hersh Horowitz, an influential rabbi, wrote in the same chat, "I hear we had over 9000 [votes] and they under 5000." (*Id.* at 774.) Board President Harry Grossman repeatedly reminded Charles-Pierre that the white community could easily replace her, texting her, "If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other 3," (PX 81_0035), and, "[I]f people wanted you off the board they just would have run a candidate against you and you would have lost as [other public school candidates] Fields, Foskew, and Morales did," (*id.* at _0040; *see* Tr. at 1534:13-21, 1536:5-1539:20, 1546:5-19).

- Private school community leaders have also acknowledged more generally that the white bloc vote holds all the power and controls election outcomes. Former Board member Bernard Charles, who is black, agreed that the Orthodox and Hasidic community "has the voting power to place anyone they want on the Board," and "the leaders in the Orthodox and Hasidic community could replace [him] if they wanted to." (Tr. at 1816:22-1817:3.) In a text with Grossman, Horowitz wrote that the public school community is "getting weaker," and Grossman said, "They feel disempowered because they are." (PX 88_0002; *see* Tr. at 990:23-991:11.)[37] Grossman said in the private school group chat that the outcome of the 2016 election would be "whatever we want it to be." (PX 80 at 279.) He also told Charles-Pierre, "Nothing can pass without [O]rthodox support." (PX 81_0050.)

45. Plaintiffs have made a strong showing of racially polarized voting and a white bloc vote that controls the outcome of elections, which gives rise to an inference that the targeted electoral process dilutes their votes, and that inference "will endure unless and until the defendant adduces credible evidence tending to prove that detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system." *Pope*, 94 F. Supp. 3d at 343 (internal quotation marks omitted). The District contends that the polarization is best explained by policy preferences, but the record lacks sufficient credible evidence to support such a conclusion.

46. In this unique community, policy preferences are not "unconnected" to race. As described above, the so-called private and public school communities in the District are essentially the white and minority communities, respectively.[38] There is nearly ***395** perfect concordance between race and the populations of public and private schools that cannot be ignored. In the District, policies benefitting private schools or reducing expenditures on public education benefit the white community, and policies benefitting public schools or reducing expenditures on private education benefit the black and Latino communities. Put differently, if the white community votes down a budget

because the budget increases taxes, minority children lose access to services. (*See, e.g.*, PX 76_0024-26 (Grossman advocating for voting down budget); Tr. at 1548:22-1554:2 (Grossman admitting voting down budget would result "massive cuts to the public schools"); *id.* at 1811:19-25 (Charles admitting that the Board's cuts to certain programs predominantly affected the black and Latino community); *id.* at 1177:23-25 (Former Board member Aron Wieder admitting that budget cuts for public schools primarily impact black and Latin students); *see also* PX 218A (ads in Jewish magazine telling readers to "vote no" on the budget); Tr. at 644:13-645:18 (former student explaining that policy and race are "intersectional," not "distinctive buckets," and that people supporting cuts to public schools and voting down the budget are white, and people attending public schools are black and Latino).) At the same time that public school cuts almost exclusively affect black and Latino children, any services for private schools beyond what is mandated by New York State almost exclusively benefit white children.[39]

47. Accordingly, race and policy cannot be isolated in a community where public school students are almost all black or Latino (92%), and students attending private schools located in the District are almost all white (98%). (*See* JPTO at 4; PX 372 ¶ 24.) This makes it all but impossible to untangle race and policy, and thus for Defendant to show that the voting discrepancies are based on the latter and not the former. *See Charleston County*, 316 F. Supp. 2d at 304.

48. The District argues that the private school community supports candidates who advocate for lower property taxes and maintaining and increasing mandated services for private schools, while the public school community supports candidates who advocate for policies supporting public education. (*See* Doc. 555 ¶¶ 154, 157.) But the record evidence to that effect came from past and present Board members, (*see* DX 174 ¶ 70; DX 176 ¶ 68; DX 172 ¶ 41; DX 177 ¶ 68; DX 251 ¶ 56; DX 175 ¶ 31), each of whom had credibility problems. The following is a nonexhaustive list of examples showing why their testimony is not credible.

- Grossman testified that he was not aware of any slating organization in the District, (DX 174 ¶ 34), but he clearly participated in slating with Hersh Horowitz, Yehuda Oshry, and private school advocate Shaya Glick, (*see* Tr. at 1411:8-1412:6, 1412:11-18, 1413:6-12, 1427:22-1428:6, 1436:13-19, 1437:12-1438:4, 1438:13-22, 1444:15-1446:16, ***396** 1446:18-1447:7, 1447:12-21, 1451:5-1452:19, 1453:14-1454:13, 1458:24-1459:17, 1465:24-1466:7, 1468:15-1469:2, 1477:17-25, 1485:1-5, 1485:15-1486:8, 1515:16-20, 1516:5-16, 1517:6-10). He seems to have no compunction about compromising his legal obligations when it suits his purposes, as evidenced by actions that would seem to conflict with his obligations as President or Board member and harm the Board, including writing the text for a petition to be presented to the Board protesting a proposal of the Superintendent, (*id.* at 1525:23-1529:9; PX 80 at 1451-52), and advocating for, among other things, lawsuits against the District, voting down the school budget, and voting out "non-frum" Board members, (Tr. at 1549:17-1554:8; *see* PX 76_0024).[40] He also lied to Board members of color about the purpose of a settlement conference in this case. (*See* Tr. at 2675:23-2676:23; *see also* note 58 below.) Plaintiffs impeached him at least three times with his prior sworn deposition testimony. (*See id.* at 1433:1-1434:2, 1510:1-1511:12, 1511:14-1512:2; *see also PX* 339 at 8-9.)[41] I found Grossman to be one of the more incredible witnesses I have encountered.

- In his written testimony, Weissmandl testified that "there is no 'slating' organization within the Orthodox and Hasidic Jewish communities in the District that recruits, vets or endorses candidates." (DX 176 ¶ 16.) Later, when confronted with evidence that he texted the private school group chat saying that he "personally got the blessing for [their] slate" for the past three years through the son of an influential Rabbi, (Tr. at 1073:1-4), he testified unconvincingly that he did not know what he was talking about, that he may have been talking about some slate other than the school board slate, and that he never went to get support from any Rabbi for Board elections, (*id.* at 1073:8-1074:25). When asked at trial whether he went with Horowitz to get the "blessing" that he had mentioned in the group chat, he answered "I guess." (*Id.* at 1076:7-19.) Another chat shows that Weissmandl told Grossman to connect an interested Board candidate with Horowitz, (PX 75_0035), and when asked at trial whether that Horowitz was Hersh Horowitz, he said "[p]robably" and "I know many Horowitzes, but I would assume in this context it's ..." before answering "I think so," (Tr. at 1077:20-1078:11). In 2016, Weissmandl forwarded an email regarding filling a Board vacancy only to the white Board members with the note, "Please respond ASAP as we discussed[. O]ne choice." (PX 73_0001.) The candidate ultimately chosen to fill the vacancy

was Joe Chajmovicz, a white person with no relevant experience for the position whose application was riddled with spelling and grammatical errors. (*See* PX 167 (Chajmovicz statement); Tr. at 1853:16-1856:6 (Charles).) Weissmandl testified that he did not know what "one choice" meant, did not ***397** remember the discussion, and "might have been referring to anything." (Tr. at 1125:7-15.) He said that he did not know whether he ever spoke to the white Board members about filling the vacancy with Chajmovicz. (*Id.* at 1126:7-10.) Weissmandl also testified that he did not recall soliciting suggestions for Board candidates in 2018, (*id.* at 1079:21-1080:12), but then later admitted to doing so, (*id.* at 1081:8-14). Plaintiffs impeached him twice with his prior sworn deposition testimony. (*See id.* at 1056:10-1057:19, 1107:14-1108:14, *see also* PX 339 at 4-6.) In sum, Weissmandl's claimed lack of memory on critical topics such as slating and Board appointments was utterly unconvincing.

- Former Board member Aron Wieder submitted written testimony that he was not aware of any recognized slating organization in the Orthodox and Hasidic communities, (DX 172 ¶ 25), but then testified that a group of people in the Orthodox and Hasidic community select people to run for the Board, he was asked to run for the Board in 2007 by Yakov Horowitz (a leader in the Orthodox community), and community leaders selected him as the candidate to endorse, (Tr. at 1155:6-11, 1162:8-14, 1167:15-20). His written testimony said that endorsement was not a guarantee of electoral success, (DX 172 ¶ 26), but he then testified at trial that Orthodox and Hasidic Jewish voters usually supported candidates based on community leaders' endorsement, (Tr. at 1173:6-12).

- Former Board member Yonah Rothman also submitted written testimony that "there is no 'slating' organization within the Orthodox and Hasidic Jewish communities," (DX 177 ¶ 122), but his other testimony raises the opposite inference. A private school advocate named Shimmy Walfish asked Rothman to run for the Board in 2012. (*Id.* ¶ 12.) He told Walfish that he did not have time to campaign, (*id.* ¶ 17), and Walfish told him not to worry because he would "talk to people who help organize signatures," (Tr. at 1386:6-22). Thereafter, he was introduced to Wieder, Oshry, and Glick. (*Id.* at 1387:13-25.) Rothman then denied knowing the first thing about how he was elected. In 2012 he ran on a slate with two other candidates, (*id.* at 1388:8-19), but said he did not meet them until after the election, did not collect any signatures for his petition or submit it, did not know who did, could not explain how lawn signs bearing the three candidates' names appeared in the community, and did not know how he came to run for a particular seat against JoAnne Thompson, a black woman. (*Id.* at 1381:21-1383:12, 1383:19-1384:8, 1384:12-1385:10, 1388:1-4.) Rothman testified that in 2015, Wieder either took care of Rothman's nominating petition or spoke to someone who did and, as in 2012, Rothman did nothing to get elected and knew virtually nothing about how he got elected. (*Id.* at 1391:1-1392:20, 1393:3-5.)

- Charles denied running on a private school slate, (DX 251 ¶ 26), yet admitted that "when it comes to running for the school board ... you're either working with the white community or you're working with the other community," (Tr. at 1849:1-4). His written testimony states that, although he and the other candidates on his slate met with "members of the Orthodox and Hasidic community," ***398** he was not aware of any slating organization, and that he was not "vetted" by leaders, and did not need the approval of a local Rabbi to become part of the private school slate. (DX 251 ¶¶ 22, 27.) Then, at trial, he admitted that he asked the Rabbi for his approval to add two people to the slate, and the Rabbi "indicated that he would like to vet [them] like he did me." (Tr. at 1819:4-1820:13.)

- Germain, another black former Board member, also contradicted himself with respect to whether he received or needed the approval of private school leaders to win an election. (DX 175 ¶¶ 18-19; Tr. at 1242:3-4, 1243:1-11.) He swore that no one told him he needed approval to run, and that he sought out Orthodox and Hasidic leaders only to receive support, yet he admitted that he had to meet with Rabbis and receive their approval before formally joining the slate with Charles. (Tr. at 1243:1-6.) He averred that he did not know what the South East Ramapo Taxpayers Association ("SERTA") is or what it might have done to support his candidacy, (DX 175 ¶ 21), but then spoke about its activities and admitted that the organization made the only contribution to his "campaign," (Tr. at 1248:17-24).

The Court will not attempt to apportion fault between the witnesses and Defendant's counsel for the extent to which the witnesses' affidavits – especially Charles's and Germain's – were contradicted by their live testimony, but regardless of who is to blame, their testimony overall was so rife with dissembling that it offered scant, if any, value.

49. The argument that private school candidates were elected because of their policy platforms is also unavailing because it is unrefuted that those candidates did not advocate policies, campaign, or spend money. (*See id.* at 1381:12-1385:10 (Rothman did not do "anything" to get elected); *id.* at 714:22-716:7, 718:9-719:19, 720:13-724:7 (Freilich did not campaign); *id.* at 1835:3-16 (Charles did not spend any of his own money on campaign); *id.* at 384:18-23 (no campaign expenditures filed by winning candidates for 2015, 216, or 2017 elections).)[42] The Rabbis who slated private school candidates did not ask about their policies. (*See id.* at 2578:3-23; 2587:20-2588:12 (Charles-Pierre); *id.* at 1787:20-1788:10 (Charles); DX 175 ¶ 16 (Germain).) Although some witnesses testified that voters in the private school community wanted lower taxes, (Tr. at 725:5-8, 1012:19-1013:14), there is little evidence that the private school candidates ran on any particular platforms. As for the policies of minority-preferred candidates, no minority-preferred candidate ran on a platform that promoted raising taxes or reducing services to private schools, although two (Young-Mercer and Dos Reis) supported a budget that would have affected taxes. (*See* PX 343 ¶ 12 (Young-Mercer); Tr. at 1889:12-1890:14, 1891:22-1892:6 (same); PX 279 ¶¶ 32, 37, 39-41 (Dos Reis); Tr. at 661:2-662:8 (same); PX 283 ¶ 52 (Fields); Tr. at 861:19-862:3, 944:20-946:1 (same); PX 281 ¶¶ 32-36 (Goodwin); PX 286 ¶ 9 (Price); Tr. at 1208:3-11, 1211:15-22 (same); DX 253 ¶¶ 3-4, 7 (Charles-Pierre).) Nevertheless, minority-preferred candidates – who did campaign – did not do much campaigning in white neighborhoods because they knew such efforts would be fruitless or they felt unwelcome there. (*See* PX 283 ***399** ¶ 60 (Fields); PX 281 ¶ 54 (Goodwin); Tr. at 801:3-14, 812:5-11 (same); *id.* at 1174:6-8 (Wieder admitting that he told Mr. Goodwin, a black man, "that the best use of his time was to campaign in his own community").) One candidate, Jean Fields, who is black, explained that sometime in the 1990s a group of white men in New Square stopped and surrounded her car and told her, "[Y]ou don't belong here, you need to leave," which is why she did not feel comfortable campaigning in white neighborhoods. (Tr. at 950:12-951:8.)

[20] 50. The District contends that "[t]he consistent success of minority candidates, with the unvaried support from the majority of White voters, conclusively demonstrates that ... if there is polarization in District elections, it must be driven by policy or political differences – not by racial animus." (Doc. 555 ¶ 137.) But this theory is unavailing for several reasons.

- First, the District cites *Goosby* as providing that "where 'it could be said that white voters [have] supported minority candidates ... at levels equal to or greater than those of white candidates, it [is] proper to conclude in that case "that divergent voting patterns among white and minority voters are best explained" ' by factors other than race, such as partisanship or policy preferences." (Doc. 555 ¶ 132 (alterations in original) quoting *Goosby*, 180 F.3d at 496 (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements (LULAC)*, 999 F.2d 831, 861 (5th Cir. 1993))). But this quotation, as presented by Defendant, is misleading. It substitutes an ellipsis for the phrase "elected by their parties." *Goosby*, 180 F.3d at 496. *LULAC* dealt with partisan elections in which minority candidates were nominated by both sides. *See* 999 F.2d at 861. *Goosby* explained that *LULAC* did not control because there, "white voters, both Democrat and Republican, supported minority candidates elected by their parties," so party affiliation best explained divergent voting patterns among white and minority voters. *Goosby*, 180 F.3d at 496. *Goosby*, too, involved partisan elections, where Republicans were overwhelmingly white and won elections and Democrats were overwhelmingly black and lost elections, and black voters had no access to the Republican party's slating process. *See id.* at 482, 496-97. Accordingly, black Republicans were "unable to advance their preferred candidates as nominees." *Id.* at 497. *LULAC* does not control here because these are not partisan elections, and because (as discussed below) minority voters have no access to the slating process of the overwhelmingly white private school community that wins elections. *Goosby* is also not controlling for same reasons, but this case is more like *Goosby* than *LULAC* because the white community's tight control of the slating process of the dominant bloc prevents black and Latino voters from electing their preferred candidates.

- Next, the District argues *that Reed v. Town of Babylon*, 914 F. Supp. 843 (E.D.N.Y. 1996), compels its conclusion. But that case is readily distinguishable. First, here, the public and private school communities are proxies for race, which was found not to be the case in *Reed*. *See* 914 F. Supp. at 883. Second, *Reed was* decided before *Goosby* separated the *Gingles* preconditions analysis from the Senate Factor analysis, and the point Defendant cites is now analyzed as ***400** part of the third *Gingles* precondition.

- Further, as discussed below in connection with Senate Factors 4 and 7, it is proper to explore whether white support for minority candidates can be explained as "manipulating the election of a 'safe' minority candidate," *Gingles*, 478 U.S. at 75, 106 S.Ct. 2752, or by other special circumstances, *Pope*, 94 F. Supp. 3d at 345-46. The issue is not simply whether a candidate is a member of a minority community, but whether the candidate is minority preferred. *Cf. Goosby*, 956 F. Supp. at 340-41, 344 (black appointee "safe" where, among other things, he was appointed over local black interest group's recommended appointee). If, as here, a successful minority candidate is not minority preferred, that is evidence of racial polarization, not the lack thereof.

Accordingly, the success of minority candidates does not prove that elections were policy driven for purposes of this factor.

51. To the extent it is fair to infer that parents who send their children to private schools (and other like-minded individuals) want lower taxes, and parents who send their children to public schools (and other like-minded individuals) want more spending on public education, that inference is not enough to tilt this factor in favor of Defendant in light of the high racial polarization in voting, the paucity of evidence of policy-driven campaigns, and the identity between race and politics in this community. Cases crediting a "better explanation" defense tend to look to something structural, like party affiliation or a superior ground organization. *See, e.g.*, *Uno*, 72 F.3d at 983 & n.4 (defendant must prove "detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system," such as "organizational disarray [and] want of campaign experience"); *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 216-17 (E.D.N.Y. 2019) (party affiliation predicted outcomes better than race did). Nothing comparable is present here. This is not to say that the white bloc voters harbor conscious racial animus. But if we assume that the white "private school community" votes as it does to reduce taxes, it would deny reality to pretend that its members were unaware that the students to be negatively affected by their votes are overwhelmingly children of color. Where that is the case; where it is difficult, if not impossible, to disentangle race from school affiliation; and where the evidence supporting the District's race-neutral explanation for divergent voting patterns is weak, Defendant's attempt to show that policy preferences best explain divergent voting patterns is, on balance, not sufficient to undermine Plaintiffs' strong showing of racial polarization, and thus Senate Factor 2 favors Plaintiffs.[43]

C. Senate Factor 3

52. Senate Factor 3 examines "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority ***401** group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting." *Gingles*, 478 U.S. at 37, 45, 106 S.Ct. 2752.[44] "Where members of a racial minority group vote as a cohesive unit, ... at-large electoral systems can reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice." *Shaw v. Reno*, 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (internal quotation marks omitted). In districts where candidates run for specific seats (that is, numbered posts), dilution is enhanced because that practice "prevents a cohesive political group from concentrating [all of their votes] on a single candidate." *Montes*, 40 F. Supp. 3d at 1411. Other dilutive practices include few, inconveniently located polling places with limited hours, *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1222-23 (S.D. Tex. 1997), *aff'd*, 165 F.3d 368 (5th Cir. 1999), and staggered elections and off-cycle voting, *United States v. Village of Port Chester*, No. 06-CV-15173, 2008 WL 190502, at *28 (S.D.N.Y. Jan. 17, 2008).

53. The District holds at-large, staggered, off-cycle elections with numbered posts, all of which have the effect of diluting minority votes. (PX 242A ¶¶ 20-35; Tr. at 364:12-20, 366:6-367:19, 369:25-371:14.) The numbered posts and one-vote-per-seat requirement prevent minorities from casting all of their votes for one candidate. (PX 242A ¶¶ 32-33; Tr. at 369:25-371:1.) As to off-cycle elections, Dr. Barreto explained that awareness and information is lower, (Tr. at 366:19-21 ("[T]here's just less awareness and information surrounding 'election day,' which is very high in November of even-numbered years.")), and voters who feel disenfranchised tend to stay home during off-cycle elections, so minority turnout is even lower in District elections, (PX 242A ¶¶ 25-28; Tr. at 366:6-368:19).

54. State and federal elections have twenty-four polling places, but the District uses only thirteen for the same geographic area, which increases confusion and enhances discrimination. (PX 242A ¶ 29; Tr. at 368:20-369:24.)[45] The District has also failed to produce critical voting and election materials in a language other than English, although 37% of

the District's public school students are English Language Learners and 53.6% of Latinos and 21.9% of blacks in the District speak English "less than very well." (JPTO at 4-5; PX 244A ¶ 51; Tr. at 371:2-372:18.) The District admitted that it has failed to make many of its election materials – including ballots, ballot applications, absentee ballots, information on voter registration, nominating petitions, and information on polling locations – available in the primary languages of many of the District's black ***402** and Latino voters, such as Creole or Spanish. (PX 257 at 22:2-24, 41:18-20; 42:20-43:3, 105:16-25, 106:11-22, 148:17-149:4, 150:12-151:10, 152:14-153:4; PX 243 ¶¶ 49-51; PX 288 ¶ 34; Tr. at 1266:7-19.)

55. Defendant argues that any election-practice issues that might exist were not intentional. (*See, e.g.*, Doc. 555 ¶ 163 (at-large system required by state law); *id.* ¶ 172 (District uses fewer polling places because of lack of staffing); *id.* ¶¶ 173-174 (new polling places selected by committee that did not consider race, and preferred plan could not be implemented because fire department would not allow use of its building).) But the third Senate Factor does not examine intent; rather, it asks whether the subdivision has used election practices "that tend to enhance the opportunity for discrimination." *Gingles*, 478 U.S. at 37, 45, 106 S.Ct. 2752. Here, Plaintiffs have offered ample evidence showing that the District employs such practices. Thus, Senate Factor 3 weighs in favor of Plaintiffs.

D. Senate Factor 4

[21] [22] [23] [24] [25] 56. Under Senate Factor 4 courts ask, "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (internal quotation marks omitted).[46] "[A] system that provides only a theoretical avenue for minority ... candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate ... contribute[s] to a violation of Section 2 of the Voting Rights Act." *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 444-45 (S.D.N.Y. 2010). Slating organizations can be formal or informal. *See Westwego Citizens for Better Gov't*, 946 F.2d at 1116 & n.5; *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984), *United States v. City of Euclid*, 580 F. Supp. 2d 584, 608 (N.D. Ohio 2008). Where minority voters do not "have any choice in determining what issues or candidates should or should not be endorsed" by the slating organization, the slating process is racially exclusive. *See Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1123 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987). The process is not made inclusive by the selection and election of a few minority candidates who may not be "true representatives of the minority population." *Velasquez v. Abilene*, 725 F.2d 1017, 1022-23 (5th Cir. 1984); *see Goosby*, 180 F.3d at 496-97; *McNeil v. Springfield*, 658 F. Supp. 1015, 1031 (C.D. Ill. 1987), *appeal dismissed sub nom. In re City of Springfield*, 818 F.2d 565 (7th Cir. 1987). Thus, the question is not simply whether minority candidates get on the ballot, but whether minorities have any "substantial input into the slating process." *Harper v. City of Chicago Heights*, No. 87-CV-5112, 1997 WL 102543, at *9 (N.D. Ill. Mar. 5, 1997).

57. Influential members of the white, private school community in the District participate in a slating process by which they select, endorse, promote, and secure the election of their preferred candidates, and minorities have no input into this process. (Tr. at 372:19-374:5; *see* PX 242A ¶ 37.)[47] There is abundant evidence of this ***403** slating process. Witnesses for both sides testified that an informal organization slates the white community's candidates. Wieder admitted that "there is a group of people in the Orthodox and Hasidic community who select people to run for School Board." (Tr. at 1155:6-9.) Freilich admitted that Grossman connected him with Glick and Oshry, who were "looking for somebody to run." (*Id.* at 706:23-708:8.) Weissmandl explained that the signatures on his required nominating petition were collected by Rabbi Rosenfeld, who was his "go-to guy" for election assistance, that Weber supported his election (discussed further below), and that he never raised or spent any money in an effort to get elected. (*Id.* at 1035:4-25, 1067:12-1068:18.)[48] Rothman testified to a similar lack of campaigning and to getting approval to run from Oshry and Glick. (*Id.* at 1381:12-1382:19, 1383:10-1388:4.) As noted earlier, Weissmandl testified unconvincingly, to be charitable, that he did not remember what he was talking about when he texted a private school group chat saying, "I personally got the blessing for our slate every year last three years through the son [of an influential Rabbi]." (*Id.* at 1072:9-1076:19.) Grossman also did not collect signatures or spend any money, and ran on a slate with Weissmandl. (*Id.* at 1420:8-1424:4.) Charles, who is black, was connected to Rabbi Rosenfeld through a friend, met with Rosenfeld twice, and said that Rosenfeld told him that Charles's proposed running mates would have to be interviewed and vetted to "see if [Rosenfeld would] accept them as part of what [he] wanted to do." (*Id.* at 1787:2-1789:16, 1819:4-1820:13.) Charles testified that he

met with other Orthodox people, but could not remember their names, and that Weber spent money on his campaign and distributed lawn signs and posters. (*Id.* at 1790:7-1792:10.) He also admitted that "leaders in the Orthodox and Hasidic community could replace [him] in an election if they wanted to." (*Id.* at 1816:25-1817:3.) Germain, who is also black, testified that he had to meet with and get the approval of six Rabbis before he could formally become Charles's running mate. (*Id.* at 1241:5-1243:11.)

58. The slating organization made no open calls for candidates, and only people with some kind of connection to the organization were introduced, vetted, and selected. Horowitz admitted that he was not aware of any public notices welcoming candidates to meet religious leaders in open forums, and that he never introduced a public school candidate to Orthodox leaders. (*Id.* at 1025:23-1026:7.) Charles admitted that "when it comes to running for the school board ... you're either working with [the] white community or you're working with the other community." (*Id.* at 1849:1-4.) Young-Mercer, who is black, testified that the Orthodox and Hasidic voters let her win in 2007. (*Id.* at 1894:19-21.) Candidates of color who lost their elections were never approached by anyone connected to the slating organization. (PX 279 ¶ 60 (Dos Reis); PX 281 ¶ 55 (Goodwin).)

59. The roles of the leaders of the slating organization are as follows.

***404** • Rabbi Oshry selects and approves candidates, controls access to the slating process, and submits petitions on behalf of candidates. He testified that he, Glick, Rosenfeld, Weber, and/or Horowitz selected candidates and that he met with and endorsed several white-preferred candidates; that he met with some non-Jewish people, but he could not remember their names; that he submitted nominating petitions; and that he "okayed" candidates. (Tr. at 2468:23-2469:16, 2474:3-2477:13, 2479:10-24, 2483:15-21, 2487:14-2488:16, 2493:11-2494:6, 2495:12-2497:16, 2500:18-2501:24, 2502:9-2506:18; *see* PX 88_0004 (Horowitz writes regarding the 2017 candidates: "Oshry has been busy with it, and he has 4 people for the 2 other seats. Last I spoke he hadn't decided yet."); *id.* (Grossman: "I know somebody who would like to run for one of the seats. Who should I connect him to?" Horowitz: "Give me his number and Rabbi Oshry will call him.").)[49]

• Glick helps select candidates, publicizes their candidacy, and organizes get-out-the-vote efforts. (*See* Tr. at 2503:15-2506:23 (Oshry); *id.* at 1410:6-1413:15, 1427:24-1428:6, 1430:10-1431:1, 1438:13-22, 1441:3-13, 1451:12-1454:13, 1455:6-1458:12, 1458:24-1461:4, 1464:13-21, 1466:1-1467:23, 1468:15-1470:15 (Grossman);[50] *id.* at 1736:2-10 (Russell); *id.* at 1792:2-10, 1836:13-24 (Charles); *id.* at 993:9-24, 996:17-999:2 (Horowitz).)

• Horowitz connects potential candidates to Oshry and approves candidates. (*See id.* at 1424:23-25, 1432:14-1434:2, 1436:1-19, 1437:16-1438:4, 1444:1-1447:21, 1477:8-1479:24 (Grossman); PX 339 at 8 (same).) Charles-Pierre testified that Grossman told her that Horowitz was key to her being unopposed in 2016. (Tr. at 2575:11-14 (Charles-Pierre).) During the course of this litigation, ***405** Grossman texted Horowitz, "Spoke to [Defendant's counsel] David Butler today. He asked me to convey message that it would be good for the case to have a [m]inority to run against Sabrina [Charles-Pierre] that [the] community could support. Message conveyed." (PX 88_0010; Tr. at 972:24-975:2 (Horowitz); *id.* at 1477:17-1479:24 (Grossman).)[51]

• SERTA, Weber's organization, places ads in a local magazine and works to get out the vote. (Tr. at 991:16-992:10 (Horowitz); *id.* at 1063:18-1067:11 (Weissmandl).)

60. In each contested election, the slating organization helped to secure the white-preferred candidate's election.

• In 2008, the slating organization created a phone script urging support "for our Heimishe candidates." (PX 188.)[52]

• In 2011, Rabbi Rosenfeld handled Weissmandl's nominating petitions. (Tr. at 1035:4-25 (Weissmandl).)

• In 2012, Glick and Walfish handled everything for Rothman's election including getting all signatures on his nominating petition, and Rothman did not do anything to get elected or even meet the two other candidates on his slate. (*Id.* at 1381:12-1389:5.)

• In 2013, Charles, Germain, and Maraluz Corado were supported by SERTA, Glick, and Horowitz,

(*id.* at 1010:19-24 (Horowitz); *id.* at 1243:21-1245:6, 1247:1-1249:18, 1251:25-1252:14 (Germain); *id.* at 1791:3-15, 1836:13-24 (Charles)), and vetted and approved by Rabbi Rosenfeld, (*id.* at 1782:2-1791:19, 1818:20-1819:21 (Charles); *see id.* at 1242:9-1243:11 (Germain); *id.* at 2503:16-2505:13 (Oshry)).

- In 2015, Rabbi Rosenfeld vetted Juan Pablo Ramirez, (*id.* at 1820:22-1821:17 (Charles)), and Weissmandl and Horowitz assisted. (Tr. at 1024:20-1025:11 (Horowitz); *see* PX 80 at 1532.) Rothman, who was also elected, did nothing to campaign. (Tr. at 1391:23-1393:5.)

- In 2016, Charles, Germain, and Weissmandl, were approved and endorsed by SERTA, Oshry, Horowitz, and Glick. (*Id.* at 1242:9-1243:11, 1246:11-1251:2 (Germain); *id.* at 1010:19-24 (Horowitz); *id.* at 1836:13-1838:6, 1846:4-1847:8 (Charles); *id.* at 1513:14-21 (Grossman); *see* PX 80 at 1532.) The private school slating organization arranged for Charles-Pierre to run unopposed, securing her win. (Tr. at 1395:17-1396:6 (Rothman).)[53]

- In 2017, Horowitz and Oshry endorsed Freilich at Grossman's recommendation. (*Id.* at 706:23-709:7 (Freilich); *id.* at 1432:14-1434:2, 1434:8-15, 1436:1-19 (Grossman); PX 339 at 8 (same).) Oshry, Glick, and SERTA supported his election. (***406** Tr. at 1410:6-1413:15, 1420:8-1421:22, 1427:24-1428:6, 1430:10-1431:1 (Grossman); *id.* at 994:18-995:5, 996:17-999:2 (Horowitz); *id.* at 706:23-709:7, 709:12-713:17, 720:13-724:7 (Freilich); PX 339 at 3 (same).) Freilich did nothing in support of his own candidacy beyond once announcing at a synagogue that he was running. (Tr. at 714:22-716:7, 718:9-719:19, 720:13-724:7 (Freilich); PX 339 at 3 (same).)

- In 2018, Ephraim Weissmandl and Yoel Trieger were assisted by Glick, Grossman, and Oshry. (PX 74_0005; Tr. at 2487:14-2488:16.) The slating organization again arranged for Charles-Pierre to run unopposed. (*See* Tr. at 2569:10-2570:2 (Charles-Pierre).)

- In 2019, as discussed in detail at paragraph 76 below in connection with Senate Factor 7, the white slating organization engineered a minority-versus-minority race and a victory for the public school community candidate Ashley Leveille, (DX 12), along the lines of what Grossman told Horowitz would be "good for the case."[54]

61. To the extent minority candidates have been elected with the support of the white community, they have been chosen by the white slating mechanism (as described above), they are often not minority-preferred, (*see* Tables 1-2 above), or special circumstances exist, (as described below in connection with Senate Factor 7). Accordingly, their election does not undermine the Court's finding of the existence of a white slating mechanism into which minorities have no significant input. *See* *Velasquez*, 725 F.2d at 1022 n.1.

62. The witness testimony corresponds with Dr. Barreto's testimony about and the academic literature on slating. The presence of slating is indicated by a pattern of two-candidate elections as well as nearly identical vote totals in every contest, which are present here. (PX 242A ¶¶ 43-44; Tr. at 377:4-383:25.) Dr. Barreto discussed a leading article on exclusive slating organizations and testified that, as here, such organizations refuse minority participants access to the nominating process by "vesting authority in a handful of community leaders who were largely unaccountable to others in the organization" and not "maintain[ing] consistent procedures from year to year." (PX 242A ¶ 38; *see* Tr. at 374:6-375:12.) All slating groups in the seminal study described in the article included " 'some minority group members, but they were often described by minority leaders not involved in the slating process as tokens, and in some cases the minority nominees were not the choice of minority voters.' " (PX 242A ¶ 38 (quoting Chandler Davidson & Luis Ricardo Fraga, *Slating Groups as Parties in a "Nonpartisan" Setting*, 41 W. Pol. Q. 373, 382 (1988)) (PX 271)).

63. In sum, it is clear that a slating organization exists in the white, private school community and that it consistently guarantees election outcomes. The organization may not be formal or official, but it need not be. *See* *Euclid*, 580 F. Supp. 2d at 608; *Gretna*, 636 F. Supp. at 1123. There is little evidence that any private school candidates created platforms or shared their views, or that the public school candidates, who did have platforms and positions, were heard within the white community. Rather, the evidence is that blacks and Latinos did not have the opportunity to participate in the private school slating process, which was tightly controlled by a few white individuals. ***407** Further, it is irrelevant whether there is a public school slating process. Even though the public school community engages in traditional electioneering, its candidates always lose. (Tr. at 2133:21-2134:6 (White); PX 279 ¶¶ 34-57 (Dos Reis); PX 281 ¶¶ 30-50 (Goodwin); PX 283 ¶¶ 53-58 (Fields); *see* PX 242A ¶ 39.) The public school community's process

is open to the public, and candidates do not need any insider information or special access to decision makers to participate. As Dr. Barreto testified, the literature explains that frustrated communities who are "locked out" of the dominant winning slate try to form their own slates, but because they represent "a numeric minority," as here, they can never "overcome the more powerful slate" and win. (Tr. at 379:8-14.) For all these reasons, this factor favors Plaintiffs.[55]

E. Senate Factor 5

[26] 64. Senate Factor 5 considers "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Goosby*, 180 F.3d at 491 (internal quotation marks omitted). "[W]here minority group members suffer effects of prior discrimination" and "the level of minority participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation." *Village of Port Chester*, 704 F. Supp. 2d at 445 (internal quotation marks and alteration omitted). Rather, "the burden falls to Defendant to show that the cause is something else." *Id.*

65. In the District, blacks and Latinos have higher unemployment rates than whites, and a higher percentage of whites work in management or professional jobs, whereas blacks and Latinos are more likely than whites to work in service occupations. (PX 244H_0051-56.) Blacks and Latinos also trail whites in earning high school diplomas and bachelor's degrees. (Tr. at 743:25-744:17 (Cooper).)

66. By some measures, including poverty rates, median income, and *per capita* income, the data seem to show that blacks are doing better than whites. (*See* PX 244A ¶ 44.) But as Plaintiffs' demographer William Cooper explained, these figures do not accurately reflect the white community's wealth, because even if income is lower, a larger percentage of whites have opted out of the labor force, (Tr. at 750:23-751:1; PX 244H_0053), and the white population "has a lot of wealth built up into ... their homes," (Tr. at 748:21-749:1; *see id.* at 745:23-747:12), which are located in higher value areas, (*see* PX 244A ¶¶ 47-48). *See Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1073 (E.D. Mo. 2016) (noting "wealth gap" in home ownership is a key driver of disparities), *aff'd*, 894 F.3d 924 (8th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 826, 202 L.Ed.2d 579 (2019). Further, the unusually large average household size of whites in the District serves to depress household financial statistics. (PX 244A ¶ 43.) Latinos lag behind blacks and whites "across most of these same key socioeconomic measures." (*Id.* ¶ 44; *see* Tr. at 532:4-6 (Cooper).)

67. Defendant contends that blacks and Latinos in the District do better than ***408** blacks and Latinos statewide, (*see* Doc. 555 ¶¶ 201-202), which is not relevant here. This factor concerns how blacks and Latinos are doing socioeconomically compared to whites in the District. Even though blacks may be doing well by some measures, the lags they experience in education and employment are consistent with their lower (and declining) turnout rates compared with whites, (PX 242A ¶ 57 & tbl.7; *see id.* ¶¶ 58-59), and their feelings of "election futility," which is one of the strongest factors correlated with low minority voter turnout rates, (Tr. at 398:10-19 (Barreto)).[56] There is also demonstrated religious and housing segregation in the District, and those separations, along with social and economic separations, "make[ ] it especially difficult for [minority] candidates ... to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win an at-large elections." *Charleston County*, 316 F. Supp. 2d at 291. As Dr. Barreto explained, in the District, "there's ample evidence of election hindrance in the [m]inority community; that they don't have equal access to slating organizations and mobilizing groups which turn out the vote for candidates" and are thereby "hindered," which "limits their ability to participate in the political process." (Tr. at 1631:2-12.) Accordingly, Plaintiffs need not prove any further causal nexus. *See Village of Port Chester*, 704 F. Supp. 2d at 445.

68. Although both sides can point to statistics in their favor on this factor, Plaintiffs have shown that blacks and Latinos in the District lag behind whites socioeconomically, and these conditions have resulted in a depressed level of participation by the minority community in the political process. Thus, Senate Factor 5 weighs in Plaintiffs' favor, although not heavily.

F. Senate Factor 6

[27] **[28]** 69. Senate Factor 6 looks to "the use of overt or subtle racial appeals in political campaigns." *Goosby*, 180 F.3d at 491 (internal quotation marks omitted). Appeals can be racial when they operate on "heightened racial tension," *id.* at 488, or when a candidate sends campaign materials to

white constituents that suggest that an opponent is a person of color, *see Charleston County*, 316 F. Supp. 2d at 295. Racial appeals need not be permanent or pervasive. *See Euclid*, 580 F. Supp. 2d at 610.

70. Plaintiffs have offered little evidence showing the use of racial appeals in political campaigns in the District. Plaintiffs suggest that white candidates' targeted messaging to white voters constitutes a racial appeal, (*see* Doc. 556 ¶ 187 (citing Tr. at 719:6-17 (Freilich); *id.* at 1061:1-9 (Weissmandl))), but there is no evidence that this activity suggested that opponents were people of color or sought to capitalize on heightened racial tension. The only evidence of a campaign activity that comes close to a racial appeal is a Yiddish phone script given to private school volunteers that translated to "the fate of Jewish money and Jewish children is in your vote." (*See* Tr. at 1169:14-1170:8 (Wieder); PX 188.) But there is no evidence that the script was ever used, and in any event, it hardly shows that racial appeals have ***409** formed a part of campaigns. Accordingly, this factor favors Defendant.

G. Senate Factor 7

[29] **[30]** 71. Senate Factor 7 examines "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Goosby*, 180 F.3d at 491 (internal quotation marks omitted). "[T]he election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote ...." *Gingles*, 478 U.S. at 75, 106 S.Ct. 2752 (internal quotation marks omitted). "[I]f it did, the possibility exists that the majority citizens might evade § 2 by manipulating the election of a safe minority candidate." *Id.* (internal quotation marks and alteration omitted). "Safe" candidates have included a black man who, once elected as a town officer, was unresponsive to the needs of black constituents, *see Goosby*, 956 F. Supp. at 339-45, and a minority candidate who won an election having received only about 30.7% of the minority vote, *see Charleston County*, 316 F. Supp. 2d at 278-79, 279 n.14. The election of a minority candidate is also discounted where whites preferred the minority candidate, engineered the election of a minority to evade a VRA challenge, or provided unusual political support to the minority candidate or otherwise campaigned to ensure that candidate's election. *See Aldasoro*, 922 F. Supp. at 375-76. Special circumstances surrounding minority elections, such as unopposed races and appointment prior to election, likewise weigh against a finding of minority success in elections. *See Pope*, 94 F. Supp. 3d at 345-46.

72. Minority candidates have won seven out of thirty-two contested races from 2005 through 2018. (PX 242A ¶ 61.)[57] Of the eighteen of those races in which the candidates were of different races, minority candidates won three. (*Id.*) Defendant argues that these victories indicate that divergent voting is best explained by policy differences rather than vote dilution. (Doc. 555 ¶ 233.) But from 2008 to 2018, no minority-preferred candidate won a contested Board election, (PX 242A ¶ 64; *see* Table 1 above), and every candidate of color who won was either perceived as "safe" by the white slating organization or affected by special circumstances.

73. Without deciding whether any particular Board member was "safe," I find that the white slating organization was certainly looking for and supporting candidates believed to be "safe." Charles and Germain, black men who won four of the six contested elections analyzed, both admitted that they were vetted by the white slating organization, (Tr. at 1819:4-1820:3 (Charles); *id.* at 1243:1-6 (Germain)), and elected because the white community approved of their candidacy, (*see id.* at 1846:4-1847:8, 1849:1-4 (Charles's campaign materials were created and distributed by members of Orthodox and Hasidic community, with whom he was working); *id.* at 1242:9-1243:11, 1250:2-1251:2 (Germain had to meet with Orthodox and Hasidic community leaders before formally joining Charles's slate and members of that community collected signatures for his nominating petition); *id.* at 1487:20-1488:6 (Grossman referring to Charles and Germain as members of the private school slate)). They apparently had no interest in or need for campaigning in or appealing to any other community because they knew they would win by virtue of the white slating organization's support. (*See* Tr. at 1847:9-1848:15 (Charles admitting that he ***410** never attended public NAACP candidate forum and felt he had no reason to attend, and that in 2013, he chose to attend a campaign event with all white attendees); *id.* at 1814:10-1815:14 (Charles acknowledging that he won with support of Orthodox and Hasidic leaders); PX 339_0010 (Charles stating that support of the Orthodox and Hasidic community was necessary to win an election); PX 288 ¶ 37 (Trotman stating that Germain did not attend 2013 NAACP forum and attended 2016 forum only briefly), Tr. at 1254:18-21 (Germain testifying that he believed he received approximately 90 percent of his votes from the Jewish community).) And, once elected, Charles and Germain appeared to join with the white majority. For example, they did not seem to support the addition of minority Board members and appeared determined to maintain the *status quo*. (*See* Tr. at 1849:5-1851:19 (Charles did not support

appointment of Charles-Pierre, a black woman whom he perceived to be "on the opposing side," and in an email to Grossman called her the "lamb who will certainly lead to a slaughter of this board"); *id.* at 1264:18-1265:21 (Germain supported Charles-Pierre only because he believed Board could "have better control of [her]" because she is "not ... aggressive" like another candidate, whom he called "the Spanish girl"); *id.* at 1853:16-1856:6 (Charles "went along" with other Board members and voted for appointment of Joe Chajmovicz, an inexperienced white man with a poor command of written English, over a retired District principal with two master's degrees who is black); *see* PX 167-168 (Chajmovicz and Fields statements).) Members of the public school community did not support Charles and Germain, (*see* PX 280 ¶ 9 (Clerveaux); PX 279 ¶¶ 12-15 (Dos Reis); PX 283 ¶¶ 43, 62, 70 (Fields); PX 281 ¶¶ 9-10, 12-13 (Goodwin); Tr. at 2565:14-23, 2567:21-24, 2598:4-7 (Charles-Pierre); *id.* at 1858:12-14 (Charles describing calls for his resignation); *id.* at 1260:25-1261:14 (Germain describing protest in front of his house that resulted in another Board member's resignation)), and some were of the view that Charles and Germain were identified with the private school community, (*see* Tr. at 841:10-25, 842:8-19 (Miller); *id.* at 1927:24-1928:10 (Cohen)). On this evidence, I need not reach a conclusion about whether Charles or Germain were "safe" candidates to conclude that the white slating organization believed that they would go along with the white community's wishes.

74. Other successful minority candidates won under unusual circumstances. Corado and Ramirez won with the support of the white community in 2013 and 2015, respectively, (PX 242A ¶¶ 8-9, 14; *see* Table 1 above), and resigned from the Board shortly thereafter, (Tr. at 1252:5-7, 1261:2-6 (Germain); *id.* at 1113:17-23 (Weissmandl)), leaving the Board to appoint Grossman and Charles-Pierre, (*see id.* at 1110:11-1111:1, 1115:7-9 (Weissmandl); PX 172). Charles and Germain were incumbent in three races, which gives an electoral advantage. (PX 242A ¶ 62.) Young-Mercer and Thompson were unopposed incumbents, but Thompson lost to Rothman the next year and Young-Mercer resigned in frustration and because she was confident she would not be re-elected. (*See* PX 234; PX 242A at 34-35; Tr. at 1876:2-1877:12, 1880:14-1881:15 (Young-Mercer).)

75. Charles-Pierre was initially appointed to the Board in 2015 as a result of pressure on the Board from the state-imposed monitor to appoint a public school parent. (*See* PX 81_0047 (Grossman told Charles-Pierre that Weissmandl said, "The only reason [Charles-Pierre] is there and ran unopposed is because the board wants to do what [the state-appointed monitor] said," which was to "[h]ave at least one [public] school parent."); ***411** Tr. at 2576:14-2577:2 (same); PX 156_0014-15 (monitor report recommending that all candidates for at least one Board seat must be parents of public school students and selected by other public school parents).) She ran unopposed and won in 2016 because she had the imprimatur of the white slating organization. (*See* PX 81 at 16-18; Tr. at 1009:9-1010:15, 1024:23-1025:11 (Horowitz supported Charles-Pierre in 2016 "[i]f it's the year she won"); *id.* at 2565:17-2566:23 (Charles-Pierre campaigned with other public school candidates who "worked just as hard" as she did but lost, while she won because she met with slating organization and got the majority of the white vote); *id.* at 2567:11-16 (Grossman told Charles-Pierre that he and Weissmandl convinced Horowitz that they would support Charles-Pierre and she would run unopposed).) After she won, Grossman repeatedly reminded her that her continued presence on the Board depended on the white slating organization's support. (Tr. at 2582:22-2583:16 (Charles-Pierre); *see* PX 81_0029 (Grossman texted Charles-Pierre, "When you look at the vote totals from last night, you know you are on the board because the Jewish community trusted me and Yehuda [Weissmandl] not to run another candidate."); *id.* at _0035 (Grossman texted Charles-Pierre, "If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other 3 .... Orthodox community could just have voted you out in May. WE told them that you were good and not to run a candidate."); *id.* at _0040 (similar statements from Grossman to Charles-Pierre).) She believed that she was kept out of important discussions and that the Board tried to placate the monitor without giving her any real power or clout. (Tr. at 2595:17-23, 2639:14-2640:9 (Board members said they believed they could control Charles-Pierre and that she had "zero control or influence on direction"); *id.* at 2626:25-2527:7 (Charles-Pierre believed Board members were making her look "stupid" and "keeping [her] in the dark").) Indeed, Board members limited certain discussions to white members only, including discussions on important matters such as the settlement of this litigation, (*see* Doc. 533), and the appointment of a new Board member, (*see* Tr. at 1530:24-1533:24 (Grossman testifying that Weissmandl forwarded resumes of Board candidates to white Board members with message, "Please respond ASAP as we discussed. One choice.")).[58]

76. Further, Leveille's election in 2019 appears to have been engineered by the white slating organization, as mentioned above, after Defendant's counsel had suggested the previous year that "it would be good for the case to have a minority to run against Sabrina [Charles-Pierre] that the community could support." (Tr. at 2648:22-2649:6 (Charles-Pierre); PX 88_0010.) In 2019, Pastor Joselito Cintron, who is Latino, ran for a seat to be vacated by Weissmandl, who is white. (Tr. at 1772:8-11, 1773:9-21 (Leveille); *id.* at 2590:8-12 (Charles-Pierre).) Cintron agreed to run on a ticket with Leveille and Goodwin, both of whom are black and public school advocates. (*See id.* at 792:21-24 (Goodwin); ***412** *id.* at 1773:17-20 (Leveille); PX 281 ¶¶ 3, 20, 23 (Goodwin).) Leveille was running for a different vacant seat. (*Id.* at 1773:21-1774:1.) Then, abruptly, Weissmandl apparently decided to run after all, and Cintron, rather than opposing him, chose to run for the same seat as his former ticket-mate Leveille, leaving Weissmandl rather than Leveille to run unopposed. (*Id.* at 1774:17-19 (Leveille); *id.* at 2592:9-12 (Charles-Pierre).) Because Cintron was now running for a different seat, he needed a new nominating petition. All the signatures for that petition were collected on a single day – the day petitions were due – and were collected almost exclusively from voters residing in the white areas of the District, showing that the white slating organization wanted the switch. (PX 314; PX 330; PX 341; Tr. at 1748:10-1750:10 (Russell); *see id.* at 1515:21-1516:16, 1517:6-12 (Grossman).) Cintron told Leveille that "they" were giving him the seat if he ran against her and that "the rabbis" said that that was the only way he could win.[59] (Tr. at 1775:19-1776:18 (Leveille).) On election day, to her surprise, Leveille unexpectedly defeated Cintron. (*Id.* at 1779:15-1780:2 (Leveille).) Turnout was inordinately low at the polling places in the white areas of the District, (*see id.* at 1742:19-1743:1 (Russell); DX 252 ¶ 62(1); DX 12), suggesting that the white slating organization had pulled its support from Cintron and engineered the victory of a candidate favored by the public school community over another minority candidate. Grossman had discussed with an activist named Rivke Feiner that it would be desirable to have two minority candidates running against one another. (Tr. at 1520:18-21 (Grossman).) This engineering of Leveille's win, complete with double-cross by and then of Cintron, shows not only the power of the white slating organization, but also that Leveille's victory was (without any participation on her part) at least a "special circumstance," if not a naked attempt to manipulate the outcome of this case.

77. Even before Leveille's engineered victory, the white slating organization was cognizant of appearances and aware that the white, private school community would be better off if it included minority candidates on the slate, whether to placate the monitor or the minority voters of the District. This awareness is supported by the white slating organization's selection and endorsement of Charles and Germain, who they believed would not stand in the way of what they wanted. Thus, the mere fact that there were some minority candidates, a few of whom were elected, does not carry a lot of weight in light of the evidence that victories were arranged for appearance's sake and/or occurred in unusual circumstances, especially considering how few people of color were ultimately elected. Senate Factor 7 therefore weighs in Plaintiffs' favor.

***413 H. Additional Factor 8**

[31] 78. In some cases, "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group" has probative value. *Goosby*, 180 F.3d at 491-92 (internal quotation marks omitted). Unresponsiveness includes failure to respond to complaints of racial discrimination, *Goosby*, 956 F. Supp. at 346; failure to identify concerns of the minority community, *see McDaniels v. Mehfoud*, 702 F. Supp. 588, 595-96 (E.D. Va. 1988), *denying amendment*, 708 F. Supp. 754 (E.D. Va. 1989), *appeal dismissed*, 927 F.2d 596 (4th Cir. 1991); scarcity of outreach sessions in the minority community, *Conn. Citizen Action Grp. v. Pugliese*, 1984 U.S. Dist. LEXIS 24869, at *12-13 (D. Conn. Sept. 27, 1984); failure to respond to unequal school resources and disparate discipline and educational opportunities, *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1073; and failure to provide bilingual translations of official forms, *Pugliese*, 1984 U.S. Dist. LEXIS 24869, at *13.

79. Defendants can introduce evidence of responsiveness, but overall the Second Circuit pursues the responsiveness/unresponsiveness "inquiry with some reluctance, as it entails ... deciphering what policy steps qualify as responses to the needs of members of the minority community," and is therefore less objective than other factors. *See Niagara Falls*, 65 F.3d at 1023 n.24 (internal quotation marks omitted). Accordingly, I do not give this factor as much weight as I give other factors. *See Village of Port Chester*, 704 F. Supp. 2d at 446.

80. Plaintiffs have put forth ample evidence of the Board's lack of responsiveness to particularized needs of the black

and Latino communities since 2008. The Board has ignored concerns and numerous requests from the NAACP and others in the public school community. (*See* PX 342 ¶¶ 18-19 (Cohen); PX 288 ¶¶ 12-14, 16-18, 25, 36 (Trotman); PX 228 (letter from NAACP); PX 40 (same); Tr. at 2665:22-2266:7 (Charles-Pierre); PX 279 ¶¶ 21-24 (Dos Reis).) One former public school student of color – an impressive and thoughtful young woman – testified that when she approached the Board as a student, she was ignored or accused of lying. (PX 278 ¶¶ 21-28 (Castor); Tr. at 590:11-24 (same).) In an apparent effort to prevent public school parents' voices from being heard, the Board for a time moved the public comment period to the end of its meetings, and often held such long executive sessions beforehand that public comments began after 10 or 11 p.m., when most members of the public had already had to leave. (PX 152 at 35; PX 342 ¶ 13 (Cohen); PX 283 ¶ 44 (Fields); PX 286 ¶ 30 (Price).) At times, Board members left the room to destroy a quorum and delay public comment, (PX 286 ¶ 31 (Price)), or became obviously absorbed in their phones or in side conversations while public school advocates were speaking, (Tr. at 590:17-22 (Castor); *id.* at 786:20-787:9 (Goodwin); *id.* at 820:14-16 (Miller)). Some were so disengaged while public school advocates were expressing concerns that "[i]t looked like they were sleeping." (*Id.* at 820:16-18 (Miller).) The Board also enacted a rule prohibiting its members from responding when community members voiced concerns during Board meetings. (*See id.* at 734:25-735:9 (Freilich).) Together, these policies stifled public school advocates' ability to articulate concerns and enabled Board members to not respond.

81. In one incident, former District Superintendent Joel Klein was discussing an influx of older students who had little education in their native Latin American countries. He said that "we know every[ ]one of these kids are dropping out" and that, to avoid having them skew the graduation ***414** rate, the District would set up an "alternate transitional program" for students who, he said, "want to learn the language, they want free lunch, breakfast and whatever else they can get." (DX 171 at 2:9-3:15; DX 180.) The state monitors characterized these remarks as a "failure to understand the background and needs of [the District's English Language Learner] community," (PX 217 at 9-10); one of Plaintiffs' witnesses called them "disgusting," (Tr. at 1337:11-1338:3); and Plaintiffs call them "racially insensitive," (Doc. 556 ¶ 140). Regardless of whether Klein was merely responding to a crisis, or intentionally hostile, or somewhere in the middle, the Board's lack of response is what matters. Despite "numerous unfortunate comments" by Klein that "contributed to an ongoing distrust between the District leadership and the public school community," (DX 35 at 9), Klein remained in place for a year, (*see* DX 180 (comments made on August 20, 2014); DX 35 at 9 (Klein replaced in 2015); Tr. at 2410:21-25 (Wortham replaced Klein in November 2015)). Defendant points out that Klein was replaced by Deborah Wortham, who has overseen "remarkable and steady improvement," (Doc. 555 ¶ 247), but the Board hired her only after pressure from the state monitors to replace Klein, (DX 35 at 9), so her appointment does little to show District responsiveness. In other incidents, lawyers retained by the Board treated students and parents in a bizarrely hostile fashion but remained as Board counsel even after the public school community protested. (PX 286 ¶ 24 (Price); PX 343 ¶ 27 (Young-Mercer); PX 278 ¶ 29 (Castor); PX 140 (letter from parent who said her son was harassed); PX 283 ¶ 47 (Fields); PX at 152 at 28 (monitor presentation).)

82. Current and former Board members who support public schools felt marginalized and harassed, (*see* PX 343 ¶¶ 35-38 (Young-Mercer); PX 286 ¶ 33 (Price); Tr. at 1184:8-1186:22 (same); *id.* at 2664:5-20 (Charles-Pierre)), while white Board members acknowledged that they had all the power, (PX 342 ¶ 16 (former Board President told Cohen that the Board had "all of the power"); PX 80 at 427 (Grossman: "If private school really wanted [Ms. Charles-Pierre's] seat she would have lost the election like the rest of them."); PX 81_0050 (Grossman: "Nothing can pass without [O]rthodox support."); PX 88_0002 (Grossman: public school advocates "feel disempowered because they are"); PX 8 at 279 (Grossman: the outcome of the 2016 election "will be whatever we want it to be"); *see* Tr. at 2670:12-24 (Charles-Pierre agreeing that the "white majority" "had all the real power")). It is therefore unsurprising that the Board refused to participate in a reconciliation process with public school community leaders. (PX 342 ¶ 16 (Cohen); PX 288 ¶ 9 (Trotman).)

83. This lack of concern regarding the views of the public school community seems to have allowed for numerous Board decisions privileging private school interests and/or harmful to public education.

- From 2009 to 2014, budgets were cut dramatically, and the Board eliminated hundreds of public school teaching, staff, and administrative positions and eliminated classes and programs. (PX 152 at 30-32.) The public school buildings fell into disrepair and custodial services were reduced. (PX 279 ¶ 19 (Dos Reis); PX 278 ¶¶ 18-20 (Castor); PX 283 ¶ 36 (Fields); PX 288 ¶ 18 (Trotman).)

Students were given academically deficient schedules full of free time and filler. (PX 278 ¶¶ 15-16 (Castor); Tr. at 582:12-584:25, 638:9-24 (same); PX 3B at 2, 4.) The Board closed two public schools over minority opposition and tried to sell one of them to a ***415** yeshiva at a sweetheart price, a sale the New York State Commissioner of Education annulled. (PX 286 ¶¶ 26-27 (Price); PX 212.) Graduation rates and test scores sank. (PX 283 ¶¶ 30-35 (Fields); *see* PX 204A-I.) The Board made "no meaningful effort ... to distribute [the] pain of deep budget cuts fairly among private and public schools." (PX 152 at 33.)

- In the 2010-2011 and 2011-2012 school years, so many special education placements were improperly given to white children that the state refused to fully reimburse the District. (PX 211; PX 286 ¶ 18 (Price); PX 289.)

- The state monitor found that in 2013 the Board turned down $3.5 million in advanced lottery funds that could have been used to restore programs, but which would have required the District to form an advisory committee including parents and teachers that would direct how the money would be spent. (*Id.* at 22, 45.)

- While the public school cuts have yet to be restored in full, (PX 108 at 5-6), nonmandated private school services have increased. For example, the budget for the 2017-2018 school year included funds for five nonmandated days of private school transportation, and as a result, the Commissioner of Education did not approve the budget. (PX 170.) The Board approved six days of nonmandated private school busing for the 2019-2020 school year. (PX 262.) In November 2019, the New York State Comptroller found that, over the preceding two school years, the District paid yeshiva private contractors to bus 1,172 more students than were registered, totaling $832,584 in unsubstantiated expenses. (PX 214 at 1.)

- The Board appointed new members seemingly without concern for candidates' qualifications or lack thereof. (PX 172; PX 283 ¶¶ 65-66 (Fields); Tr. at 2666:21-2667:17 (Charles-Pierre).) It also made accommodations for Yiddish-speaking parents and students that were not made for Spanish speakers. (PX 157 at 8-9; PX 217 at 1-2.) It remains under a corrective action plan by the New York State Education Department Office of Bilingual Education and World Languages. (Tr. at 2418:19-2419:6 (Wortham).)

Accordingly, that cuts may, as Defendant suggests,[60] have been necessitated by the financial crisis or a state funding formula that is unfair to the District does not undermine the conclusion that the Board has not been responsive to the concerns of black and Latino persons.

84. Since 2015, the District has seen improvements, which are commendable, but the positions that have been restored have not been restored in full, (*see* PX 208 at 5-6), and have not kept up with a significant increase in enrollment, (*id.*). Further, all improvements have occurred under state supervision and with the help of a lot of state money. For example, the District's budgets, developed in consultation with the state monitors, must be approved by the Commissioner before being submitted to a vote in the District, (Tr. at 2404:22-2405:4 (Wortham)), and an annual $3 million grant recommended by the monitors must be spent on public schools, (PX 206_0007-08; ***416** PX 203; Tr. at 2431:23-2432:13 (Wortham); PX 207_0009-10; PX 208_0010-11). The District cannot maintain its public school program restorations without the grant money. (PX 206_0019.) There is every reason to believe that the improvements are because of the state monitors, and in spite of the machinations of some Board members. (*See, e.g.*, Tr. at 1525:23-1529:9, 1550:7-1554:8, 2675:23-2676:23 (Grossman urging petitions against Board, suggesting removal of non-Orthodox Board members, and interfering with settlement of this lawsuit).) Even Superintendent Wortham, who has overseen many of the positive changes, was hired by the Board in collaboration with the state monitors, who helped to "identify, recruit, and hire" her. (PX 156_0010.) Accordingly, the improvements to public education in the District do not show responsiveness by the Board, or change the facts above, which show a lack thereof. For these reasons, this factor favors Plaintiffs.

I. Additional Factor 9

85. Under Senate Factor 9, courts consider "whether the policy underlying the ... political subdivision's use of ... [the contested] practice or procedure is tenuous." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (internal quotation marks omitted).

86. Defendant contends that it is required to use an at-large voting system because under New York law, "[e]ach vacancy upon the board of education to be filled shall be considered a separate specific office," N.Y. Educ. Law § 2018(a), and all qualified voters are "entitled to vote at any school meeting or election for the election of school district

officers," *id.* § 2012. Defendant's interpretation is reasonable, and may even be correct, and on this record, there is no basis for concluding that the at-large elections are a cover for intentional discrimination or a desire for discriminatory effect. But although the District has a legitimate basis for running the elections the way that it does, there is evidence that the dominant Board members and the white slating organization have a desire to adhere to the current system despite its discriminatory effect and went to extraordinary lengths to preserve that system to maintain political power. The evidence shows that, in the course of this proceeding, Board members outright lied or disingenuously claimed lack of memory;[61] the Board President and others failed to provide the Board's members of color with complete or accurate information about this lawsuit, including settlement possibilities that could have saved enormous amounts of money,[62] (*see* Tr. at 2672:10-2674:1, 2675:23-2677:1 (Charles-Pierre); Doc. 553-1 ¶ 9 (Leveille)); and one leader of the white slating organization went so far as to go into contempt of court, (*see* Doc. 530; note 49 above). The District also knew, at least as of January 30, 2020, when the Court ruled on the parties' motions *in limine*, that even if state law requires at-large elections, the ***417** Court has the power to impose a remedy if the challenged voting practice violates Section 2 and, therefore, that it would have been possible to resolve this case. Further, as discussed above, the slating organization appears to have been so desperate to maintain the at-large system that it engineered Leveille's 2019 victory for purposes of appearances after Defendant's counsel suggested it would be "good for the case" to have an additional minority candidate. (Tr. at 2648:22-2649:6 (Charles-Pierre); PX 88 at 10.) All of these machinations show that, even if the District is justified in its belief that state law requires at-large elections, some Board members had tenuous, if not illegitimate, reasons for wanting to maintain the *status quo*. Accordingly, this factor weighs in Plaintiffs' favor.

IV. FINAL CONCLUSIONS & REMEDY

87. Balancing all of the relevant factors, I find that Plaintiffs have convincingly proven their case of vote dilution. The three *Gingles* factors are met, and the Senate Factors weigh firmly in Plaintiffs' favor. The at-large system of electing the Board of Education of the East Ramapo Central School District affords black and Latino residents "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," *Gingles*, 478 U.S. at 36, 106 S.Ct. 2752 (internal quotation marks omitted), in that it "thwarts a distinctive minority vote by submerging it in larger white voting population," *Growe*, 507 U.S. at 40, 113 S.Ct. 1075. I do not address whether this result was intentional, as no such finding is required under Section 2. The case is made by showing that people of color feel the deleterious impact of the at-large scheme employed for Board elections and white people do not, such that the challenged practice "has operated to invidiously exclude blacks [and Latinos] from effective participation in political life in violation of Section 2." *Goosby*, 956 F. Supp. at 356.

[32] 88. Plaintiffs have proven that the at-large method of electing Board members in the District violates Section 2 of the VRA and that they are thus entitled to full relief. This Court enjoins the District from holding any further elections under its at-large system, including the elections currently scheduled for June 9, 2020. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, 361 F. Supp. 3d 1296, 1305-06 (M.D. Ga. 2018) (enjoining election pending redistricting), *modified on other grounds*, No. 14-CV-42, 2018 WL 7366461 (M.D. Ga. June 21, 2018), *reconsideration denied*, 2018 WL 7366501 (M.D. Ga. July 23, 2018); *Arbor Hill*, 281 F. Supp. 2d at 457 (same); *cf. Reynolds v. Sims*, 377 U.S. 533, 585-86, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (court not required to enjoin imminent election where apportionment scheme found invalid, but "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan"). The District shall propose a remedial plan that fully complies with the VRA within thirty days of the date of this Order. *See Goosby*, 981 F. Supp. at 755 ("Where a court has struck down a voting system, it must give the appropriate elected body an opportunity to propose a remedial plan."); *see also Pope*, 94 F. Supp. 3d at 351 (affording defendant municipality "the first opportunity to create a remedial plan"). Such a remedial plan shall divide the District into nine voting wards – one for each Board seat – and require that only those residents living in a voting ward may vote for that ward's seat. The Court will not prescribe further details at this time except to note that as many as four majority-minority wards appear to be possible, (*see* ¶ 13 above), and ***418** that a special election would appear to be necessary once the remedial plan is adopted. Plaintiffs shall respond within thirty days of the date of Defendant's proposal.[63] This Court shall retain jurisdiction to ensure that the District complies fully with the VRA and implements all steps to cure its violation. *See New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2003).

89. Finally, Plaintiffs are entitled to attorney's fees and costs, including expert fees, pursuant to 52 U.S.C. § 10310(e). *See Pope*, 94 F. Supp. 3d at 351-52. Within thirty days of the entry of this Order, Plaintiffs shall file a motion for the award of such fees and costs, unless the parties can come to an agreement on that subject. Defendant will thereafter have thirty days to respond.

* * *

This ruling may or may not change the way the schools in the District are run. But the purpose of Section 2 is not to produce any particular policy outcome. Rather, it is to ensure that every voter has equal access to the electoral process. For too long, black and Latino voters in the District have been frustrated in that most fundamental and precious endeavor. They, like their white neighbors, are entitled to have their voices heard.

SO ORDERED.

All Citations

462 F.Supp.3d 368, 382 Ed. Law Rep. 631

Footnotes

1 "PX" refers to an exhibit offered by Plaintiffs and received at trial. "DX" refers to an exhibit offered by Defendant and received at trial. "Tr." refers to the transcript of the bench trial. "JPTO" refers to the Joint Pretrial Order. (Doc. 458.) For clarity and ease of reference, some record citations include the last name of the testifying witness.

2 On November 5, 2018, Washington Sanchez voluntarily withdrew as a Plaintiff. (Doc. 195.) Plaintiff Jose Vitelio Gregorio passed away on April 30, 2020. (*See* Doc. 566.) Plaintiffs designated Plaintiff Hillary Moreau as a witness, (JPTO at 18), but she did not testify, and no information about her is in the record.

3 William S. Cooper is Plaintiffs' expert in demography and redistricting, (*see* Tr. at 498:5-10), and the author of the expert report at PX 244A through PX 244X.

4 The District provides certain services to both public and private schools including transportation, special education, and textbooks. (Tr. at 2380:21-2381:9, 2381:24-2382:19 (Wortham).) Deborah Wortham is the Superintendent of the District. (DX 173 ¶ 1.)

5 The District's citizen voting age population ("CVAP") is 61.4% white, 24.1% black, 9.1% Latino, and 4.5% Asian. (PX 244A ¶ 4; Tr. at 510:5-17 (Cooper).)

6 Dr. Matthew Barreto is Plaintiffs' political science and statistical analysis expert, (*see* Tr. at 154:5-11), and the co-author of the expert report at PX 242A and the preliminary expert report at PX 242B.

7 Defendant contends that a "non-trivial" percentage of black families in the District send their children to private schools, (*see* Doc. 555 ¶ 78 n.2), and while it is obvious that some black and Latino students attend private schools, (PX 278 ¶¶ 9-10 (Castor); Tr. at 1237:23-24 (Germain)), there is no evidence that it is more than an insignificant number, (*see* PX 372_0009 (New York State Education Department data show that 571 nonwhite students both reside and attend private schools in the District); *id.* at _0010 (no more than 813 nonwhite students reside in the District and attend private schools in New York State but outside of the District)); *id.* at _0030-31 (it is not possible to calculate the number of black and Latino students residing in the District and attending private schools outside of New York State).

8 As of January 6, 2020, Board members were Harry Grossman (President), Sabrina Charles-Pierre (Vice-President), Mark Berkowitz, Bernard L. Charles Jr., Joel Freilich, Ashley Leveille, Yoel T. Trieger, Ephraim Weissmandl, and Yehuda Weissmandl. (JPTO at 6.) On February 6, 2020, Charles resigned from the Board after pleading guilty to a misdemeanor in state court. (Tr. at 1783:21-1784:22.) Thereafter, Carole Anderson was appointed on an interim basis until the next election, currently scheduled for June 9, 2020. (*See* Doc. 567; *Board Members*, E. Ramapo Cent. Sch. District, https://www.ercsd.org/Page/90 (last visited May 25, 2020).)

9 In an at-large system, all voters vote in all contests. In a ward system, also called a single-member district system, political subdivisions are divided into "compact, contiguous and essentially equipopulous" geographical areas, commonly referred to as wards. *See Goosby v. Town Bd.*, 981 F. Supp. 751, 757 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999). Under

a single-member district system, candidates run for a seat associated with a particular ward, and only residents of that ward vote in that contest. *See, e.g.*, N.Y. Town Law § 85.

10 A summary of Mr. Cooper's redistricting experience is available at PX 244C. Although his testimony may have been shaky on unrelated matters such as the location of private schools attended by District residents and the number of students of color attending private schools, (*see* Tr. at 555:2-15, 561:1-17), his testimony and conclusions regarding redistricting – upon which he is eminently qualified to opine – were convincing and essentially unchallenged by Defendant.

11 Rather, Defendant contends that Plaintiffs may not assert a VRA claim on behalf of a combined minority group because such a group would be a political rather than racial coalition. (*See* Doc. 555 ¶ 24 (citing *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) ("[A]ny construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined.")).) But Defendant's argument is disingenuous because in *Hall*, plaintiff sought to combine black and white voters to show vote dilution. *See* 385 F.3d at 424-25. The Fourth Circuit held that black and white voters combined would form a political coalition, not a minority group. *Id.* at 431. *Hall* does not stand for the proposition that minority groups cannot be combined. To the contrary, courts "recognize the permissibility of coalition claims under § 2, as long as plaintiffs are able to demonstrate the political cohesiveness of the coalition." *Ga. State Conference of the NAACP v. Gwinnett Cty. Bd. of Registrations & Elections*, No. 16-CV-2852, 2017 WL 4250535, at *1 (N.D. Ga. May 12, 2017) (collecting cases); *see Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir.), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994).

12 I need not reach whether the District's Latino voters alone are sufficiently large and geographically compact to constitute a majority, (*see* Doc. 555 ¶¶ 22-23), because I conclude that they vote cohesively with black voters.

13 All references to PX 242B are to the page numbers stamped at the top-center of each page.

14 I refer to Dr. Barreto alone throughout because he provided live expert testimony in this case, but Drs. Barreto and Collingwood "work[ed] together on all of the reports and analyses," with Dr. Collingwood serving as lead programmer. (Tr. at 164:23-165:13.)

15 "Generally speaking, both methods take ecological data in the aggregate – such as precinct vote totals – and use Bayesian statistical methods to find voting patterns by regressing candidate choice against racial demographics within the aggregate precinct." (PX 242B at 11.)

16 For every surname that occurs at least 1,000 times, demographers at the Census Bureau have created a race probability estimate based on census respondents' self-reported race. (Tr. at 168:16-24.)

17 The Census Bureau collects data at various geographic levels, the smallest being a "block," which is about one city block in size, and the next smallest being a "block group," which is a collection of several blocks. (PX 244 ¶¶ 3-4, 29.) That data can then be aggregated to the precinct (or polling place) level. (*See* Tr. at 2200:16-21.)

18 In 2016, Imai and Khanna published an article in the leading political science statistics and methods journal proposing the use of surname and geocoding analysis to estimate voter preference and turnout. (PX 269; *see* Tr. at 190:3-8.) They validated their statistical package WRU by comparing its results to the self-reported race of 9 million Florida voters. (PX 269 at 267.) They concluded that BISG "enables academic researchers and litigators to conduct more reliable ecological inference in states where registered voters are not asked to report their race." (*Id.* at 271.)

19 Dr. Barreto did not purport to have expertise on how the equation underlying Imai and Khanna's software package functions, and it appears he may not have fully understood it, (*see* Tr. at 1597:11-1607:20 (Barreto); *id.* at 2227:15-2228:21 (Alford)), but he used the software as published by Imai and Khanna without alteration, (*id.* at 1598:3, 1598:25-1599:1, 1599:20-22, 1600:7-9, 2727:23-2728:6), and his understanding of the results produced is manifest, (*see, e.g.*, *id.* at 167:3-10, 168:9-170:10, 170:24-175:8, 185:11-18).

20 Dr. Barreto explained that Imai and Khanna's validation in particular supports the use of BISG in the District because Florida and the District have similar demographics, including large Latino, Haitian, and Hasidic populations. (Tr. at 194:4-11.)

21 Dr. Morrison testified that Dr. Barreto should not have used BISG, (Tr. at 23:15-19), but this testimony was not consistent with his earlier published statement that BISG could be used in vote dilution analysis, (*see* DX 99 at 12 n.21).

22 In other words, black voters tended to vote for the same candidates as each other, Latino voters tended to vote for the same candidates as each other, and both groups supported the same candidates; "it wasn't as though blacks were voting for one candidate and Latinos are voting for a third. Black and Latino voters were also voting cohesively with each other." (Tr. at 289:16-24.)

23 The 2014 election was not analyzed because all candidates that year ran unopposed. (*See* JPTO at 8-9; *see also* Table 1 above.)

24 Both sides agree that white voters have supported black and Latino candidates to the same extent as white candidates, but contrary to Defendant's suggestion, (Doc. 555 ¶ 73), that does not show the absence of racial polarization or a Section 2 violation. A minority candidate is not necessarily preferred by minority voters. *See* *Goosby*, 180 F.3d at 497 (acknowledging that black candidate was not minority preferred); *see also* *Niagara Falls*, 65 F.3d at 1018 (cautioning against "degenerat[ing] into racial stereotyping"). And the election of a minority candidate is discounted where whites preferred the minority candidate, manipulated the election of a "safe" minority candidate, engineered the election of a minority to evade a VRA challenge, or provided unusual political support to the minority candidate or otherwise campaigned to ensure that candidate's election, *see* *Aldasoro*, 922 F. Supp. at 375-76, all of which occurred here (as discussed below).

25 In this CVAP analysis Dr. Barreto combined black and Latino voters into a single "non-white" category. Dr. Barreto testified that he did not believe "the CVAP data was appropriate or precise" and so he "did not attempt to make CVAP estimates for Blacks or Latinos" but rather performed a white/non-white analysis of CVAP to "start to understand voting patterns. (Tr. at 420:20-25, 421:24-422:8.) While this might not be a reliable methodology in the first instance, (*see id.* at 2184:22-2185:11 (Alford testifying that if Barreto were concerned with reliability, he should have reported black/white/Latino results and explained them); *id.* at 2751:19-2752:4 (Barreto admitting that he was aware of Alford's CVAP results)), it is appropriately considered here because grouping the minority voters increased the sample size being analyzed, (*id.* at 284:1-14), and helped to mitigate the turnout problem, (*see id.* at 284:1-3), described below, and because Dr. Barreto used this method just as a cross-check of his BISG analysis, (*id.* at 283:20-24).

26 Dr. Barreto used Dr. Alford's own method and conclusions in this analysis. (Tr. at 294:20-295:14, 306:204.) The results showed that even if every black and Latino voter voted for the losing candidate, that candidate would still lose by thousands of votes because the white voting bloc was too powerful to overcome. (*Id.* at 304:6-19, 306:2-8.)

27 As noted in paragraph 15 above, anecdotal evidence is not considered in determining which candidates are minority preferred under the third *Gingles* precondition. As to whether white voters vote as a bloc under that precondition, courts likewise rely on statistical analysis. *See* *Niagara Falls*, 65 F.3d at 1012; *Pope*, 94 F. Supp. 3d at 336-37; *Rodriguez*, 308 F. Supp. 2d at 422-26.

28 The turnout problem is amplified in the District. Dr. Barreto's testimony confirms that the CVAP data set used in this case overestimates black and Latino turnout and underestimates white turnout. (*See* Tr. at 272:11-274:10, 274:14-275:8, 275:17-276:14.) Accordingly, EI estimates of voter preference relying on CVAP underestimate the extent of racially polarized voting. (*Id.* at 281:15-24.)

29 In so opining, Dr. Alford contended that PX 364 – Dr. Barreto and Dr. Grofman's article – claimed that RxC can also account for turnout, (*see* Tr. at 2208:4-15), but the article covered King's EI, not RxC, (*see id.* at 2707:21-2708:7).

30 A point estimate is the most likely outcome as generated by a statistical model such as King's EI or RxC. (*See* Tr. at 336:5-10, 336:22-25, 337:23-338:4 (Barreto).) The confidence interval is the rest of the distribution and shows the probability of other estimates. (*Id.* at 336:18-21.)

31 In his expert report, Dr. Barreto reported confidence intervals using CVAP data for the contested races in 2013, 2016, 2017, and 2018, (PX 242A at 40-44, 46-47), and 2017 King's EI and RxC analysis using Catalist data, (*id.* at 44-46). He did not analyze the 2015 election in that report because the data contained incorrect precinct assignments. (*Id.* ¶ 7.) In his preliminary report, Dr. Barreto reported confidence intervals using CVAP data for the contested races in 2013, 2015, 2016, and 2017; the 2012 presidential election; and the 2017 races using BISG. (PX 242B at 34-42.) At the time of the preliminary report, Dr. Barreto was able to apply BISG only to the 2017 voter file, which had been produced in discovery by that point. (*Id.* at 9, 12-13.)

32 Dr. Barreto explained that "the error rate in BISG is built into the model, ... it is part of the probability. And so it's not an otherwise published statistic." (Tr. at 1578:19-21.) In other words, "when [BISG] spits out estimates, what is the error rate on that specific estimate, and my answer to that is that it is baked into that estimate, and that's why it gives us a probability instead of an assignment. It gives you a .83 White and a .07 Black and .05 Hispanic." (*Id.* at 1580:6-11.)

33 As noted, elsewhere Dr. Morrison appeared to understand how political scientists use BISG in voting analysis. A 2017 paper co-authored by Dr. Morrison cited the Imai and Khanna article in support of the contention that "one could assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by a geographic unit such as a voting precinct" and then use that as an EI input, (DX 99 at 12 n.21) – exactly what Dr. Barreto did, (Tr. at 201:1-12). I did not find persuasive Dr. Morrison's attempt to backtrack at trial by suggesting that he did not intend for readers to rely on the footnote where this statement was made. (*Id.* at 29:3-30:4.)

34 This anomaly could be explained by the fact that the Catalist database incorporates first name and self-reported data, (*see* PX 258 at 52:6-21, 61:19-63:7; Tr. at 245:15-246:9, 250:8-9, 479:11-16), not just surname and geolocation data.

35 Defendant contends that " '[P]laintiffs cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus.' " (*See* Doc. 555 ¶ 127 (alteration in original) (quoting *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995)).) But this approach is at best an oversimplification because "it ignores language in the Senate Report which expressly states that such an inference of racial animus is unnecessary." *See Solomon v. Liberty County*, 957 F. Supp. 1522, 1548 n.55 (N.D. Fla. 1997), *aff'd*, 221 F.3d 1218 (11th Cir. 2000); *accord Charleston County*, 316 F. Supp. 2d at 299 n.35.

36 On June 10, 2014, the New York State Commissioner of Education appointed a fiscal monitor to oversee the District due to "the District's history of and continued signs of fiscal distress," (PX 210), and to ensure that the District provide "appropriate educational programs and services for all its students and properly manage[ ] and account[ ] for State and federal funds received," (PX 169_0001). Thereafter, and to this day, the Commissioner has continued to appoint monitors not only to oversee District finances, but also to address the educational decline, community rifts, failures of accountability, and need for planning in the District. (*See* PX 152; PX 156; PX 169; PX 206; PX 207; PX 208.)

37 In that same text exchange Horowitz seemed to call public school advocates "haters." (PX 88_0002.) He testified unconvincingly at trial that he was probably talking about a few individuals but did not know who they were. (Tr. at 962:16-963:12.)

38 The Court does not mean to suggest that there are no white voters in the District who support public education or that there are no minority voters whose interests correspond to those of Orthodox or Hasidic voters. But the racial polarization in voting and in the populations attending the public and private schools is so strong that the observation in the text – shared by witnesses from both communities – holds.

39 School services required under state law are called "mandated" services. For example, state law requires the District to provide busing services to private schools on certain days, called "mandated" days. The District is not required to provide private school busing on days when public school is not in session, or "nonmandated days." (*See* Tr. at 805:25-806:8 (Goodwin); *id.* at 2380:21-2384:3 (Wortham).)

40 "Frum" describes an observant Jew.

41 At trial, Plaintiffs used video clips showing portions of certain witnesses' depositions to impeach those witnesses, and the content of those videos is not reflected in the trial transcript. PX 339 contains excerpts of the deposition transcripts that correspond to those videos.

42 Ads placed in a Yiddish newspaper by a private school advocate warn of a tax hike, (*see, e.g.*, PX 218A_0002, 0004, 0005, 0009), but this is little support for the notion that policies advocated by the candidates drove election results.

43 The outcome of the case would be the same even if Defendant had provided sufficient evidence to show that Senate Factor 2 was a wash or tilted in its favor. As noted, even if divergent voting patterns may be explained by a factor other than race, the court must still assess the totality of the circumstances and may find – as I do – that the minority citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to the slating and election of candidates are not equally open to them. *See* *Goosby*, 956 F. Supp. at 355.

44 Bullet, or single-shot, voting refers "to a voting practice in which a voter is allowed to cast fewer than all of his or her votes." *Reed*, 914 F. Supp. at 849. "An anti-single-shot provision prohibits this practice" and may "force[ ] minority voters to vote for white candidates whom the minority voters may not favor, thereby increasing the vote totals of those white candidates." *Id.* at 849 n.2 (internal quotation marks omitted). Plaintiffs here do not allege that there is an anti-single-shot-voting practice in the District, but, as discussed below, elections for numbered posts – which the District does have – effectively "neutralize[ ] the single-shot voting strategy." *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1411 (E.D. Wash. 2014).

45 In 2018, the District increased the number of polling places from ten to thirteen. Grossman solicited input on the location of the new polling places from white, private school activist Shaya Glick, who suggested two locations in overwhelmingly Orthodox Jewish neighborhoods, (Tr. at 1473:6-19), and said, "Great opportunity to help ourselves," to which Grossman responded, "Bingo," (*id.* at 1475:24-1476:8).

46 Slating is "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991).

47 Slating group members include current and former Board members Aron Wieder, Harry Grossman and Yehuda Weissmandl, community activists Shaya Glick and Kalman Weber (who runs SERTA, an association that organizes private school voters), and influential Rabbis Yehuda Oshry, Hersh Horowitz, and the late Rabbi Beryl Rosenfeld, as discussed further below.

48 Candidates must submit nominating petitions with the signatures of 2% of the actual voters from the previous election to get on the ballot. (JPTO at 5.) While public school candidates find the process "daunting" and time consuming, (Tr. at 785:20-786:2 (Goodwin); *see* PX 283 ¶ 56), candidates backed by the private school slating organization could have all their signatures collected "in one morning in the synagogue," (Tr. at 2505:15-17 (Oshry)).

49 In the weeks leading up to and during trial, Rabbi Oshry went to great lengths to avoid testifying. He ignored repeated attempts by Plaintiffs to serve a subpoena *ad testificandum.* On February 13, 2020, Plaintiffs' agent accomplished service by alternative means ordered by the Court. (Doc. 517.) Rabbi Oshry did not appear as instructed on February 18, 19, 20, or 21. On February 20, Plaintiffs filed a motion for a finding of civil contempt, (Doc. 522), which they served, along with a new subpoena, commanding Oshry to appear on February 24. When he did not appear, the Court found him to be in contempt of court for his failure to appear and testify at trial and ordered a warrant for his arrest. The Court issued an Order indicating that Oshry would be subject to arrest by the U.S. Marshals at any time and that, should he not appear on February 26 or 27, he risked being incarcerated for some period of time pending his testimony. (*See* Doc. 530.) Oshry finally appeared to testify on February 27 and, accordingly, the contempt was purged and the warrant vacated. (Tr. at 2508:25-2509:12.) Oshry's defiance, along with his attempts at evasion in his testimony, betray a remarkable reluctance – shared by several other witnesses associated with the private school community – to admit the obvious existence of the slating process.

50 On the topic of slating, Grossman at times testified unconvincingly that he did not know what he was talking about in certain text messages, (*see, e.g.*, Tr. at 1448:3-1449:21, 1458:8-12), gave glib responses, (*see, e.g., id.* at 1431:2-6,

1446:23-1447:7), and seemed to have a selective memory when it came to conversations he had as recently as 2019, (*see id.* at 1517:6-16). He and several other Board members and white witnesses associated with the private school community were not credible in their claimed lack of knowledge of the slating process, and the sometimes absurd lengths to which they went to feign ignorance suggests their understanding of how that process excludes blacks and Latinos. (*See* ¶ 48 above.)

51 Grossman claimed that he inaccurately conveyed Butler's message, (Tr. at 1482:20-21), but he was impeached with his deposition testimony, in which he admitted that the text accurately conveys what Butler told him to convey, (*see* Tr. at 1511:14-1512:2; *see also* PX 339 at 9), and he never explained what was supposedly inaccurate about his text.

52 "Heimishe" is a Yiddish term meaning homey, homegrown, or one of the group.

53 That year, the minority-preferred candidates in contested races – Fields, Morales, and Foskew – lost. (*See* Tables 1-2 above.) Charles-Pierre admitted that "if [she] didn't have the support of the majority of the white community, [she had] basically no chance to win." (Tr. at 2566:11-15.)

54 The parties did not introduce expert testimony on the 2019 election.

55 Plaintiffs made a motion for sanctions seeking an adverse inference against the District for what they argue was Defendant's failure to preserve and produce certain documents relevant to Senate Factor 4. (*See* Docs. 518, 521 at 1.) The motion is denied as moot, in that Plaintiffs have adduced sufficient evidence to decisively establish Senate Factor 4 without the adverse inference.

56 The testimony of Charles, NAACP of Spring Valley President Willie J. Trotman, and Grossman confirms the election futility faced by the District's black and Latino voters. Charles explained that minority voters do not turn out to vote in Board elections. (Tr. at 1818:13-16.) Trotman testified that the NAACP works to encourage minorities to vote, even though they feel that "they don't have a voice," and if "[they] can't win[,] why bother?" (*Id.* at 1282:14-1283:6.) Grossman texted Horowitz that public school voters "feel disempowered because they are." (PX 88_0002.)

57 Dr. Barreto analyzed the voting patterns in six of the seven races. Data for 2007 were unavailable. (PX 242A ¶ 63.)

58 As to the settlement discussions, Grossman affirmatively misled Charles-Pierre by telling her that the reason for a settlement conference was "Judge wants to talk/yell at" the Board "for not doing what N.A.A.C.P. wants." (Tr. at 2675:23-2677:1; DX 233 at 382-83.) He sent similar messages to Ashley Leveille, another black Board member, (*see* Doc. 553-1 ¶ 9; *id.* Ex. 1), who was also not included on emails about settlement proposals, (*see* Docs. 545-2, 553-1 ¶¶ 6-8).

59 I received this testimony not for its truth but for the fact that it was said. It is not evidence that "the rabbis" in fact said what Cintron attributed to them, but it is relevant to show that Cintron and Leveille found it entirely plausible that the white slating organization had the power to dictate who ran for what seat as well as the outcome of the election, as shown by Leveille's belief that she would lose, (*see* Tr. at 1779:17-18), and Cintron's apparent belief that he would win, (*id.* at 1778:25-1779:4 (Cintron told Leveille there was "no point" in her running); *id.* at 1779:21-1780:5 (Leveille observed Cintron on election day "walking around greeting everyone, smiling, happy, [and] cheerful" before results were announced, and she saw him sink into his seat and then leave after he lost)). This testimony also goes to minority election futility in that, once Leveille heard that Cintron had the support of the white slating mechanism, she believed that she would lose.

60 During discovery, Defendant invoked legislative privilege to shield testimony about the reasons for Board actions, so – while state funding and the financial crisis might explain certain Board actions to a certain extent – the Board's actual reasoning remains unknown.

61 Throughout this Decision and Order, I discuss credibility determinations with respect to each witness as appropriate. In the interest of brevity, I also find accurate and incorporate the details set forth in Part IV of Plaintiffs' Proposed Findings of Fact and Conclusions of Law. (Doc. 556 ¶¶ 209-216.)

62 Plaintiffs' counsel offered to waive their fees as part of a settlement. (*See* Doc. 553.) A defendant obviously has no obligation whatsoever to settle a case, and the Court does not hold it against Defendant in any way that it put Plaintiffs to their proof. But the failure to provide Board members of color with updated and accurate information about the case,

and the false, misleading, or evasive testimony of present and former Board members and their allies at trial, reveal a disturbing win-at-all-costs attitude that suggests bad motives for adhering to the challenged voting practice.

63 As noted, before and during trial certain Board members' actions and positions taken by the District seemed to stymie resolution of this matter, but I also observed some apparently sincere attempts at agreement. In hopes that the former will not be repeated, and encouraged by the latter, the Court urges the parties to reach agreement on the proposed remedial plan if possible.

End of Document

New York Official Reports

20 N.Y.3d 586, 987 N.E.2d 621, 965 N.Y.S.2d 61, 2013 N.Y. Slip Op. 02102

**1 Overstock.com, Inc., Appellant

v

New York State Department of Taxation and Finance et al., Respondents.

Amazon.com, LLC, et al., Appellants

v

New York State Department of Taxation and Finance et al., Respondents.

Court of Appeals of New York
Argued February 6, 2013

Decided March 28, 2013

CITE TITLE AS: Overstock.com, Inc. v New York State Dept. of Taxation & Fin.

SUMMARY

Appeal, in the first above-entitled action, on constitutional grounds, from a stipulation of discontinuance (deemed a judgment of the Supreme Court, New York County) entered December 13, 2011. The stipulation discontinued plaintiffs' as-applied constitutional challenges to Tax Law § 1101 (b) (8) (vi). The appeal brings up for review a prior nonfinal order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 4, 2010. The Appellate Division had modified, on the law and the facts, an order of that Supreme Court (Eileen Bransten, J.), which granted defendants' motion to dismiss the complaint in an action to declare Tax Law § 1101 (b) (8) (vi) unconstitutional and denied plaintiff's cross motion for summary judgment. The modification consisted of declaring that Tax Law § 1101 (b) (8) (vi) is constitutional on its face and does not violate the Equal Protection Clause either on its face or as applied, and reinstating the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses.

Appeal, in the second above-entitled action, on constitutional grounds, from a stipulation of discontinuance (deemed a judgment of the Supreme Court, New York County) dated February 8, 2012. The stipulation discontinued plaintiff's as-applied constitutional challenges to Tax Law § 1101 (b) (8) (vi). The appeal brings up for review a prior nonfinal order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 4, 2010. The Appellate Division had modified, on the law and the facts, a judgment of that Supreme Court (Eileen Bransten, J.; op 23 Misc 3d 418 [2009]), which granted defendants' motion to dismiss the complaint in an action to declare Tax Law § 1101 (b) (8) (vi) unconstitutional and denied plaintiffs' cross motion for summary judgment. The modification consisted of declaring that Tax Law § 1101 (b) (8) (vi) is constitutional on its face and does not violate the Equal ***587** Protection Clause either on its face or as applied, and reinstating the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses.

Amazon.com, LLC v New York State Dept. of Taxation & Fin., 81 AD3d 183, affirmed.

HEADNOTES

Constitutional Law
Validity of Statute
Collection of Sales Tax by Out-of-State Internet Vendors—Commerce Clause

(1) Tax Law § 1101 (b) (8) (vi) (the Internet tax), which subjects online vendors, without a physical presence in New York, to state sales and compensating use taxes if the vendors use in-state residents to solicit business in New York through the residents' websites, is facially valid under the Commerce Clause. The Internet tax is constitutional on its face under either standard for evaluating a facial challenge pursuant to the Commerce Clause—that there is "no set of circumstances" under which the statute would be valid, or the stricter test of whether the statute has a plainly legitimate sweep. The relevant inquiry is whether the tax is applied to an activity with a substantial nexus with the taxing state. Although an in-state physical presence is necessary, it need not be substantial, but demonstrably more than a slightest presence, and the presence requirement will be satisfied if economic activities are performed in New York by the seller's employees or on its behalf. The Internet tax statute satisfies the substantial nexus requirement, as active, in-state solicitation that produces a significant amount of revenue qualifies as demonstrably

more than a slightest presence. Further, although not a dispositive factor, vendors are not required to pay the taxes out-of-pocket. Rather, they are collecting taxes that are due, which are exceedingly difficult to collect from the individual purchasers themselves, and as to which there is no risk of multiple taxation. The statutory language allows for a range of possible types of compensation, which would include flat fee arrangements, and although a substantial nexus would be lacking if New York residents were merely engaged to post passive advertisements on their websites, a vendor paying New York residents to actively solicit business in New York should shoulder the appropriate tax burden.

Constitutional Law
Validity of Statute
Collection of Sales Tax by Out-of-State Internet Vendors—Due Process Clause

(2) Tax Law § 1101 (b) (8) (vi) (the Internet tax), which subjects online vendors, without a physical presence in New York, to state sales and compensating use taxes if the vendors use in-state residents to solicit business in New York through the residents' websites, is facially valid under the Due Process Clause. An in-state physical presence is not required in order to satisfy due process. Instead, the focus is on whether a party has purposefully directed its activities toward the forum state and whether it is reasonable, based on the extent of a party's contacts with that state and the benefits derived from such access, to require it to collect taxes for that state. The Internet tax statute says that a seller "shall be presumed to be soliciting business through an independent contractor or other representative" if it enters an agreement under which a New York resident, "for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise." The statutory presumption is not ***588** irrational or irrebuttable. It is rational to presume that, given the direct correlation between referrals and compensation, it is likely that residents will seek to increase their referrals by soliciting customers. More specifically, it is not unreasonable to presume that affiliated website owners residing in New York State will reach out to their New York friends, relatives and other local individuals in order to accomplish this purpose. Moreover, the agency charged with enforcing the statute has expressly acknowledged that mere advertising is beyond the scope of the provision, and it has set forth a method (contractual prohibition and annual certification) through which the retailers will be deemed to have rebutted the presumption.

RESEARCH REFERENCES

Am Jur 2d, Commerce §§ 20, 41, 108; Am Jur 2d, Constitutional Law §§ 965, 968; Am Jur 2d, Sales and Use Taxes §§ 8, 22–24.

McKinney's, Tax Law § 1101 (b) (8) (vi).

NY Jur 2d, Constitutional Law §§ 126, 387; NY Jur 2d, Taxation and Assessment §§ 53, 54, 73, 74, 1688, 1690.

ANNOTATION REFERENCE

Validity, construction, and application of sales, use, and utility taxes on retail transactions of Internet sellers and Internet access providers. 30 ALR6th 341.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: internet /4 tax & commerce /2 clause /p constitutional

POINTS OF COUNSEL

Bracewell & Giuliani LLP, New York City (*Daniel S. Connolly* and *Rachel B. Goldman* of counsel), for appellant in the first above-entitled action.
I. New York's Internet tax is facially invalid under the Commerce Clause. (*Quill Corp. v North Dakota*, 504 US 298; *Healy v Beer Institute*, 491 US 324; *General Motors Corp. v Tracy*, 519 US 278; *Northwestern States Portland Cement Co. v Minnesota*, 358 US 450; *Dutchess Sanitation Serv. v Town of Plattekill*, 51 NY2d 670; *Wardair Canada Inc. v Florida Dept. of Revenue*, 477 US 1; *Hughes v Oklahoma*, 441 US 322; *National Bellas Hess, Inc. v Department of Revenue of Ill.*, 386 US 753; *Oklahoma Tax Comm'n v Jefferson Lines, Inc.*, 514 US 175; *Complete Auto Transit, Inc. v Brady*, 430 US 274.) II. The Internet tax violates due process. (*People v Leyva*, 38 NY2d 160; *Speiser v Randall*, 357 US 513; ***589** *Bailey v Alabama*, 219 US 219; *Vlandis v Kline*, 412 US 441; *Central Sav. Bank v City of New York*, 280 NY 9; *Usery v Turner Elkhorn Mining Co.*, 428 US 1; *Heiner v Donnan*, 285 US 312; *Eff-Ess, Inc. v New York Edison Co.*, 237 App Div 315; *County Court of Ulster Cty. v Allen*, 442 US 140.)
Gibson, Dunn & Crutcher LLP, New York City (*Randy M. Mastro* and *Oliver M. Olanoff* of counsel), and *Gibson, Dunn*

& Crutcher LLP (*Julian W. Poon*, of the California bar, admitted pro hac vice, and *Kahn A. Scolnick*, of the California bar, admitted pro hac vice, of counsel) for appellants in the second above-entitled action.

I. Tax Law § 1101 (b) (8) (vi) violates due process on its face. (*Complete Auto Transit, Inc. v Brady*, 430 US 274; *Quill Corp. v North Dakota*, 504 US 298; *Scripto, Inc. v Carson*, 362 US 207; *Tyler Pipe Industries, Inc. v Washington State Dept. of Revenue*, 483 US 232; *National Bellas Hess, Inc. v Department of Revenue of Ill.*, 386 US 753; *Miller Brothers Co. v Maryland*, 347 US 340; *Speiser v Randall*, 357 US 513, *Bailey v Alabama*, 219 US 219; *United States v Romano*, 382 US 136; *Tot v United States*, 319 US 463.) II. Tax Law § 1101 (b) (8) (vi) violates the Commerce Clause on its face. (*Quill Corp. v North Dakota*, 504 US 298; *Scripto, Inc. v Carson*, 362 US 207; *Tyler Pipe Industries, Inc. v Washington State Dept. of Revenue*, 483 US 232; *Miller Brothers Co. v Maryland*, 347 US 340; *National Bellas Hess, Inc. v Department of Revenue of Ill.*, 386 US 753; *St. Tammany Parish Tax Collector v Barnesandnoble.Com*, 481 F Supp 2d 575; *Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165; *General Trading Co. v State Tax Comm'n of Iowa*, 322 US 335; *Felt & Tarrant Mfg. Co. v Gallagher*, 306 US 62; *American Libs. Assn. v Pataki*, 969 F Supp 160.) III. The Appellate Division, First Department, applied the wrong legal standard to decide Amazon.com, LLC's and Amazon Services LLC's facial constitutional claims. (*United States v Salerno*, 481 US 739; *Doe v City of Albuquerque*, 667 F3d 1111; *Washington State Grange v Washington State Republican Party*, 552 US 442; *Chicago v Morales*, 527 US 41; *Washington v Glucksberg*, 521 US 702; *County Court of Ulster Cty. v Allen*, 442 US 140; *Leary v United States*, 395 US 6.) IV. Even under the "no set of circumstances" test, Tax Law § 1101 (b) (8) (vi) would still be unconstitutional on its face. (*Roe v Meese*, 689 F Supp 344; *United States v Arizona*, 295 US 174; *Speiser v Randall*, 357 US 513; *Washington State Grange v Washington State Republican Party*, 552 US 442.)

Eric T. Schneiderman, Attorney General, New York City (*Steven C. Wu, Barbara D. Underwood* and *Andrew D. Bing* of ***590** counsel), for respondents in the first and second above-entitled actions.

I. Facial invalidation requires proof that a statute is indisputably unconstitutional regardless of individual factual circumstances. (*People v Stuart*, 100 NY2d 412; *Cohen v Cuomo*, 19 NY3d 196; *Paterson v University of State of N.Y.*, 14 NY2d 432; *Cohen v State of New York*, 94 NY2d 1; *United States v Salerno*, 481 US 739; *Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443; *Washington State Grange v Washington State Republican Party*, 552 US 442; *Matter of McGee v Korman*, 70 NY2d 225; *Sabri v United States*, 541 US 600; *Department of Taxation & Finance of N. Y. v Milhelm Attea & Bros.*, 512 US 61.) II. Tax Law § 1101 (b) (8) (vi) complies with the dormant Commerce Clause. (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d 85; *Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443; *Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165; *Quill Corp. v North Dakota*, 504 US 298; *Scripto, Inc. v Carson*, 362 US 207; *National Geographic Soc. v California Bd. of Equalization*, 430 US 551; *Standard Pressed Steel Co. v Department of Revenue of Wash.*, 419 US 560; *Felt & Tarrant Mfg. Co. v Gallagher*, 306 US 62; *Tyler Pipe Industries, Inc. v Washington State Dept. of Revenue*, 483 US 232; *Complete Auto Transit, Inc. v Brady*, 430 US 274.) III. Tax Law § 1101 (b) (8) (vi)'s presumption of solicitation satisfies the Due Process Clause. (*Mobile, J. & K. C. R. Co. v Turnipseed*, 219 US 35; *Matter of Casse v New York State Racing & Wagering Bd.*, 70 NY2d 589; *Usery v Turner Elkhorn Mining Co.*, 428 US 1; *United States v Gainey*, 380 US 63; *County Court of Ulster Cty. v Allen*, 442 US 140; *Lavine v Milne*, 424 US 577; *Trump v Chu*, 65 NY2d 20; *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193; *Matter of 31/32 Lexington Assoc. v Tax Appeals Trib. of State of N.Y.*, 258 AD2d 684; *Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165.)

OPINION OF THE COURT

Chief Judge Lippman.

Plaintiffs challenge Tax Law § 1101 (b) (8) (vi) (the Internet tax), alleging that it is unconstitutional on its face because it violates the Commerce Clause by subjecting online retailers, without a physical presence in the state, to New York sales and compensating use taxes. They also maintain that the Internet tax violates the Due Process Clause by creating an irrational, irrebuttable presumption of solicitation of business within the state. We reject ****2** plaintiffs' facial challenges.

***591** I.

Plaintiff Amazon.com, LLC is a limited liability company formed in Delaware; Amazon Services LLC is a limited liability company formed in Nevada (collectively Amazon). Its principal corporate offices are located in the State of Washington. Amazon is strictly an online retailer—selling its merchandise solely through the Internet—and represents that it does not maintain any offices or property in New York.

Amazon offers an "Associates Program" through which third parties agree to place links on their own websites that, when clicked, direct users to Amazon's website. The Associates are compensated on a commission basis. They receive a percentage of the revenue from sales generated when a customer clicks on the Associate's link and completes a purchase from the Amazon site. The operating agreement governing this arrangement states that the Associates are independent contractors and that there is no employment relationship between the parties. Thousands of entities enrolled in the Associates Program have provided a New York address in connection with their applications.

Plaintiff Overstock.com is a Delaware corporation with its principal place of business in Utah. Overstock likewise sells its merchandise solely through the Internet and does not maintain any office, employees or property in New York. Similar to Amazon, Overstock had an "Affiliates" program through which third parties would place links for Overstock.com on their own websites.[1] When a customer clicked on the link, he or she was immediately directed to Overstock.com, and if the customer completed a purchase, the Affiliate received a commission. According to the parties' Master Agreement, the Affiliates were independent contractors without the authority to obligate or bind Overstock.

In April 2008, the legislature amended the Tax Law to include the subparagraph at issue here. In connection with the statutory definition of "vendor," the Internet tax provides that

> "a person making sales of tangible personal property or services taxable under this article ('seller') shall be presumed to be soliciting business through an independent contractor or other representative if ***592** the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods" ****3** (Tax Law § 1101 [b] [8] [vi]).

The statutory presumption, however, can "be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question" (Tax Law § 1101 [b] [8] [vi]).

Shortly after the legislation was enacted, the Department of Taxation and Finance (DTF) issued a memorandum to provide taxpayer guidance on the recent amendment. The document clarified that advertising alone would not invoke the statutory presumption, but further observed that, for purposes of this statute, the placement of a link to the seller's website where the resident was compensated on the basis of completed sales deriving from that link would not be considered mere advertising (*see* NY St Dept of Taxation & Fin Mem No. TSB-M-08[3]S). The memorandum also explained that the statutory presumption could be rebutted through proof that the residents' only activity in New York on behalf of the seller was to provide a link to the seller's website and that the residents did not engage in any in-state solicitation directed toward potential New York customers (*see* NY St Dept of Taxation & Fin Mem No. TSB-M-08[3]S).

The following month, DTF issued a second memorandum, further detailing how sellers could rebut the statutory presumption. The presumption would be deemed successfully rebutted if the seller satisfied two conditions: (1) if the parties' contract prohibited the resident representative from engaging in any solicitation activities in New York State on behalf of the seller, and (2) if each resident representative submitted an annual, signed certification stating that the resident had not engaged in any of the proscribed solicitation (*see* NY St Dept of Taxation & Fin Mem No. TSB-M-08[3.1]S).

***593** Amazon commenced this action on April 25, 2008, seeking a judgment declaring that the statute was unconstitutional both on its face and as applied. Overstock commenced its action on May 30, 2008, making essentially the same arguments and also seeking injunctive relief. Supreme Court, in separate decisions, granted DTF's motions to dismiss the complaints for failure to state a cause of action and denied plaintiffs' cross motions for summary judgment as moot, rejecting all of plaintiffs' challenges to the constitutionality of the statute (*see Amazon.com LLC v New York State Dept. of Taxation & Fin.*, 23 Misc 3d 418 [Sup Ct, NY County 2009]).

The Appellate Division affirmed the portions of the orders that dismissed the facial challenges under the Commerce and Due Process Clauses and declared the statute constitutional on its face (81 AD3d 183 [1st Dept 2010]). However, the Court modified by reinstating the as-applied challenges, finding that further discovery was required before those claims could be determined. Plaintiffs then entered into stipulations of

discontinuance withdrawing their as-applied constitutional challenges with prejudice, which were deemed the final judgments. They now appeal pursuant to CPLR 5601 (b) (1) and (d), bringing **4 up for review the prior nonfinal Appellate Division order.

II.

Having elected to forgo their as-applied challenges, plaintiffs now confront the substantial hurdle of demonstrating that the Internet tax is unconstitutional on its face. It is well settled that facial constitutional challenges are disfavored. "Legislative enactments enjoy a strong presumption of constitutionality . . . [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.' Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*LaValle v Hayden*, 98 NY2d 155, 161 [2002] [citations omitted]).

(1) There is some dispute as to the appropriate standard for evaluating a facial challenge under the Commerce Clause —whether we must determine that there is "no set of circumstances" under which the statute would be valid (*see Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003], quoting *United States v Salerno*, 481 US 739, 745 [1987]) or apply the stricter test of whether "the statute has a plainly legitimate sweep" (*see* ***594** *Washington State Grange v Washington State Republican Party*, 552 US 442, 449 [2008] [internal quotation marks and citation omitted]; *Crawford v Marion County Election Bd.*, 553 US 181, 202 [2008]). Under either standard, however, the Internet tax is constitutional on its face.

The dormant Commerce Clause has been interpreted to prohibit states from imposing an undue tax burden on interstate commerce (*see Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165, 170-171 [1995]). However, in the absence of an improper burden, entities participating in interstate commerce will not be excused from the obligation to pay their fair share of state taxes (*see Orvis*, 86 NY2d at 171). To that end, a state tax impacting the Commerce Clause will be upheld " '[1] when the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State' " (*Moran Towing*, 99 NY2d at 449, quoting *Complete Auto Transit, Inc. v Brady*, 430 US 274, 279 [1977]). The parties agree that the only prong at issue here is whether the statute satisfies the "substantial nexus" test.

In *National Bellas Hess, Inc. v Department of Revenue of Ill.* (386 US 753 [1967]), the United States Supreme Court held that a use tax could not be imposed on an out-of-state mail-order business that did not have offices, property or sales representatives in Illinois. The Court noted that it had never permitted such a tax where the seller's sole connection with its customers in the forum state was by mail or common carrier (*see Bellas Hess*, 386 US at 758). Rather, the Court observed that, if Illinois were permitted to impose that type of tax burden, every other taxing jurisdiction in the country could do the same, which would result in a morass of obligations to local governments (*see Bellas Hess*, 386 US at 759-760). **5

The Supreme Court confronted a similar issue involving a mail-order business in *Quill Corp. v North Dakota* (504 US 298, 314 [1992]) and considered whether the emphasis in *Bellas Hess* on physical presence within the state had been rendered obsolete by the Court's shift toward "more flexible balancing analyses" under the Commerce Clause. While allowing that the result might have been different if the issue was being considered for the first time, the Court retained the bright-line presence requirement articulated in *Bellas Hess*, recognizing the benefits provided by a clear rule that established the limits of state taxing authority (*see Quill*, 504 US at 311, 315).

***595** The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet. That question, however, would be for the United States Supreme Court to consider. We are bound, and adjudicate this controversy, under the binding precedents of that Court, the ultimate arbiter of the meaning of the Commerce Clause.

Subsequent to *Quill*, we further explained that, although an in-state physical presence is necessary, it "need not be substantial. Rather, it must be demonstrably more than a 'slightest presence' " (*Orvis*, 86 NY2d at 178, quoting *National Geographic Soc. v California Bd. of Equalization*, 430 US 551, 556 [1977]). The presence requirement will be satisfied if economic activities are performed in New York by the seller's employees or on its behalf (*see Orvis*, 86 NY2d at 178).

There are clearly parallels between a mail-order business and an online retailer—both are able to conduct their operations without maintaining a physical presence in a particular state. Indeed, physical presence is not typically associated with the Internet in that many websites are designed to reach a national or even a global audience from a single server whose location is of minimal import. However, through this statute, the legislature has attached significance to the physical presence of a resident website owner. The decision to do so recognizes that, even in the Internet world, many websites are geared toward predominantly local audiences—including, for instance, radio stations, religious institutions and schools—such that the physical presence of the website owner becomes relevant to Commerce Clause analysis. Indeed, the Appellate Division record in this case contains examples of such websites urging their local constituents to support them by making purchases through their Amazon links. Essentially, through these types of affiliation agreements, a vendor is deemed to have established an in-state sales force.

Viewed in this manner the statute plainly satisfies the substantial nexus requirement. Active, in-state solicitation that produces a significant amount of revenue qualifies as "demonstrably more than a 'slightest presence' " under *Orvis*. Although it is not a dispositive factor, it also merits notice that vendors are not required to pay these taxes out-of-pocket. ****6** Rather, they are collecting taxes that are unquestionably due, which are exceedingly difficult to collect from the individual purchasers themselves, and as to which there is no risk of multiple taxation.

***596** Clearly, the statutory language allows for a range of possible types of compensation ("commission or other consideration"), which would include flat fee arrangements. However, no one disputes that a substantial nexus would be lacking if New York residents were merely engaged to post passive advertisements on their websites. The bottom line is that if a vendor is paying New York residents to actively solicit business in this state, there is no reason why that vendor should not shoulder the appropriate tax burden. We will not strain to invalidate this statute where plaintiffs have not met their burden of establishing that it is facially invalid.

III.

As explained in *Quill*, although Due Process and Commerce Clause challenges are "closely related," each provision "pose[s] distinct limits on the taxing powers of the States" (504 US at 305). Unlike the bright line presented by the Commerce Clause, physical presence is not required in order to satisfy due process. Instead, the focus is on whether a party has purposefully directed its activities toward the forum state and whether it is reasonable, based on the extent of a party's contacts with that state and the benefits derived from such access, to require it to collect taxes for that state (*see Quill*, 504 US at 307-308). Indeed, an entity "that is engaged in continuous and widespread solicitation of business within a State . . . clearly has fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign," even in the absence of physical presence (*Quill*, 504 US at 308 [internal quotation marks and citation omitted]). In this respect, we believe that a brigade of affiliated websites compensated by commission is the equivalent of "a deluge of catalogs" and "a phalanx of drummers" (*Quill*, 504 US at 308).

Plaintiffs argue that the Internet tax violates due process because the statutory presumption is irrational and essentially irrebuttable. In order for the presumption to be constitutionally valid, there must be "a rational connection between the facts proven and the fact presumed, and . . . a fair opportunity for the opposing party to make [a] defense" (*Matter of Casse v New York State Racing & Wagering Bd.*, 70 NY2d 589, 595 [1987]).

(2) Here, the fact proved is that the resident is compensated for referrals that result in purchases. The fact presumed is that at least some of those residents will actively solicit other New Yorkers in order to increase their referrals and, consequently, ***597** their compensation.[2] It is plainly rational to presume that, given the direct correlation between referrals and compensation, it is likely that residents will seek to increase their referrals by soliciting customers. More ****7** specifically, it is not unreasonable to presume that affiliated website owners residing in New York State will reach out to their New York friends, relatives and other local individuals in order to accomplish this purpose. As noted above, the record contains examples of this type of solicitation by schools and certain other organizations.

The presumption would appear decidedly less rational if it were applied to those who receive some types of "other consideration"—i.e., those whose compensation is unrelated to actual sales. It is difficult to distinguish that arrangement from traditional advertising. Nonetheless, plaintiffs have chosen to limit our review to a facial challenge, and the fact that plaintiffs can posit a potential constitutional infirmity does not require the statute's invalidation on its face. This is particularly true where, as here, the agency charged with

enforcing the statute has expressly acknowledged that mere advertising is beyond the scope of the provision.

Plaintiffs also claim that the presumption is irrebuttable because it will be extremely difficult, if not impossible, to prove that none of their New York affiliates is soliciting customers on the retailers' behalf. However, as noted above, DTF has set forth a method (contractual prohibition and annual certification) through which the retailers will be deemed to have rebutted the presumption. Obtaining the necessary information may impose a burden on the retailers, but inconvenience does not render the presumption irrebuttable. In addition, while not determinative, it is notable that the presumption sensibly places the burden on the retailers to provide information about the activities of their own affiliates—information that DTF would have significant difficulty uncovering on its own (*see Lavine v Milne*, 424 US 577, 585 [1976]).

In sum, plaintiffs have failed to demonstrate that the statute is facially unconstitutional under either the Commerce or the Due Process Clause.

Accordingly, in both cases, the judgment appealed from and the order of the Appellate Division brought up for review should be affirmed, with costs. ***598**

Smith, J. (dissenting). The rules that govern this case are laid down in a series of United States Supreme Court decisions and are not in dispute. Under the Commerce Clause, a state may require an out-of-state retailer to collect use tax from in-state purchasers only if the retailer has a physical presence within the state (*National Bellas Hess, Inc. v Department of Revenue of Ill.*, 386 US 753 [1967]; *Quill Corp. v North Dakota*, 504 US 298, 309-319 [1992]). The solicitation of customers for the retailer by in-state sales representatives counts as a physical presence, even where the sales representatives are independent contractors (*Scripto, Inc. v Carson*, 362 US 207 [1960]; *Tyler Pipe Industries, Inc. v Washington State Dept. of Revenue*, 483 US 232, 250-251 [1987]; *cf. Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165, 180 [1995]); but mere advertising by the out-of-state retailer in in-state media does not (*see Quill*, 504 US at 302-303 [North Dakota statute making tax obligation dependent on advertisements held invalid]). Thus, the majority correctly summarizes the law by saying that "if New York residents were merely ****8** engaged to post passive advertisements on their websites" no tax could be collected, but that a vendor who "is paying New York residents to actively solicit business in this state" may be required to remit tax (majority op at 596).

Our task here is to decide whether certain New York-based websites—Overstock's "Affiliates" and Amazon's "Associates"—are the equivalent of sales agents, soliciting business for Overstock and Amazon, or are only media in which Overstock and Amazon advertise their products. I think they are the latter.

The Overstock and Amazon links that appear on websites owned by New York proprietors serve essentially the same function as advertising that a more traditional out-of-state retailer might place in local newspapers. The websites are not soliciting customers for Overstock and Amazon in the fashion of a local sales agent. Of course the website owners solicit business for themselves; they encourage people to visit their websites, just as a newspaper owner would seek to boost circulation. But there is no basis for inferring that they are actively soliciting for the out-of-state retailers.

It does not make sense to envision a website owner trying to persuade members of the public, as a sales agent would, that Overstock and Amazon are high quality merchants that the public should want to do business with: persuasion of that sort ***599** does the website owner no good. A traditional sales agent—say, a vacuum cleaner salesman—would promote a particular brand of vacuum cleaner so that customers would order the product through him and he would get a commission. But no website owner promotes Overstock or Amazon for a similar reason, because everyone who wants to buy from either of those firms can go to the retailer's website directly. It is true, as the majority mentions (majority op at 595), that certain kinds of website owners—churches and schools, for example—may ask their supporters to show their loyalty by using the website when they buy from Amazon, but that is not the same as soliciting business that Amazon would not otherwise get. In any event, a rule applicable to websites generally cannot be justified on the basis of the special characteristics of volunteer-supported organizations.

The statute at issue here tries to turn advertising media into an in-state sales force through a presumption. The statute says that a seller "shall be presumed to be soliciting business through an independent contractor or other representative" if it enters an agreement under which a New York resident "for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise" (Tax Law § 1101 [b] [8] [vi]). But of

course a statutory presumption cannot by itself permit a state to do what the United States Constitution forbids. To presume that every website that has an agreement under which it carries an Overstock or Amazon link is a sales agent for Overstock or Amazon would be to nullify the rule that advertising in in-state media is not the equivalent of physical presence.

Read literally, the statute would reach essentially all Internet advertising that links ****9** to a seller's website: it includes any agreement for referral of customers, by a link or otherwise, "for a commission or other consideration." Since this literal reading would unquestionably render the statute unconstitutional, the Department of Taxation and Finance has adopted a narrowing construction, largely ignoring the words "or other consideration," and applying the presumption only where the website receives a commission or similar compensation—i.e., where "the consideration for placing the link on the Web site is based on the volume of completed sales generated by the link" (NY St Dept of Taxation & Fin Mem No. TSB-M-08[3]S at 2). The narrowing construction, in my view, does not save the statute.

It was no doubt true before the Internet existed that advertising was usually sold for a flat fee, while sales agents usually ***600** worked on commission, but that has changed. When an advertisement takes the form of a link on a website, it is easy, as well as efficient, for the advertiser to compensate the website on the basis of results. But the link is still only an ad. It seems quite unlikely, and the record contains no evidence, that compensation "based on the volume of completed sales" is an unusual way of charging for web advertising, or that such compensation is primarily associated with active solicitation on the seller's behalf by the website owner.

A number of tests have been stated for deciding the validity of a statutory presumption. In *People v Leyva* (38 NY2d 160, 165-166 [1975]), we described certain United States Supreme Court cases as requiring "a rational connection between the facts which are proved and the one which is to be inferred with the aid of the presumption" (*see Tot v United States*, 319 US 463, 467-468 [1943]; *United States v Romano*, 382 US 136, 139-141 [1965]), and others as requiring a "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend" (*Leary v United States*, 395 US 6, 36 [1969]). New York, according to the *Leyva* case, "has exacted an even higher standard of rational connection," one that "must assure 'a reasonably high degree of probability' that the presumed fact follows from those proved directly" (38 NY2d at 166, quoting *People v McCaleb*, 25 NY2d 394, 404 [1969]).

I do not think it necessary to decide here what test should apply to a presumption enacted by a state for the purpose of expanding its own power over interstate transactions (though I would think it should be a relatively demanding one); whatever the test is, this statute fails. To infer, from an agreement to put a link on a website and to compensate the website owner in proportion to the resulting sales, that the website owner is actively soliciting business for the seller "is so strained as not to have a reasonable relation to the circumstances of life as we know them" (*Tot v United States*, 319 US at 468).

I would therefore hold that the statute challenged in this litigation is invalid under the Commerce Clause.

Judges Graffeo, Read and Pigott concur with Chief Judge Lippman; Judge Smith dissents in an opinion; Judge Rivera taking no part.

In each case: Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs.

FOOTNOTES

Footnotes

1 Overstock suspended its Affiliates program (for those who provided a New York address) shortly after the enactment of the Internet tax at issue here.

2 The presumption only applies in the first instance to a company that has sold at least $10,000 in products or services as the result of such referrals.

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127 S.Ct. 2738
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS, Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1 et al.

Crystal D. Meredith, custodial parent and next friend of Joshua Ryan McDonald, Petitioner,

v.

Jefferson County Board of Education et al.

Nos. 05–908, 05–915.
|
Argued Dec. 4, 2006.
|
Decided June 28, 2007.

Synopsis

Background: Parents brought action against school district challenging, under Equal Protection Clause, student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools. The United States District Court for the District of Washington, Barbara Jacobs Rothstein, J., 137 F.Supp.2d 1224, entered summary judgment for school district, and the United States Court of Appeals for the Ninth Circuit, on rehearing en banc, ultimately affirmed, 426 F.3d 1162. In separate action, another parent brought similar suit against school board that used racial classification in student assignment plan for elementary school assignments and transfer requests. The United States District Court for the Western District of Kentucky, John G. Heyburn II, Chief Judge, 330 F.Supp.2d 834, upheld assignment plan, and the United States Court of Appeals for the Sixth Circuit, 416 F.3d 513, affirmed. The Supreme Court granted certiorari in both cases.

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

[1] parents had standing;

[2] allegedly compelling interest of diversity in higher education could not justify districts' use of racial classifications in student assignment plans, abrogating *Comfort v. Lynn School Comm.*, 418 F.3d 1; and

[3] districts failed to show that use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity.

Reversed and remanded.

Justice Thomas filed concurring opinion.

Justice Kennedy concurred in part, concurred in the judgment, and filed opinion.

Justice Stevens filed dissenting opinion.

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

West Headnotes (15)

[1] **Constitutional Law** Education
Declaratory Judgment Subjects of relief in general

Parents of elementary school, middle school, and high school students had standing to challenge, under Equal Protection Clause, school district's use of racial classification in student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools, despite claim that whether students would be affected by policy was speculative; complaint sought declaratory and injunctive relief on behalf of parents whose elementary and middle school children might be denied admission to particular high schools in the future and also asserted an interest in not being forced to compete for seats at certain high schools in a system that used race as a deciding factor in many of its admissions decisions. U.S.C.A. Const.Amend. 14.

33 Cases that cite this headnote

[2] **Constitutional Law** Race, National Origin, or Ethnicity

One form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff. U.S.C.A. Const.Amend. 14.

23 Cases that cite this headnote

[3] **Constitutional Law** Education

Constitutional Law Mootness

School district's alleged cessation of student assignment plan that relied on racial classification, pending outcome of litigation that challenged plan under the Equal Protection Clause, did not render such litigation moot, or negate plaintiff parents' standing, where district vigorously defended constitutionality of its race-based program and nowhere suggested that, if litigation was resolved in its favor, it would not resume using race to assign students. U.S.C.A. Const.Amend. 14.

35 Cases that cite this headnote

[4] **Federal Courts** Voluntary cessation of challenged conduct

Voluntary cessation of challenged conduct does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

108 Cases that cite this headnote

[5] **Federal Courts** Particular Cases, Contexts, and Questions

Although student whose parent challenged school board's student assignment plan, under Equal Protection Clause, had been granted a transfer to the school to which transfer was denied under board's racial guidelines, Supreme Court retained jurisdiction to consider parent's challenge to plan, because racial guidelines applied at all grade levels, such that, upon student's enrollment in middle school, he might again be subject to assignment based on his race, and parent sought damages in her complaint. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

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

When the government distributes burdens or benefits on the basis of individual racial classifications, that action, when challenged under the Equal Protection Clause, is reviewed under strict scrutiny; racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. U.S.C.A. Const.Amend. 14.

50 Cases that cite this headnote

[7] **Constitutional Law** Assignment and transfer of students

In order to satisfy searching standard of review applicable to individual racial classifications challenged under the Equal Protection Clause, school districts that used such classifications in their student assignment plans had to demonstrate that the use of racial classifications was narrowly tailored to achieve a compelling government interest. U.S.C.A. Const.Amend. 14.

69 Cases that cite this headnote

[8] **Constitutional Law** Assignment and transfer of students

Education School location; districts and attendance zones

Education Freedom of choice; transfer

Any interest in remedying effects of past intentional discrimination could not serve as compelling interest justifying school board's use of racial classification in student assignment plan for elementary school assignments and transfer requests, which was challenged under the Equal Protection Clause, where, although district's schools were previously segregated by law and then subject to desegregation decree, decree had since been dissolved upon finding

that district had achieved unitary status. U.S.C.A. Const.Amend. 14.

25 Cases that cite this headnote

[9] **Constitutional Law** Assignment and transfer of students

Education School location; districts and attendance zones

Education Freedom of choice; transfer

Allegedly compelling interest of diversity in higher education could not justify school districts' use of racial classifications in student assignment plans for elementary schools, transfer requests, and high schools, under Equal Protection Clause, as race was not considered by the districts as part of a broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints, but could sometimes be determinative standing alone, and plans employed only limited notion of diversity; abrogating, *Comfort v. Lynn School Comm.*, 418 F.3d 1. U.S.C.A. Const.Amend. 14.

23 Cases that cite this headnote

[10] **Constitutional Law** Assignment and transfer of students

Education Desegregation plans in general

School districts' use of racial classifications in their student assignment plans, which were challenged under the Equal Protection Clause, were not narrowly tailored to their asserted goal of fostering educational and broader socialization benefits through a racially diverse learning environment, particularly where level of racial diversity sought by each plan was tied specifically to each district's racial demographics, not any particular pedagogic concept, and thus was directed only to impermissible goal of racial balance. (Per Chief Justice Roberts, with three Justices joining and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

[11] **Constitutional Law** Assignment and transfer of students

Education Desegregation plans in general

School districts failed to show that use of racial classifications in their student assignment plans, which was challenged under the Equal Protection Clause, was necessary to achieve their stated goal of racial diversity, in view of minimal effect that classifications actually had on student assignments, and districts also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. U.S.C.A. Const.Amend. 14.

19 Cases that cite this headnote

[12] **Courts** Dicta

Supreme Court is not bound to follow its dicta in a prior case in which the point presently at issue was not fully debated. (Per Chief Justice Roberts, with three Justices joining and one Justice concurring in the judgment.)

12 Cases that cite this headnote

[13] **Constitutional Law** Persons or Entities Protected

The Equal Protection Clause protects persons, not groups. (Per Chief Justice Roberts, with three Justices joining and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[14] **Constitutional Law** Education

Education Desegregation plans in general

Simply because school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny under the Equal Protection Clause. (Per Chief Justice Roberts, with three Justices joining and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

24 Cases that cite this headnote

[15] **Constitutional Law** Equal protection
Constitutional Law Assignment and transfer of students

Judicial deference toward local school boards on issue of using racial classifications in student assignment plans is fundamentally at odds with equal protection jurisprudence, and burden is on state actors to demonstrate that their race-based policies are justified. (Per Chief Justice Roberts, with three Justices joining and one Justice concurring in the judgment.) U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

****2740** ***701** *Syllabus*[*]

Respondent school districts voluntarily adopted student assignment plans that rely on race to determine which schools certain children may attend. The Seattle district, which has never operated legally segregated schools or been subject to court-ordered desegregation, classified children as white or nonwhite, and used ****2741** the racial classifications as a "tiebreaker" to allocate slots in particular high schools. The Jefferson County, Ky., district was subject to a desegregation decree until 2000, when the District Court dissolved the decree after finding that the district had eliminated the vestiges of prior segregation to the greatest extent practicable. In 2001, the district adopted its plan classifying students as black or "other" in order to make certain elementary school assignments and to rule on transfer requests.

Petitioners, an organization of Seattle parents (Parents Involved) and the mother of a Jefferson County student (Joshua), whose children were or could be assigned under the foregoing plans, filed these suits contending, *inter alia,* that allocating children to different public schools based solely on their race violates the Fourteenth Amendment's equal protection guarantee. In the Seattle case, the District Court granted the school district summary judgment, finding, *inter alia,* that its plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit affirmed. In the Jefferson County case, the District Court found that the school district had asserted a compelling interest in maintaining racially diverse schools, and that its plan was, in all relevant respects, narrowly tailored to serve that interest. The Sixth Circuit affirmed.

Held: The judgments are reversed, and the cases are remanded.

No. 05–908, 426 F.3d 1162; No. 05–915, 416 F.3d 513, reversed and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, concluding:

***702** 1. The Court has jurisdiction in these cases. Seattle argues that Parents Involved lacks standing because its current members' claimed injuries are not imminent and are too speculative in that, even if the district maintains its current plan and reinstitutes the racial tiebreaker, those members will only be affected if their children seek to enroll in a high school that is oversubscribed and integration positive. This argument is unavailing; the group's members have children in all levels of the district's schools, and the complaint sought declaratory and injunctive relief on behalf of members whose elementary and middle school children may be denied admission to the high schools of their choice in the future. The fact that those children may not be denied such admission based on their race because of undersubscription or oversubscription that benefits them does not eliminate the injury claimed. The group also asserted an interest in not being forced to compete in a race-based system that might prejudice its members' children, an actionable form of injury under the Equal Protection Clause, see, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158. The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails. See *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610. Similarly, the fact that Joshua has been granted a transfer does not eliminate the Court's jurisdiction; Jefferson County's racial guidelines apply at all grade levels and he may again be subject to race-based assignment in middle school. Pp. 2750 – 2751.

2. The school districts have not carried their heavy burden of showing that the interest they seek to achieve justifies the

extreme means they have chosen— ****2742** discriminating among individual students based on race by relying upon racial classifications in making school assignments. Pp. 2751 – 2755, 2759 – 2761.

(a) Because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (STEVENS, J., dissenting), governmental distributions of burdens or benefits based on individual racial classifications are reviewed under strict scrutiny, *e.g., Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949. Thus, the school districts must demonstrate that their use of such classifications is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra,* at 227, 115 S.Ct. 2097.

Although remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test, see *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108, that interest is not involved here because the ***703** Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree to which the Jefferson County schools were previously subject has been dissolved. Moreover, these cases are not governed by *Grutter v. Bollinger,* 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304, in which the Court held that, for strict scrutiny purposes, a government interest in student body diversity "in the context of higher education" is compelling. That interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity," *id.,* at 337, 123 S.Ct. 2325, including, *e.g.,* having "overcome personal adversity and family hardship," *id.,* at 338, 123 S.Ct. 2325. Quoting Justice Powell's articulation of diversity in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 314–315, 98 S.Ct. 2733, 57 L.Ed.2d 750, the *Grutter* Court noted that " 'it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups,' that can justify the use of race," 539 U.S., at 324–325, 123 S.Ct. 2325, but " 'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,' " *id.,* at 325, 123 S.Ct. 2325. In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.,* at 330, 123 S.Ct. 2325; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter* ; it is *the* factor. See *Gratz v. Bollinger,* 539 U.S. 244, 275, 123 S.Ct. 2411, 156 L.Ed.2d 257. Even as to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. The *Grutter* Court expressly limited its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to the sort of classifications at issue here. Pp. 2751 – 2755.

(b) Despite the districts' assertion that they employed individual racial classifications in a way necessary to achieve their stated ends, the minimal effect these classifications have on student assignments suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Similarly, Jefferson ****2743** County admits that its use of racial classifications has had a minimal effect, and claims only that its guidelines provide a firm definition of the goal of racially integrated schools, thereby providing administrators with authority to collaborate with principals and staff to maintain schools within the desired range. Classifying and assigning schoolchildren according to a binary conception of ***704** race is an extreme approach in light of this Court's precedents and the Nation's history of using race in public schools, and requires more than such an amorphous end to justify it. In *Grutter,* in contrast, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school there at issue. See 539 U.S., at 320, 123 S.Ct. 2325. While the Court does not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using such classifications. The districts have also failed to show they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *id.,* at 339, 123 S.Ct. 2325, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily

through means other than the racial classifications. Pp. 2759 – 2761.

THE CHIEF JUSTICE, joined by Justice SCALIA, Justice THOMAS, and Justice ALITO, concluded for additional reasons in Parts III–B and IV that the plans at issue are unconstitutional under this Court's precedents. Pp. 2754 – 2759, 2761 – 2768.

1. The Court need not resolve the parties' dispute over whether racial diversity in schools has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits because it is clear that the racial classifications at issue are not narrowly tailored to the asserted goal. In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate. They are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. Whatever those demographics happen to be drives the required "diversity" number in each district. The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective districts, or rather the districts' white/nonwhite or black/"other" balance, since that is the only diversity addressed by the plans. In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body, 539 U.S., at 316, 335–336, 123 S.Ct. 2325, and the Court concluded that the law school did not count back from its applicant pool to arrive at that number, *id.,* at 335–336, 123 S.Ct. 2325. Here, in contrast, the schools worked backward to achieve a ***705** particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits. This is a fatal flaw under the Court's existing precedent. See, *e.g., Freeman,* 503 U.S., at 494, 112 S.Ct. 1430. Accepting racial balancing as a compelling state interest would justify imposing racial proportionality throughout American society, contrary to the Court's repeated admonitions ****2744** that this is unconstitutional. While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition suggesting that their interest differs from racial balancing. Pp. 2754 – 2759.

2. If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. Government action dividing people by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Richmond v. J.A. Croson, Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511, and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict," *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 603, 110 S.Ct. 2997, 111 L.Ed.2d 445 (O'Connor, J., dissenting). When it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the Court held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because the classification and separation themselves denoted inferiority. *Id.,* at 493–494, 74 S.Ct. 686. It was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation in that case. *Id.,* at 494, 74 S.Ct. 686. The districts here invoke the ultimate goal of those who filed *Brown* and subsequent cases to support their argument, but the argument of the plaintiff in *Brown* was that the Equal Protection Clause "prevents states from according differential treatment to American children on the basis of their color or race," and that view prevailed—this Court ruled in its remedial opinion that *Brown* required school districts "to achieve a system of determining admission to the public schools *on a nonracial basis*." *Brown v. Board of Education,* 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (emphasis added). Pp. 2761 – 2768.

Justice KENNEDY agreed that the Court has jurisdiction to decide these cases and that respondents' student assignment plans are not narrowly tailored to achieve the compelling goal of diversity properly defined, but concluded that some parts of the plurality opinion imply an ***706** unyielding insistence that race cannot be a factor in instances when it may be taken into account. Pp. 2788 – 2797.

(a) As part of its burden of proving that racial classifications are narrowly tailored to further compelling interests, the government must establish, in detail, how decisions based on an individual student's race are made in a challenged

program. The Jefferson County Board of Education fails to meet this threshold mandate when it concedes it denied Joshua's requested kindergarten transfer on the basis of his race under its guidelines, yet also maintains that the guidelines do not apply to kindergartners. This discrepancy is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. As becomes clearer when the district's plan is further considered, Jefferson County has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. In its briefing it fails to make clear—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in ****2745** fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the government. In the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions based on individual racial classifications, but it has nevertheless failed to explain why, in a district composed of a diversity of races, with only a minority of the students classified as "white," it has employed the crude racial categories of "white" and "non-white" as the basis for its assignment decisions. Far from being narrowly tailored, this system threatens to defeat its own ends, and the district has provided no convincing explanation for its design. Pp. 2788 – 2791.

(b) The plurality opinion is too dismissive of government's legitimate interest in ensuring that all people have equal opportunity regardless of their race. In administering public schools, it is permissible to consider the schools' racial makeup and adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger, supra*. School authorities concerned that their student bodies' racial compositions interfere with offering an equal educational opportunity to all are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion based solely on a systematic, individual typing by race. Such measures may include strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood ***707** demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Each respondent has failed to provide the necessary support for the proposition that there is no other way than individual racial classifications to avoid racial isolation in their school districts. Cf. *Croson*, *supra*, at 501, 109 S.Ct. 706, 102 L.Ed.2d 854. In these cases, the fact that the number of students whose assignment depends on express racial classifications is small suggests that the schools could have achieved their stated ends through different means, including the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter,* though the criteria relevant to student placement would differ based on the students' age, the parents' needs, and the schools' role. Pp. 2791 – 2793.

ROBERTS, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Parts III–B and IV, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 2768. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 2788. STEVENS, J., filed a dissenting opinion, *post*, p. 2797. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 2800.

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Opinion

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III–A, and III–C, and an opinion with respect to Parts III–B and IV, in which Justice SCALIA, Justice THOMAS, and Justice ALITO join.

***709** The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine ***710** which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these ***711** plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. App. in No. 05–908, pp. 90a–92a.[1] The plan ****2747** allows incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling ***712** currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. *Id.,* at 38a, 103a.[2] If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." *Id.,* at 38a. See *Parents Involved VII,* 426 F.3d 1162, 1169–1170 (C.A.9 2005) (en banc).[3] If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence. App. in No. 05–908, at 38a.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. *Parents Involved VII, supra,* at 1166. Four of Seattle's high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle, ***713** Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle. App. in No. 05–908, at 38a–39a, 45a.

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. *Id.,* at 38a. Three of the oversubscribed schools were "integration

positive" because the school's white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. *Id.,* at 39a–40a. Franklin was ****2748** "integration positive" because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the 2000–2001 school year than otherwise would have been. *Ibid.* Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield's enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students. *Id.,* at 39a.

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program ***714** held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. *Id.,* at 143a–146a, 152a–160a. Parents Involved commenced this suit in the Western District of Washington, alleging that Seattle's use of race in assignments violated the Equal Protection Clause of the Fourteenth Amendment,[4] Title VI of the Civil Rights Act of 1964,[5] and the Washington Civil Rights Act.[6] *Id.,* at 28a–35a.

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. 137 F.Supp.2d 1224, 1240 (W.D.Wash.2001) (*Parents Involved I*). The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act, 285 F.3d 1236, 1253 (2002) (*Parents Involved II*), and enjoined the district's use of the integration tiebreaker, *id.,* at 1257. Upon realizing that the litigation would not be resolved in time for assignment decisions for the 2002–2003 school year, the Ninth Circuit withdrew its opinion, 294 F.3d 1084 (2002) (*Parents Involved III*), vacated the injunction, and, pursuant to Wash. Rev.Code § 2.60.020 (2006), certified the state-law question to the Washington Supreme Court, 294 F.3d 1085, 1087 (2002) (*Parents Involved IV*).

***715** The Washington Supreme Court determined that the State Civil Rights Act bars only preferential treatment programs "where race or gender is used by government to select a less qualified applicant over a more qualified applicant," and not "[p]rograms which are racially neutral, such as the [district's] open choice plan." ****2749** *Parents Involved in Community Schools v. Seattle School Dist., No. 1,* 149 Wash.2d 660, 689–690, 663, 72 P.3d 151, 166, 153 (2003) (en banc) (*Parents Involved V*). The state court returned the case to the Ninth Circuit for further proceedings. *Id.,* at 690, 72 P.3d, at 167.

A panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question. *Parents Involved VI,* 377 F.3d 949 (2004). The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests, *id.,* at 964, Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests, *id.,* at 980. The Ninth Circuit granted rehearing en banc, 395 F.3d 1168 (2005), and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest, *Parents Involved VII,* 426 F.3d, at 1192–1193. We granted certiorari. 547 U.S. 1177, 126 S.Ct. 2351, 165 L.Ed.2d 277 (2006).

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* 489 F.2d 925, 932 (CA6), vacated and remanded, 418 U.S. 918, 94 S.Ct. 3208, 3209, 41 L.Ed.2d 1160, reinstated with modifications, 510 F.2d 1358, 1359 (C.A.6 1974), and in 1975 the District Court entered a desegregation decree. See *Hampton v. Jefferson Cty. Bd. of Ed.,* 72 F.Supp.2d 753, 762–764 (W.D.Ky.1999). Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after ***716** finding that

the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation. *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 360 (2000). See *Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249–250, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435–436, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. App. in No. 05–915, p. 77. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 839–840, and n. 6 (W.D.Ky.2004) (*McFarland I*). The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent. App. in No. 05–915, at 81; *McFarland I, supra,* at 842.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate integration." App. in No. 05–915, at 82. The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. "Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." *Id.,* at 38. If a school has reached the "extremes of the ****2750** racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. *Id.,* at 38–39, 82. After assignment, students at all grade levels ***717** are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines. *Id.,* at 43.[7]

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. See Tr. in *McFarland I*, pp. 1–49 through 1–54 (Dec. 8, 2003). Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young. App. in No. 05–915, at 97.[8]

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining ***718** racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. *McFarland I, supra,* at 837.[9] The Sixth Circuit affirmed in a *per curiam* opinion relying upon the reasoning of the District Court, concluding that a written opinion "would serve no useful purpose." *McFarland v. Jefferson Cty. Public Schools,* 416 F.3d 513, 514 (2005) (*McFarland II*). We granted certiorari. 547 U.S. 1178, 126 S.Ct. 2351, 165 L.Ed.2d 277 (2006).

II

[1] As a threshold matter, we must assure ourselves of our jurisdiction. Seattle argues that Parents Involved lacks standing because none of its current members can claim an imminent injury. Even if the district maintains the current plan and reinstitutes the racial tiebreaker, Seattle argues, Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a ****2751** harm to maintain standing. Brief for Respondents in No. 05–908, pp. 16–17.

[2] This argument is unavailing. The group's members have children in the district's elementary, middle, and high schools, App. in No. 05–908, at 299a–301a; Affidavit of Kathleen Brose Pursuant to this Court's Rule 32.3 (Lodging of Petitioner Parents Involved), and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future," App. in No. 05–908, at 30a. The fact that it is possible that children of group

members will not be denied admission to a school ***719** based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed. Moreover, Parents Involved also asserted an interest in not being "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Ibid.* As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), an injury that the members of Parents Involved can validly claim on behalf of their children.

[3] **[4]** In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05–908, at 16–17. But the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students. Voluntary cessation does not moot a case or controversy unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.,* 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); internal quotation marks omitted), a heavy burden that Seattle has clearly not met.

[5] Jefferson County does not challenge our jurisdiction, Tr. of Oral Arg. in No. 05–915, p. 48, but we are nonetheless obliged to ensure that it exists, *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). Although apparently Joshua has now been granted a transfer to Bloom, the school to which transfer was denied under the racial guidelines, Tr. of Oral Arg. in No. 05–915, at 45, the racial guidelines apply at all grade ***720** levels. Upon Joshua's enrollment in middle school, he may again be subject to assignment based on his race. In addition, Meredith sought damages in her complaint, which is sufficient to preserve our ability to consider the question. *Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

III

A

[6] **[7]** It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); ****2752** *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Adarand, supra,* at 224, 115 S.Ct. 2097. As the Court recently reaffirmed, " 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' " *Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting); brackets omitted). In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest. *Adarand, supra,* at 227, 115 S.Ct. 2097.

[8] Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. See *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson ***721** County had "eliminated the vestiges associated with the former policy of segregation and its pernicious effects," and thus had achieved "unitary" status. *Hampton,* 102 F.Supp.2d, at 360. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination in defending its present use of race in assigning students. See Tr. of Oral Arg. in No. 05–915, at 38.

Nor could it. We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that "the Constitution is not

violated by racial imbalance in the schools, without more." *Milliken v. Bradley,* 433 U.S. 267, 280, n. 14, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). See also *Freeman, supra,* at 495–496, 112 S.Ct. 1430; *Dowell,* 498 U.S., at 248, 111 S.Ct. 630; *Milliken v. Bradley,* 418 U.S. 717, 746, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.[10]

****2753** ***722** The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter,* 539 U.S., at 328, 123 S.Ct. 2325. The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." *Ibid.* The diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." *Id.,* at 337, 123 S.Ct. 2325. We described the various types of diversity that the law school sought:

> "[The law school's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Id.,* at 338, 123 S.Ct. 2325 (brackets and internal quotation marks omitted).

The Court quoted the articulation of diversity from Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), noting that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, that can justify the use of race." *Grutter, supra,* at 324–325, 123 S.Ct. 2325 (citing and quoting *Bakke, supra,* at 314–315, 98 S.Ct. 2733 (opinion of Powell, J.); brackets and internal quotation marks omitted). Instead, what was upheld in *Grutter* was consideration of "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 539 U.S., at 325, 123 S.Ct. 2325 (quoting *Bakke, supra,* at 315, 98 S.Ct. 2733 (opinion of Powell, J.); internal quotation marks omitted).

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld ***723** in *Grutter* was only as part of a "highly individualized, holistic review," 539 U.S., at 337, 123 S.Ct. 2325. As the Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." *Ibid.* The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional." *Id.,* at 330, 123 S.Ct. 2325.

[9] In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," *ibid.*; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter* ; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz,* 539 U.S., at 275, 123 S.Ct. 2411, the plans here "do not ****2754** provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way, *id.,* at 276, 280, 123 S.Ct. 2411 (O'Connor, J., concurring).

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County.[11] But see *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 610, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with divergent ***724** communities knitted together by various traditions and carried forth, above all, by individuals"). The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "[p]roviding students the opportunity to attend schools with diverse student enrollment," App. in No. 05–908, at 128a, 129a. But under the Seattle plan, a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is " 'broadly diverse,' " *Grutter, supra,* at 329, 123 S.Ct. 2325.

Prior to *Grutter,* the courts of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue here—in primary and secondary schools. See, *e.g., Eisenberg v. Montgomery Cty. Public Schools,* 197 F.3d 123, 133 (C.A.4 1999); *Tuttle v. Arlington Cty. School Bd.,* 195 F.3d 698, 701 (C.A.4 1999) (*per curiam*); *Wessmann v. Gittens,* 160 F.3d 790, 809 (C.A.1 1998). See also *Ho v. San Francisco Unified School Dist.,* 147 F.3d 854, 865 (C.A.9 1998). After *Grutter,* however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. See *Parents Involved VII,* 426 F.3d, at 1166; *McFarland II,* 416 F.3d, at 514; *Comfort v. Lynn School Comm.,* 418 F.3d 1, 13 (C.A.1 2005) (en banc).

In upholding the admissions plan in *Grutter,* though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U.S., at 329, 123 S.Ct. 2325. See also ***725** *Bakke,* 438 U.S., at 312, 313, 98 S.Ct. 2733 (opinion of Powell, J.). The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." *Grutter, supra,* at 327, 328, 334, 123 S.Ct. 2325. The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

****2755** B

[10] Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter,* to justify their race-based assignments. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Brief for Respondents in No. 05–908, at 19. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." App. in No. 05–915, at 22.[12] Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek ***726** is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). App. in No. 05–908, at 103a. In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," *McFarland I,* 330 F.Supp.2d, at 842, based on the objective of achieving at "all schools ... an African–American enrollment equivalent to the average district-wide African–American enrollment" of 34 percent, App. in No. 05–915, at 81. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district—whatever they happen to be— ***727** drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager ****2756** of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity

within the schools that approximates the district's overall demographics." App. in No. 05–908, at 42a.

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. See Brief for Respondents in No. 05–908, at 36 ("For Seattle, 'racial balance' is clearly not an end in itself but rather a measure of the extent to which the educational goals the plan was designed to foster are likely to be achieved"). When asked for "a range of percentage that would be diverse," however, Seattle's expert said it was important to have "sufficient numbers so as to avoid students feeling any kind of specter of exceptionality." App. in No. 05–908, at 276a. The district did not attempt to defend the proposition that anything outside its range posed the "specter of exceptionality." Nor did it demonstrate in any way how the educational and social benefits of racial diversity or avoidance of racial isolation are more likely to be achieved at a school that is 50 percent white and 50 percent Asian–American, which would qualify as diverse under Seattle's plan, than at a school that is 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white, which under Seattle's definition would be racially concentrated.

Similarly, Jefferson County's expert referred to the importance of having "at least 20 percent" minority group representation ***728** for the group "to be visible enough to make a difference," and noted that "small isolated minority groups in a school are not likely to have a strong effect on the overall school." App. in No. 05–915, at 159, 147. The Jefferson County plan, however, is based on a goal of replicating at each school "an African–American enrollment equivalent to the average district-wide African–American enrollment." *Id.,* at 81. Joshua McDonald's requested transfer was denied because his race was listed as "other" rather than black, and allowing the transfer would have had an adverse effect on the racial guideline compliance of Young Elementary, the school he sought to leave. *Id.,* at 21. At the time, however, Young Elementary was 46.8 percent black. *Id.,* at 73. The transfer might have had an adverse effect on the effort to approach districtwide racial proportionality at Young, but it had nothing to do with preventing either the black or "other" group from becoming "small" or "isolated" at Young.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, at Franklin High School in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000–2001 that was 30.3 percent Asian–American, 21.9 percent African–American, 6.8 percent Latino, 0.5 percent Native–American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian–American, 30.2 percent African–American, 8.3 percent Latino, 1.1 percent Native–American, and 20.8 percent Caucasian. See App. in No. 05–908, at 308a. When the actual racial breakdown is considered, enrolling students without regard to their ****2757** race yields a substantially diverse student body under any definition of diversity.[13]

***729** In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body. 539 U.S., at 316, 335–336, 123 S.Ct. 2325. Although the matter was the subject of disagreement on the Court, see *id.,* at 346–347, 123 S.Ct. 2325 (SCALIA, J., concurring in part and dissenting in part); *id.,* at 382–383, 123 S.Ct. 2325 (Rehnquist, C. J., dissenting); *id.,* at 388–392, 123 S.Ct. 2325 (KENNEDY, J., dissenting), the majority concluded that the law school did not count back from its applicant pool to arrive at the "meaningful number" it regarded as necessary to diversify its student body. *Id.,* at 335–336, 123 S.Ct. 2325. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not ***730** to be achieved for its own sake." *Freeman,* 503 U.S., at 494, 112 S.Ct. 1430. See also *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Bakke,* 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as

facially invalid"). *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional." 539 U.S., at 330, 123 S.Ct. 2325.

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson,* 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Metro Broadcasting,* 497 U.S., at 602, 110 S.Ct. 2997 (O'Connor, J., dissenting); internal quotation ****2758** marks omitted).[14] Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson, supra,* at 495, 109 S.Ct. 706 (plurality opinion of O'Connor, J.) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 320, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting), in turn quoting ***731** *Fullilove,* 448 U.S., at 547, 100 S.Ct. 2758 (STEVENS, J., dissenting); brackets and citation omitted). An interest "linked to nothing other than proportional representation of various races ... would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting, supra,* at 614, 110 S.Ct. 2997 (O'Connor, J., dissenting).

The validity of our concern that racial balancing has "no logical stopping point," *Croson, supra,* at 498, 109 S.Ct. 706 (quoting *Wygant, supra,* at 275, 106 S.Ct. 1842 (plurality opinion); internal quotation marks omitted); see also *Grutter, supra,* at 343, 123 S.Ct. 2325, is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics. As the districts' demographics shift, so too will their definition of racial diversity. See App. in No. 05–908, at 103a (describing application of racial tiebreaker based on "*current* white percentage" of 41 percent and "*current* minority percentage" of 59 percent (emphasis added)).

The Ninth Circuit below stated that it "share[d] in the hope" expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case. *Parents Involved VII,* 426 F.3d, at 1192. But in Seattle the plans are defended as necessary to address the consequences of racially identifiable housing patterns. The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action. See, *e.g., Shaw v. Hunt,* 517 U.S. 899, 909–910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson, supra,* at 498–499, 109 S.Ct. 706; *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.,* at 288, 106 S.Ct. 1842 (O'Connor, J., concurring in part and concurring in judgment) ("[A] governmental agency's interest in remedying 'societal' discrimination,that ***732** is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster").

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to ****2759** describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance. See, *e.g.,* App. in No. 05–908, at 257a ("Q. What's your understanding of when a school suffers from racial isolation?" "A. I don't have a definition for that"); *id.,* at 228a–229a ("I don't think we've ever sat down and said, 'Define racially concentrated school exactly on point in quantitative terms.' I don't think we've ever had that conversation"); Tr. in *McFarland I,* at 1–90 (Dec. 8, 2003) ("Q." "How does the Jefferson County School Board define diversity ... ?" "A. Well, we want to have the schools that make up the percentage of students of the population").

Jefferson County phrases its interest as "racial integration," but integration certainly does not require the sort of racial proportionality reflected in its plan. Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required, see *Milliken,* 433 U.S., at 280, n. 14, 97 S.Ct. 2749 ("[A desegregation] order contemplating the substantive constitutional right [to a] particular degree of racial balance or mixing is ... infirm as a matter of law" (internal quotation marks omitted)); *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("The constitutional command to desegregate schools does not mean that every school in every

community must always reflect the racial composition of the school system as a whole"), and here Jefferson County has already been found to have eliminated the vestiges of its prior segregated school system.

***733** The en banc Ninth Circuit declared that "when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution." *Parents Involved VII, supra,* at 1191. For the foregoing reasons, this conclusory argument cannot sustain the plans. However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled "racial diversity" or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

C

[11] The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle's racial tiebreaker results, in the end, only in shifting a small number of students between schools. Approximately 307 student assignments were affected by the racial tiebreaker in 2000–2001; the district was able to track the enrollment status of 293 of these students. App. in No. 05–908, at 162a. Of these, 209 were assigned to a school that was one of their choices, 87 of whom were assigned to the same school to which they would have been assigned without the racial tiebreaker. Eighty-four students were assigned to schools that they did not list as a choice, but 29 of those students would have been assigned to their respective school without the racial tiebreaker, and 3 were able to attend one of the oversubscribed schools due to waitlist and capacity adjustments. *Id.,* at 162a–163a. In over one-third of the assignments affected by the racial tiebreaker, then, the use of race in the end made no ****2760** difference, and the district could identify ***734** only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school they had not listed as a preference and to which they would not otherwise have been assigned.

As the panel majority in *Parents Involved VI* concluded:

> "[T]he tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools—about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes ... outweigh the cost of subjecting hundreds of students to disparate treatment based solely upon the color of their skin." 377 F.3d, at 984–985.

Similarly, Jefferson County's use of racial classifications has only a minimal effect on the assignment of students. Elementary school students are assigned to their first- or second-choice school 95 percent of the time, and transfers, which account for roughly 5 percent of assignments, are only denied 35 percent of the time—and presumably an even smaller percentage are denied on the basis of the racial guidelines, given that other factors may lead to a denial. *McFarland I,* 330 F.Supp.2d, at 844–845, nn. 16, 18. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments. Brief in Opposition in No. 05–915, p. 7, n. 4; Tr. of Oral Arg. in No. 05–915, at 46. As Jefferson County explains, "the racial guidelines have minimal impact in this process, because they 'mostly influence student assignment in subtle and indirect ways.' " Brief for Respondents in No. 05–915, pp. 8–9.

While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In *Grutter,* the consideration of race was viewed as indispensable in more than tripling minority ***735** representation at the law school —from 4 to 14.5 percent. See 539 U.S., at 320, 123 S.Ct. 2325. Here the most Jefferson County itself claims is that "because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they 'provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.' " Brief in Opposition in No. 05–915, at 7 (quoting *McFarland I, supra,* at 842). Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," *Grutter, supra,* at 339, 123 S.Ct. 2325, and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. See, *e.g.,* App. in No. 05–908, at 224a–225a, 253a–259a, 307a. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications. Brief for Respondents in No. 05–915, at 8–9. Cf. *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and ****2761** concurring in judgment) (racial classifications permitted only "as a last resort").

IV

Justice BREYER's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, ***736** and greatly exaggerates the consequences of today's decision.

To begin with, Justice BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. See *post,* at 2809 – 2813. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. See, *e.g., Milliken,* 433 U.S., at 280, n. 14, 97 S.Ct. 2749; *Freeman,* 503 U.S., at 495–496, 112 S.Ct. 1430 ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications"). The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation, *post,* at 2802, 2809 – 2810, 2812,[15] and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.

Justice BREYER's reliance on *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), *post,* at 2812 – 2813, 2815 – 2816, highlights how far removed the discussion in the dissent is from the question actually presented in these cases. *McDaniel* concerned a Georgia school system that had been segregated by law. There was no doubt that the county had operated a "dual school ***737** system," 402 U.S., at 41, 91 S.Ct. 1287, and no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect. See *supra,* at 2806. The present cases are before us, however, because the Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary, having eliminated the vestiges of its prior dual status. The justification for race-conscious remedies in *McDaniel* is therefore not applicable here. The dissent's persistent refusal to accept this distinction —its insistence on viewing the racial classifications here as if they were just like the ones in *McDaniel,* "devised to overcome a history of segregated public schools," *post,* at 2825 – 2826—explains its inability to understand why the remedial justification for racial classifications cannot decide these cases.

****2762** **[12]** Justice BREYER's dissent next relies heavily on dicta from *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S., at 16, 91 S.Ct. 1267—far more heavily than the school districts themselves. Compare *post,* at 2801, 2811 – 2815, with Brief for Respondents in No. 05–908, at 19–20; Brief for Respondents in No. 05–915, at 31. The dissent acknowledges that the two-sentence discussion in *Swann* was pure dicta, *post,* at 2811 – 2812, but nonetheless asserts that it demonstrates a "basic principle of constitutional law" that provides "authoritative legal guidance," *post,* at 2811 – 2812, 2816. Initially, as the Court explained just last Term, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Community College v. Katz,* 546 U.S. 356, 363, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. See n. 16, *infra*. There is nothing "technical" or "theoretical," *post,* at 2816, about our approach to such dicta. See, *e.g., Cohens v. Virginia,* 6 Wheat. 264, 399–400, 5 L.Ed. 257 (1821) (Marshall, C.J.) (explaining why dicta is not binding).

***738** Justice BREYER would not only put such extraordinary weight on admitted dicta, but relies on the

statement for something it does not remotely say. *Swann* addresses only a possible state objective; it says nothing of the permissible *means*—race conscious or otherwise—that a school district might employ to achieve that objective. The reason for this omission is clear enough, since the case did not involve any voluntary means adopted by a school district. The dissent's characterization of *Swann* as recognizing that "the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals" is—at best—a dubious inference. *Post,* at 2811–2812. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann,* it also does not address the question presented in these cases—whether the school districts' use of racial classifications to achieve their stated goals is permissible.

Further, for all the lower court cases Justice BREYER cites as evidence of the "prevailing legal assumption," *post*, at 2813, embodied by *Swann,* very few are pertinent. Most are not. For example, the dissent features *Tometz v. Board of Ed., Waukegan City School Dist. No. 61,* 39 Ill.2d 593, 597–598, 237 N.E.2d 498, 501 (1968), as evidence that "state and federal courts had considered the matter settled and uncontroversial." *Post,* at 2813. But *Tometz* addressed a challenge to a statute requiring race-consciousness in drawing school attendance boundaries—an issue well beyond the scope of the question presented in these cases. Importantly, it considered that issue only under rational-basis review, 39 Ill.2d, at 600, 237 N.E.2d, at 502 ("The test of any legislative classification essentially is one of reasonableness"), which even the dissent grudgingly recognizes is an improper standard for evaluating express racial classifications. Other cases cited are similarly inapplicable. See, *e.g.,* ***739** *Citizens for Better Ed. v. Goose Creek Consol. Independent School Dist.,* 719 S.W.2d 350, 352–353 (Tex.App.1986) (upholding rezoning plan under rational-basis review).[16]

****2763** Justice BREYER's dissent next looks for authority to a footnote in ***740** *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 472, n. 15, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982), *post,* at 2830 – 2831, but there this Court expressly noted that it was *not* passing on the propriety of race-conscious student assignments in the absence of a finding of *de jure* segregation. Similarly, the citation of *Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), *post,* at 2813, in which a state referendum prohibiting a race-based assignment plan was challenged, is inapposite—in *Crawford* the Court again expressly reserved the question presented by these cases. 458 U.S., at 535, n. 11, 102 S.Ct. 3211. Such reservations and preliminary analyses of course did not decide the merits of this question—as evidenced by the disagreement among the lower courts on this issue. Compare *Eisenberg,* 197 F.3d, at 133, with *Comfort,* 418 F.3d, at 13.

Justice BREYER's dissent also asserts that these cases are controlled by *Grutter,* claiming that the existence of a compelling interest in these cases "follows *a fortiori* " from *Grutter, post,* at 2822, 2834 – 2836, and accusing us of tacitly overruling that case, see *post,* at 2834 – 2836. The dissent overreads *Grutter,* however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be "patently unconstitutional," 539 U.S., at 330, 123 S.Ct. 2325. The Court was exceedingly careful in describing the interest furthered in *Grutter* as "not an interest in simple ethnic diversity" but rather a "far broader array of qualifications and characteristics" in which race was but a single element. *Id.*, at 324–325, 123 S.Ct. 2325 (internal ****2764** quotation marks omitted). We take the *Grutter* Court at its word. We simply do not understand how Justice BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a determinative factor in assigning children to achieve pure racial balance, can be regarded as "less burdensome, and hence more narrowly tailored" than the consideration of race in *Grutter, post,* at 2825 – 2826, when the Court in *Grutter* stated that "[t]he importance of ... individualized consideration" in the program was "paramount," and consideration ***741** of race was one factor in a "highly individualized, holistic review," 539 U.S., at 337, 123 S.Ct. 2325. Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter.* In light of the foregoing, Justice BREYER's appeal to *stare decisis* rings particularly hollow. See *post,* at 2835 – 2836.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, Justice BREYER's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, see *post,* at 2816 – 2817, 2818 – 2820, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes, see *post,* at 2816 – 2820.

This Court has recently reiterated, however, that " '*all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.' " *Johnson,* 543 U.S., at 505, 125 S.Ct. 1141 (quoting *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097; emphasis added by *Johnson* Court). See also *Grutter, supra,* at 326, 123 S.Ct. 2325 ("[G]overnmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry" (internal quotation marks and emphasis omitted)). Justice BREYER nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that ... repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." *Post,* at 2815 – 2816 (emphasis in original). We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis. See *Johnson, supra,* at 505, 125 S.Ct. 1141 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand, supra*, at 227, 115 S.Ct. 2097 (rejecting idea that " 'benign' " racial classifications may ***742** be held to "different standards"); *Croson,* 488 U.S., at 500, 109 S.Ct. 706 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice").

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, see, *e.g., Gratz,* 539 U.S., at 282, 123 S.Ct. 2411 (BREYER, J., concurring in judgment); *id.,* at 301, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Adarand, supra,* at 243, 115 S.Ct. 2097 (STEVENS, J., dissenting); *Wygant,* 476 U.S., at 316–317, 106 S.Ct. 1842 (STEVENS, J., dissenting), and has been repeatedly rejected. See also *Bakke,* 438 U.S., at 289–291, 98 S.Ct. 2733 (opinion of Powell, J.) (rejecting argument that strict scrutiny should be applied only to classifications that disadvantage minorities, stating "[r]acial and ethnic distinctions of any sort are inherently ****2765** suspect and thus call for the most exacting judicial examination").

The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility .... '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting,* 497 U.S., at 609–610, 110 S.Ct. 2997 (O'Connor, J., dissenting). See also *Adarand, supra,* at 226, 115 S.Ct. 2097 (" '[I]t may not always be clear that a so-called preference is in fact benign' " (quoting *Bakke, supra,* at 298, 98 S.Ct. 2733 (opinion of Powell, J.))). Accepting Justice BREYER's approach would "do no more than move us from 'separate but equal' to 'unequal but benign.' " *Metro Broadcasting, supra,* at 638, 110 S.Ct. 2997 (KENNEDY, J., dissenting).

[13] Justice BREYER speaks of bringing "the races" together (putting aside the purely black-and-white nature of the plans) as the justification for excluding individuals on the basis of their race.) See *post,* at 2815 – 2816. Again, this approach ***743** to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause "protect [s] *persons,* not *groups,*" *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097 (emphasis in original). See *ibid.* ("[A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' *Hirabayashi* [*v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)]—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" (emphasis in original)); *Metro Broadcasting, supra,* at 636, 110 S.Ct. 2997 (KENNEDY, J., dissenting) ("[O]ur Constitution protects each citizen as an individual, not as a member of a group"); *Bakke, supra,* at 289, 98 S.Ct. 2733 (opinion of Powell, J.) (The Fourteenth Amendment creates rights " 'guaranteed to the individual. The rights established are personal rights' "). This fundamental principle goes back, in this context, to *Brown* itself. See *Brown v. Board of Education,* 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools ... on a nondiscriminatory basis" (emphasis added)). For the dissent, in contrast, " 'individualized scrutiny' is simply beside the point." *Post,* at 2829 – 2830.

[14] Justice BREYER's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,' " *post,* at 2836, but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends *and* as to means." *Adarand, supra,* at 236, 115 S.Ct. 2097 (emphasis added). Simply because the school districts may seek a worthy goal does not mean they are free to discriminate

on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word," *post,* at 2819 – 2820, Justice BREYER still purports ***744** to apply strict scrutiny to these cases. See *ibid.* It is evident, however, that Justice BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. ****2766** Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals. This conclusion is divorced from any evaluation of the actual impact of the plans at issue in these cases—other than to note that the plans "often have no effect." *Post,* at 2824 – 2825.[17] Instead, the dissent suggests that some combination of the development of these plans over time, the difficulty of the endeavor, and the good faith of the districts suffices to demonstrate that these stark and controlling racial classifications are constitutional. The Constitution and our precedents require more.

[15] In keeping with his view that strict scrutiny should not apply, Justice BREYER repeatedly urges deference to local school boards on these issues. See, *e.g., post,* at 2811, 2826 – 2827, 2835 – 2836. Such deference "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson,* 543 U.S., at 506, n. 1, 125 S.Ct. 1141. See *Croson, supra*, at 501, 109 S.Ct. 706 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in ***745** equal protection analysis"); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures—Boards of Education not excepted").

Justice BREYER's dissent ends on an unjustified note of alarm. It predicts that today's decision "threaten[s]" the validity of "[h]undreds of state and federal statutes and regulations." *Post,* at 2833; see also *post,* at 2814 – 2815. But the examples the dissent mentions—for example, a provision of the No Child Left Behind Act of 2001 that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups, 20 U.S.C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV)—have nothing to do with the pertinent issues in these cases.

Justice BREYER also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. *Post,* at 2831 – 2834. These other means—*e.g.,* where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent's cataclysmic concerns. Under ****2767** that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

* * *

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "[D]istinctions between citizens ***746** solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand,* 515 U.S., at 214, 115 S.Ct. 2097 (internal quotation marks omitted). Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson,* 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion), "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno,* 509 U.S. 630, 657, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broadcasting,* 497 U.S., at 603, 110 S.Ct. 2997 (O'Connor, J., dissenting). As the Court explained in *Rice v. Cayetano,* 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. *Id.,* at 493–494, 74 S.Ct. 686. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. See *id.,* at 494, 74 S.Ct. 686 (" 'The impact [of segregation] is greater when it has the sanction of the law' "). The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of ***747** determining admission to the public schools *on a nonracial basis*." *Brown II,* 349 U.S., at 300–301, 75 S.Ct. 753 (emphasis added).

The parties and their *amici* debate which side is more faithful to the heritage of *Brown,* but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." Brief for Appellants in Nos. 1, 2, and 4 and for Respondents in No. 10 on Reargument in *Brown I,* O.T.1953, p. 15 (Summary of Argument). What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in ****2768** affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I,* O.T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis,*" and what was required was "determining admission to the public schools *on a nonracial basis*." *Brown II, supra,* at 300–301, 75 S.Ct. 753 (emphasis added). What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as ***748** Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II, supra*, at 300–301, 75 S.Ct. 753, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

Justice THOMAS, concurring.

Today, the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable. I wholly concur in THE CHIEF JUSTICE's opinion. I write separately to address several of the contentions in Justice BREYER's dissent (hereinafter dissent). Contrary to the dissent's arguments, resegregation is not occurring in Seattle or Louisville; these school boards have no present interest in remedying past segregation; and these race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). This approach is just as wrong today as it was a half century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.

I

The dissent repeatedly claims that the school districts are threatened with resegregation and that they will succumb to that threat if these plans are declared unconstitutional.

It also argues that these plans can be justified as part of the school boards' attempts to "eradicat[e] earlier school segregation." ***749** See, *e.g., post,* at 2801 – 2802. Contrary to the dissent's rhetoric, neither of these school districts is threatened with resegregation, and neither is constitutionally compelled or permitted to undertake race-based remediation. Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.

A

Because this Court has authorized and required race-based remedial measures to ****2769** address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to "carry out a governmental policy to separate pupils in schools solely on the basis of race." *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 6, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Monroe v. Board of Comm'rs of Jackson,* 391 U.S. 450, 452, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). In *Brown,* this Court declared that segregation was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Swann, supra,* at 6, 91 S.Ct. 1267; see also *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 435, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) ("[T]he State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.' It was such dual systems that 14 years ago *Brown* [, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873,] held unconstitutional and a year later *Brown* [*v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955),] held must be abolished").[1]

Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large. Cf. *Washington* ***750** *v. Seattle School Dist. No. 1,* 458 U.S. 457, 460, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Racial imbalance is not segregation.[2] Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. See *Swann, supra,* at 25–26, 91 S.Ct. 1267; *Missouri v. Jenkins,* 515 U.S. 70, 116, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself. *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 413, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Dayton Bd. of Ed. v. Brinkman,* 443 U.S. 526, 531, n. 5, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) ("Racial imbalance ... is not *per se* a constitutional violation"); *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992); see also *Swann, supra,* at 31–32, 91 S.Ct. 1267; cf. *Milliken v. Bradley,* 418 U.S. 717, 740–741, and n. 19, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974).

Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race. The statistics cited in Appendix A to the dissent are not to the contrary. See *post,* at 2837 – 2839. At most, those statistics show a national trend toward classroom racial imbalance. However, racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend ****2770** these programs is to ignore the meaning of the word and the nature of the cases before us.[3]

***751** B

Just as the school districts lack an interest in preventing resegregation, they also have no present interest in remedying past segregation. The Constitution generally prohibits government race-based decisionmaking, but this Court has authorized the use of race-based measures for remedial purposes in two narrowly defined circumstances. First, in schools that were formerly segregated by law, race-based measures are sometimes constitutionally compelled to remedy prior school segregation. Second, in *Croson,* the Court appeared willing to authorize a government unit to remedy past discrimination for which it was responsible. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Without explicitly resting on either of these strands of doctrine, the dissent repeatedly invokes the school districts' supposed interests in remedying past segregation. Properly analyzed, though, these plans do not fall within either existing category of permissible race-based remediation.

1

The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Grutter v. Bollinger,* 539 U.S. 306, 371, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ***752** THOMAS, J., concurring in part and dissenting in part) (citing *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (SCALIA, J., concurring in part and concurring in judgment)). Rather, race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest. *Grutter, supra,* at 326, 123 S.Ct. 2325; see also Part II–A, *infra*. This exacting scrutiny "has proven automatically fatal" in most cases. *Jenkins, supra,* at 121, 115 S.Ct. 2038 (THOMAS, J., concurring); cf. *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) ("[R]acial discriminations are in most circumstances irrelevant and therefore prohibited"). And appropriately so. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter, supra,* at 353, 123 S.Ct. 2325 (opinion of THOMAS, J.). Therefore, as a general rule, all race-based government ****2771** decisionmaking—regardless of context—is unconstitutional.

2

This Court has carved out a narrow exception to that general rule for cases in which a school district has a "history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race."[4] *Swann,* 402 U.S., at 5–6, 91 S.Ct. 1267. In such cases, race-based remedial ***753** measures are sometimes required.[5] *Green,* 391 U.S., at 437–438, 88 S.Ct. 1689; cf. *United States v. Fordice,* 505 U.S. 717, 745, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring).[6] But without a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to eliminate segregation and its vestiges.

Neither of the programs before us today is compelled as a remedial measure, and no one makes such a claim. Seattle has no history of *de jure* segregation; therefore, the Constitution did not require Seattle's plan.[7] Although Louisville ***754** once operated ****2772** a segregated school system and was subject to a Federal District Court's desegregation decree, see *ante,* at 2803; *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 376–377 (W.D.Ky.2000), that decree was dissolved in 2000, *id.,* at 360. Since then, no race-based remedial measures have been required in Louisville. Thus, the race-based student-assignment plan at issue here, which was instituted the year after the dissolution of the desegregation decree, was not even arguably required by the Constitution.

3

Aside from constitutionally compelled remediation in schools, this Court has permitted government units to remedy prior racial discrimination only in narrow circumstances. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). Regardless of the constitutional validity of such remediation, see *Croson,* 488 U.S., at 524–525, 109 S.Ct. 706 (SCALIA, J., concurring in judgment), it does not apply here. Again, neither school board asserts that its race-based actions were taken to remedy prior discrimination. Seattle provides three forward-looking—as opposed to remedial—justifications for its race-based assignment plan. Brief for Respondents in No. 05–908, pp. 24–34. Louisville asserts several similar forward-looking interests, Brief for Respondents in No. 05–915, pp. 24–29, and at oral argument, counsel for Louisville disavowed any claim that Louisville's argument "depend[ed] in any way on the prior de jure segregation," Tr. of Oral Arg. in No. 05–915, p. 38.

Furthermore, for a government unit to remedy past discrimination for which it was responsible, the Court has required it to demonstrate "a 'strong basis in evidence for its conclusion that remedial action was necessary.' " ***755** *Croson, supra*, at 500, 109 S.Ct. 706 (quoting *Wygant, supra,* at 277, 106 S.Ct. 1842 (plurality opinion)). Establishing a "strong basis in evidence" requires proper findings regarding the extent of the government unit's past racial discrimination. *Croson,* 488 U.S., at 504, 109 S.Ct. 706. The findings should "define the scope of any injury [and] the necessary remedy," *id.,* at 505, 109 S.Ct. 706, and must be more than "inherently unmeasurable claims of past wrongs," *id.,* at 506, 109 S.Ct. 706. Assertions of general societal discrimination are plainly insufficient. *Id.,* at 499, 504, 109 S.Ct. 706; *Wygant, supra,* at 274, 106 S.Ct. 1842 (plurality opinion); cf. *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 310, 98 S.Ct. 2733, 57

L.Ed.2d 750 (1978) (opinion of Powell, J.). Neither school district has made any such specific findings. For Seattle, the dissent attempts to make up for this failing by adverting to allegations made in past complaints filed against the Seattle school district. However, allegations in complaints cannot substitute for specific findings of prior discrimination—even when those allegations lead to settlements with complaining parties. Cf. *Croson, supra,* at 505, 109 S.Ct. 706; *Wygant, supra,* at 279, n. 5, 106 S.Ct. 1842 (plurality opinion). As for Louisville, its slate was cleared by the District Court's 2000 dissolution decree, which effectively declared that there were no longer any effects of *de jure* discrimination in need of remediation.[8]

**2773 *756 Despite the dissent's repeated intimation of a remedial purpose, neither of the programs in question qualifies as a permissible race-based remedial measure. Thus, the programs are subject to the general rule that government race-based decisionmaking is unconstitutional.

C

As the foregoing demonstrates, racial balancing is sometimes a constitutionally permissible remedy for the discrete legal wrong of *de jure* segregation, and when directed to that end, racial balancing is an exception to the general rule that government race-based decisionmaking is unconstitutional. Perhaps for this reason, the dissent conflates the concepts of segregation and racial imbalance: If racial imbalance equates to segregation, then it must also be constitutionally acceptable to use racial balancing to remedy racial imbalance.

For at least two reasons, however, it is wrong to place the remediation of segregation on the same plane as the remediation of racial imbalance. First, as demonstrated above, the two concepts are distinct. Although racial imbalance can result from *de jure* segregation, it does not necessarily, and the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation. See *Freeman,* 503 U.S., at 496, 112 S.Ct. 1430; *Jenkins,* 515 U.S., at 118, 115 S.Ct. 2038 (THOMAS, J., concurring).

Second, a school cannot "remedy" racial imbalance in the same way that it can remedy segregation. Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. See *Swann,* 402 U.S., at 31, 91 S.Ct. 1267. Unlike *de jure* segregation, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing *757 demographics. Thus, racial balancing will have to take place on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point. In part for those reasons, the Court has never permitted outright racial balancing solely for the purpose of achieving a particular racial balance.

II

Lacking a cognizable interest in remediation, neither of these plans can survive strict scrutiny because neither plan serves a genuinely compelling state interest. The dissent avoids reaching that conclusion by unquestioningly accepting the assertions of selected social scientists while completely ignoring the fact that those assertions are the subject of fervent debate. Ultimately, the dissent's entire analysis is corrupted by the considerations that lead it initially to question whether strict scrutiny should apply at all. What emerges is a version of "strict scrutiny" that combines hollow assurances of harmlessness with reflexive acceptance of conventional wisdom. When it **2774 comes to government race-based decisionmaking, the Constitution demands more.

A

The dissent claims that "the law requires application here of a standard of review that is not 'strict' in the traditional sense of that word." *Post,* at 2819 – 2820. This view is informed by dissents in our previous cases and the concurrences of two Court of Appeals judges. *Post,* at 34–36 (citing 426 F.3d 1162, 1193–1194 (C.A.9 2005) (Kozinski, J., concurring); *Comfort v. Lynn School Comm.,* 418 F.3d 1, 28–29 (C.A.1 2005) (Boudin, C. J., concurring)). Those lower court judges reasoned that programs like these are not "aimed at oppressing blacks" and do not "seek to give one racial group an edge over another." *Id.,* at 27; 426 F.3d, at 1193 (Kozinski, J., concurring). They were further persuaded that these plans differed from other race-based programs this Court has considered because they are "certainly more benign than laws *758 that favor or disfavor one race, segregate by race, or create quotas for or against a racial group," *Comfort,* 418 F.3d, at 28 (Boudin, C. J., concurring), and they are "far

from the original evils at which the Fourteenth Amendment was addressed," *id.,* at 29; 426 F.3d, at 1195 (Kozinski, J., concurring). Instead of strict scrutiny, Judge Kozinski would have analyzed the plans under "robust and realistic rational basis review." *Id.,* at 1194.

These arguments are inimical to the Constitution and to this Court's precedents.[9] We have made it unusually clear that strict scrutiny applies to *every* racial classification. *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097; *Grutter,* 539 U.S., at 326, 123 S.Ct. 2325; *Johnson v. California,* 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications").[10] There are good reasons not to apply a lesser standard to these cases. The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking. *Adarand,* 515 U.S., at 228–229, 115 S.Ct. 2097. Purportedly benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking. ***759** *Id.,* at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment) ("As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged").

****2775** Even supposing it mattered to the constitutional analysis, the race-based student-assignment programs before us are not as benign as the dissent believes. See *post,* at 2818 – 2819. "[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Adarand, supra,* at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). As these programs demonstrate, every time the government uses racial criteria to "bring the races together," *post,* at 2815 – 2816, someone gets excluded, and the person excluded suffers an injury solely because of his or her race. The petitioner in the Louisville case received a letter from the school board informing her that her *kindergartner* would not be allowed to attend the school of petitioner's choosing because of the child's race. App. in No. 05–915, p. 97. Doubtless, hundreds of letters like this went out from both school boards every year these race-based assignment plans were in operation. This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand, supra,* at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). Accordingly, these plans are simply one more variation on the government race-based decisionmaking we have consistently held must be subjected to strict scrutiny. *Grutter, supra,* at 326, 123 S.Ct. 2325.

B

Though the dissent admits to discomfort in applying strict scrutiny to these plans, it claims to have nonetheless applied that exacting standard. But in its search for a compelling ***760** interest, the dissent casually accepts even the most tenuous interests asserted on behalf of the plans, grouping them all under the term " 'integration.' " See *post,* at 2820. " '[I]ntegration,' " we are told, has "three essential elements." *Ibid.* None of these elements is compelling. And the combination of the three unsubstantiated elements does not produce an interest any more compelling than that represented by each element independently.

1

According to the dissent, integration involves "an interest in setting right the consequences of prior conditions of segregation." *Ibid*. For the reasons explained above, the records in these cases do not demonstrate that either school board's plan is supported by an interest in remedying past discrimination. Part I–B, *supra*.

Moreover, the school boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as "housing patterns, employment practices, economic conditions, and social attitudes." *Post,* at 2820 – 2821. General claims that past school segregation affected such varied societal trends are "too amorphous a basis for imposing a racially classified remedy," *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion), because "[i]t is sheer speculation" how decades-past segregation in the school system might have affected these trends, see *Croson,* 488 U.S., at 499, 109 S.Ct. 706. Consequently, school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy. *Id.,* at 498, 109 S.Ct. 706. Indeed, remedial measures geared toward such broad and unrelated societal ills have " 'no logical stopping point,' " *ibid.,* and

threaten to become "ageless in their reach into the past, and timeless in their ability to affect the future," ****2776** *Wygant, supra,* at 276, 106 S.Ct. 1842 (plurality opinion). See *Grutter, supra*, at 342, 123 S.Ct. 2325 (stating the "requirement that all governmental use of race must have a logical end point").

***761** Because the school boards lack any further interest in remedying segregation, this element offers no support for the purported interest in "integration."

2

Next, the dissent argues that the interest in integration has an educational element. The dissent asserts that racially balanced schools improve educational outcomes for black children. In support, the dissent unquestioningly cites certain social science research to support propositions that are hotly disputed among social scientists. In reality, it is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement.

Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. See, *e.g.,* Crain & Mahard, Desegregation and Black Achievement: A Review of the Research, 42 Law & Contemp. Prob. 17, 48 (Summer 1978). Others have been more circumspect. See, *e.g.,* Henderson, Greenberg, Schneider, Uribe, & Verdugo, High–Quality Schooling for African American Students, in Beyond Desegregation 162, 166 (M. Shujaa ed. 1996) ("Perhaps desegregation does not have a single effect, positive or negative, on the academic achievement of African American students, but rather some strategies help, some hurt, and still others make no difference whatsoever. It is clear to us that focusing simply on demographic issues detracts from focusing on improving schools"). And some have concluded that there are no demonstrable educational benefits. See, *e.g.,* Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds.2002).

The *amicus* briefs in the cases before us mirror this divergence of opinion. Supporting the school boards, one *amicus* ***762** has assured us that "both early desegregation research and recent statistical and econometric analyses ... indicate that there are positive effects on minority student achievement scores arising from diverse school settings." Brief for American Educational Research Association 10. Another brief claims that "school desegregation has a modest positive impact on the achievement of African–American students." App. to Brief for 553 Social Scientists as *Amici Curiae* 13–14 (footnote omitted). Yet neither of those briefs contains specific details like the magnitude of the claimed positive effects or the precise demographic mix at which those positive effects begin to be realized. Indeed, the social scientists' brief rather cautiously claims the existence of any benefit at all, describing the "positive impact" as "modest," *id.,* at 13, acknowledging that "there appears to be little or no effect on math scores," *id.,* at 14, and admitting that the "underlying reasons for these gains in achievement are not entirely clear," *id.,* at 15.[11]

****2777** Other *amici* dispute these findings. One *amicus* reports that "[i]n study after study, racial composition of a student body, when isolated, proves to be an insignificant determinant of student achievement." Brief for Dr. John Murphy et al. in No. 05–908, p. 8; see also *id.,* at 9 ("[T]here is no evidence that diversity in the K–12 classroom positively affectsstudent ***763** achievement"). Another *amicus* surveys several social science studies and concludes that "a fair and comprehensive analysis of the research shows that there is no clear and consistent evidence of [educational] benefits." Brief for David J. Armor et al. 29.

Add to the inconclusive social science the fact of black achievement in "racially isolated" environments. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). Before *Brown,* the most prominent example of an exemplary black school was Dunbar High School. Sowell, Education: Assumptions Versus History, at 29 ("[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan"). Dunbar is by no means an isolated example. See *id.,* at 10–32 (discussing other successful black schools); Walker, Can Institutions Care? Evidence from the Segregated Schooling of African American Children, in Beyond Desegregation, *supra*, at 209–226; see also T. Sowell, Affirmative Action Around the World: An Empirical Study 141–165 (2004). Even after *Brown,* some schools with predominantly black enrollments have achieved outstanding educational results. See, *e.g.,* S. Carter, No Excuses: Lessons from 21 High–Performing, High–Poverty Schools 49–50, 53–56, 71–73, 81–84, 87–88 (2001); A. Thernstrom & S. Thernstrom, No Excuses: Closing the Racial

Gap in Learning 43–64 (2003); see also L. Izumi, They Have Overcome: High–Poverty, High–Performing Schools in California (2002) (chronicling exemplary achievement in predominantly Hispanic schools in California). There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges. *Grutter,* 539 U.S., at 364–365, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) (citing sources); see also *Fordice,* 505 U.S., at 748–749, 112 S.Ct. 2727 (THOMAS, J., concurring).

***764** The Seattle School Board itself must believe that racial mixing is not necessary to black achievement. Seattle operates a K–8 "African–American Academy," which has a "nonwhite" enrollment of 99%. See App. in No. 05–908, p. 227a; Reply Brief for Petitioner in No. 05–908, p. 13, n. 13. That school was founded in 1990 as part of the school board's effort to "increase academic achievement."[12] See African American Academy History, online at http://www.seattleschools.org/schools/aaa/history.htm (all Internet materials as visited June 26, 2007, and available in Clerk of Court's case file). According to the school's most recent annual report, "[a]cademic excellence" is its "primary goal." See African American Academy 2006 Annual Report, p. ****2778** 2, online at http://www.seattleschools.org/area/siso/reports/anrep/altern/938.pdf. This racially imbalanced environment has reportedly produced test scores "higher across all grade levels in reading, writing and math." *Ibid.* Contrary to what the dissent would have predicted, see *post,* at 2820 – 2821, the children in Seattle's African American Academy have shown gains when placed in a "highly segregated" environment.

Given this tenuous relationship between forced racial mixing and improved educational results for black children, the dissent cannot plausibly maintain that an educational element supports the integration interest, let alone makes it compelling.[13] See ***765** *Jenkins,* 515 U.S., at 121–122, 115 S.Ct. 2038 (THOMAS, J., concurring) ("[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment").

Perhaps recognizing as much, the dissent argues that the social science evidence is "strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one." *Post,* at 2820 – 2821. This assertion is inexplicable. It is not up to the school boards —the very government entities whose race-based practices we must strictly scrutinize—to determine what interests qualify as compelling under the Fourteenth Amendment to the United States Constitution. Rather, this Court must assess independently the nature of the interest asserted and the evidence to support it in order to determine whether it qualifies as compelling under our precedents. In making such a determination, we have deferred to state authorities only once, see *Grutter,* 539 U.S., at 328–330, 123 S.Ct. 2325, and that deference was prompted by factors uniquely relevant to higher education. *Id.,* at 328, 123 S.Ct. 2325 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions"). The dissent's proposed test—whether sufficient social science evidence supports a government unit's conclusion that the interest it asserts is compelling—calls to mind the rational-basis standard of review the dissent purports not to apply, *post,* at 2819 – 2820. See *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("It is enough that there is an evil at hand for correction, ***766** and that it might be thought that the particular legislative measure was a rational way to correct it"). Furthermore, it would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists. To adopt the dissent's deferential approach ****2779** would be to abdicate our constitutional responsibilities.[14]

3

Finally, the dissent asserts a "democratic element" to the integration interest. It defines the "democratic element" as "an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live." *Post,* at 2821.[15] Environmental reflection, though, is ***767** just another way to say racial balancing. And "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Bakke,* 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.). "This the Constitution forbids." *Ibid.; Grutter, supra,* at 329–330, 123 S.Ct. 2325; *Freeman,* 503 U.S., at 494, 112 S.Ct. 1430.

Navigating around that inconvenient authority, the dissent argues that the racial balancing in these plans is not an end in itself but is instead intended to "teac[h] children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation." *Post,* at 2821 – 2822. These "generic lessons in socialization and good citizenship" are too sweeping to

qualify as compelling interests. *Grutter,* 539 U.S., at 348, 123 S.Ct. 2325 (SCALIA, J., concurring in part and dissenting in part). And they are not "uniquely relevant" to schools or "uniquely 'teachable' in a formal educational setting." *Id.,* at 347, 123 S.Ct. 2325. Therefore, if governments may constitutionally use racial balancing to achieve these aspirational ends in schools, they may use racial balancing to achieve similar goals at every level—from state-sponsored 4–H clubs, see *Bazemore v. Friday,* 478 U.S. 385, 388–390, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (Brennan, J., concurring in part), to the state civil service, see *Grutter,* 539 U.S., at 347–348, 123 S.Ct. 2325 (opinion of SCALIA, J.).

Moreover, the democratic interest has no durational limit, contrary to *Grutter*'s command. See *id.,* at 342, 123 S.Ct. 2325 (opinion of the Court); see also ****2780** *Croson,* 488 U.S., at 498, 109 S.Ct. 706; *Wygant,* 476 U.S., at 275, 106 S.Ct. 1842 (plurality opinion). In other words, it will always be important for students to learn cooperation among the races. If this interest justifies race-conscious measures today, then logically it will justify race-conscious measures forever. Thus, the democratic interest, limitless in scope ***768** and "timeless in [its] ability to affect the future," *id.,* at 276, 106 S.Ct. 1842, cannot justify government race-based decisionmaking.[16]

In addition to these defects, the democratic element of the integration interest fails on the dissent's own terms. The dissent again relies upon social science research to support the proposition that state-compelled racial mixing teaches children to accept cooperation and improves racial attitudes and race relations. Here again, though, the dissent overstates the data that supposedly support the interest.

The dissent points to data that indicate that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools." *Post,* at 2821 – 2822 (internal quotation marks omitted). By the dissent's account, improvements in racial attitudes depend upon the increased contact between black and white students thought to occur in more racially balanced schools. There is no guarantee, however, that students of different races in the same school will actually spend time with one another. Schools frequently group students by academic ability as an aid to efficient instruction, but such groupings often result in classrooms with high concentrations of one race or another. See, ***769** *e.g.,* Yonezawa, Wells, & Serna, Choosing Tracks: "Freedom of Choice" in Detracking Schools, 39 Am. Ed. Research J. 37, 38 (2002); Mickelson, Subverting Swann: First- and Second–Generation Segregation in the Charlotte–Mecklenburg Schools, 38 Am. Ed. Research J. 215, 233–234 (2001) (describing this effect in schools in Charlotte, North Carolina). In addition to classroom separation, students of different races within the same school may separate themselves socially. See Hallinan & Williams, Interracial Friendship Choices in Secondary Schools, 54 Am. Sociological Rev. 67, 72–76 (1989); see also Clotfelter, Interracial Contact in High School Extracurricular Activities, 34 Urban Rev. 25, 41–43 (2002). Therefore, even supposing interracial contact leads directly to improvements in racial attitudes and race relations, a program that assigns students of different races to the same schools might not capture those benefits. Simply putting students together under the same roof does not necessarily mean that the students will learn together or even interact.

Furthermore, it is unclear whether increased interracial contact improves racial ****2781** attitudes and relations.[17] One researcher has stated that "the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were ... [;] ***770** virtually all of the reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn." Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed.1991). Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools. See N. St. John, School Desegregation Outcomes for Children 67–68 (1975) ("A glance at [the data] shows that for either race positive findings are less common than negative findings"); Stephan, The Effects of School Desegregation: An Evaluation 30 Years After *Brown*, in 3 Advances in Applied Social Psychology 181, 183–186 (M. Saks & L. Saxe eds.1986). Therefore, it is not nearly as apparent as the dissent suggests that increased interracial exposure automatically leads to improved racial attitudes or race relations.

Given our case law and the paucity of evidence supporting the dissent's belief that these plans improve race relations, no democratic element can support the integration interest.[18]

4

The dissent attempts to buttress the integration interest by claiming that it follows *a fortiori* from the interest

this Court recognized as compelling in *Grutter*. *Post,* at 2822. Regardless of the merit of *Grutter,* the compelling interest recognized in that case cannot support these plans. *Grutter* recognized a compelling interest in a law school's attainment of a diverse student body. ***771** 539 U.S., at 328, 123 S.Ct. 2325. This interest was critically dependent upon features unique to higher education: "the expansive freedoms of speech and thought associated with the university environment," the "special niche in our constitutional tradition" occupied by universities, and "[t]he freedom of a university to make its own judgments as to education[,] includ[ing] the selection of its student body." *Id.,* at 329, 123 S.Ct. 2325 (internal quotation marks omitted). None of these features is present in elementary and secondary schools. Those schools do not select their own students, and education in the elementary and secondary environment generally does not involve ****2782** the free interchange of ideas thought to be an integral part of higher education. See 426 F.3d, at 1208 (Bea, J., dissenting). Extending *Grutter* to this context would require us to cut that holding loose from its theoretical moorings. Thus, only by ignoring *Grutter*'s reasoning can the dissent claim that recognizing a compelling interest in these cases is an *a fortiori* application of *Grutter*.

C

Stripped of the baseless and novel interests the dissent asserts on their behalf, the school boards cannot plausibly maintain that their plans further a compelling interest. As I explained in *Grutter,* only "those measures the State must take to provide a bulwark against anarchy ... or to prevent violence" and "a government's effort to remedy past discrimination for which it is responsible" constitute compelling interests. 539 U.S., at 353, 351–352, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). Neither of the parties has argued —nor could they—that race-based student assignment is necessary to provide a bulwark against anarchy or to prevent violence. And as I explained above, the school districts have no remedial interest in pursuing these programs. See Part I–B, *supra*. Accordingly, the school boards cannot satisfy strict scrutiny. These plans are unconstitutional.

***772** III

Most of the dissent's criticisms of today's result can be traced to its rejection of the colorblind Constitution. See *post,* at 2815 – 2816. The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality.[19] See *ibid.;* see also *post,* at 2832 – 2833. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion). And my view was the rallying cry for the lawyers who litigated *Brown*. See, *e.g.,* Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown v. Board of Education,* O.T.1953, p. 65 ("That the Constitution is color blind is our dedicated belief"); Brief for Appellants in *Brown v. Board of Education,* O.T.1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone");[20] ***773** see also ****2783** In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley) ("Marshall had a 'Bible' to which he turned during his most depressed moments. The 'Bible' would be known in the legal community as the first Mr. Justice Harlan's dissent in *Plessy v. Ferguson,* 163 U.S. 537, 552, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). I do not know of any opinion which buoyed Marshall more in his pre-*Brown* days ...").

The dissent appears to pin its interpretation of the Equal Protection Clause to current societal practice and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts. Such a view was ascendant in this Court's jurisprudence for several decades. It first appeared in *Plessy,* where the Court asked whether a state law providing for segregated railway cars was "a reasonable regulation." 163 U.S., at 550, 16 S.Ct. 1138. The Court deferred to local authorities in making its determination, noting that in inquiring into reasonableness "there must necessarily be a large discretion on the part of the legislature." *Ibid.* The Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to "the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." *Ibid.* Guided by these principles, the Court concluded: "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia." *Id.,* at 550–551, 16 S.Ct. 1138.

The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected ***774** those arguments, today's dissent replicates them to a distressing extent. Thus, the dissent argues that "[e]ach plan embodies the results of local experience and community consultation." *Post,* at 2825 – 2826. Similarly, the segregationists made repeated appeals to societal practice and expectation. See, *e.g.,* Brief for Appellees on Reargument in *Briggs v. Elliott,* O.T.1953, No. 2, p. 76 ("[A] State has power to establish a school system which is capable of efficient administration, taking into account local problems and conditions").[21] The dissent argues that "weight [must be ****2784** given] to a local school board's knowledge, expertise, and concerns," *post,* at 2826, and with equal vigor, the segregationists argued for deference ***775** to local authorities. See, *e.g.,* Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, p. 14 ("We advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels. We defend only the validity of the statute that enables the Topeka Board of Education to determine its own course").[22] The dissent argues that today's decision "threatens to substitute for present calm a disruptive round of race-related litigation," *post,* at 2800 – 2801, and claims that today's decision "risks serious harm to the law and for the Nation," *post,* at 2835. The segregationists also relied upon the likely practical consequences of ending the state-imposed system of racial separation. See, *e.g.,* Brief ***776** for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, p. 37 ("Yet a holding that school segregation by race violates the Constitution will result in upheaval in all of those places not now subject to Federal judicial scrutiny. This Court has made many decisions of widespread effect; none would affect more people more directly in more fundamental interests and, in fact, cause more chaos in local government than a reversal of the decision in this case").[23] ****2785** And foreshadowing today's dissent, the segregationists most heavily relied upon judicial precedent. See, *e.g.,* Brief for Appellees on Reargument in *Briggs v. Elliott,* O.T.1953, No. 2, at 59 ("[I]t would be difficult indeed to find a case so favored by precedent as is the case for South Carolina here").[24]

***777** The similarities between the dissent's arguments and the segregationists' arguments do not stop there. Like the dissent, the segregationists repeatedly cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment.[25] And just as ****2786** the dissent ***778** argues that the need for these programs will lessen over time, the segregationists claimed that reliance on segregation was lessening and might eventually end.[26]

What was wrong in 1954 cannot be right today.[27] Whatever else the Court's rejection of the segregationists' arguments ***779** in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards' race-based plans because no contextual detail—or collection of contextual details, *post,* at 2800 – 2812—can "provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." *Adarand,* 515 U.S., at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment).[28]

****2787** ***780** In place of the colorblind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart.[29] See *post,* at 2815 – 2818. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the problems at hand," *post,* at 2811, the Constitution enshrines principles independent of social theories. See *Plessy,* 163 U.S., at 559, 16 S.Ct. 1138 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time .... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. ... Our Constitution is color-blind, and neither knows nor tolerates classes among citizens"). Indeed, if our history has taught us anything, it has taught ***781** us to beware of elites bearing racial theories.[30] See, *e.g.,* ****2788** *Dred Scott v. Sandford,* 19 How. 393, 406,

407, 15 L.Ed. 691 (1857) ("[T]hey [members of the "negro African race"] had no rights which the white man was bound to respect"). Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be ***782** nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.

* * *

The plans before us base school assignment decisions on students' race. Because "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," such race-based decisionmaking is unconstitutional. *Plessy, supra,* at 559, 16 S.Ct. 1138 (Harlan, J., dissenting). I concur in THE CHIEF JUSTICE's opinion so holding.

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

The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled. But the solutions mandated by these school districts must themselves be lawful. To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome. In my view the state-mandated racial classifications at issue, official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.

I agree with THE CHIEF JUSTICE that we have jurisdiction to decide the cases before us and join Parts I and II of the Court's opinion. I also join Parts III–A and III–C for reasons provided below. My views do not allow me to join the balance of the opinion by THE CHIEF JUSTICE, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection ***783** Clause. Justice BREYER's dissenting opinion, on the other hand, rests on what in my respectful submission is a misuse and mistaken interpretation of our precedents. This leads it to advance propositions that, in my view, are both erroneous and in fundamental conflict with basic equal protection principles. As a consequence, this separate opinion is necessary to set forth my conclusions in the two cases before the Court.

I

The opinion of the Court and Justice BREYER's dissenting opinion (hereinafter ****2789** dissent) describe in detail the history of integration efforts in Louisville and Seattle. These plans classify individuals by race and allocate benefits and burdens on that basis; and as a result, they are to be subjected to strict scrutiny. See *Johnson v. California,* 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005); *ante,* at 2751 – 2752. The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. See *post,* at 2820 – 2824. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. See *ante,* at 2755 – 2759. For this reason, among others, I do not join Parts III–B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

It is well established that when a governmental policy is subjected to strict scrutiny, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.' " *Johnson, supra,* at 505, 125 S.Ct. 1141 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). And the inquiry ***784** into less restrictive alternatives demanded by the narrow tailoring analysis requires in many cases a thorough understanding of how a plan works. The government bears the burden of justifying its use of individual racial classifications. As part of that burden it must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program. The Jefferson County Board of Education fails to meet this threshold mandate.

Petitioner Crystal Meredith challenges the district's decision to deny her son Joshua McDonald a requested transfer for

his kindergarten enrollment. The district concedes it denied his request "under the guidelines," which is to say, on the basis of Joshua's race. Brief for Respondents in No. 05–915, p. 10; see also App. in No. 05–915, p. 97. Yet the district also maintains that the guidelines do not apply to "kindergartens," Brief for Respondents in No. 05–915, at 4, and it fails to explain the discrepancy. Resort to the record, including the parties' stipulation of facts, further confuses the matter. See App. in No. 05–915, at 43 ("Transfer applications can be denied because of lack of available space or, for students in grades other than Primary 1 (kindergarten), the racial guidelines in the District's current student assignment plan"); *id*., at 29 ("The student assignment plan does not apply to ... students in Primary 1"); see also Stipulation of Facts in No. 3:02–CV–00620–JGH; Doc. 32, Exh. 44, p. 6 (2003–04 Jefferson County Public Schools Elementary Student Assignment Application, Section B) ("Assignment is made to a school for Primary 1 (Kindergarten) through Grade Five as long as racial guidelines are maintained. If the Primary 1 (Kindergarten) placement does not enhance racial balance, a new application must be completed for Primary 2 (Grade One)").

The discrepancy identified is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. To the contrary, Jefferson County in its briefing has explained how and ***785** when it employs these classifications ****2790** only in terms so broad and imprecise that they cannot withstand strict scrutiny. See, *e.g*., Brief for Respondents in No. 05–915, at 4–10. While it acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision. See *ibid*.*;* see also App. in No. 05–915, at 38, 42 (indicating that decisions are "based on ... the racial guidelines" without further explanation); *id*., at 81 (setting forth the blanket mandate that "[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines"); *id*., at 43, 76–77, 81–83; *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834, 837–845, 855–862 (W.D.Ky.2004).

When litigation, as here, involves a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools," Brief for Respondents in No. 05–915, at 4, these ambiguities become all the more problematic in light of the contradictions and confusions that result. Compare, *e.g*., App. in No. 05–915, at 37 ("Each [Jefferson County] school ... has a designated geographic attendance area, which is called the 'resides area' of the school[, and each] such school is the 'resides school' for those students whose parent's or guardian's residence address is within the school's geographic attendance area"); *id*., at 82 ("All elementary students ... shall be assigned to the school which serves the area in which they reside"); and Brief for Respondents in No. 05–915, at 5 ("There are no selection criteria for admission to [an elementary school student's] resides school, except attainment of the appropriate age and completion of ***786** the previous grade"), with App. in No. 05–915, at 38 ("Decisions to assign students to schools within each cluster are based on available space within the [elementary] schools and the racial guidelines in the District's current student assignment plan"); *id*., at 82 (acknowledging that a student may not be assigned to his or her resides school if it "has reached ... the extremes of the racial guidelines").

One can attempt to identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with these competing propositions; but this does not remedy the underlying problem. Jefferson County fails to make clear to this Court—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and ad hoc manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.

As for the Seattle case, the school district has gone further in describing the methods and criteria used to determine assignment decisions on the basis of individual racial classifications. See, *e.g*., Brief for Respondents in No. 05–908, pp. 5–11. The district, nevertheless, has failed to make an adequate showing in at least one respect. It has failed to explain why, in a district composed of a diversity of races, with fewer than half of the students classified as "white," it has employed the crude racial categories of "white" and ****2791** "non-white" as the basis for its assignment decisions. See, *e.g., id*., at 1–11.

The district has identified its purposes as follows: "(1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white ***787** students from having equitable access to the most popular over-subscribed schools." *Id*., at 19. Yet the school district does not explain how, in the context of its diverse student population, a blunt distinction between "white" and "non-white" furthers these goals. As the Court explains, "a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not." *Ante,* at 2754 – 2755; see also Brief for United States as *Amicus Curiae* in No. 05–908, pp. 13–14. Far from being narrowly tailored to its purposes, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design. Other problems are evident in Seattle's system, but there is no need to address them now. As the district fails to account for the classification system it has chosen, despite what appears to be its ill fit, Seattle has not shown its plan to be narrowly tailored to achieve its own ends; and thus it fails to pass strict scrutiny.

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

This is by way of preface to my respectful submission that parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government ***788** has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *ante,* at 2767 – 2768, is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in ****2792** *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The Court's decision in that case was a grievous error it took far too long to overrule. *Plessy,* of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *id.,* at 387–388, 123 S.Ct. 2325 (KENNEDY, J., dissenting). If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a ***789** general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so

it is unlikely any of them would demand strict scrutiny to be found permissible. See *Bush v. Vera,* 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race .... Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race' " (quoting *Adarand,* 515 U.S., at 213, 115 S.Ct. 2097)). Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained, each has failed to provide the support necessary for that proposition. Cf. *Croson,* 488 U.S., at 501, 109 S.Ct. 706 ***790** "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest. See *id.,* at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment).

In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III–C of the Court's opinion because I agree that in the ****2793** context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter,* though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.

III

The dissent rests on the assumptions that these sweeping race-based classifications of persons are permitted by existing precedents; that its confident endorsement of race categories for each child in a large segment of the community presents no danger to individual freedom in other, prospective realms of governmental regulation; and that the racial classifications used here cause no hurt or anger of the type the Constitution prevents. Each of these premises is, in my respectful view, incorrect.

A

The dissent's reliance on this Court's precedents to justify the explicit, sweeping, classwide racial classifications at issue ***791** here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom. And in his critique of that analysis, I am in many respects in agreement with THE CHIEF JUSTICE. The conclusions he has set forth in Part III–A of the Court's opinion are correct, in my view, because the compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education. See *ante,* at 2752 – 2753. As the Court notes, we recognized the compelling nature of the interest in remedying past intentional discrimination in *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992), and of the interest in diversity in higher education in *Grutter*. At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning.

As to the dissent, the general conclusions upon which it relies have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling. The dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications. There is every reason to think that, if the dissent's rationale were accepted, Congress, assuming an otherwise proper exercise of its spending authority or commerce power, could mandate either the Seattle or the Jefferson County plans nationwide. There seems to be no principled rule, moreover, to limit the

dissent's rationale to the context of public schools. The dissent emphasizes local control, see *post,* at 2826 – 2827, the unique history of school desegregation, see *post,* at 2800 – 2801, and the fact that these plans make less use of race than prior plans, see *post,* at 2830 – 2831, but these factors seem more rhetorical than integral to the analytical structure of the opinion.

***792** This brings us to the dissent's reliance on the Court's opinions in *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), and *Grutter,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304. If ****2794** today's dissent said it was adhering to the views expressed in the separate opinions in *Gratz* and *Grutter,* see *Gratz,* 539 U.S., at 281, 123 S.Ct. 2411 (BREYER, J., concurring in judgment); *id.,* at 282, 123 S.Ct. 2411 (STEVENS, J., dissenting); *id.,* at 291, 123 S.Ct. 2411 (SOUTER, J., dissenting); *id.,* at 298, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Grutter, supra,* at 344, 123 S.Ct. 2325 (GINSBURG, J., concurring), that would be understandable, and likely within the tradition—to be invoked, in my view, in rare instances—that permits us to maintain our own positions in the face of *stare decisis* when fundamental points of doctrine are at stake. See, *e.g., Federal Maritime Comm'n v. South Carolina Ports Authority,* 535 U.S. 743, 770, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (STEVENS, J., dissenting). To say, however, that we must ratify the racial classifications here at issue based on the majority opinions in *Gratz* and *Grutter* is, with all respect, simply baffling.

Gratz involved a system where race was not the entire classification. The procedures in *Gratz* placed much less reliance on race than do the plans at issue here. The issue in *Gratz* arose, moreover, in the context of college admissions where students had other choices and precedent supported the proposition that First Amendment interests give universities particular latitude in defining diversity. See *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312–314, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Even so the race factor was found to be invalid. *Gratz, supra,* at 251, 123 S.Ct. 2411. If *Gratz* is to be the measure, the racial classification systems here are *a fortiori* invalid. If the dissent were to say that college cases are simply not applicable to public school systems in kindergarten through high school, this would seem to me wrong, but at least an arguable distinction. Under no fair reading, though, can the majority opinion in *Gratz* be cited as authority to sustain the racial classifications under consideration here.

***793** The same must be said for the controlling opinion in *Grutter*. There the Court sustained a system that, it found, was flexible enough to take into account "all pertinent elements of diversity," 539 U.S., at 341, 123 S.Ct. 2325 (internal quotation marks omitted), and considered race as only one factor among many, *id*., at 340, 123 S.Ct. 2325. Seattle's plan, by contrast, relies upon a mechanical formula that has denied hundreds of students their preferred schools on the basis of three rigid criteria: placement of siblings, distance from schools, and race. If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application. That, though, is not the case. The only support today's dissent can draw from *Grutter* must be found in its various separate opinions, not in the opinion filed for the Court.

B

To uphold these programs the Court is asked to brush aside two concepts of central importance for determining the validity of laws and decrees designed to alleviate the hurt and adverse consequences resulting from race discrimination. The first is the difference between *de jure* and *de facto* segregation; the second, the presumptive invalidity of a State's use of racial classifications to differentiate its treatment of individuals.

In the immediate aftermath of *Brown* the Court addressed other instances where laws and practices enforced *de jure* segregation. See, *e.g., Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (marriage); ****2795** *New Orleans City Park Improvement Assn. v. Detiege,* 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) *(per curiam)* (public parks); *Gayle v. Browder,* 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) *(per curiam)* (buses); *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) *(per curiam)* (golf courses); *Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) *(per curiam)* (beaches). But with reference to schools, the effect of the legal wrong proved most difficult to correct. To remedy the wrong, school districts that had been segregated by law had no choice, whether ***794** under court supervision or pursuant to voluntary desegregation efforts, but to resort to extraordinary measures including individual student and teacher assignment to schools based on race. See, *e.g., Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 8–10, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); see also *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment) (noting

that racial classifications "may be the only adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause"). So it was, as the dissent observes, see *post,* at 2806 – 2807, that Louisville classified children by race in its school assignment and busing plan in the 1970's.

Our cases recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not. Compare *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 437–438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), with *Milliken v. Bradley,* 418 U.S. 717, 745, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). The distinctions between *de jure* and *de facto* segregation extended to the remedies available to governmental units in addition to the courts. For example, in *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the plurality noted: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." The Court's decision in *Croson, supra,* reinforced the difference between the remedies available to redress *de facto* and *de jure* discrimination:

> "To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream ***795** of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.,* at 505–506, 109 S.Ct. 706.

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought ****2796** to be an important one. It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies. See, *e.g., Milliken, supra,* at 746, 94 S.Ct. 3112. The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government's systematic classification of each individual by race. There, too, the distinction serves as a limit on the exercise of a power that reaches to the very verge of constitutional authority. Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications. See, *e.g., Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Adarand,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158.

Notwithstanding these concerns, allocation of benefits and burdens through individual racial classifications was found ***796** sometimes permissible in the context of remedies for *de jure* wrong. Where there has been *de jure* segregation, there is a cognizable legal wrong, and the courts and legislatures have broad power to remedy it. The remedy, though, was limited in time and limited to the wrong. The Court has allowed school districts to remedy their prior *de jure* segregation by classifying individual students based on their race. See *North Carolina Bd. of Ed. v. Swann,* 402 U.S. 43, 45–46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). The limitation of this power to instances where there has been *de jure* segregation serves to confine the nature, extent, and duration of governmental reliance on individual racial classifications.

The cases here were argued upon the assumption, and come to us on the premise, that the discrimination in question did not result from *de jure* actions. And when *de facto* discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here.

C

The dissent refers to an opinion filed by Judge Kozinski in one of the cases now before us, and that opinion relied upon an opinion filed by Chief Judge Boudin in a case presenting an issue similar to the one here. See *post,* at 2818 – 2819 (citing 426 F.3d 1162, 1193–1196 (C.A.9 2005) (concurring opinion), in turn citing *Comfort v. Lynn School Comm.,* 418 F.3d 1, 27, 29 (C.A.1 2005) (Boudin, C. J., concurring)). Though this may oversimplify the matter a bit, one of the main concerns underlying those opinions was this: If it is legitimate for school authorities to work to avoid racial isolation in their schools, must they do so only by indirection and general policies? Does the Constitution mandate this inefficient result? Why may the authorities not recognize the problem in candid fashion and solve it altogether through resort to direct assignments based on student racial classifications? So, the argument ***797** proceeds, if race is the problem, then perhaps race is the solution.

The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly ****2797** is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it. Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

* * *

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a ***798** compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

That statement, to be sure, invites this response: A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. But to this the replication must be: Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

With this explanation I concur in the judgment of the Court.

Justice STEVENS, dissenting.

While I join Justice BREYER's eloquent and unanswerable dissent in its entirety, it is appropriate to add these words.

There is a cruel irony in THE CHIEF JUSTICE's reliance on our decision in ***799** *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 1955). The first sentence in the concluding paragraph of his opinion states: "Before ****2798** *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin." *Ante,* at 2767 – 2768. This sentence reminds me of Anatole

France's observation: "[T]he majestic equality of the la[w], ... forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[1] THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.[2] In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court's most important decisions. Compare *ante,* at 2767 ("history will be heard"), with *Brewer v. Quarterman,* 550 U.S. 286, 275, 127 S.Ct. 1706, 1720, 167 L.Ed.2d 622 (2007) (ROBERTS, C. J., dissenting) ("It is a familiar adage that history is written by the victors").

THE CHIEF JUSTICE rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude.[3] The only justification for ***800** refusing to acknowledge the obvious importance of that difference is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under "strict scrutiny." See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Even today, two of our wisest federal judges have rejected such a wooden reading of the Equal Protection Clause in the context of school integration. See 426 F.3d 1162, 1193–1196 (C.A.9 2005) (Kozinski, J., concurring); *Comfort v. Lynn School Comm.,* 418 F.3d 1, 27–29 (C.A.1 2005) (Boudin, C. J., concurring). The Court's misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution. See *Craig v. Boren,* 429 U.S. 190, 211, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (concurring opinion).[4]

****2799** If we look at cases decided during the interim between *Brown* and *Adarand,* we can see how a rigid adherence to ***801** tiers of scrutiny obscures *Brown*'s clear message. Perhaps the best example is provided by our approval of the decision of the Supreme Judicial Court of Massachusetts in 1967 upholding a state statute mandating racial integration in that State's school system. See *School Comm. of Boston v. Board of Education,* 352 Mass. 693, 227 N.E.2d 729.[5] Rejecting arguments comparable to those that the plurality accepts today,[6] that court noted: "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based ***802** on race, founder on unsuspected shoals in the Fourteenth Amendment." *Id.,* at 698, 227 N.E.2d, at 733 (footnote omitted).

Invoking our mandatory appellate jurisdiction,[7] the Boston plaintiffs prosecuted an appeal in this Court. Our ruling on the merits simply stated that the appeal was "dismissed for want of a substantial federal question." *School Comm. of Boston v. Board of Education,* 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) *(per curiam).* That decision not only expressed our appraisal of the merits of the appeal, but it constitutes a precedent that the Court ****2800** overrules today. The subsequent statements by the unanimous Court in *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), by then-Justice Rehnquist in chambers in *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978), and by the host of state–court decisions cited by Justice BREYER, see *post,* at 2813 – 2815,[8] were ***803** fully consistent with that disposition. Unlike today's decision, they were also entirely loyal to *Brown.*

The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.
These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake. This Court has recognized that the public interests at stake in such cases are "compelling." We have approved of "narrowly tailored" plans that are no less race conscious than the plans before us. And we have understood that the Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.

The plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts

in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought ***804** to make a ****2801** reality. This cannot be justified in the name of the Equal Protection Clause.

I

Facts

The historical and factual context in which these cases arise is critical. In *Brown,* this Court held that the government's segregation of schoolchildren by race violates the Constitution's promise of equal protection. The Court emphasized that "education is perhaps the most important function of state and local governments." 347 U.S., at 493, 74 S.Ct. 686. And it thereby set the Nation on a path toward public school integration.

In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply with *Brown*'s constitutional holding. The measures required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers. See, *e.g., Columbus Bd. of Ed. v. Penick,* 443 U.S. 449, 455, n. 3, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979); *Davis v. Board of School Comm'rs of Mobile Cty.,* 402 U.S. 33, 37–38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *Green v. School Bd. of New Kent Cty.,* 391 U.S. 430, 441–442, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities. Thus, in respect to race-conscious desegregation measures that the Constitution *permitted,* but did not *require* (measures similar to those at issue here), this Court unanimously stated:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within* ***805** *the broad discretionary powers of school authorities*." *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added).

As a result, different districts—some acting under court decree, some acting in order to avoid threatened lawsuits, some seeking to comply with federal administrative orders, some acting purely voluntarily, some acting after federal courts had dissolved earlier orders—adopted, modified, and experimented with hosts of different kinds of plans, including race-conscious plans, all with a similar objective: greater racial integration of public schools. See F. Welch & A. Light, New Evidence on School Desegregation, p. v (1987) (hereinafter Welch) (prepared for the Commission on Civil Rights) (reviewing a sample of 125 school districts, constituting 20% of national public school enrollment, that had experimented with nearly 300 different plans over 18 years). The techniques that different districts have employed range "from voluntary transfer programs to mandatory reassignment." *Id.,* at 21. And the design of particular plans has been "dictated by both the law and the specific needs of the district." *Ibid.*

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% ****2802** to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, ***806** 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99%–100% minority. See Appendix A, *infra.* In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts.

The upshot is that myriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

I describe those histories at length in order to highlight three important features of these cases. First, the school districts' plans serve "compelling interests" and are "narrowly tailored" on any reasonable definition of those terms. Second, the distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, *e.g.,* by housing patterns or generalized societal discrimination) is meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction. Third, real-world efforts to substitute racially diverse for racially segregated schools (however caused) are complex, to the point where the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are "conscious" of the race of individuals.

In both Seattle and Louisville, the local school districts began with schools that were highly segregated in fact. In both cities, plaintiffs filed lawsuits claiming unconstitutional segregation. In Louisville, a Federal District Court found that school segregation reflected pre-*Brown* state laws separating the races. In Seattle, the plaintiffs alleged that school segregation unconstitutionally reflected not only generalized societal discrimination and residential housing patterns, ***807** but also *school board policies and actions* that had helped to create, maintain, and aggravate racial segregation. In Louisville, a federal court entered a remedial decree. In Seattle, the parties settled after the school district pledged to undertake a desegregation plan. In both cities, the school boards adopted plans designed to achieve integration by bringing about more racially diverse schools. In each city, the school board modified its plan several times in light of, for example, hostility to busing, the threat of resegregation, and the desirability of introducing greater student choice. And in each city, the school boards' plans have evolved over time in ways that progressively *diminish* the plans' use of explicit race-conscious criteria.

The histories that follow set forth these basic facts. They are based upon numerous sources, which for ease of exposition I have cataloged, along with their corresponding citations, at Appendix B, *infra.*

A

Seattle

1. Segregation, 1945 to 1956. During and just after World War II, significant ****2803** numbers of black Americans began to make Seattle their home. Few black residents lived outside the central section of the city. Most worked at unskilled jobs. Although black students made up about 3% of the total Seattle population in the mid–1950's, nearly all black children attended schools where a majority of the population was minority. Elementary schools in central Seattle were between 60% and 80% black; Garfield, the central district high school, was more than 50% minority; schools outside the central and southeastern sections of Seattle were virtually all white.

2. Preliminary Challenges, 1956 to 1969. In 1956, a memo for the Seattle School Board reported that school segregation reflected not only segregated housing patterns but also school board policies that permitted white students to ***808** transfer out of black schools while restricting the transfer of black students into white schools. In 1958, black parents whose children attended Harrison Elementary School (with a black student population of over 75%) wrote the Seattle board, complaining that the " 'boundaries for the Harrison Elementary School were not set in accordance with the long-established standards of the School District ... but were arbitrarily set with an end to excluding colored children from McGilvra School, which is adjacent to the Harrison school district.' "

In 1963, at the insistence of the National Association for the Advancement of Colored People (NAACP) and other community groups, the school board adopted a new race-based transfer policy. The new policy added an explicitly racial criterion: If a place exists in a school, then, irrespective of other transfer criteria, a white student may transfer to a predominantly black school, and a black student may transfer to a predominantly white school.

At that time, one high school, Garfield, was about two-thirds minority; eight high schools were virtually all white. In 1963, the transfer program's first year, 239 black students and 8 white students transferred. In 1969, about 2,200 (of 10,383 total) of the district's black students and about 400 of the district's white students took advantage of the plan.

For the next decade, annual program transfers remained at approximately this level.

3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977. In 1966, the NAACP filed a federal lawsuit against the school board, claiming that the board had "unlawfully and unconstitutionally" "establish[ed]" and "maintain [ed]" a system of "racially segregated public schools." The complaint said that 77% of black public elementary school students in Seattle attended 9 of the city's 86 elementary schools and that 23 of the remaining schools had no black students at all. Similarly, of the 1,461 black students ***809** enrolled in the 12 senior high schools in Seattle, 1,151 (or 78.8%) attended 3 senior high schools, and 900 (61.6%) attended a single school, Garfield.

The complaint charged that the school board had brought about this segregated system in part by "mak[ing] and enforc[ing]" certain "rules and regulations," in part by "drawing ... boundary lines" and "executing school attendance policies" that would create and maintain "predominantly Negro or non-white schools," and in part by building schools "in such a manner as to restrict the Negro plaintiffs and the class they represent to predominantly Negro or non-white schools." The complaint also charged that the board discriminated in assigning teachers.

The board responded to the lawsuit by introducing a plan that required race-based transfers and mandatory busing. The plan created three new middle schools ****2804** at three school buildings in the predominantly white north end. It then created a "mixed" student body by assigning to those schools students who would otherwise attend predominantly white, or predominantly black, schools elsewhere. It used explicitly racial criteria in making these assignments (*i.e.,* it deliberately assigned to the new middle schools black students, not white students, from the black schools and white students, not black students, from the white schools). And it used busing to transport the students to their new assignments. The plan provoked considerable local opposition. Opponents brought a lawsuit. But eventually a state court found that the mandatory busing was lawful.

In 1976–1977, the plan involved the busing of about 500 middle school students (300 black students and 200 white students). Another 1,200 black students and 400 white students participated in the previously adopted voluntary transfer program. Thus about 2,000 students out of a total district population of about 60,000 students were involved in one or the other transfer program. At that time, about ***810** 20% or 12,000 of the district's students were black. And the board continued to describe 26 of its 112 schools as "segregated."

4. The NAACP's Second Legal Challenge, 1977. In 1977, the NAACP filed another legal complaint, this time with the federal Department of Health, Education, and Welfare's Office for Civil Rights (OCR). The complaint alleged that the Seattle School Board had created or perpetuated unlawful racial segregation through, *e.g.,* certain school-transfer criteria, a construction program that needlessly built new schools in white areas, district line-drawing criteria, the maintenance of inferior facilities at black schools, the use of explicit racial criteria in the assignment of teachers and other staff, and a general pattern of delay in respect to the implementation of promised desegregation efforts.

The OCR and the school board entered into a formal settlement agreement. The agreement required the board to implement what became known as the "Seattle Plan."

5. The Seattle Plan: Mandatory Busing, 1978 to 1988. The board began to implement the Seattle Plan in 1978. This plan labeled "racially imbalanced" any school at which the percentage of black students exceeded by more than 20% the minority population of the school district as a whole. It applied that label to 26 schools, including 4 high schools —Cleveland (72.8% minority), Franklin (76.6% minority), Garfield (78.4% minority), and Rainier Beach (58.9% minority). The plan paired (or "triaded") "imbalanced" black schools with "imbalanced" white schools. It then placed some grades (say, third and fourth grades) at one school building and other grades (say, fifth and sixth grades) at the other school building. And it thereby required, for example, all fourth grade students from the previously black and previously white schools first to attend together what would now be a "mixed" fourth grade at one of the school buildings and then the next year to attend what would now be a "mixed" fifth grade at the other school building.

***811** At the same time, the plan provided that a previous "black" school would remain about 50% black, while a previous "white" school would remain about two-thirds white. It was consequently necessary to decide with some care *which* students would attend the new "mixed" grade. For this purpose, administrators cataloged the racial makeup of each neighborhood housing block. The school district met its percentage goals by assigning to the new ****2805** "mixed"

school an appropriate number of "black" housing blocks and "white" housing blocks. At the same time, transport from house to school involved extensive busing, with about half of all students attending a school other than the one closest to their home.

The Seattle Plan achieved the school integration that it sought. Just prior to the plan's implementation, for example, 4 of Seattle's 11 high schools were "imbalanced," *i.e.,* almost exclusively "black" or almost exclusively "white." By 1979, only two were out of "balance." By 1980, only Cleveland remained out of "balance" (as the board defined it) and that by a mere two students.

Nonetheless, the Seattle Plan, due to its busing, provoked serious opposition within the State. See generally *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 461–466, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). Thus, Washington state voters enacted an initiative that amended state law to require students to be assigned to the schools closest to their homes. *Id.,* at 462, 102 S.Ct. 3187. The Seattle School Board challenged the constitutionality of the initiative. *Id.,* at 464, 102 S.Ct. 3187. This Court then held that the initiative—which would have prevented the Seattle Plan from taking effect—violated the Fourteenth Amendment. *Id.,* at 470, 102 S.Ct. 3187.

6. Student Choice, 1988 to 1998. By 1988, many white families had left the school district, and many Asian families had moved in. The public school population had fallen from about 100,000 to less than 50,000. The racial makeup of the school population amounted to 43% white, 24% black, and 23% Asian or Pacific Islander, with Hispanics and Native ***812** Americans making up the rest. The cost of busing, the harm that members of all racial communities feared that the Seattle Plan caused, the desire to attract white families back to the public schools, and the interest in providing greater school choice led the board to abandon busing and to substitute a new student assignment policy that resembles the plan now before us.

The new plan permitted each student to choose the school he or she wished to attend, subject to race-based constraints. In respect to high schools, for example, a student was given a list of a subset of schools, carefully selected by the board to balance racial distribution in the district by including neighborhood schools and schools in racially different neighborhoods elsewhere in the city. The student could then choose among those schools, indicating a first choice, and other choices the student found acceptable. In making an assignment to a particular high school, the district would give first preference to a student with a sibling already at the school. It gave second preference to a student whose race differed from a race that was "over-represented" at the school (*i.e.,* a race that accounted for a higher percentage of the school population than of the total district population). It gave third preference to students residing in the neighborhood. It gave fourth preference to students who received child care in the neighborhood. In a typical year, say, 1995, about 20,000 potential high school students participated. About 68% received their first choice. Another 16% received an "acceptable" choice. A further 16% were assigned to a school they had not listed.

7. The Current Plan, 1999 to the Present. In 1996, the school board adopted the present plan, which began in 1999. In doing so, it sought to deemphasize the use of racial criteria and to increase the likelihood that a student would receive an assignment at his first or second choice high school. The district retained a racial tiebreaker ****2806** for oversubscribed schools, which takes effect only if the school's minority or ***813** majority enrollment falls outside of a 30% range centered on the minority/majority population ratio within the district. At the same time, all students were free subsequently to transfer from the school at which they were initially placed to a different school of their choice without regard to race. Thus, at worst, a student would have to spend one year at a high school he did not pick as a first or second choice.

The new plan worked roughly as expected for the two school years during which it was in effect (1999–2000 and 2000–2001). In the 2000–2001 school year, for example, with the racial tiebreaker, the entering ninth grade class at Franklin High School had a 60% minority population; without the racial tiebreaker that same class at Franklin would have had an almost 80% minority population. (We consider only the ninth grade since only students entering that class were subject to the tiebreaker, and because the plan was not in place long enough to change the composition of an entire school.) In the year 2005–2006, by which time the racial tiebreaker had not been used for several years, Franklin's overall minority enrollment had risen to 90%. During the period the tiebreaker applied, it typically affected about 300 students per year. Between 80% and 90% of all students received their first choice assignment; between 89% and 97% received their first or second choice assignment.

Petitioner Parents Involved in Community Schools objected to Seattle's most recent plan under the State and Federal Constitutions. In due course, the Washington Supreme Court, the Federal District Court, and the Court of Appeals for the Ninth Circuit (sitting en banc) rejected the challenge and found Seattle's plan lawful.

B

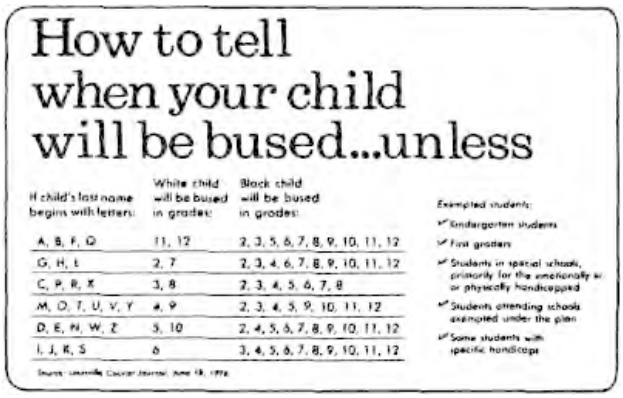
Louisville

1. Before the Lawsuit, 1954 to 1972. In 1956, two years after *Brown* made clear that Kentucky could no longer require racial segregation by law, the Louisville Board of Education ***814** created a geography-based student assignment plan designed to help achieve school integration. At the same time, it adopted an open transfer policy under which approximately 3,000 of Louisville's 46,000 students applied for transfer. By 1972, however, the Louisville School District remained highly segregated. Approximately half the district's public school enrollment was black; about half was white. Fourteen of the district's nineteen nonvocational middle and high schools were close to totally black or totally white. Nineteen of the district's forty-six elementary schools were between 80% and 100% black. Twenty-one elementary schools were between roughly 90% and 100% white.

2. Court–Imposed Guidelines and Busing, 1972 to 1991. In 1972, civil rights groups and parents, claiming unconstitutional segregation, sued the Louisville Board of Education in federal court. The original litigation eventually became a lawsuit against the Jefferson County School System, which in April 1975 absorbed Louisville's schools and combined them with those of the surrounding suburbs. (For ease of exposition, I shall still use "Louisville" to refer to what is now the combined districts.) After preliminary rulings and an eventual victory for the plaintiffs in the Court of Appeals for the Sixth Circuit, the District Court in July 1975 entered an order requiring desegregation.

The order's requirements reflected a (newly enlarged) school district student population of about 135,000, approximately ****2807** 20% of whom were black. The order required the school board to create and to maintain schools with student populations that ranged, for elementary schools, between 12% and 40% black, and for secondary schools (with one exception), between 12.5% and 35% black.

The District Court also adopted a complex desegregation plan designed to achieve the order's targets. The plan required redrawing school attendance zones, closing 12 schools, and busing groups of students, selected by race and the first letter of their last names, to schools outside their immediate ***815** neighborhoods. The plan's initial busing requirements were extensive, involving the busing of 23,000 students and a transportation fleet that had to "operate from early in the morning until late in the evening." For typical students, the plan meant busing for several years (several more years for typical black students than for typical white students). The following notice, published in a Louisville newspaper in 1976, gives a sense of how the district's race-based busing plan operated in practice:



How to tell when your child will be bused...unless

If child's last name begins with letters:	White child will be bused in grades:	Black child will be bused in grades:
A, B, F, Q	11, 12	2, 3, 5, 6, 7, 8, 9, 10, 11, 12
G, H, I	2, 7	2, 3, 4, 6, 7, 8, 9, 10, 11, 12
C, P, R, X	3, 8	2, 3, 4, 5, 6, 7, 8
M, O, T, U, V, Y	4, 9	2, 3, 4, 5, 9, 10, 11, 12
D, E, N, W, Z	5, 10	2, 4, 5, 6, 7, 8, 9, 10, 11, 12
J, K, S	6	3, 4, 5, 6, 7, 8, 9, 10, 11, 12

Exempted students:
- Kindergarten students
- First graders
- Students in special schools, primarily for the emotionally ill or physically handicapped
- Students attending schools exempted under the plan
- Some students with specific handicaps

Louisville Courier–Journal, June 18, 1976 (reproduced in J. Wilkinson, From *Brown* to *Bakke:* The Supreme Court and School Integration 1954–1978, p. 176 (1979)).

The District Court monitored implementation of the plan. In 1978, it found that the plan had brought all of Louisville's schools within its " 'guidelines' for racial composition" for "at least a substantial portion of the [previous] three years." It removed the case from its active docket while stating that it expected the board "to continue to implement those portions of the desegregation order which are by their nature of a continuing effect."

***816** By 1984, after several schools had fallen out of compliance with the order's racial percentages due to shifting demographics in the community, the school board revised its desegregation plan. In doing so, the board created a new racial "guideline," namely a "floating range of 10% above and 10% below the countywide average for the different grade levels." The board simultaneously redrew district boundaries so that middle school students could attend the same school for three years and high school students for four years. It added "magnet" programs at two high schools. And it adjusted

its alphabet-based system for grouping and busing students. The board estimated **2808 that its new plan would lead to annual reassignment (with busing) of about 8,500 black students and about 8,000 white students.

3. Student Choice and Project Renaissance, 1991 to 1996. By 1991, the board had concluded that assigning elementary school students to two or more schools during their elementary school years had proved educationally unsound and, if continued, would undermine Kentucky's newly adopted Education Reform Act. It consequently conducted a nearly year-long review of its plan. In doing so, it consulted widely with parents and other members of the local community, using public presentations, public meetings, and various other methods to obtain the public's input. At the conclusion of this review, the board adopted a new plan, called "Project Renaissance," that emphasized student choice.

Project Renaissance again revised the board's racial guidelines. It provided that each elementary school would have a black student population of between 15% and 50%; each middle and high school would have a black population and a white population that fell within a range, the boundaries of which were set at 15% above and 15% below the general student population percentages in the county at that grade level. The plan then drew new geographical school assignment zones designed to satisfy these guidelines; the district could reassign students if particular schools failed to meet *817 the guidelines and was required to do so if a school repeatedly missed these targets.

In respect to elementary schools, the plan first drew a neighborhood line around each elementary school, and it then drew a second line around groups of elementary schools (called "clusters"). It initially assigned each student to his or her neighborhood school, but it permitted each student freely to transfer between elementary schools within each cluster *provided that* the transferring student (1) was black if transferring from a predominantly black school to a predominantly white school, or (2) was white if transferring from a predominantly white school to a predominantly black school. Students could also apply to attend magnet elementary schools or programs.

The plan required each middle school student to be assigned to his or her neighborhood school unless the student applied for, and was accepted by, a magnet middle school. The plan provided for "open" high school enrollment. Every 9th or 10th grader could apply to any high school in the system, and the high school would accept applicants according to set criteria —one of which consisted of the need to attain or remain in compliance with the plan's racial guidelines. Finally, the plan created two new magnet schools, one each at the elementary and middle school levels.

4. The Current Plan: Project Renaissance Modified, 1996 to 2003. In 1995 and 1996, the Louisville School Board, with the help of a special "Planning Team," community meetings, and other official and unofficial study groups, monitored the effects of Project Renaissance and considered proposals for improvement. Consequently, in 1996, the board modified Project Renaissance, thereby creating the present plan.

At the time, the district's public school population was approximately 30% black. The plan consequently redrew the racial "guidelines," setting the boundaries at 15% to 50% black for *all* schools. It again redrew school assignment boundaries. And it expanded the transfer opportunities *818 available to elementary and middle school pupils. The plan forbade transfers, however, if the transfer would lead to a school population outside the guidelines range, *i.e.,* if it would create a school **2809 where fewer than 15% or more than 50% of the students were black.

The plan also established "Parent Assistance Centers" to help parents and students navigate the school selection and assignment process. It pledged the use of other resources in order to "encourage all schools to achieve an African–American enrollment equivalent to the average district-wide African–American enrollment at the school's respective elementary, middle or high school level." And the plan continued use of magnet schools.

In 1999, several parents brought a lawsuit in federal court attacking the plan's use of racial guidelines at one of the district's magnet schools. They asked the court to dissolve the desegregation order and to hold the use of *magnet* school racial guidelines unconstitutional. The board opposed dissolution, arguing that "the old dual system" had left a "demographic imbalance" that "prevent[ed] dissolution." In 2000, after reviewing the present plan, the District Court dissolved the 1975 order. It wrote that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes." It added that the Louisville School Board had "treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy

and an essential element of any well-rounded public school education."

The court also found that the magnet programs available at the high school in question were "not available at other high schools" in the school district. It consequently held unconstitutional the use of race-based "targets" to govern admission to *magnet schools*. And it ordered the board not to control access to those scarce programs through the use of racial targets.

***819** *5. The Current Lawsuit, 2003 to the Present.* Subsequent to the District Court's dissolution of the desegregation order (in 2000) the board simply continued to implement its 1996 plan as modified to reflect the court's magnet school determination. In 2003, the petitioner now before us, Crystal Meredith, brought this lawsuit challenging the plan's unmodified portions, *i.e.,* those portions that dealt with *ordinary,* not magnet, schools. Both the District Court and the Court of Appeals for the Sixth Circuit rejected Meredith's challenge and held the unmodified aspects of the plan constitutional.

C

The histories I have set forth describe the extensive and ongoing efforts of two school districts to bring about greater racial integration of their public schools. In both cases the efforts were in part remedial. Louisville began its integration efforts in earnest when a federal court in 1975 entered a school desegregation order. Seattle undertook its integration efforts in response to the filing of a federal lawsuit and as a result of its settlement of a segregation complaint filed with the federal OCR.

The plans in both Louisville and Seattle grow out of these earlier remedial efforts. Both districts faced problems that reflected initial periods of severe racial segregation, followed by such remedial efforts as busing, followed by evidence of resegregation, followed by a need to end busing and encourage the return of, *e.g.,* suburban students through increased student choice. When formulating the plans under review, both districts drew upon their considerable experience with earlier plans, having revised their policies periodically in light of that experience. Both districts rethought their methods over time and explored a wide range of other means, including non-race-conscious policies. Both districts also ****2810** considered elaborate studies and consulted widely within their communities.

***820** Both districts sought greater racial integration for educational and democratic, as well as for remedial, reasons. Both sought to achieve these objectives while preserving their commitment to other educational goals, *e.g.,* district wide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice, reduced risk of white flight, and so forth. Consequently, the present plans expand student choice; they limit the burdens (including busing) that earlier plans had imposed upon students and their families; and they use race-conscious criteria in limited and gradually diminishing ways. In particular, they use race-conscious criteria only to mark the outer bounds of broad population-related ranges.

The histories also make clear the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of "race-conscious" criteria. Justice THOMAS suggests that it will be easy to identify *de jure* segregation because "[i]n most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Ante,* at 2771, n. 4 (concurring opinion). But our precedent has recognized that *de jure* discrimination can be present even in the absence of racially explicit laws. See *Yick Wo v. Hopkins,* 118 U.S. 356, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

No one here disputes that Louisville's segregation was *de jure*. But what about Seattle's? Was it *de facto? De jure?* A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated, just as in 1956 a memo for the school board admitted? The plurality does not seem confident as to the answer. Compare *ante,* at 2752 (opinion of the Court) ("[T]he Seattle public schools *have not shown* ***821** that they were ever segregated by law" (emphasis added)), with *ante*, at 2761 – 2762 (plurality opinion) (assuming "the Seattle school district was never segregated by law," but seeming to concede that a school district with *de jure* segregation need not be subject to a court order to be allowed to engage in race-based remedial measures).

A court finding of *de jure* segregation cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated *by law* voluntarily desegregated their schools *without a court order*—just as Seattle did. See, *e.g.,* Coleman, Desegregation of the Public Schools in Kentucky—The Second Year After the Supreme Court's Decision, 25 J. Negro Educ. 254, 256, 261 (1956) (40 of Kentucky's 180 school districts began desegregation without court orders); Branton, Little Rock Revisited: Desegregation to Resegregation, 52 J. Negro Educ. 250, 251 (1983) (similar in Arkansas); Bullock & Rodgers, Coercion to Compliance: Southern School Districts and School Desegregation Guidelines, 38 J. Politics 987, 991 (1976) (similar in Georgia); *McDaniel v. Barresi,* 402 U.S. 39, 40, n. 1, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971) (Clarke County, Georgia). See also Letter from Robert F. Kennedy, Attorney General, to John F. Kennedy, President (Jan. 24, 1963) (hereinafter Kennedy Report), online at http://www.gilderlehrman.org/search/collection_pdfs/05/63/0/05630.pdf (all Internet materials as visited June 26, 2007, and available ****2811** in Clerk of Court's case file) (reporting successful efforts by the Government to induce voluntary desegregation).

Moreover, Louisville's history makes clear that a community under a court order to desegregate might submit a race-conscious remedial plan *before* the court dissolved the order, but with every intention of following that plan even *after* dissolution. How could such a plan be lawful the day before dissolution but then become unlawful the very next day? On what legal ground can the majority rest its contrary view? But see *ante,* at 2752 – 2753, 2755, n. 12.

***822** Are courts really to treat as merely *de facto* segregated those school districts that avoided a federal order by voluntarily complying with *Brown*'s requirements? See *ante*, at 2752 (opinion of the Court), *ante*, at 2761 – 2762 (plurality opinion). This Court has previously done just the opposite, permitting a race-conscious remedy without any kind of court decree. See *McDaniel, supra,* at 41, 91 S.Ct. 1287. Because the Constitution emphatically does not forbid the use of race-conscious measures by districts in the South that voluntarily desegregated their schools, on what basis does the plurality claim that the law forbids Seattle to do the same? But see *ante,* at 2761.

The histories also indicate the complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration. The boards work in communities where demographic patterns change, where they must meet traditional learning goals, where they must attract and retain effective teachers, where they should (and will) take account of parents' views and maintain *their* commitment to public school education, where they must adapt to court intervention, where they must encourage voluntary student and parent action—where they will find that their own good faith, their knowledge, and their understanding of local circumstances are always necessary but often insufficient to solve the problems at hand.

These facts and circumstances help explain why in this context, as to means, the law often leaves legislatures, city councils, school boards, and voters with a broad range of choice, thereby giving "different communities" the opportunity to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs." *Comfort v. Lynn School Comm.,* 418 F.3d 1, 28 (C.A.1 2005) (Boudin, C. J., concurring) (citing *United States v. Lopez,* 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring)), cert. denied, 546 U.S. 1061, 126 S.Ct. 798, 163 L.Ed.2d 627 (2005).

***823** With this factual background in mind, I turn to the legal question: Does the United States Constitution prohibit these school boards from using race-conscious criteria in the limited ways at issue here?

II

The Legal Standard

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. Because of its importance, I shall repeat what this Court said about the matter in *Swann.* Chief Justice Burger, on behalf of a unanimous Court in a case of exceptional importance, wrote:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a ****2812** pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad

discretionary powers of school authorities." 402 U.S., at 16, 91 S.Ct. 1267.

The statement was not a technical holding in the case. But the Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found "wide acceptance in the legal culture." *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (internal quotation marks omitted); *Mitchell v. United States,* 526 U.S. 314, 330, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *id.,* at 331, 332, 119 S.Ct. 1307 (SCALIA, J., dissenting) (citing " 'wide acceptance in the legal culture' " as "adequate reason not to overrule" prior cases).

Thus, in *North Carolina Bd. of Ed. v. Swann,* 402 U.S. 43, 45, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), this Court, citing *Swann,* restated the point. "[S]chool authorities," the Court said, "have wide discretion ***824** in formulating school policy, and ... as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." Then–Justice Rehnquist echoed this view in *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978) (opinion in chambers), making clear that he too believed that *Swann*'s statement reflected settled law: "While I have the gravest doubts that [a state supreme court] was *required* by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action." (Emphasis in original.)

These statements nowhere suggest that this freedom is limited to school districts where court-ordered desegregation measures are also in effect. Indeed, in *McDaniel,* a case decided the same day as *Swann,* a group of parents challenged a race-conscious student assignment plan that the Clarke County School Board had *voluntarily* adopted as a remedy without a court order (though under federal agency pressure —pressure Seattle also encountered). The plan required that each elementary school in the district maintain 20% to 40% enrollment of African–American students, corresponding to the racial composition of the district. See *Barresi v. Browne,* 226 Ga. 456, 456–459, 175 S.E.2d 649, 650–651 (1970). This Court upheld the plan, see *McDaniel,* 402 U.S., at 41, 91 S.Ct. 1287, rejecting the parents' argument that "a person may not be *included* or *excluded* solely because he is a Negro or because he is white," Brief for Respondents in *McDaniel,* O.T.1970, No. 420, p. 25.

Federal authorities had claimed—as the NAACP and the OCR did in Seattle—that Clarke County schools were segregated in law, not just in fact. The plurality's claim that Seattle was "never segregated by law" is simply not accurate. Compare *ante,* at 2761 – 2762, with *supra,* at 2748 – 2750. The plurality could validly claim that *no court* ever found that Seattle ***825** schools were segregated in law. But that is also true of the Clarke County schools in *McDaniel*. Unless we believe that the Constitution enforces one legal standard for the South and another for the North, this Court should grant Seattle the permission it granted Clarke County, Georgia. See *McDaniel, supra*, at 41, 91 S.Ct. 1287 ("[S]teps will almost invariably require that students be assigned 'differently because of their race.' ... Any other approach would freeze the status quo that is the very target of all desegregation processes").

****2813** This Court has also held that school districts may be required by federal statute to undertake race-conscious desegregation efforts even when there is no likelihood that *de jure* segregation can be shown. In *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 148–149, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), the Court concluded that a federal statute required school districts receiving certain federal funds to remedy faculty segregation, even though in this Court's view the racial disparities in the affected schools were purely *de facto* and would not have been actionable under the Equal Protection Clause. Not even the dissenters thought the race-conscious remedial program posed a *constitutional* problem. See *id.,* at 152, 100 S.Ct. 363 (opinion of Stewart, J.). See also, *e.g., Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 535–536, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982) ("[S]tate courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, *whether or not there has been a finding of intentional segregation* .... [S]chool districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and *they remain free to adopt reassignment and busing plans to effectuate desegregation* " (emphasis added)); *School Comm. of Boston v. Board of Education,* 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) *(per curiam)* (dismissing for want of a federal question a challenge to a voluntary statewide integration plan using express racial criteria).

Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided ***826** *Swann*. Indeed, in 1968, the Illinois Supreme Court

rejected an equal protection challenge to a race-conscious state law seeking to undo *de facto* segregation:

> "To support [their] claim, the defendants heavily rely on three Federal cases, each of which held, no State law being involved, that a local school board does not have an affirmative constitutional duty to act to alleviate racial imbalance in the schools that it did not cause. However, the question as to whether the constitution requires a local school board, or a State, to act to undo *de facto* school segregation is simply not here concerned. The issue here is whether the constitution permits, rather than prohibits, voluntary State action aimed toward reducing and eventually eliminating *de facto* school segregation.
>
> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. Similarly, the Federal courts which have considered the issue ... have recognized that voluntary programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden." *Tometz v. Board of Ed., Waukegan School Dist. No. 61,* 39 Ill.2d 593, 597–598, 237 N.E.2d 498, 501 (citing decisions from the high courts of Pennsylvania, Massachusetts, New Jersey, California, New York, and Connecticut, and from the Courts of Appeals for the First, Second, Fourth, and Sixth Circuits; citations omitted).

See also, *e.g., Offermann v. Nitkowski,* 378 F.2d 22, 24 (C.A.2 1967); *Deal v. Cincinnati Bd. of Ed.,* 11 Ohio Misc. 184, 369 F.2d 55, 61 (C.A.6 1966), cert. denied, 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed.2d 114 (1967); *Springfield School Comm. v. Barksdale,* 348 F.2d 261, 266 (C.A.1 1965); ***827** ****2814** *Pennsylvania Human Relations Comm'n v. Chester School Dist.,* 427 Pa. 157, 164, 233 A.2d 290, 294 (1967); *Booker v. Board of Ed. of Plainfield, Union Cty.,* 45 N.J. 161, 170, 212 A.2d 1, 5 (1965); *Jackson v. Pasadena City School Dist.,* 59 Cal.2d 876, 881–882, 31 Cal.Rptr. 606, 382 P.2d 878, 881–882 (1963).

I quote the Illinois Supreme Court at length to illustrate the prevailing legal assumption at the time *Swann* was decided. In this respect, *Swann* was not a sharp or unexpected departure from prior rulings; it reflected a consensus that had already emerged among state and lower federal courts.

If there were doubts before *Swann* was decided, they did not survive this Court's decision. Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow. For instance, a Texas appeals court in 1986 rejected a Fourteenth Amendment challenge to a voluntary integration plan by explaining:

> "[T]he absence of a court order to desegregate does not mean that a school board cannot exceed minimum requirements in order to promote school integration. School authorities are traditionally given broad discretionary powers to formulate and implement educational policy and may properly decide to ensure to their students the value of an integrated school experience." *Citizens for Better Ed. v. Goose Creek Consol. Independent School Dist.,* 719 S.W.2d 350, 352–353 (citing *Swann* and *North Carolina Bd. of Ed.*), appeal dism'd for want of substantial federal question, 484 U.S. 804, 108 S.Ct. 49, 98 L.Ed.2d 14 (1987).

Similarly, in *Zaslawsky v. Board of Ed. of Los Angeles City Unified School Dist.,* 610 F.2d 661, 662–664 (1979), the Ninth Circuit rejected a federal constitutional challenge to a school district's use of mandatory faculty transfers to ensure that each school's faculty makeup would fall within 10% of the districtwide racial composition. Like the Texas court, the Ninth Circuit relied upon *Swann* and *North Carolina Bd.* ***828** *of Ed.* to reject the argument that "a race-conscious plan is permissible only when there has been a judicial finding of *de jure* segregation." 610 F.2d, at 663–664. See also, *e.g., Darville v. Dade Cty.School Bd.,* 497 F.2d 1002, 1004–1006 (C.A.5 1974); *State ex rel. Citizens Against Mandatory Bussing v. Brooks,* 80 Wash.2d 121, 128–129, 492 P.2d 536, 541–542 (1972) (en banc), overruled on other grounds, *Cole v. Webster,* 103 Wash.2d 280, 692 P.2d 799 (1984) (en banc); *School Comm. of Springfield v. Board of Ed.,* 362 Mass. 417, 428–429, 287 N.E.2d 438, 447–448 (1972). These decisions illustrate well how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle.

Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated—*i.e.,* that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so. That principle has been accepted by every branch of government and is rooted in the history of the Equal Protection Clause itself. Thus, Congress has enacted numerous race-conscious statutes that illustrate that principle or rely upon its validity. See, *e.g.,* No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v) (2000 ed., Supp. IV); § 1067 *et seq.* (authorizing aid to minority institutions). In fact, without being exhaustive, I have counted 51 federal statutes that

use racial classifications. I have counted well over 100 state statutes that similarly employ racial classifications. Presidential administrations for the past half century have used and supported various race-conscious measures. See, *e.g.,* **2815 Exec. Order No. 10925, 26 Fed.Reg.1977 (1961) (President Kennedy); Exec. Order No. 11246, 30 Fed.Reg. 12319 (1965) (President Johnson); Sugrue, Breaking Through: The Troubled Origins of Affirmative Action in the Workplace, in Color Lines: Affirmative Action, Immigration, and Civil Rights Options for America 31 (J. Skrentny ed.2001) (describing President Nixon's lobbying for affirmative action plans, *e.g.,* the PhiladelphiaPlan); *829 White, Affirmative Action's Alamo: Gerald Ford Returns to Fight Once More for Michigan, Time, Aug. 23, 1999, p. 48 (reporting on President Ford's support for affirmative action); Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 50 (2002) (describing President Carter's support for affirmation action). And during the same time, hundreds of local school districts have adopted student assignment plans that use race-conscious criteria. See Welch 83–91.

That *Swann*'s legal statement should find such broad acceptance is not surprising. For *Swann* is predicated upon a well-established legal view of the Fourteenth Amendment. That view understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery. See *Slaughter–House Cases,* 16 Wall. 36, 71, 21 L.Ed. 394 (1873) ("[N]o one can fail to be impressed with the one pervading purpose found in [all the Reconstruction amendments] ... we mean the freedom of the slave race"); *Strauder v. West Virginia,* 100 U.S. 303, 306, 25 L.Ed. 664 (1880) ("[The Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated ... all the civil rights that the superior race enjoy").

There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together. See generally R. Sears, A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866–1904 (1996) (describing federal funding, through the Freedman's Bureau, of race-conscious school integration programs). See also R. Fischer, The Segregation Struggle in Louisiana 1862–77, *830 p. 51 (1974) (describing the use of race-conscious remedies); Harlan, Desegregation in New Orleans Public Schools During Reconstruction, 67 Am. Hist. Rev. 663, 664 (1962) (same); W. Vaughn, Schools for All: The Blacks & Public Education in the South, 1865–1877, pp. 111–116 (1974) (same). Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter. See *Gratz v. Bollinger,* 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (GINSBURG, J., dissenting); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (STEVENS, J., dissenting).

Sometimes Members of this Court have disagreed about the degree of leniency that the Clause affords to programs designed to include. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick,* 448 U.S. 448, 507, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J., concurring). But I can find no case in which this Court has followed Justice THOMAS' "color-blind" approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that **2816 which seeks to *include* members of minority races.

What does the plurality say in response? First, it seeks to distinguish *Swann* and other similar cases on the ground that those cases involved remedial plans in response to *judicial findings* of *de jure* segregation. As *McDaniel* and *Harris* show, that is historically untrue. See *supra,* at 2757 – 2759. Many school districts in the South adopted segregation remedies (to which *Swann* clearly applies) without any such federal order, see *supra,* at 2756 – 2757. See also Kennedy Report. Seattle's circumstances are not meaningfully different from those in, say, *McDaniel,* where this Court approved race-conscious remedies. Louisville's plan was created and initially adopted when a compulsory district court order was in place. And, in any event, the histories of Seattle and Louisville make clear that this distinction—between court-ordered and voluntary desegregation—seeks a line that sensibly cannot be drawn.

*831 Second, the plurality downplays the importance of *Swann* and related cases by frequently describing their relevant statements as "dicta." These criticisms, however, miss the main point. *Swann* did not hide its understanding of the law in a corner of an obscure opinion or in a footnote, unread but by experts. It set forth its view prominently in an

important opinion joined by all nine Justices, knowing that it would be read and followed throughout the Nation. The basic problem with the plurality's technical "dicta"-based response lies in its overly theoretical approach to case law, an approach that emphasizes rigid distinctions between holdings and dicta in a way that serves to mask the radical nature of today's decision. Law is not an exercise in mathematical logic. And statements of a legal rule set forth in a judicial opinion do not always divide neatly into "holdings" and "dicta." (Consider the legal "status" of Justice Powell's separate opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).) The constitutional principle enunciated in *Swann,* reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance. And if the plurality now chooses to reject that principle, it cannot adequately justify its retreat simply by affixing the label "dicta" to reasoning with which it disagrees. Rather, it must explain to the courts and to the Nation *why* it would abandon guidance set forth many years before, guidance that countless others have built upon over time, and which the law has continuously embodied.

Third, a more important response is the plurality's claim that later cases—in particular *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), *Adarand, supra*, and *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003)—supplanted *Swann*. See *ante,* at 2751 – 2752, 2762 – 2763, n. 16, 2764 – 2765 (citing *Adarand, supra,* at 227, 115 S.Ct. 2097; *Johnson, supra*, at 505, 125 S.Ct. 1141, 160 L.Ed.2d 949; *Grutter, supra* at 326, 123 S.Ct. 2325, 156 L.Ed.2d 304). The plurality says that cases such as *Swann* and the others I have described all "were decided before this Court definitively determined ***832** that 'all racial classifications ... must be analyzed by a reviewing court under strict scrutiny.' " *Ante,* at 2762 – 2763, n. 16 (quoting *Adarand,* 515 U.S., at 227, 115 S.Ct. 2097). This Court in *Adarand* added that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Ibid*. And the Court repeated this same statement in *Grutter*. See 539 U.S., at 326, 123 S.Ct. 2325.

Several of these cases were significantly more restrictive than *Swann* in respect to the degree of leniency the Fourteenth Amendment grants to programs designed ****2817** to *include* people of all races. See, *e.g., Adarand, supra; Gratz, supra; Grutter, supra*. But that legal circumstance cannot make a critical difference here for two separate reasons.

First, no case—not *Adarand, Gratz, Grutter,* or any other—has ever held that the test of "strict scrutiny" means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same. The Court did not say in *Adarand* or in *Johnson* or in *Grutter* that it was overturning *Swann* or its central constitutional principle.

Indeed, in its more recent opinions, the Court recognized that the "fundamental purpose" of strict scrutiny review is to "take relevant differences" between "fundamentally different situations ... into account." *Adarand,* 515 U.S., at 228, 115 S.Ct. 2097 (internal quotation marks omitted). The Court made clear that "[s]trict scrutiny does not trea[t] dissimilar race-based decisions as though they were equally objectionable." *Ibid* (internal quotation marks omitted). It added that the fact that a law "treats [a person] unequally because of his or her race ... says nothing about the ultimate validity of any particular law." *Id.,* at 229–230, 115 S.Ct. 2097. And the Court, using the very phrase that Justice Marshall had used to describe strict scrutiny's application to any *exclusionary* use of racial criteria, sought to "*dispel the notion* that strict scrutiny" is as likely to condemn *inclusive* uses of "race-conscious" criteria ***833** as it is to invalidate *exclusionary* uses. That is, it is *not* in all circumstances " 'strict in theory, but fatal in fact.' " *Id.,* at 237, 115 S.Ct. 2097 (quoting *Fullilove*, 448 U.S., at 519, 100 S.Ct. 2758 (Marshall, J., concurring in judgment)).

The Court in *Grutter* elaborated:

> "Strict scrutiny is not 'strict in theory, but fatal in fact.' ... Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it....
>
> "Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344 [, 81 S.Ct. 125, 5 L.Ed.2d 110] (1960) (admonishing that, 'in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts')).... Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for

the use of race in that particular context." 539 U.S., at 326–327, 123 S.Ct. 2325.

The Court's holding in *Grutter* demonstrates that the Court meant what it said, for the Court upheld an elite law school's race-conscious admissions program.

The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.

The plurality cannot avoid this simple fact. See *ante,* at 2764 – 2766. Today's opinion reveals that the plurality would ***834** rewrite this Court's prior jurisprudence, at least in practical application, transforming the "strict scrutiny" test into a rule that is fatal in fact across the board. In doing so, the plurality parts company from ****2818** this Court's prior cases, and it takes from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.

Second, as *Grutter* specified, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S., at 327, 123 S.Ct. 2325 (citing *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960)). And contexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

Here, the context is one in which school districts seek to advance or to maintain racial integration in primary and secondary schools. It is a context, as *Swann* makes clear, where history has required special administrative remedies. And it is a context in which the school boards' plans simply set race-conscious limits at the outer boundaries of a broad range. This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize ***835** or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.

The importance of these differences is clear once one compares the present circumstances with other cases where one or more of these negative features are present. See, *e.g., Strauder,* 100 U.S. 303, 25 L.Ed. 664; *Yick Wo,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Brown,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Adarand*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158; *Grutter, supra; Gratz*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257; *Johnson*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949.

If one examines the context more specifically, one finds that the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts. Compare *Wessmann v. Gittens,* 160 F.3d 790, 809–810 (C.A.1 1998) (Boudin, J., concurring), with *Comfort,* 418 F.3d, at 28–29 (Boudin, C. J., concurring). They do not ****2819** seek to award a scarce commodity on the basis of merit, for they are not magnet schools; rather, by design and in practice, they offer substantially equivalent academic programs and electives. Although some parents or children prefer some schools over others, school popularity has varied significantly over the years. In 2000, for example, Roosevelt was the most popular first choice high school in Seattle; in 2001, Ballard was the most popular; in 2000, West Seattle was one of the least popular; by 2003, it was one of the more popular. See Research, Evaluation and Assessment, Student Information ***836** Services Office,

Seattle Public Schools, Data Profile: District Summary December 2005 (hereinafter Data Profile: District Summary December 2005), online at http://www.seattleschools. org/area/siso/disprof/2005/DP05all.pdf. In a word, the school plans under review do not involve the kind of race-based harm that has led this Court, in other contexts, to find the use of race-conscious criteria unconstitutional.

These and related considerations convinced one Ninth Circuit judge in the Seattle case to apply a standard of constitutionality review that is less than "strict," and to conclude that this Court's precedents do not require the contrary. See 426 F.3d 1162, 1193–1194 (2005) (*Parents Involved VII*) (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability"). That judge is not alone. Cf. *Gratz, supra,* at 301, 123 S.Ct. 2411 (GINSBURG, J., dissenting); *Adarand, supra,* at 243, 115 S.Ct. 2097 (STEVENS, J., dissenting); Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433–434 (1988).

The view that a more lenient standard than "strict scrutiny" should apply in the present context would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria's tailoring in light of the need. And the present context requires a court to examine carefully the race-conscious program at issue. In doing so, a reviewing judge must be fully aware of the potential dangers and pitfalls that Justice THOMAS and Justice KENNEDY mention. See *ante,* at 11–12 (THOMAS, J., concurring); *ante,* at 3, 17 (KENNEDY, J., concurring in part and concurring in judgment).

But unlike the plurality, such a judge would also be aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks they mention, for ***837** example, helping to end racial isolation or to achieve a diverse student body in public schools. Cf. *ante,* at 2796 – 2797 (opinion of KENNEDY, J.). Where that is so, the judge would carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves.

In my view, this contextual approach to scrutiny is altogether fitting. I believe that the law requires application here of a standard of review that is not "strict" in the traditional sense of that word, although it does require the careful review I have just described. See *Gratz, supra,* at 301, 123 S.Ct. 2411 (GINSBURG, J., joined by SOUTER, J., dissenting); *Adarand, supra,* at 242–249, 115 S.Ct. 2097 (STEVENS, J., joined by GINSBURG, J., dissenting); *Parents Involved VII, supra*, at 1193–1194 (Kozinski, J., concurring). Apparently Justice KENNEDY also agrees that strict scrutiny would not apply in respect to certain "race-conscious" school board policies. See *ante,* at 2793 – 2794 ("Executive and legislative branches, which for generations now have considered these types of policies and procedures, ****2820** should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races").

Nonetheless, in light of *Grutter* and other precedents, see, *e.g., Bakke, supra*, at 290, 98 S.Ct. 2733 (opinion of Powell, J.), I shall adopt the first alternative. I shall apply the version of strict scrutiny that those cases embody. I shall consequently ask whether the school boards in Seattle and Louisville adopted these plans to serve a "compelling governmental interest" and, if so, whether the plans are "narrowly tailored" to achieve that interest. If the plans survive this strict review, they would survive less exacting review *a fortiori*. Hence, I conclude that the plans before us pass both parts of the strict scrutiny test. Consequently I must conclude that the plans here are permitted under the Constitution.

***838** III

Applying the Legal Standard

A

Compelling Interest

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial "diversity." Other times a court, like the plurality here, refers to it as an interest in racial "balancing." I have used more general terms to signify that interest, describing it, for example, as an interest in promoting or preserving greater racial "integration" of public schools. By this term, I mean the school districts' interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes

each of the district's schools and each individual student's public school experience.

Regardless of its name, however, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the *de facto* resegregation of America's public schools. See Part I, *supra,* at 2801 – 2802; Appendix A, *infra.* See also *ante,* at 2796 – 2797 (opinion of KENNEDY, J.) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children").

***839** Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Cf. *Grutter,* 539 U.S., at 345, 123 S.Ct. 2325 (GINSBURG, J., concurring). Studies suggest that children taken from those schools and placed in integrated settings often show positive academic gains. See, *e.g.,* Powell, Living and Learning: Linking Housing and Education, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 15, 35 (J. Powell, G. Kearney, & V. Kay eds.2001) (hereinafter Powell); Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733, 741–742 (1998) (hereinafter Hallinan).

****2821** Other studies reach different conclusions. See, *e.g.,* D. Armor, Forced Justice (1995). See also *ante,* at 2776 – 2777 (THOMAS, J., concurring). But the evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one.

Research suggests, for example, that black children from segregated educational environments significantly increase their achievement levels once they are placed in a more integrated setting. Indeed, in Louisville itself, the achievement gap between black and white elementary school students grew substantially smaller (by seven percentage points) after the integration plan was implemented in 1975. See Powell 35. Conversely, to take another example, evidence from a district in Norfolk, Virginia, shows that resegregated schools led to a decline in the achievement test scores of children of all races. *Ibid.*

One commentator, reviewing dozens of studies of the educational benefits of desegregated schooling, found that the studies have provided "remarkably consistent" results, showing that: (1) black students' educational achievement is improved in integrated schools as compared to racially isolated schools, (2) black students' educational achievement is improved ***840** in integrated classes, and (3) the earlier that black students are removed from racial isolation, the better their educational outcomes. See Hallinan 741–742. Multiple studies also indicate that black alumni of integrated schools are more likely to move into occupations traditionally closed to African–Americans, and to earn more money in those fields. See, *e.g.,* Schofield, Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook of Research on Multicultural Education 597, 606–607 (J. Banks & C. Banks eds.1995). Cf. W. Bowen & D. Bok, The Shape of the River 118 (1998) (hereinafter Bowen & Bok).

Third, there is a democratic element: an interest in producing an educational environment that reflects the "pluralistic society" in which our children will live. *Swann,* 402 U.S., at 16, 91 S.Ct. 1267. It is an interest in helping our children learn to work and play together with children of different racial backgrounds. It is an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

Again, data support this insight. See, *e.g.,* Hallinan 745; Quillian & Campbell, Beyond Black and White: The Present and Future of Multiracial Friendship Segregation, 68 Am. Sociological Rev. 540, 541 (2003) (hereinafter Quillian & Campbell); Dawkins & Braddock, The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society, 63 J. Negro Educ. 394, 401–403 (1994) (hereinafter Dawkins & Braddock); Wells & Crain, Perpetuation Theory and the Long–Term Effects of School Desegregation, 64 Rev. Educ. Research 531, 550 (1994) (hereinafter Wells & Crain).

There are again studies that offer contrary conclusions. See, *e.g.,* Schofield, School Desegregation and Intergroup Relations: A Review of the Literature, in 17 Review of Research in Education 335, 356 (G. Grant ed.1991). See also *ante,* at 2780 – 2781 (THOMAS, J., concurring). Again, however, ***841** the evidence supporting a democratic interest in racially integrated schools is firmly established and sufficiently strong to permit a school board to determine, as this Court has itself often found, that this interest is compelling.

****2822** For example, one study documented that "black and white students in desegregated schools are less racially prejudiced than those in segregated schools," and that "interracial contact in desegregated schools leads to an increase in interracial sociability and friendship." Hallinan 745. See also Quillian & Campbell 541. Cf. Bowen & Bok 155. Other studies have found that both black and white students who attend integrated schools are more likely to work in desegregated companies after graduation than students who attended racially isolated schools. Dawkins & Braddock 401–403; Wells & Crain 550. Further research has shown that the desegregation of schools can help bring adult communities together by reducing segregated housing. Cities that have implemented successful school desegregation plans have witnessed increased interracial contact and neighborhoods that tend to become less racially segregated. Dawkins & Braddock 403. These effects not only reinforce the prior gains of integrated primary and secondary education; they also foresee a time when there is less need to use race-conscious criteria.

Moreover, this Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education. See, *e.g., Swann, supra,* at 16, 91 S.Ct. 1267; *Seattle School Dist. No. 1,* 458 U.S., at 472–473, 102 S.Ct. 3187. In *Grutter,* in the context of law school admissions, we found that these types of interests were, constitutionally speaking, "compelling." See 539 U.S., at 330, 123 S.Ct. 2325 (recognizing that Michigan Law School's race-conscious admissions policy "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races," and pointing out that "the skills needed in today's increasingly global marketplace can only be developed through exposure ***842** to widely diverse people, cultures, ideas, and viewpoints" (internal quotation marks omitted; alteration in original)).

In light of this Court's conclusions in *Grutter,* the "compelling" nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, "unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken v. Bradley,* 418 U.S. 717, 783, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (dissenting opinion).

And it was *Brown,* after all, focusing upon primary and secondary schools, not *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950), focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed.,* 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950), focusing on graduate schools, that affected so deeply not only Americans but the world. R. Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality, p. x (1975) (arguing that perhaps no other Supreme Court case has "affected more directly the minds, hearts, and daily lives of so many Americans"); J. Patterson, *Brown v. Board of Education* p. xxvii (2001) (identifying *Brown* as "the most eagerly awaited and dramatic judicial decision of modern times"). See also *Parents Involved VII,* 426 F.3d, at 1194 (Kozinski, J., concurring); Strauss, Discriminatory Intent and the Taming of *Brown,* 56 U. Chi. L.Rev. 935, 937 (1989) (calling *Brown* "the Supreme Court's greatest anti-discrimination decision"); Brief for United States as *Amicus Curiae* in *Brown,* O.T. ****2823** 1952, No. 8 etc.; Dudziak, *Brown* as a Cold War Case, 91 J. Am. Hist. 32 (2004); A Great Decision, Hindustan Times (New Delhi, May 20, 1954), p. 5; USA Takes Positive Step, West African Pilot (Lagos, May 22, 1954), p. 2 (stating that *Brown* is an acknowledgment that the "United States should set an example for all other nations by taking ***843** the lead in removing from its national life all signs and traces of racial intolerance, arrogance or discrimination"). Hence, I am not surprised that Justice KENNEDY finds that "a district may consider it a compelling interest to achieve a diverse student population," including a *racially* diverse population. *Ante,* at 2796 – 2797.

The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general "societal discrimination," *ante,* at 2758 (plurality opinion), but of primary and secondary school segregation, see *supra,* at 2803, 2807; it includes an effort to create school environments that provide better educational opportunities for all children;

it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not "compelling," what is?

The majority acknowledges that in prior cases this Court has recognized at least two interests as compelling: an interest in "remedying the effects of past intentional discrimination," and an interest in "diversity in higher education." *Ante,* at 2806, 2807. But the plurality does not convincingly explain why those interests do not constitute a "compelling interest" here. How do the remedial interests here differ in kind from those at issue in the voluntary desegregation efforts that Attorney General Kennedy many years ago described in his letter to the President? *Supra,* at 2810 – 2811. How do the educational and civic interests differ in kind from those that underlie and justify the racial "diversity" that the law school sought in *Grutter,* where this Court found a compelling interest?

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation ("segregation by state action") and *de facto* segregation ("racial imbalance caused by other factors"). ***844** *Ante,* at 2815. But that distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do. Compare, *e.g., Green,* 391 U.S., at 437–438, 88 S.Ct. 1689 ("School boards ... operating state-compelled dual systems" have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"), with, *e.g., Milliken, supra*, at 745, 94 S.Ct. 3112 (the Constitution does not impose a duty to desegregate upon districts that have not been "shown to have committed any constitutional violation").

The opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake. See, *e.g., Freeman v. Pitts,* 503 U.S. 467, 495, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). As to what is *permitted,* nothing in our equal protection law suggests that a State may right only those wrongs that it committed. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do. That is what is at issue here. And *Swann, McDaniel, Crawford*, *North Carolina Bd. of Ed., Harris,* and *Bustop* made one thing clear: significant as the difference between *de* ****2824** *jure* and *de facto* segregation may be to the question of what a school district *must* do, that distinction is not germane to the question of what a school district *may* do.

Nor does any precedent indicate, as the plurality suggests with respect to Louisville, *ante,* at 2815 – 2816, that remedial interests vanish the day after a federal court declares that a district is "unitary." Of course, Louisville adopted those portions of the plan at issue here *before* a court declared Louisville "unitary." Moreover, in *Freeman,* this Court pointed out that in "one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of ***845** history. And stubborn facts of history linger and persist." 503 U.S., at 495, 112 S.Ct. 1430. See also *ante,* at 2807 – 2808 (opinion of KENNEDY, J.). I do not understand why this Court's cases, which rest the significance of a "unitary" finding in part upon the wisdom and desirability of returning schools to local control, should deprive those local officials of legal *permission* to use means they once found necessary to combat persisting injustices.

For his part, Justice THOMAS faults my citation of various studies supporting the view that school districts can find compelling educational and civic interests in integrating their public schools. See *ante,* at 2776 – 2777, 2781 (concurring opinion). He is entitled of course to his own opinion as to which studies he finds convincing—although it bears mention that even the author of some of Justice THOMAS' preferred studies has found *some* evidence linking integrated learning environments to increased academic achievement. Compare *ante,* at 2776 – 2777 (opinion of THOMAS, J.) (citing Armor & Rossell, Desegregation and Resegregation in the Public Schools, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 239, 251 (A. Thernstrom & S. Thernstrom eds.2002)); Brief for David J. Armor et al. as *Amici Curiae* 29), with Rosen, Perhaps Not All Affirmative Action is Created Equal, N.Y. Times, June 11, 2006, section 4, p. 14 (quoting David Armor as commenting, " 'we did not find the [racial] achievement gap changing *significantly* ' " but acknowledging that he " 'did find a modest association for math but not reading in terms of racial composition and achievement, but there's a big state variation' " (emphasis added)). If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one. I believe only that the Constitution allows democratically elected school boards to make up their

own minds as to how best to include people of all races in one America.

***846** B

Narrow Tailoring

I next ask whether the plans before us are "narrowly tailored" to achieve these "compelling" objectives. I shall not accept the school boards' assurances on faith, cf. *Miller v. Johnson,* 515 U.S. 900, 920, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), and I shall subject the "tailoring" of their plans to "rigorous judicial review," *Grutter,* 539 U.S., at 388, 123 S.Ct. 2325 (KENNEDY, J., dissenting). Several factors, taken together, nonetheless lead me to conclude that the boards' use of race-conscious criteria in these plans passes even the strictest "tailoring" test.

First, the race-conscious criteria at issue only help set the outer bounds of *broad* ranges. Cf. *id.,* at 390, 123 S.Ct. 2325 (expressing concern about "narrow fluctuation band[s]"). They constitute but one part of plans that depend primarily upon other, nonracial elements. To use race in this way is not to set a forbidden "quota." See *id.,* at 335, 123 S.Ct. 2325 (opinion of the Court) ("Properly understood, a 'quota' ****2825** is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups' " (quoting *Croson,* 488 U.S., at 496, 109 S.Ct. 706) (plurality opinion)).

In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice alone determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). *Choice,* therefore, is the "predominant factor" in these plans. *Race* is not. See *Grutter, supra,* at 393, 123 S.Ct. 2325 (KENNEDY, J., dissenting) (allowing consideration of race only if it does "not become a predominant factor").

Indeed, the race-conscious ranges at issue in these cases often have no effect, either because the particular school is not oversubscribed in the year in question, or because the ***847** racial makeup of the school falls within the broad range, or because the student is a transfer applicant or has a sibling at the school. In these respects, the broad ranges are less like a quota and more like the kinds of "useful starting points" that this Court has consistently found permissible, even when they set boundaries upon voluntary transfers, and even when they are based upon a community's general population. See, *e.g., North Carolina Bd. of Ed. v. Swann,* 402 U.S., at 46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (no "absolute prohibition against [the] use" of mathematical ratios as a "starting point"); *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S., at 24–25, 91 S.Ct. 1267 (approving the use of a ratio reflecting "the racial composition of the whole school system" as a "useful starting point," but not as an "inflexible requirement"). Cf. *United States v. Montgomery County Bd. of Ed.,* 395 U.S. 225, 232, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969) (approving a lower court desegregation order that "provided that the [school] board must move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system,' " and "immediately" requiring "[t]he ratio of Negro to white teachers" in each school to be equal to "the ratio of Negro to white teachers in ... the system as a whole").

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, see *Grutter, supra,* at 341, 123 S.Ct. 2325, than other race-conscious restrictions this Court has previously approved. See, *e.g., Swann, supra,* at 26–27, 91 S.Ct. 1267; *Montgomery County Bd. of Ed., supra,* at 232, 89 S.Ct. 1670. Indeed, the plans before us are *more narrowly tailored* than the race-conscious admission plans that this Court approved in *Grutter*. Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students' merit-based applications. Moreover, the effect of applying race-conscious criteria here affects potentially disadvantaged students *less severely,* not more severely, than the criteria at issue in *Grutter*. Disappointed students are not rejected from a ***848** State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal. Cf. *Wygant,* 476 U.S., at 283, 106 S.Ct. 1842 (plurality opinion). And, in Seattle, the disadvantaged student loses at most one year at the high school of his choice. One will search *Grutter* in vain for similarly persuasive evidence of narrow tailoring as the school districts have presented here.

Third, the manner in which the school boards developed these plans itself reflects "narrow tailoring." Each plan was devised to overcome a history of segregated public ****2826** schools. Each plan embodies the results of local experience and community consultation. Each plan is the product of

a process that has sought to enhance student choice, while diminishing the need for mandatory busing. And each plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans.

The school boards' widespread consultation, their experimentation with numerous other plans, indeed, the 40–year history that Part I sets forth, make clear that plans that are less explicitly race-based are unlikely to achieve the boards' "compelling" objectives. The history of each school system reveals highly segregated schools, followed by remedial plans that involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city's integration goals. See Parts I–A and I–B, *supra,* at 2802 – 2809.

Moreover, giving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act ***849** as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils. See *Milliken,* 418 U.S., at 741–742, 94 S.Ct. 3112 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process"). See also *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 49–50, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (extolling local control for "the opportunity it offers for participation in the decisionmaking process that determines how ... local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence"); *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... By and large, public education in our Nation is committed to the control of state and local authorities"); *Brown v. Board of Education,* 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) ("Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles").

Experience in Seattle and Louisville is consistent with experience elsewhere. In 1987, the U.S. Commission on Civil Rights studied 125 large school districts seeking integration. It reported that most districts—92 of them, in fact—adopted desegregation policies that combined two or more highly ***850** race-conscious strategies, for example, rezoning or pairing. See Welch 83–91.

****2827** Having looked at dozens of *amicus* briefs, public reports, news stories, and the records in many of this Court's prior cases, which together span 50 years of desegregation history in school districts across the Nation, I have discovered many examples of districts that sought integration through explicitly race-conscious methods, including mandatory busing. Yet, I have found *no* example or model that would permit this Court to say to Seattle and to Louisville: "Here is an instance of a desegregation plan that is likely to achieve your objectives and also makes less use of race-conscious criteria than your plans." And, if the plurality cannot suggest such a model—and it cannot—then it seeks to impose a "narrow tailoring" requirement that in practice would never be met.

Indeed, if there is no such plan, or if such plans are purely imagined, it is understandable why, as the Court notes, *ante,* at 2759 – 2760, Seattle school officials concentrated on diminishing the racial component of their districts' plan, but did not pursue eliminating that element entirely. For the Court now to insist as it does, *ante,* at 2760 – 2761, that these school districts ought to have said so officially is either to ask for the superfluous (if they need only make explicit what is implicit) or to demand the impossible (if they must somehow provide more proof that there is no hypothetical *other* plan that could work as well as theirs). I am not aware of any case in which this Court has read the "narrow tailoring" test to impose such a requirement. Cf. *People Who Care v. Rockford Bd. of Ed. School Dist. No. 205,* 961 F.2d 1335, 1338 (C.A.7 1992) (Easterbrook, J.) ("Would it be necessary to adjudicate the obvious before adopting (or permitting the parties to agree on) a remedy ... ?").

The plurality also points to the school districts' use of numerical goals based upon the racial breakdown of the general school population, and it faults the districts for failing to prove that *no other set of numbers will work*. See ***851** *ante,* at 2755 – 2757. The plurality refers to no case in support of its demand. Nor is it likely to find such a case. After all, this Court has in many cases explicitly permitted districts to use target ratios based upon the district's underlying population. See, *e.g., Swann,* 402 U.S., at 24–25, 91 S.Ct. 1267; *North Carolina Bd. of Ed.,* 402 U.S., at 46, 91 S.Ct. 1284; *Montgomery County Bd. of Ed.,* 395 U.S., at 232, 89 S.Ct. 1670. The reason is obvious: In Seattle, where the overall student population is 41% white, permitting 85% white enrollment at a single school would make it much more likely that other schools would have very few white students, whereas in Jefferson County, with a 60% white enrollment, one school with 85% white students would be less likely to skew enrollments elsewhere.

Moreover, there is research-based evidence supporting, for example, that a ratio no greater than 50% minority—which is Louisville's starting point, and as close as feasible to Seattle's starting point—is helpful in limiting the risk of "white flight." See Orfield, Metropolitan School Desegregation: Impacts on Metropolitan Society, in Pursuit of a Dream Deferred: Linking Housing and Education Policy 121, 125. Federal law also assumes that a similar target percentage will help avoid detrimental "minority group isolation." See No Child Left Behind Act of 2001, Title V, Part C, 115 Stat. 1806, 20 U.S.C. § 7231 *et seq.* (2000 ed., Supp. IV); 34 CFR §§ 280.2, 280.4 (2006) (implementing regulations). What other numbers are the boards to use as a "starting point"? Are they to spend days, weeks, or months seeking independently to validate the use of ratios that this Court has repeatedly authorized in prior cases? Are they to draw numbers out of thin air? These districts ****2828** have followed this Court's holdings and advice in "tailoring" their plans. That, too, strongly supports the lawfulness of their methods.

Nor could the school districts have accomplished their desired aims (*e.g.,* avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the ***852** past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals. Nevertheless, Justice KENNEDY suggests that school boards

> "may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Ante,* at 2791 – 2792.

But, as to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students). In fact, six of the Seattle high schools involved in this case were built by the 1920's; the other four were open by the early 1960's. See generally N. Thompson & C. Marr, Building for Learning: Seattle Public School Histories, 1862–2000 (2002). As to "drawing" neighborhood "attendance zones" on a racial basis, Louisville tried it, and it worked only when forced busing was also part of the plan. See *supra,* at 2806 – 2807. As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet schools," but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. See Brief for Respondents in No. 05–908, p. 42. As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance, and other statistics by race," tracking *reveals* the problem; it does not cure it.

***853** Justice KENNEDY sets forth two additional concerns related to "narrow tailoring." In respect to Louisville, he says first that officials stated (1) that kindergarten assignments are not subject to the race-conscious guidelines, and (2) that the child at issue here was denied permission to attend the kindergarten he wanted because of those guidelines. Both, he explains, cannot be true. He adds that this confusion illustrates that Louisville's assignment plan (or its explanation of it to this Court) is insufficiently precise in respect to "who makes the decisions," "oversight," "the precise circumstances in which an assignment decision" will be made; and "which of two similarly situated children will be subjected to a given race-based decision." *Ante,* at 2790.

The record suggests, however, that the child in question was not assigned to the school he preferred because he missed the kindergarten application deadline. See App. in No. 05–915, p. 20. After he had enrolled and after the academic year had begun, he then applied to transfer to his preferred school after the kindergarten assignment deadline had passed, *id.,* at 21,

possibly causing school officials to treat his late request as an application to transfer to the first grade, in respect to which the guidelines apply. I am not certain just how the remainder of Justice KENNEDY's ****2829** concerns affect the lawfulness of the Louisville program, for they seem to be failures of explanation, not of administration. But Louisville should be able to answer the relevant questions on remand.

Justice KENNEDY's second concern is directly related to the merits of Seattle's plan: Why does Seattle's plan group Asian–Americans, Hispanic–Americans, Native–Americans, and African–Americans together, treating all as similar minorities? *Ante,* at 2790 – 2791. The majority suggests that Seattle's classification system could permit a school to be labeled "diverse" with a 50% Asian–American and 50% white student body, and no African–American students, Hispanic ***854** students, or students of other ethnicity. *Ante,* at 2749 (opinion of Kennedy, J.); *ante,* at 2753 – 2754 (opinion of the Court).

The 50/50 hypothetical has no support in the record here; it is conjured from the imagination. In fact, Seattle apparently began to treat these different minority groups alike in response to the federal Emergency School Aid Act's requirement that it do so. A. Siqueland, Without A Court Order: The Desegregation of Seattle's Schools 116–117 (1981) (hereinafter Siqueland). See also F. Hanawalt & R. Williams, The History of Desegregation in Seattle Public Schools 1954–1981, p. 31 (1981) (hereinafter Hanawalt); Pub.L. 95–561, Title VI, 92 Stat. 2252 (prescribing percentage enrollment requirements for "minority" students); Siqueland 55 (discussing Department of Health, Education, and Welfare's definition of "minority"). Moreover, maintaining this federally mandated system of classification makes sense insofar as Seattle's experience indicates that the relevant circumstances in respect to each of these different minority groups are roughly similar, *e.g.,* in terms of residential patterns, and call for roughly similar responses. This is confirmed by the fact that Seattle has been able to achieve a desirable degree of diversity without the *greater* emphasis on race that drawing fine lines among minority groups would require. Does the plurality's view of the Equal Protection Clause mean that courts must give no weight to such a board determination? Does it insist upon especially strong evidence supporting inclusion of multiple minority groups in an otherwise lawful government minority-assistance program? If so, its interpretation threatens to produce divisiveness among minority groups that is incompatible with the basic objectives of the Fourteenth Amendment. Regardless, the plurality cannot object that the constitutional defect is the individualized use of race and simultaneously object that not enough account of individuals' race has been taken.

Finally, I recognize that the Court seeks to distinguish *Grutter* from these cases by claiming that *Grutter* arose in ***855** " 'the context of higher education.' " *Ante,* at 2808. But that is not a meaningful legal distinction. I have explained why I do not believe the Constitution could possibly find "compelling" the provision of a racially diverse education for a 23–year–old law student but not for a 13–year–old high school pupil. See *supra,* at 2824 – 2826. And I have explained how the plans before us are more narrowly tailored than those in *Grutter*. See *supra,* at 2824. I add that one cannot find a relevant distinction in the fact that these school districts did not examine the merits of applications "individual[ly]." See *ante,* at 2806 – 2808. The context here does not involve admission by merit; a child's academic, artistic, and athletic "merits" are not at all relevant to the child's placement. These are not affirmative action plans, and hence "individualized scrutiny" is simply beside the point.

The upshot is that these plans' specific features—(1) their limited and historically diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with ****2830** prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts' plans are "narrowly tailored" to achieve their "compelling" goals. In sum, the districts' race-conscious plans satisfy "strict scrutiny" and are therefore lawful.

IV

Direct Precedent

Two additional precedents more directly related to the plans here at issue reinforce my conclusion. The first consists of the District Court determination in the Louisville case when it dissolved its desegregation order that there was "overwhelming evidence of the Board's good faith compliance with the desegregation Decree and its underlying purposes," indeed that the board had "treated the ideal of an integrated system as much more than a legal obligation—they consider ***856** it a positive, desirable policy and an essential element of any well-rounded public school education." *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358,

370 (W.D.Ky. 2000) (*Hampton II*). When the court made this determination in 2000, it did so in the context of the Louisville desegregation plan that the board had adopted in 1996. That plan, which took effect before 1996, is the very plan that in all relevant respects is in effect now and is the subject of the present challenge.

No one claims that (the relevant portion of) Louisville's plan was unlawful in 1996 when Louisville adopted it. To the contrary, there is every reason to believe that it represented part of an effort to implement the 1978 desegregation order. But if the plan was lawful when it was first adopted and if it was lawful the day before the District Court dissolved its order, how can the plurality now suggest that it became *unlawful* the following day? Is it conceivable that the Constitution, implemented through a court desegregation order, could permit (perhaps *require*) the district to make use of a race-conscious plan the day before the order was dissolved and then *forbid* the district to use the identical plan the day after? See *id.,* at 380 ("The very analysis for dissolving desegregation decrees supports continued maintenance of a desegregated system as a compelling state interest"). The Equal Protection Clause is not incoherent. And federal courts would rightly hesitate to find unitary status if the consequences of the ruling were so dramatically disruptive.

Second, *Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896, is directly on point. That case involves the original Seattle Plan, a *more heavily race-conscious predecessor* of the very plan now before us. In *Seattle School Dist. No. 1,* this Court struck down a state referendum that effectively barred implementation of Seattle's desegregation plan and "burden[ed] all future attempts to integrate Washington schools in districts throughout the State." *Id.,* at 462–463, 483, 102 S.Ct. 3187. Because ***857** the referendum would have prohibited the adoption of a school integration plan that involved mandatory busing, and because it would have imposed a special burden on school integration plans (plans that sought to integrate previously segregated schools), the Court found it unconstitutional. *Id*., at 483–487, 102 S.Ct. 3187.

In reaching this conclusion, the Court did not directly address the constitutional merits of the underlying Seattle Plan. But it explicitly cited *Swann*'s statement that the Constitution permitted a local district to adopt such a plan. 458 U.S., at 472, n. 15, 102 S.Ct. 3187. It also cited to Justice Powell's opinion in *Bakke, approving of* the limited use of race-conscious criteria in a university-admissions "affirmative action" case. 458 U.S., at 472, n. 15, 102 S.Ct. 3187. In addition, the Court stated that "[a]ttending an ethnically diverse ****2831** school," *id.,* at 473, 102 S.Ct. 3187, could help prepare "minority children for citizenship in our pluralistic society," hopefully "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Ibid.* (internal quotation marks omitted).

It is difficult to believe that the Court that held unconstitutional a referendum that would have interfered with the implementation of this plan thought that the integration plan it sought to preserve was itself an *unconstitutional* plan. And if *Seattle School Dist. No. 1* is premised upon the constitutionality of the original Seattle Plan, it is equally premised upon the constitutionality of the present plan, for the present plan *is* the Seattle Plan, modified only insofar as it places even *less* emphasis on race-conscious elements than its predecessors.

It is even more difficult to accept the plurality's contrary view, namely, that the underlying plan was unconstitutional. If that is so, then *all* of Seattle's earlier (even more race-conscious) plans must also have been unconstitutional. That necessary implication of the plurality's position strikes the 13th chime of the clock. How could the plurality adopt a ***858** constitutional standard that would hold unconstitutional large numbers of race-conscious integration plans adopted by numerous school boards over the past 50 years while remaining true to this Court's desegregation precedent?

V

Consequences

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality's approach, as measured against the Constitution's objectives. To do so provides further reason to believe that the plurality's approach is legally unsound.

For one thing, consider the effect of the plurality's views on the parties before us and on similar school districts throughout the Nation. Will Louisville and all similar school districts have to return to systems like Louisville's initial 1956 plan, which did not consider race at all? See *supra,* at 2806. That

initial 1956 plan proved ineffective. Sixteen years into the plan, 14 of 19 middle and high schools remained almost totally white or almost totally black. *Ibid.*

The districts' past and current plans are not unique. They resemble other plans, promulgated by hundreds of local school boards, which have attempted a variety of desegregation methods that have evolved over time in light of experience. A 1987 Civil Rights Commission study of 125 school districts in the Nation demonstrated the breadth and variety of desegregation plans:

> "The [study] documents almost 300 desegregation plans that were implemented between 1961 and 1985. The degree of heterogeneity within these districts is immediately apparent. They are located in every region of the country and range in size from Las Cruces, New Mexico, with barely over 15,000 students attending 23 schools in 1968, to New York City, with more than one ***859** million students in 853 schools. The sample includes districts in urban areas of all sizes, suburbs (*e.g.,* Arlington County, Virginia) and rural areas (*e.g.,* Jefferson Parish, Louisiana, and Raleigh County, West Virginia). It contains 34 countywide districts with central cities (the 11 Florida districts fit this description, plus Clark County, Nevada and ****2832** others) and a small number of consolidated districts (New Castle County, Delaware and Jefferson County, Kentucky).
>
> "The districts also vary in their racial compositions and levels of segregation. Initial plans were implemented in Mobile, Alabama and Mecklenburg County, North Carolina, and in a number of other southern districts in the face of total racial segregation. At the other extreme, Santa Clara, California had a relatively even racial distribution prior to its 1979 desegregation plan. When the 1965 plan was designed for Harford County, Maryland, the district was 92 percent white. Compton, California, on the other hand, became over 99 percent black in the 1980s, while Buffalo, New York had a virtual 50–50 split between white and minority students prior to its 1977 plan.
>
> "It is not surprising to find a large number of different desegregation strategies in a sample with this much variation." Welch 23 (footnote omitted).

A majority of these desegregation techniques explicitly considered a student's race. See *id.,* at 24–28. Transfer plans, for example, allowed students to shift from a school in which they were in the racial majority to a school in which they would be in a racial minority. Some districts, such as Richmond, California, and Buffalo, New York, permitted only "one-way" transfers, in which only black students attending predominantly black schools were permitted to transfer to designated receiver schools. *Id.,* at 25. Fifty-three of the one hundred twenty-five studied districts used transfers as a component of their plans. *Id.,* at 83–91.

***860** At the state level, 46 States and Puerto Rico have adopted policies that encourage or require local school districts to enact interdistrict or intradistrict open choice plans. Eight of those States condition approval of transfers to another school or district on whether the transfer will produce increased racial integration. Eleven other States require local boards to deny transfers that are not in compliance with the local school board's desegregation plans. See Education Commission of the States, StateNotes, Open Enrollment: 50–State Report (2007), online at http:// mb2.ecs.org/reports/Report.aspx?id =268.

Arkansas, for example, provides by statute that "[n]o student may transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in the student's resident district." Ark.Code Ann. § 6–18–206(f)(1), as amended, 2007 Ark. Gen. Acts no. 552. An Ohio statute provides, in respect to student choice, that each school district must establish "[p]rocedures to ensure that an appropriate racial balance is maintained in the district schools." Ohio Rev.Code Ann. § 3313.98(B)(2)(b)(iii) (Lexis Supp.2006). Ohio adds that a "district may object to the enrollment of a native student in an adjacent or other district in order to maintain an appropriate racial balance." § 3313.98(F)(1)(a).

A Connecticut statute states that its student choice program will seek to "preserve racial and ethnic balance." Conn. Gen.Stat. § 10–266aa(b)(2) (2007). Connecticut law requires each school district to submit racial group population figures to the State Board of Education. § 10–226a. Another Connecticut regulation provides that "[a]ny school in which the Proportion for the School falls outside of a range from 25 percentage points less to 25 percentage points more than the Comparable Proportion for the School District, shall be determined to be racially imbalanced." Conn. Agencies Regs. § 10–226e–3(b) (1999). A "racial imbalance" determination requires the district to submit a plan to correct the ***861** racial imbalance, which plan may include ****2833** "mandatory pupil reassignment." §§ 10–226e–5(a) and (c)(4).

Interpreting that State's Constitution, the Connecticut Supreme Court has held legally inadequate the reliance by a local school district solely upon some of the techniques Justice KENNEDY today recommends (*e.g.,* reallocating resources, etc.). See *Sheff v. O'Neill,* 238 Conn. 1, 678 A.2d 1267 (1996). The State Supreme Court wrote: "Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity." *Id.,* at 42, 678 A.2d, at 1289.

At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. See *supra,* at 2814 – 2815. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.

The wide variety of different integration plans that school districts use throughout the Nation suggests that the problem of racial segregation in schools, including *de facto* segregation, is difficult to solve. The fact that many such plans have used explicitly racial criteria suggests that such criteria have an important, sometimes necessary, role to play. The fact that the controlling opinion would make a school district's use of such criteria often unlawful (and the plurality's "colorblind" view would make such use always unlawful) suggests that today's opinion will require setting aside the laws of several States and many local communities.

As I have pointed out, *supra,* at 2801 – 2802, *de facto* resegregation is on the rise. See Appendix A, *infra*. It is reasonable ***862** to conclude that such resegregation can create serious educational, social, and civic problems. See *supra,* at 2820 – 2824. Given the conditions in which school boards work to set policy, see *supra,* at 2811 – 2812, they may need all of the means presently at their disposal to combat those problems. Yet the plurality would deprive them of at least one tool that some districts now consider vital—the limited use of broad race-conscious student population ranges.

I use the words "may need" here deliberately. The plurality, or at least those who follow Justice THOMAS' " 'color-blind' " approach, see *ante,* at 2782 – 2783 (concurring opinion); *Grutter,* 539 U.S., at 353–354, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part), may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. See *ante,* at 2767 – 2768 (plurality opinion); see also *ante,* at 2782 (THOMAS, J., concurring). By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing *de facto* segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for ****2834** them to decide, to quote the plurality's slogan, whether the best "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Ante,* at 2821 – 2822. See also *Parents Involved VII,* 426 F.3d, at 1222 (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race"). That is why the Equal Protection Clause outlaws ***863** invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of "race-conscious" criteria from among their available options. See *Adarand,* 515 U.S., at 237, 115 S.Ct. 2097 ("[S]trict scrutiny" in this context is "[not] 'strict in theory, but fatal in fact' " (quoting *Fullilove,* 448 U.S., at 519, 100 S.Ct. 2758 (Marshall, J., concurring in judgment))). Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America's efforts to create, out of its diversity, one Nation.

VI

Conclusions

To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length. But that length is necessary. I cannot refer to the

history of the plans in these cases to justify the use of race-conscious criteria without describing that history in full. I cannot rely upon *Swann*'s statement that the use of race-conscious limits is permissible without showing, rather than simply asserting, that the statement represents a constitutional principle firmly rooted in federal and state law. Nor can I explain my disagreement with the Court's holding and the plurality's opinion without offering a detailed account of the arguments they propound and the consequences they risk.

Thus, the opinion's reasoning is long. But its conclusion is short: The plans before us satisfy the requirements of the Equal Protection Clause. And it is the plurality's opinion, not this dissent, that "fails to ground the result it would reach in law." *Ante,* at 2815.

Four basic considerations have led me to this view. *First,* the histories of Louisville and Seattle reveal complex circumstances ***864** and a long tradition of conscientious efforts by local school boards to resist racial segregation in public schools. Segregation at the time of *Brown* gave way to expansive remedies that included busing, which in turn gave rise to fears of white flight and resegregation. For decades now, these school boards have considered and adopted and revised assignment plans that sought to rely less upon race, to emphasize greater student choice, and to improve the conditions of all schools for all students, no matter the color of their skin, no matter where they happen to reside. The plans under review—which are less burdensome, more egalitarian, and more effective than prior plans—continue in that tradition. And their history reveals school district goals whose remedial, educational, and democratic elements are inextricably intertwined each with the others. See Part I, *supra,* at 2801 – 2812.

Second, since this Court's decision in *Brown,* the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures to combat segregated schools. The Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities ****2835** and state action that seeks to bring together people of all races. From *Swann* to *Grutter,* this Court's decisions have emphasized this distinction, recognizing that the fate of race relations in this country depends upon unity among our children, "for unless our children begin to learn together, there is little hope that our people will ever learn to live together." *Milliken,* 418 U.S., at 783, 94 S.Ct. 3112 (Marshall, J., dissenting). See also Sumner, Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts (Dec. 4, 1849), in 2 The Works of Charles Sumner 327, 371 (1870) ("The law contemplates not only that all shall be taught, but that *all* shall be taught *together*"). See Part II, *supra,* at 2811 – 2820.

***865** *Third,* the plans before us, subjected to rigorous judicial review, are supported by compelling state interests and are narrowly tailored to accomplish those goals. Just as diversity in higher education was deemed compelling in *Grutter,* diversity in public primary and secondary schools —where there is even more to gain—must be, *a fortiori,* a compelling state interest. Even apart from *Grutter,* five Members of this Court agree that "avoiding racial isolation" and "achiev[ing] a diverse student population" remain today compelling interests. *Ante,* at 2796 – 2797 (opinion of KENNEDY, J.). These interests combine remedial, educational, and democratic objectives. For the reasons discussed above, however, I disagree with Justice KENNEDY that Seattle and Louisville have not done enough to demonstrate that their present plans are necessary to continue upon the path set by *Brown*. These plans are *more* "narrowly tailored" than the race-conscious law school admissions criteria at issue in *Grutter*. Hence, their lawfulness follows *a fortiori* from this Court's prior decisions. See Parts III–IV, *supra,* at 2820 – 2831.

Fourth, the plurality's approach risks serious harm to the law and for the Nation. Its view of the law rests either upon a denial of the distinction between exclusionary and inclusive use of race-conscious criteria in the context of the Equal Protection Clause, or upon such a rigid application of its "test" that the distinction loses practical significance. Consequently, the Court's decision today slows down and sets back the work of local school boards to bring about racially diverse schools. See Part V, *supra,* at 2831 – 2834.

Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a ***866** full range of means to combat segregated schools. Today, they do not.

The Court's decision undermines other basic institutional principles as well. What has happened to *stare decisis?* The history of the plans before us, their educational importance,

their highly limited use of race—all these and more—make clear that the compelling interest here is stronger than in *Grutter*. The plans here are more narrowly tailored than the law school admissions program there at issue. Hence, applying *Grutter*'s strict test, their lawfulness follows *a fortiori*. To hold to the contrary is to transform that test from "strict" to "fatal in fact"—the very opposite of what *Grutter* said. And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law.

And what of respect for democratic local decisionmaking by States and school ****2836** boards? For several decades this Court has rested its public school decisions upon *Swann*'s basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.

And what of law's concern to diminish and peacefully settle conflict among the Nation's people? Instead of accommodating different good-faith visions of our country and our Constitution, today's holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict.

And what of the long history and moral vision that the Fourteenth Amendment itself embodies? The plurality cites in support those who argued in *Brown* against segregation, and Justice THOMAS likens the approach that I have taken to that of segregation's defenders. See *ante,* at 2767 –2768 ***867** (plurality opinion) (comparing Jim Crow segregation to Seattle and Louisville's integration polices); *ante,* at 2783 – 2786 (THOMAS, J., concurring). But segregation policies did not simply tell schoolchildren "where they could and could not go to school based on the color of their skin," *ante,* at 2767 – 2768 (plurality opinion); they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history, see *ante,* at 2767 (same), is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying "a state-mandated racial label." *Ante,* at 2797 (KENNEDY, J., concurring in part and concurring in judgment). But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.

* * *

Finally, what of the hope and promise of *Brown?* For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It ***868** sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

Not everyone welcomed this Court's decision in *Brown*. Three years after that decision was handed down, the Governor of Arkansas ordered state militia to block the doors of a white schoolhouse so that black children could not enter. The President of the United States dispatched the 101st Airborne Division to Little Rock, Arkansas, and federal troops were needed to enforce a desegregation decree. See *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). Today, almost 50 years later, attitudes toward race in this ****2837** Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the

plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.

I must dissent.

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***869** APPENDIXES

A

Resegregation Trends

Percentage of Black Students in 90–100 Percent Nonwhite and Majority Nonwhite Public Schools by Region, 1950–1954 to 2000, Fall Enrollment

Region	1950–1954	1960–1961	1968	1972	1976	1980	1989	1998	2000
Percentage in 90–100% Nonwhite Schools									
Northeast	—	40	42.7	46.9	51.4	48.7	49.8	50.2	51.2
Border	100	59	60.2	54.7	42.5	37.0	33.7	39.7	39.6
South	100	100	77.8	24.7	22.4	23.0	26.0	31.1	30.9
Midwest	53	36	58.0	57.4	51.1	43.6	40.1	45.0	46.3
West	—	27	50.8	42.7	36.3	33.7	26.7	29.9	29.5
U. S.			64.3	38.7	35.9	33.2	33.8	37.4	37.4
Percentage in 50–100% Nonwhite Schools									
Northeast	—	62	66.8	69.9	72.5	79.9	75.4	77.5	78.3
Border	100	69	71.6	67.2	60.1	59.2	58.0	64.8	67.0
South	100	100	80.9	55.3	54.9	57.1	59.3	67.3	69.0
Midwest	78	80	77.3	75.3	70.3	69.5	69.4	67.9	73.3
West	—	69	72.2	68.1	67.4	66.8	67.4	76.7	75.3
U. S.			76.6	63.6	62.4	62.9	64.9	70.1	71.6

Source: C. Clotfelter, After *Brown:* The Rise and Retreat of School Desegregation 56 (2004) (Table 2.1).

****2838**

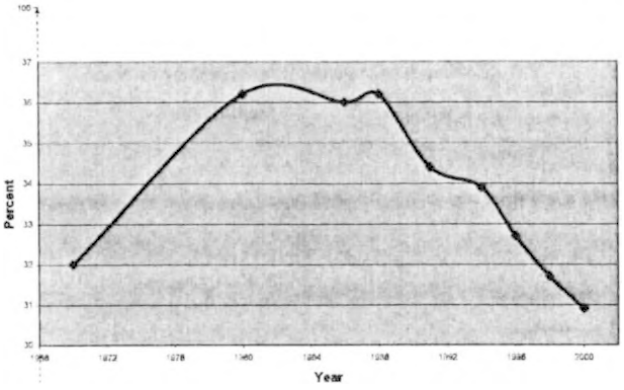
***870 Changes in the Percentage of White Students in Schools Attended by the Average Black Student by State, 1970–2003 (includes States with 5% or greater enrollment of black students in 1970 and 1980)**

	% White	% White Students in School of Average Black Student				Change		
	2003	1970	1980	1991	2003	1970–1980	1980–1991	1991–2003
Alabama	60	33	38	35	30	5	-3	-5
Arkansas	70	43	47	44	36	4	-3	-8
California	33	26	28	27	22	2	-1	-5
Connecticut	68	44	40	35	32	-4	-5	-3
Delaware	57	47	69	65	49	22	-4	-16
Florida	51	43	51	43	34	8	-8	-9
Georgia	52	35	38	35	30	3	-3	-5
Illinois	57	15	19	20	19	4	1	-1
Indiana	82	32	39	47	41	7	8	-6
Kansas	76	52	59	58	51	7	-1	-7
Kentucky	87	49	74	72	65	25	-2	-7
Louisiana	48	31	33	32	27	2	-1	-5
Maryland	50	30	35	29	23	5	-6	-6
Massachusetts	75	48	50	45	38	2	-5	-7
Michigan	73	22	23	22	22	1	-1	0
Mississippi	47	30	29	30	26	-1	1	-4
Missouri	78	21	34	40	33	13	6	-7
Nebraska	80	33	66	62	49	33	-4	-13
New Jersey	58	32	26	26	25	-6	0	-1
New York	54	29	23	20	18	-6	-3	-2
Nevada	51	56	68	62	38	12	-6	-24
N. Carolina	58	49	54	51	40	5	-3	-11
Ohio	79	28	43	41	32	15	-2	-9
Oklahoma	61	42	58	51	42	16	-7	-9
Pennsylvania	76	28	29	31	30	1	2	-1
S. Carolina	54	41	43	42	39	2	-1	-3
Tennessee	73	29	38	36	32	9	-2	-4
Texas	39	31	35	35	27	4	0	-8
Virginia	61	42	47	46	41	5	-1	-5
Wisconsin	79	26	45	39	29	19	-6	-10

Source: G. Orfield & C. Lee, Racial Transformation and the Changing Nature of Segregation 18 (Jan. 2006) (Table 8), online at http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf.

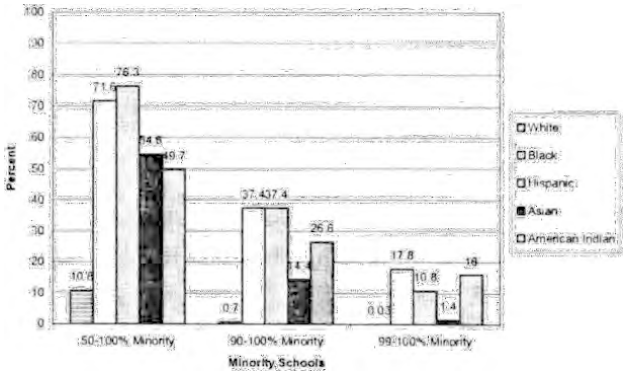
****2839**

***871 Percentage of White Students in Schools Attended by the Average Black Student, 1968–2000**



Source: Modified from E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream?, p. 30, fig. 5 (Jan. 2003), online at http://www.civilrightsproject.harvard.edu/ research / reseg03 / AreWeLosingtheDream.pdf (using U.S. Dept. of Education and National Center for Education Statistics Common Core of Data).

***872 Percentage of Students in Minority Schools by Race, 2000–2001**



Source: *Id.*, at 28, fig. 4.

****2840 *873** B

Sources for Parts I–A and I–B

Part I–A: Seattle

Section 1. Segregation, 1945 to 1956

¶ 1 C. Schmid & W. McVey, Growth and Distribution of Minority Races in Seattle, Washington, 3, 7–9 (1964); Hanawalt 1–7; Taylor, The Civil Rights Movement in the American West: Black Protest in Seattle, 1960–1970, 80 J. Negro Hist. 1, 2–3 (1995); Siqueland 10; D. Pieroth, Desegregating the Public Schools, Seattle, Washington, 1954–1968, p. 6 (Dissertation Draft 1979).

Section 2. Preliminary Challenges, 1956 to 1969

¶ 1 *Id.,* at 32, 41; Hanawalt 4.

¶ 2 *Id.,* at 11–13.

¶ 3 *Id.,* at 5, 13, 27.

Section 3. The NAACP's First Legal Challenge and Seattle's Response, 1966 to 1977

¶ 1 Complaint in *Adams v. Bottomly,* Civ. No. 6704 (WD Wash., Mar. 18, 1966), pp. 10–11.

¶ 2 *Id.,* at 10, 14–15.

¶ 3 Planning and Evaluation Dept., Seattle Public Schools, The Plan Adopted by the Seattle School Board to Desegregate Fifth, Sixth, Seventh, and Eighth Grade Pupils in the Garfield, Lincoln, and Roosevelt High School Districts by September, 1971, pp. 6, 11 (Nov. 12, 1970) (on file with the University of Washington Library); see generally Siqueland 12–15; Hanawalt 18–20.

¶ 4 Siqueland 5, 7, 21.

Section 4. The NAACP's Second Legal Challenge, 1977

¶ 1 Administrative Complaint in *Seattle Branch, NAACP v. Seattle School Dist. No. 1,* pp. 2–3 (OCR, Apr. 22, 1977) ***874** filed with Court as exhibit in *Seattle School Dist. No. 1,* 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896); see generally Siqueland 23–24.

¶ 2 Memorandum of Agreement between Seattle School District No. 1 of King Cty., Washington, and the OCR (June 9, 1978) (filed with the Court as Exh. A to Kiner Affidavit in *Seattle School Dist. No. 1, supra*).

Section 5. The Seattle Plan: Mandatory Busing, 1978 to 1988

¶ 1 See generally *Seattle School Dist. No. 1, supra,* at 461, 102 S.Ct. 3187; Seattle Public Schools Desegregation Planning Office, Proposed Alternative Desegregation Plans: Options for Eliminating Racial Imbalance by the 1979–80 School Year (1977) (filed with the Court in *Seattle School Dist. No. 1, supra*); Hanawalt 36–38, 40; Siqueland 3, 184, Table 4.

¶ 2 *Id.,* at 151–152; Hanawalt 37–38; *Seattle School Dist. No. 1, supra,* at 461; Motion to Dismiss or Affirm in *Seattle School Dist. No. 1,* O.T. 1981, No. 81–9.

¶ 3 *Seattle School Dist. No. 1, supra,* at 461, 102 S.Ct. 3187; Hanawalt 40.

¶ 4 See generally *Seattle School Dist. No. 1, supra.*

Section 6. Student Choice, 1988 to 1998

¶ 1 L. Kohn, Priority Shift: The Fate of Mandatory Busing for School Desegregation in Seattle and the Nation 27–30, 32 (Mar.1996).

¶ 2 *Id.,* at 32–34.

Section 7. The Current Plan, 1999 to the Present

¶ 1 App. in No. 05–908, p. 84a; Brief for Respondents in No. 05–908, at 5–7; *Parents Involved VII,* 426 F.3d, at 1169–1170.

**2841 ¶ 2 App. in No. 05–908, at 39a–42a; Data Profile: District Summary December 2005; Brief for Respondents in No. 05–908, at 9–10, 47; App. in No. 05–908, at 309a; School Board Report, School Choices and Assignments 2005–2006 School *875 Year (Apr. 2005), online at http://www.seattleschools.org/ area/ facilities—plan/ Choice/ 05—06AppsChoicesBoardApril2005final.pdf.

¶ 3 *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 149 Wash.2d 660, 72 P.3d 151 (2003); 137 F.Supp.2d 1224 (WD Wash.2001); *Parents Involved VII, supra*.

Part I–B: Louisville

Section 1. Before the Lawsuit, 1954 to 1972

¶ 1 *Hampton v. Jefferson Cty. Bd. of Ed.,* 72 F.Supp.2d 753, 756, and nn. 2, 4, 5 (WD Ky.1999) *(Hampton I)*.

Section 2. Court–Imposed Guidelines and Busing, 1972 to 1991

¶ 1 *Id.,* at 757–758, 762; *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* 489 F.2d 925 (CA6 1973), vacated and remanded, 418 U.S. 918, 94 S.Ct. 3208, 3209, 41 L.Ed.2d 1160, reinstated with modifications, 510 F.2d 1358 (CA6 1974) *(per curiam);* Judgment and Findings of Fact and Conclusions of Law in *Newburg Area Council, Inc. v. Board of Ed. of Jefferson Cty.,* Nos. 7045 and 7291 (WD Ky., July 30, 1975).

¶ 2 *Id.,* at 2, 3, and Attachment 1.

¶ 3 *Id.,* at 4–16.

¶ 4 Memorandum Opinion and Order in *Haycraft v. Board of Ed. of Jefferson Cty.,* Nos. 7045 and 7291 (WD Ky., June 16, 1978), pp. 1, 2, 4, 18.

¶ 5 Memorandum Opinion and Order, *Haycraft v. Board of Ed. of Jefferson Cty.,* Nos. 7045 and 7291 (WD Ky., Sept. 24, 1985), p. 3; Memorandum from Donald W. Ingwerson, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 1, 3, 5 (Apr. 4, 1984); Memorandum from Donald W. Ingwerson, Superintendent, to the Board of Education, Jefferson County Public School District, pp. 4–5 (Dec. 19, 1991) (1991 Memorandum).

*876 *Section 3. Student Choice and Project Renaissance, 1991 to 1996*

¶ 1 *Id.,* at 1–4, 7–11 (Stipulated Exh. 72); Brief for Respondents in No. 05–915, p. 12, n. 13.

¶ 2 1991 Memorandum 14–16.

¶ 3 *Id.,* at 11, 14–15.

¶ 4 *Id.,* at 15–16; Memorandum from Stephen W. Daeschner, Superintendent, to the Board of Education, Jefferson County Public School District, p. 2 (Aug. 6, 1996) (1996 Memorandum).

Section 4. The Current Plan: Project Renaissance Modified, 1996 to 2003

¶ 1 *Id.,* at 1–4; Brief for Respondents in No. 05–915, at 12, and n. 13.

¶ 2 1996 Memorandum 4–7, and Attachment 2; *Hampton I, supra,* at 768.

¶ 3 1996 Memorandum 5–8; *Hampton I, supra,* at 768, n. 30.

¶ 4 *Hampton II,* 102 F.Supp.2d, at 359, 363, 370, 377.

¶ 5 *Id.,* at 380–381.

Section 5. The Current Lawsuit, 2003 to the Present

¶ 1 *McFarland v. Jefferson Cty. Public Schools,* 330 F.Supp.2d 834 (W.D.Ky.2004); **2842 *McFarland v. Jefferson Cty. Public Schools,* 416 F.3d 513 (CA6, 2005) *(per curiam);* Memorandum from Stephen W. Daeschner, Superintendent, to the Board of Education, Jefferson County Public School District, 3–4 (Apr. 2, 2001).

All Citations

551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508, 75 USLW 4577, 220 Ed. Law Rep. 84, 07 Cal. Daily Op. Serv. 7559, 2007 Daily Journal D.A.R. 9798, 2007 Daily Journal D.A.R. 10,272, 20 Fla. L. Weekly Fed. S 490

Footnotes

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

1 The plan was in effect from 1999–2002, for three school years. This litigation was commenced in July 2000, and the record in the District Court was closed before assignments for the 2001–2002 school year were made. See Brief for Respondents in No. 05–908, p. 9, n. 9. We rely, as did the lower courts, largely on data from the 2000–2001 school year in evaluating the plan. See 426 F.3d 1162, 1169–1171 (C.A.9 2005) (en banc) (*Parents Involved VII*).

2 The racial breakdown of this nonwhite group is approximately 23.8 percent Asian–American, 23.1 percent African–American, 10.3 percent Latino, and 2.8 percent Native–American. See 377 F.3d 949, 1005–1006 (C.A.9 2004) (*Parents Involved VI*) (Graber, J., dissenting).

3 For the 2001–2002 school year, the deviation permitted from the desired racial composition was increased from 10 to 15 percent. App. in No. 05–908, p. 38a. The bulk of the data in the record was collected using the 10 percent band, see n. 1, *supra*.

4 "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1.

5 "No person in the United States shall, on the ground of race ... be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U.S.C. § 2000d.

6 "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Wash. Rev.Code § 49.60.400(1) (2006).

7 Middle and high school students are designated a single resides school and assigned to that school unless it is at the extremes of the racial guidelines. Students may also apply to a magnet school or program, or, at the high school level, take advantage of an open enrollment plan that allows ninth-grade students to apply for admission to any nonmagnet high school. App. in No. 05–915, pp. 39–41, 82–83.

8 It is not clear why the racial guidelines were even applied to Joshua's transfer application—the guidelines supposedly do not apply at the kindergarten level. *Id.,* at 43. Neither party disputes, however, that Joshua's transfer application was denied under the racial guidelines, and Meredith's objection is not that the guidelines were misapplied but rather that race was used at all.

9 Meredith joined a pending lawsuit filed by several other plaintiffs. See *id.,* at 7–11. The other plaintiffs all challenged assignments to certain specialized schools, and the District Court found these assignments, which are no longer at issue in this case, unconstitutional. *McFarland I,* 330 F.Supp.2d 834, 837, 864 (W.D.Ky.2004).

10 The districts point to dicta in a prior opinion in which the Court suggested that, while not constitutionally mandated, it would be constitutionally permissible for a school district to seek racially balanced schools as a matter of "educational policy." See *Swann v. Charlotte–Mecklenburg Bd. of Ed.,* 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The districts also quote with approval an in-chambers opinion in which then-Justice Rehnquist made a suggestion to the same effect. See *Bustop, Inc. v. Los Angeles Bd. of Ed.,* 439 U.S. 1380, 1383, 99 S.Ct. 40, 58 L.Ed.2d 88 (1978). The citations do not carry the significance the districts would ascribe to them. *Swann,* evaluating a school district engaged in court-ordered desegregation, had no occasion to consider whether a district's voluntary adoption of race-based assignments in the absence of a finding of prior *de jure* segregation was constitutionally permissible, an issue that was again expressly reserved in *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 472, n. 15, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). *Bustop,* addressing in the context of an emergency injunction application a busing plan imposed by the Superior Court of Los Angeles County, is similarly unavailing. Then–Justice Rehnquist, in denying emergency relief, stressed that "equitable consideration[s]" counseled against preliminary relief. 439 U.S., at 1383, 99 S.Ct. 40. The propriety of preliminary relief and resolution of the merits are of course "significantly different" issues. *University of Texas v. Camenisch,* 451 U.S. 390, 393, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

11 The way Seattle classifies its students bears this out. Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, "[t]he application will not be accepted and, if necessary, the enrollment service person taking the application will indicate one box." App. in No. 05–908, at 303a.

12 Jefferson County also argues that it would be incongruous to hold that what was constitutionally required of it one day —race-based assignments pursuant to the desegregation decree—can be constitutionally prohibited the next. But what was constitutionally required of the district prior to 2000 was the elimination of the vestiges of prior segregation—not racial proportionality in its own right. See *Freeman v. Pitts,* 503 U.S. 467, 494–496, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). Once those vestiges were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds.

13 Data for the Seattle schools in the several years since this litigation was commenced further demonstrate the minimal role that the racial tiebreaker in fact played. At Ballard, in 2005–2006—when no class at the school was subject to the racial tiebreaker—the student body was 14.2 percent Asian–American, 9 percent African–American, 11.7 percent Latino, 62.3 percent Caucasian, and 2.8 percent Native–American. Reply Brief for Petitioner in No. 05–908, p. 7. In 2000–2001, when the racial tiebreaker was last used, Ballard's total enrollment was 17.5 percent Asian–American, 10.8 percent African–American, 10.7 percent Latino, 56.4 percent Caucasian, and 4.6 percent Native–American. App. in No. 05–908, at 283a. Franklin in 2005–2006 was 48.9 percent Asian–American, 33.5 percent African–American, 6.6 percent Latino, 10.2 percent Caucasian, and 0.8 percent Native–American. Reply Brief for Petitioner in No. 05–908, at 7. With the racial tiebreaker in 2000–2001, total enrollment was 36.8 percent Asian–American, 32.2 percent African–American, 5.2 percent Latino, 25.1 percent Caucasian, and 0.7 percent Native–American. App. in No. 05–908, at 284a. Nathan Hale's 2005–2006 enrollment was 17.3 percent Asian–American, 10.7 percent African–American, 8 percent Latino, 61.5 percent Caucasian, and 2.5 percent Native–American. Reply Brief for Petitioner in No. 05–908, at 7. In 2000–2001, with the racial tiebreaker, it was 17.9 percent Asian–American, 13.3 percent African–American, 7 percent Latino, 58.4 percent Caucasian, and 3.4 percent Native–American. App. in No. 05–908, at 286a.

14 In contrast, Seattle's Web site formerly described "emphasizing individualism as opposed to a more collective ideology" as a form of "cultural racism," and currently states that the district has no intention " 'to hold onto unsuccessful concepts such as [a] ... colorblind mentality.' " Harrell, School Web Site Removed: Examples of Racism Sparked Controversy, Seattle Post–Intelligencer, June 2, 2006, pp. B1, B5. Compare *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law").

15 Justice BREYER makes much of the fact that in 1978 Seattle "settled" an NAACP complaint alleging illegal segregation with the federal Office for Civil Rights (OCR). See *post,* at 2802, 2804, 2809 – 2810, 2812. The memorandum of agreement between Seattle and OCR, of course, contains no admission by Seattle that such segregation ever existed or was ongoing at the time of the agreement, and simply reflects a "desire to avoid the incovenience [*sic*] and expense of a formal OCR investigation," which OCR was obligated under law to initiate upon the filing of such a complaint. Memorandum of Agreement between Seattle School District No. 1 of King County, Washington, and the OCR, U.S. Dept. of Health, Education, and Welfare 2 (June 9, 1978); see also 45 CFR § 80.7(c) (2006).

16 In fact, all the cases Justice BREYER's dissent cites as evidence of the "prevailing legal assumption," see *post,* at 2813 – 2815, were decided before this Court definitively determined that "all racial classifications ... must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Many proceeded under the now-rejected view that classifications seeking to benefit a disadvantaged racial group should be held to a lesser standard of review. See, *e.g., Springfield School Comm. v. Barksdale,* 348 F.2d 261, 266 (C.A.1 1965). Even if this purported distinction, which Justice STEVENS would adopt, *post,* at 2798, n. 3 (dissenting opinion), had not been already rejected by this Court, the distinction has no relevance to these cases, in which students of all races are excluded from the schools they wish to attend based solely on the racial classifications. See, *e.g.,* App. in No. 05–908, at 202a (noting that 89 nonwhite students were denied assignment to a particular school by operation of Seattle's racial tiebreaker).

Justice STEVENS's reliance on *School Comm. of Boston v. Board of Ed.,* 352 Mass. 693, 227 N.E.2d 729 (1967), appeal dism'd, 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778 (1968) (*per curiam*), *post,* at 2798 – 2800, is inapposite for the same reason that many of the cases cited by Justice BREYER are inapposite; the case involved a Massachusetts law that required school districts to avoid racial imbalance in schools but did not specify how to achieve this goal—and certainly did not require express racial classifications as the means to do so. The law was upheld under rational-basis review, with the state court explicitly rejecting the suggestion—which is now plainly the law—that "racial group classifications bear a far heavier burden of justification." 352 Mass., at 700, 227 N.E.2d, at 734 (internal quotation marks omitted). The passage Justice STEVENS quotes proves our point; all the quoted language says is that the school committee "shall prepare a plan to eliminate imbalance." *Id.,* at 695, 227 N.E.2d, at 731; see *post,* at 2799, n. 5. Nothing in the opinion approves use of racial classifications as the means to address the imbalance. The suggestion that our decision today is somehow inconsistent with our disposition of that appeal is belied by the fact that neither the lower courts, the respondent school districts, nor any of their 51 *amici* saw fit even to cite the case. We raise this fact not to argue that the dismissal should be afforded any different *stare decisis* effect, but rather simply to suggest that perhaps—for the reasons noted above—the dismissal does not mean what Justice STEVENS believes it does.

17 Justice BREYER also tries to downplay the impact of the racial assignments by stating that in Seattle "students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria)." *Post,* at 2824 – 2825. This presumably refers to the district's decision to cease, for 2001–2002 school year assignments, applying the racial tiebreaker to students seeking to transfer to a different school after ninth grade. See App. in No. 05–908, at 137a–139a. There are obvious disincentives for students to transfer to a different school after a full quarter of their high school experience has passed, and the record sheds no light on how transfers to the oversubscribed high schools are handled.

1 In this Court's paradigmatic segregation cases, there was a local ordinance, state statute, or state constitutional provision requiring racial separation. See, *e.g.,* Brief for Petitioners in *Bolling v. Sharpe,* O.T.1952, No. 413, pp. 28–30 (cataloging state laws requiring separation of the races); *id.,* at App. A (listing "Statutory and Constitutional Provisions in the States Where Segregation in Education is Institutionalized").

2 The dissent refers repeatedly and reverently to " 'integration.' " However, outside of the context of remediation for past *de jure* segregation, "integration" is simply racial balancing. See *post,* at 2820. Therefore, the school districts' attempts to further "integrate" are properly thought of as little more than attempts to achieve a particular racial balance.

3 The dissent's assertion that these plans are necessary for the school districts to maintain their "hard-won gains" reveals its conflation of segregation and racial imbalance. *Post,* at 2820 – 2821. For the dissent's purposes, the relevant hard-won gains are the present racial compositions in the individual schools in Seattle and Louisville. However, the actual hard-won gain in these cases is the elimination of the vestiges of the system of state-enforced racial separation that once existed in Louisville. To equate the achievement of a certain statistical mix in several schools with the elimination of the system of systematic *de jure* segregation trivializes the latter accomplishment. Nothing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs. See Part II–B, *infra*. But "the principle of inherent equality that underlies and infuses our Constitution" required the disestablishment of *de jure* segregation. See *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment). Assessed in any objective manner, there is no comparison between the two.

4 The dissent makes much of the supposed difficulty of determining whether prior segregation was *de jure* or *de facto*. See, *e.g., post,* at 2810 – 2811. That determination typically will not be nearly as difficult as the dissent makes it seem. In most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races. See, *e.g.,* n. 1, *supra*. And even if the determination is difficult, it is one the dissent acknowledges must be made to determine what remedies school districts are required to adopt. *Post,* at 2823.

5 This Court's opinion in *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), fits comfortably within this framework. There, a Georgia school board voluntarily adopted a desegregation plan. At the time of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), Georgia's Constitution required that "[s]eparate schools shall

be provided for the white and colored races." Ga. Const., Art. VIII, § 2–6401 (1945). Given that state law had previously required the school board to maintain a dual school system, the county was obligated to take measures to remedy its prior *de jure* segregation. This Court recognized as much in its opinion, which stated that the school board had an "affirmative duty to disestablish the dual school system." *McDaniel, supra,* at 41, 91 S.Ct. 1287.

6 As I have explained elsewhere, the remedies this Court authorized lower courts to compel in early desegregation cases like *Green* and *Swann* were exceptional. See *Missouri v. Jenkins,* 515 U.S. 70, 124–125, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (concurring opinion). Sustained resistance to *Brown* prompted the Court to authorize extraordinary race-conscious remedial measures (like compelled racial mixing) to turn the Constitution's dictate to desegregate into reality. 515 U.S., at 125, 115 S.Ct. 2038 (THOMAS, J., concurring). Even if these measures were appropriate as remedies in the face of widespread resistance to *Brown*'s mandate, they are not forever insulated from constitutional scrutiny. Rather, "such powers should have been temporary and used only to overcome the widespread resistance to the dictates of the Constitution." 515 U.S., at 125, 115 S.Ct. 2038 (THOMAS, J., concurring).

7 Though the dissent cites every manner of complaint, record material, and scholarly article relating to Seattle's race-based student-assignment efforts, *post,* at 2839 – 2841, it cites no law or official policy that required separation of the races in Seattle's schools. Nevertheless, the dissent tries to cast doubt on the historical fact that the Seattle schools were never segregated by law by citing allegations that the National Association for the Advancement of Colored People and other organizations made in court filings to the effect that Seattle's schools were once segregated by law. See *post,* at 2803 – 2805, 2812. These allegations were never proved and were not even made in this case. Indeed, the record before us suggests the contrary. See App. in No. 05–908, pp. 214a, 225a, 257a. Past allegations in another case provide no basis for resolving these cases.

8 Contrary to the dissent's argument, *post,* at 2823 – 2824, the Louisville school district's interest in remedying its past *de jure* segregation did vanish the day the District Court found that Louisville had eliminated the vestiges of its historic *de jure* segregation. See *Hampton v. Jefferson Cty. Bd. of Ed.,* 102 F.Supp.2d 358, 360 (W.D.Ky.2000). If there were further remediation to be done, the District Court could not logically have reached the conclusion that Louisville "ha [d] eliminated the vestiges associated with the former policy of segregation and its pernicious effects." *Ibid.* Because Louisville could use race-based measures only as a remedy for past *de jure* segregation, it is not "incoherent," *post,* at 2830, to say that race-based decisionmaking was allowed to Louisville one day—while it was still remedying—and forbidden to it the next—when remediation was finished. That seemingly odd turnaround is merely a result of the fact that the remediation of *de jure* segregation is a jealously guarded exception to the Equal Protection Clause's general rule against government race-based decisionmaking.

9 The dissent's appeal to *stare decisis, post,* at 2835, is particularly ironic in light of its apparent willingness to depart from these precedents, *post,* at 2819 – 2820.

10 The idea that government racial classifications must be subjected to strict scrutiny did not originate in *Adarand*. As early as *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), this Court made clear that government action that "rest[s] solely upon distinctions drawn according to race" had to be "subjected to the 'most rigid scrutiny.' " *Id.,* at 11, 87 S.Ct. 1817 (quoting *Korematsu v. United States,* 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944)); see also *McLaughlin v. Florida,* 379 U.S. 184, 196, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (requiring a statute drawing a racial classification to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy"); *id.,* at 197, 85 S.Ct. 283 (Harlan, J., concurring) ("The necessity test ... should be equally applicable in a case involving state racial discrimination").

11 At least one of the academic articles the dissent cites to support this proposition fails to establish a causal connection between the supposed educational gains realized by black students and racial mixing. See Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733 (1998). In the pages following the ones the dissent cites, the author of that article remarks that "the main reason white and minority students perform better academically in majority white schools is likely that these schools provide greater opportunities to learn. In other words, it is not desegregation per se that improves achievement, but rather the learning advantages some desegregated schools provide." *Id.,* at 744. Evidence that race is a good proxy for other factors that might be correlated with educational benefits does not support a compelling interest in the use of race to achieve academic results.

12 Of course, if the Seattle School Board were truly committed to the notion that diversity leads directly to educational benefits, operating a school with such a high "nonwhite" enrollment would be a shocking dereliction of its duty to educate the students enrolled in that school.

13 In fact, the available data from the Seattle school district appear to undercut the dissent's view. A comparison of the test results of the schools in the last year the racial balancing program operated to the results in the 2004–to–2005 school year (in which student assignments were race neutral) does not indicate the decline in black achievement one would expect to find if black achievement were contingent upon a particular racial mix. See Washington State Report Card, online at http://reportcard. ospi.k12.wa.us/summary.aspx?schoolId=1099&OrgType=4&reportLevel=School; http://reportcard.ospi.k12.wa.us/summary.aspx? schoolId=1104&reportLevel=School&orgLinkId=1104&yrs=; http: // reportcard. ospi.k12.wa.us/ summary.aspx?schoolId=1061&report Level=School&orgLinkId=1061&yrs=; http:// reportcard.ospi.k12.wa.us/sum mary.aspx?schoolId=1043&reportLevel=School&orgLinkId=1043&yrs= (showing that reading scores went up, not down, when Seattle's race-based assignment program ended at Sealth High School, Ingraham High School, Garfield High School, and Franklin High School—some of the schools most affected by the plan).

14 The dissent accuses me of "feel[ing] confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria" and chastises me for not deferring to democratically elected majorities. See *post,* at 2833 – 2834. Regardless of what Justice BREYER's goals might be, this Court does not sit to "create a society that includes all Americans" or to solve the problems of "troubled inner–city schooling." *Ibid.* We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

It should escape no one that behind Justice BREYER's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all.

15 The notion that a "democratic" interest qualifies as a compelling interest (or constitutes a part of a compelling interest) is proposed for the first time in today's dissent and has little basis in the Constitution or our precedent, which has narrowly restricted the interests that qualify as compelling. See *Grutter v. Bollinger,* 539 U.S. 306, 351–354, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (THOMAS, J., concurring in part and dissenting in part). The Fourteenth Amendment does not enact the dissent's newly minted understanding of liberty. See *Lochner v. New York,* 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

16 The dissent does not explain how its recognition of an interest in teaching racial understanding and cooperation here is consistent with the Court's rejection of a similar interest in *Wygant*. In *Wygant,* a school district justified its race-based teacher-layoff program in part on the theory that "minority teachers provided 'role models' for minority students and that a racially 'diverse' faculty would improve the education of all students." *Grutter, supra,* at 352, 123 S.Ct. 2325 (opinion of THOMAS, J.) (citing Brief for Respondents, O.T.1985, No. 84–1340, pp. 27–28; *Wygant*, 476 U.S., at 315, 106 S.Ct. 1842 (STEVENS, J., dissenting)). The Court rejected the interests asserted to justify the layoff program as insufficiently compelling. *Id.*, at 275–276, 106 S.Ct. 1842 (plurality opinion); *id.,* at 295, 106 S.Ct. 1842 (White, J., concurring in judgment). If a school district has an interest in teaching racial understanding and cooperation, there is no logical reason why that interest should not extend to the composition of the teaching staff as well as the composition of the student body. The dissent's reliance on this interest is, therefore, inconsistent with *Wygant*.

17 Outside the school context, this Court's cases reflect the fact that racial mixing does not always lead to harmony and understanding. In *Johnson v. California,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005), this Court considered a California prison policy that separated inmates racially. *Id.,* at 525–528, 125 S.Ct. 1141 (THOMAS, J., dissenting). That policy was necessary because of "numerous incidents of racial violence." *Id.,* at 502, 125 S.Ct. 1141 (opinion of the Court); *id.*, at 532–534, 125 S.Ct. 1141 (THOMAS, J., dissenting). As a result of this Court's insistence on strict scrutiny of that policy, but see *id.,* at 538–547, 125 S.Ct. 1141, inmates in the California prisons were killed. See *Beard v. Banks,*

548 U.S. 521, 536 – 537, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (THOMAS, J., concurring in judgment) (noting that two were killed and hundreds were injured in race rioting subsequent to this Court's decision in *Johnson*).

18 After discussing the "democratic element," the dissent repeats its assertion that the social science evidence supporting that interest is "sufficiently strong to permit a school board to determine ... that this interest is compelling." *Post,* at 2821 – 2822. Again, though, the school boards have no say in deciding whether an interest is compelling. Strict scrutiny of race-based government decisionmaking is more searching than *Chevron*-style administrative review for reasonableness. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

19 The dissent halfheartedly attacks the historical underpinnings of the colorblind Constitution. *Post,* at 2815 – 2816. I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members. *Post,* at 2815 (citing *Slaughter–House Cases,* 16 Wall. 36, 71–72, 21 L.Ed. 394 (1873)). What the dissent fails to understand, however, is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. See, *e.g.,* Part I–B, *supra.* Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution.

20 See also Juris. Statement in *Davis v. County School Board,* O.T.1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Tr. of Oral Arg. in *Brown v. Board of Education,* O.T.1952, No. 8, p. 7 ("We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens"); Tr. of Oral Arg. in *Briggs v. Elliott* et al., O.T.1953, No. 2 etc., p. 50 ("[T]he state is deprived of any power to make any racial classifications in any governmental field").

21 See also Brief for Appellees in *Davis v. County School Board,* O.T.1952, No. 191, p. 1 ("[T]he Court is asked ... to outlaw the fixed policies of the several States which are based on local social conditions well known to the respective legislatures"); *id.,* at 9 ("For this purpose, Virginia history and present Virginia conditions are important"); Tr. of Oral Arg. in *Davis v. County School Board,* O.T.1952, No. 191, p. 57 ("[T]he historical background that exists, certainly in this Virginia situation, with all the strife and the history that we have shown in this record, shows a basis, a real basis, for the classification that has been made"); *id.,* at 69 (describing the potential abolition of segregation as "contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races"). Accord, *post,* at 2836 – 2837 ("Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced"); *post,* at 2811 (emphasizing the importance of "local circumstances" and encouraging different localities to "try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs" (internal quotation marks omitted)); post, *at 2826 (emphasizing the school districts' "40–year history" during which both school districts have tried numerous approaches "to achieve more integrated schools");* post, *at 2834 ("[T]he histories of Louisville and Seattle reveal complex circumstances and a long tradition of conscientious efforts by local school boards"*).

22 See also Brief for Appellees in *Brown v. Board of Education,* O.T.1952, No. 8, p. 29 (" 'It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power .... And in no field is this right of the several states more clearly recognized than in that of public education' " (quoting *Briggs v. Elliott,* 98 F.Supp. 529, 532 (E.D.S.C.1951))); Brief for Appellees in *Briggs v. Elliott,* O.T.1952, No. 101, p. 7 ("Local self-government in local affairs is essential to the peace and happiness of each locality and to the strength and stability of our whole federal system. Nowhere is this more profoundly true than in the field of education"); Tr. of Oral Arg. in *Briggs v. Elliott,* O.T.1952, No. 101, pp. 54–55 ("What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of government the one which most nearly approaches the hearts and minds of people, the question of the education of their young? Is it not

the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before their children are forced into what may be an unwelcome contact?"). Accord, *post,* at 2826 ("[L]ocal school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils"); *post,* at 2835 – 2836 ("[W]hat of respect for democratic local decisionmaking by States and school boards?"); *ibid.* (explaining "that the Constitution grants local school districts a significant degree of leeway").

23 See also Brief for Appellees in Reply to Supp. Brief for the United States on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, p. 17 ("The Court is ... dealing with thousands of local school districts and schools. Is each to be the subject of litigation in the District Courts?"); Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, p. 51 ("The delicate nature of the problem of segregation and the paramount interest of the State of Kansas in preserving the internal peace and tranquility of its people indicates that this is a question which can best be solved on the local level, at least until Congress declares otherwise"). Accord, *post,* at 2833 ("At a minimum, the plurality's views would threaten a surge of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes .... In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm"); *post,* at 2835 ("Indeed, the consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not"); *post,* at 2835 – 2836 (predicting "further litigation, aggravating race-related conflict").

24 See also Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm in *Davis v. County School Board,* O.T.1952, No. 191, p. 5 ("[I]t would be difficult to find from any field of law a legal principle more repeatedly and conclusively decided than the one sought to be raised by appellants"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, pp. 46–47 ("If this case were to be decided solely on the basis of precedent, this brief could have been much more limited. There is ample precedent in the decisions of this Court to uphold school segregation"); Brief for Petitioners in *Gebhart v. Belton,* O.T.1952, No. 448, p. 27 ("Respondents ask this Court to upset a long established and well settled principle recognized by numerous state Legislatures, and Courts, both state and federal, over a long period of years"); Tr. of Oral Arg. in *Briggs v. Elliott,* et al., O.T.1953, No. 2 etc., at 79 ("But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance .... We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine. We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-a-vis the Fourteenth Amendment. We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia"); App. D. Brief for Appellees in *Briggs v. Elliott,* O.T.1952, No. 101 (collecting citations of state and federal cases "[w]hich [e]nunciate the [p]rinciple that [s]tate [l]aws [p]roviding for [r]acial [s]egregation in the [p]ublic [s]chools do not [c]onflict with the Fourteenth Amendment"). Accord, *post,* at 2811 – 2812 ("[T]he Court set forth in *Swann* a basic principle of constitutional law—a principle of law that has found wide acceptance in the legal culture" (internal quotation marks omitted)); *post,* at 2813 ("Lower state and federal courts had considered the matter settled and uncontroversial even before this Court decided *Swann* "); *post,* at 2813 – 2814 ("Numerous state and federal courts explicitly relied upon *Swann*'s guidance for decades to follow"); *post,* at 2814 – 2815 (stating "how lower courts understood and followed *Swann*'s enunciation of the relevant legal principle"); *post,* at 2816 ("The constitutional principle enunciated in *Swann,* reiterated in subsequent cases, and relied upon over many years, provides, and has widely been thought to provide, authoritative legal guidance"); *post,* at 2833 ("[T]oday's opinion will require setting aside the laws of several States and many local communities"); *post,* at 2835 – 2836 ("And what has happened to *Swann?* To *McDaniel?* To *Crawford?* To *Harris?* To *School Committee of Boston?* To *Seattle School Dist. No. 1?* After decades of vibrant life, they would all, under the plurality's logic, be written out of the law").

25 Compare Brief for Appellees in *Davis v. County School Board,* O.T.1952, No. 191, at 16–17 (" 'It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered' " (quoting *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 110, 69 S.Ct. 463, 93 L.Ed. 533 (1949))); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 76 ("The question is a practical one for them to solve; it is not subject to solution in the theoretical realm of abstract principles"); Tr. of Oral Arg. in *Briggs v. Elliot* et al., O.T.1953, No. 2 etc., at 86 ("[Y]ou cannot talk about this problem just in a vacuum in the manner of a law school discussion"), with *post,* at 2830 – 2831 ("The Founders meant the Constitution as a practical document").

26 Compare Brief for Kansas on Reargument in *Brown v. Board of Education,* O.T.1953, No. 1, at 57 ("[T]he people of Kansas ... are abandoning the policy of segregation whenever local conditions and local attitudes make it feasible"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 76 ("As time passes, it may well be that segregation will end"), with *post,* at 2810 ("[T]hey use race-conscious criteria in limited and gradually diminishing ways"); *post,* at 2826 ("[E]ach plan's use of race-conscious elements is *diminished* compared to the use of race in preceding integration plans"); *post,* at 2829 – 2830 (describing the "historically diminishing use of race" in the school districts).

27 It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. See *post,* at 2833–2834. How does one tell when a racial classification is invidious? The segregationists in *Brown* argued that their racial classifications were benign, not invidious. See Tr. of Oral Arg. in *Briggs v. Elliott,* et al., O.T.1953, No. 2 etc., at 83 ("It [South Carolina] is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"); Brief for Appellees on Reargument in *Davis v. County School Board,* O.T.1953, No. 4, at 82–83 ("Our many hours of research and investigation have led only to confirmation of our view that segregation by race in Virginia's public schools at this time not only does not offend the Constitution of the United States but serves to provide a better education for living for the children of both races"); Tr. of Oral Arg. in *Davis v. County School Board,* O.T.1952, No. 191, at 71 ("[T]o make such a transition, would undo what we have been doing, and which we propose to continue to do for the uplift and advancement of the education of both races. It would stop this march of progress, this onward sweep"). It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.

28 See also *id.,* at 8–9 ("It has been urged that [these state laws and policies] derive validity as a consequence of a long duration supported and made possible by a long line of judicial decisions, including expressions in some of the decisions of this Court. At the same time, it is urged that these laws are valid as a matter of constitutionally permissible social experimentation by the States. On the matter of stare decisis, I submit that the duration of the challenged practice, while it is persuasive, is not controlling .... As a matter of social experimentation, the laws in question must satisfy the requirements of the Constitution. While this Court has permitted the States to legislate or otherwise officially act experimentally in the social and economic fields, it has always recognized and held that this power is subject to the limitations of the Constitution, and that the tests of the Constitution must be met"); Reply Brief for Appellants on Reargument in *Briggs v. Elliott* et al., O.T.1953, No. 2 etc., pp. 18–19 ("The truth of the matter is that this is an attempt to place local mores and customs above the high equalitarian principles of our Government as set forth in our Constitution and particularly the Fourteenth Amendment. This entire contention is tantamount to saying that the vindication and enjoyment of constitutional rights recognized by this Court as present and personal can be postponed whenever such postponement is claimed to be socially desirable").

29 The dissent does not face the complicated questions attending its proposed standard. For example, where does the dissent's principle stop? Can the government force racial mixing against the will of those being mixed? Can the government force black families to relocate to white neighborhoods in the name of bringing the races together? What about historically black colleges, which have "established traditions and programs that might disproportionately appeal to one race or another"? *United States v. Fordice,* 505 U.S. 717, 749, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring). The dissent does not and cannot answer these questions because the contours of the distinction it propounds rest entirely in the eye of the beholder.

30 Justice BREYER's good intentions, which I do not doubt, have the shelf life of Justice BREYER's tenure. Unlike the dissenters, I am unwilling to delegate my constitutional responsibilities to local school boards and allow them to experiment with race-based decisionmaking on the assumption that their intentions will forever remain as good as Justice BREYER's. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) ("If men were angels, no government would be necessary"). Indeed, the racial theories endorsed by the Seattle School Board should cause the dissenters to question whether local school boards should be entrusted with the power to make decisions on the basis of race. The Seattle school district's Website formerly contained the following definition of "cultural racism": " 'Those aspects of society that overtly and covertly attribute value and normality to white people and whiteness, and devalue, stereotype, and label people of color as "other," different, less than, or render them invisible. Examples of these norms include defining white skin tones as nude or flesh colored, having a future time orientation, emphasizing individualism as opposed to a more collective ideology, defining one form of English as standard....' " See Harrell, School Web Site Removed: Examples

of Racism Sparked Controversy, Seattle Post–Intelligencer, June 2, 2006, pp. B1, B5. After the site was removed, the district offered the comforting clarification that the site was not intended " 'to hold onto unsuccessful concepts such as melting pot or colorblind mentality.' " *Ibid.;* see also *ante,* at 2761, n. 14 (plurality opinion).

More recently, the school district sent a delegation of high school students to a "White Privilege Conference." See Equity and Race Relations White Privilege Conference, http://www.seattleschools.org/area/equityand race/ whiteprivilegeconference.xml. One conference participant described "white privilege" as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious. White Privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks." See White Privilege Conference, Questions and Answers, http://www.uccs.edu/ wpc/ faqs.htm; see generally Westneat, District's Obsessed with Race, Seattle Times, Apr. 1, 2007, p. B1 (describing racial issues in Seattle schools).

1 Le Lys Rouge (The Red Lily) 95 (W. Stephens transl. 6th ed.1922).

2 See, *e.g.,* J. Wilkinson, From *Brown* to *Bakke* 11 (1979) ("Everyone understands that *Brown v. Board of Education* helped deliver the Negro from over three centuries of legal bondage"); Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424–425 (1960) ("History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality").

3 I have long adhered to the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason. See, *e.g., Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 243, 248, n. 6, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (STEVENS, J., dissenting); *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (same). This distinction is critically important in the context of education. While the focus of our opinions is often on the benefits that minority schoolchildren receive from an integrated education, see, *e.g., ante,* at 2753 – 2754 (THOMAS, J., concurring), children of *all* races benefit from integrated classrooms and playgrounds, see *Wygant,* 476 U.S., at 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 ("[T]he fact that persons of different races do, indeed, have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it").

4 THE CHIEF JUSTICE twice cites my dissent in *Fullilove v. Klutznick,* 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). See *ante,* at 2752, 2758. In that case, I stressed the importance of confining a remedy for *past* wrongdoing to the members of the injured class. See 448 U.S., at 539, 100 S.Ct. 2758. The present cases, unlike *Fullilove* but like our decision in *Wygant,* 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, require us to "ask whether the Board[s'] action [s] advanc[e] the public interest in educating children for the *future,*" *id*., at 313, 106 S.Ct. 1842 (STEVENS, J., dissenting) (emphasis added). See *ibid*. ("In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future"). See also *Adarand,* 515 U.S., at 261–262, 115 S.Ct. 2097 (STEVENS, J., dissenting) ("This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors").

5 THE CHIEF JUSTICE states that the Massachusetts racial imbalance Act did not require express classifications. See *ante,* at 2762 – 2763, n. 16. This is incorrect. The Massachusetts Supreme Judicial Court expressly stated:

"The racial imbalance act requires the school committee of every municipality annually to submit statistics showing the percentage of nonwhite pupils in all public schools and in each school. Whenever the board finds that racial imbalance exists in a public school, it shall give written notice to the appropriate school committee, which shall prepare a plan to eliminate imbalance and file a copy with the board. 'The term "racial imbalance" refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school.' " 352 Mass., at 695, 227 N.E.2d, at 731.

6 Compare *ante,* at 2767 ("It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954"), with Juris. Statement in *School Comm. of Boston v. Board of Education,* O.T.1967, No. 759, p. 11 ("It is implicit in *Brown v. Board of Education*[,] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873[(1954)], that color or race is a constitutionally impermissible standard for the assignment of school children to public schools. We construe *Brown* as endorsing Mr. Justice Harlan's classical statement in *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 [(1896) (dissenting opinion)]: 'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens' ").

7 In 1968 our mandatory jurisdiction was defined by the provision of the 1948 Judicial Code then codified at 28 U.S.C. § 1257, see 62 Stat. 929; that provision was repealed in 1988, see 102 Stat. 662.

8 For example, prior to our decision in *School Comm. of Boston,* the Illinois Supreme Court had issued an unpublished opinion holding unconstitutional a similar statute aimed at eliminating racial imbalance in public schools. See Juris. Statement in *School Comm. of Boston v. Board of Education,* O.T.1967, No. 759, at 9 ("Unlike the Massachusetts Court, the Illinois Supreme Court has recently held its law to eliminate racial imbalance unconstitutional on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment"); *ibid.,* n. 1. However, shortly after we dismissed the Massachusetts suit for want of a substantial federal question, the Illinois Supreme Court reversed course and upheld its statute in the published decision that Justice BREYER extensively quotes in his dissent. See *Tometz v. Board of Ed., Waukegan City School Dist. No. 61,* 39 Ill.2d 593, 237 N.E.2d 498 (1968). In so doing, the Illinois Supreme Court acted in explicit reliance on our decision in *School Comm. of Boston.* See 39 Ill.2d, at 599–600, 237 N.E.2d, at 502 ("Too, the United States Supreme Court on January 15, 1968, dismissed an appeal in *School Committee of Boston v. Board of Education,* (Mass.1967) 352 Mass. 693, 227 N.E.2d 729, which challenged the statute providing for elimination of racial imbalance in public schools 'for want of a substantial federal question.' 389 U.S. 572, 88 S.Ct. 692, 19 L.Ed.2d 778").

8 N.Y.3d 70, 861 N.E.2d 75, 828
N.Y.S.2d 260, 2006 N.Y. Slip Op. 09499

**1 The People of the State
of New York, Respondent
v
Michael Barton, Appellant.

Court of Appeals of New York
Argued November 14, 2006

Decided December 19, 2006

CITE TITLE AS: People v Barton

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Monroe County Court (Alex R. Renzi, J.), entered March 10, 2006. The County Court (1) reversed an order of the Rochester City Court (Ann E. Pfeiffer, J.; op 8 Misc 3d 291), which had declared Rochester City Code § 44-4 (H) unconstitutional and invalid and granted defendant's motion to dismiss the accusatory instrument; (2) declared section 44-4 (H) constitutional; and (3) remanded the case to Rochester City Court for further proceedings on the accusatory instrument.

People v Barton, 12 Misc 3d 322, affirmed.

HEADNOTES

Constitutional Law
Validity of Statute
Ordinance Addressing Aggressive Panhandling--Challenge to Ordinance as Overbroad

(1) Assuming that panhandling is speech or expressive conduct safeguarded by the First Amendment, entitled to protection tantamount to that afforded eleemosynary appeals by organized charities, defendant, who was charged with violating a municipal ordinance designed to address aggressive panhandling by prohibiting the solicitation of any occupant of a motor vehicle that is on a street or other public place, was entitled to challenge the ordinance as overbroad on behalf of others whose constitutionally-protected expression was potentially "chilled" by the provision's very existence, even though defendant's own conduct may have been unshielded by the First Amendment.

Constitutional Law
Validity of Statute
Ordinance Addressing Aggressive Panhandling

(2) A municipal ordinance designed to address aggressive panhandling by prohibiting the solicitation of any occupant of a motor vehicle that is on a street or other public place is not unconstitutionally overbroad. Content-neutral regulations of time, place and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. The governmental interests served by the ordinance--to eliminate a source of distraction for motorists and thus promote the free and safe flow of traffic--are significant. Further, the ordinance is not a blanket ban and leaves open ample alternative avenues to communicate any message of indigency or need through begging. Because the ordinance focuses on specific conduct that the municipality has an interest in controlling in order to further a significant content-neutral government interest, it is narrowly tailored.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law §§ 450–454, 456, 459, 512, *71 523, 525, 920; Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 315, 321, 322, 331–333, 437.

NY Jur 2d, Constitutional Law §§ 51–53, 70, 71, 73, 217–219, 252, 256, 259, 261, 266, 400–402; NY Jur 2d, Counties, Towns, and Municipal Corporations §§ 291, 293–296.

US Const 1st Amend.

ANNOTATION REFERENCE

Laws regulating begging, panhandling, or similar activity by poor or homeless persons. 7 ALR5th 455.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: panhandl! /s ordinance & protected /s constitution!

POINTS OF COUNSEL

Donald M. Thompson, Rochester, for appellant.
The motion court correctly found Rochester City Code § 44-4 (H) to be unconstitutional. (*Acorn v City of Phoenix,* 798 F2d 1260; *Schaumburg v Citizens for a Better Environment,* 444 US 620; *Loper v New York City Police Dept.,* 999 F2d 699; *Hill v Colorado,* 530 US 703; *Madsen v Women's Health Center, Inc.,* 512 US 753; *Carey v Brown,* 447 US 455; *People v Foley,* 94 NY2d 668; *Broadrick v Oklahoma,* 413 US 601; *Perry Ed. Assn. v Perry Local Educators' Assn.,* 460 US 37; *International Socy. for Krishna Consciousness of New Orleans, Inc. v City of Baton Rouge,* 876 F2d 494.)
Michael C. Green, District Attorney, Rochester (*William Taylor* of counsel), for respondent.
County Court properly held that the ordinance is constitutional. (*United States v O'Brien,* 391 US 367; *Perry Ed. Assn. v Perry Local Educators' Assn.,* 460 US 37; *Ward v Rock Against Racism,* 491 US 781; *Clark v Community for Creative Non-Violence,* 468 US 288; *Heffron v International Soc. for Krishna Consciousness, Inc.,* 452 US 640; *People v Foley,* 94 NY2d 668; *Matter of Rogers v New York City Tr. Auth.,* 89 NY2d 692; *Renton v Playtime Theatres, Inc.,* 475 US 41; *Virginia Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc.,* 425 US 748; *Acorn v City of Phoenix,* 798 F2d 1260.)
Thomas S. Richards, Corporation Counsel, Rochester (*Jeffrey Eichner* of counsel), for City of Rochester, intervenor. I. Section 44-4 (H) of the Rochester City Code is constitutional. (***72** *Cornelius v NAACP Legal Defense & Ed. Fund, Inc.,* 473 US 788; *United States v O'Brien,* 391 US 367; *Perry Ed. Assn. v Perry Local Educators' Assn.,* 460 US 37; *Frisby v Schultz,* 487 US 474; *Ward v Rock Against Racism,* 491 US 781; *Clark v Community for Creative Non-Violence,* 468 US 288; *Members of City Council of Los Angeles v Taxpayers for Vincent,* 466 US 789; *Heffron v International Soc. for Krishna Consciousness, Inc.,* 452 US 640; *Renton v Playtime Theatres, Inc.,* 475 US 41; *Virginia Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc.,* 425 US 748.) II. Section 44-4 (H) of the Rochester City Code is valid under the New York Constitution. (*Matter of Town of Islip v Caviglia,* 73 NY2d 544; *Stringfellow's of N.Y. v City of New York,* 91 NY2d 382.) III. Section 44-4 (H) of the Rochester City Code is not overbroad. (*Broadrick v Oklahoma,* 413 US 601; *Coates v Cincinnati,* 402 US 611; *Alderman v United States,* 394 US 165; *Houston v Hill,* 482 US 451; *Boos v Barry,* 485 US 312; *Chicago v Morales,* 527 US 41; *International Socy. for Krishna Consciousness of New Orleans, Inc. v City of Baton Rouge,* 876 F2d 494; *Hill v Colorado,* 530 US 703; *People v Scott,* 26 NY2d 286; *People v Clark,* 71 NY2d 376.)
Palyn Hung, New York City, *Jeffrey E. Fogel* and *Arthur N. Eisenberg* for New York Civil Liberties Union, amicus curiae. I. The ordinance, even if content-neutral, is not a reasonable time, place, or manner regulation because it is not narrowly tailored to a significant government interest and does not leave open ample alternative avenues of communication. (*Watchtower Bible & Tract Soc. of N. Y., Inc. v Village of Stratton,* 536 US 150; *Schaumburg v Citizens for a Better Environment,* 444 US 620; *Loper v New York City Police Dept.,* 999 F2d 699; *Hague v Committee for Industrial Organization,* 307 US 496; *Frisby v Schultz,* 487 US 474; *Houston v Hill,* 482 US 451; *Nichols v Village of Pelham Manor,* 974 F Supp 243; *Loper v New York City Police Dept.,* 802 F Supp 1029.) II. The ordinance constitutes a content-based enactment that is not narrowly tailored to the pursuit of a compelling state interest. (*Police Dept. of Chicago v Mosley,* 408 US 92; *Cincinnati v Discovery Network, Inc.,* 507 US 410; *Los Angeles v Alameda Books, Inc.,* 535 US 425; *Perry Ed. Assn. v Perry Local Educators' Assn.,* 460 US 37; *Ashcroft v American Civil Liberties Union,* 542 US 656.) III. The ordinance is facially overbroad. (*Houston v Hill,* 482 US 451; *New York v Ferber,* 458 US 747; *Members of City Council of Los Angeles v Taxpayers for Vincent,* 466 US 789.)

***73 OPINION OF THE COURT**

Read, J.

On August 4, 2004, defendant Michael Barton was ticketed for violating section 44-4 (H) of the Code of the City of Rochester when he allegedly waded into traffic on a ****2** highway exit ramp in downtown Rochester, soliciting money from motorists. Section 44-4 of the Code addresses aggressive panhandling, and subsection (H) specifies that "[n]o person on a sidewalk or alongside a roadway shall solicit from any occupant of a motor vehicle that is on a street or other public place." The Code defines "solicit" as "the spoken, written, or printed word or such other acts or bodily gestures as are conducted in furtherance of the purposes of immediately obtaining money or any other thing of value" (Rochester City Code § 44-4 [B]). Violations are punishable by fines ranging from $25 to $250, or an appropriate alternative sentence; a

second conviction within a year could result in imprisonment for up to 15 days (Rochester City Code § 44-4 [I]).

Section 44-4, approved by the City Council and the Mayor of the City of Rochester in the spring of 2004, was nearly a decade in the making, spurred by the increasing incidence of panhandling in the downtown area and attendant citizen complaints. Subsection (A) of section 44-4, entitled "Legislative intent," states that this provision was

> "adopted in order to protect persons from threatening, intimidating or harassing behavior, to keep public places safe and attractive for use by all members of the community and to maintain and preserve public places where all of the community can interact in a peaceful manner. *This legislation is also intended to provide for the free flow of pedestrian and vehicular traffic on the streets and sidewalks in the City*, to promote tourism and business and preserve the quality of urban life" (emphasis added).

The Council loosely patterned section 44-4 after panhandling ordinances adopted in other cities, including Atlanta, Baltimore, Cincinnati, New Haven, New York City, Philadelphia, Portland, San Francisco, Seattle and Washington, D.C.

As the Council's President explained, subsection (H) of section 44-4 was "aimed at specific conduct, and not at any type of speech or expression," because "[t]he conduct itself is offensive, for it leads to an interference with the free flow of vehicular traffic and raises traffic safety and traffic congestion concerns." In particular,

> ***74** "[s]olicitation of contributions from occupants of motor vehicles is disruptive to the drivers of those vehicles and diverts their attention from the traffic on the street. Even if the vehicle is stopped, the driver is not paying attention to potential hazards in the road, observing traffic control signals, or preparing to move along the street or through the intersection."

Further, section 44-4 (H) treats all solicitation "the same whether it be for an individual or a charity, and whether the cause may be deemed by some to be favored or disfavored."

On August 31, 2004, defendant moved to dismiss the accusatory instrument lodged against him. He contended that section 44-4 (H) was overbroad in violation of the Free ****3** Speech clauses of the federal and New York State constitutions. Defendant did not argue that section 44-4 (H) was unconstitutional as applied to him. Rather, he complained that this provision impermissibly "impact[ed] activities beyond its intended reach" as it applied not only to aggressive panhandling, but "to anyone who would solicit" motorists from the sidewalk, including an individual holding up a sign simply stating "Food," or participating in the city firefighters' annual "Fill-the-Boot" fundraising campaign.

City Court agreed, declaring section 44-4 (H) unconstitutional and dismissing the accusatory instrument. The court cited *Perry Ed. Assn. v Perry Local Educators' Assn.* (460 US 37, 45 [1983]) for the relevant constitutional standard: "The state may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." In City Court's view, section 44-4 (H) was content-neutral, but lacked narrow tailoring because it "allow[ed] for the prosecution of those . . . guilty of nothing more than peacefully asking for assistance" (8 Misc 3d 291, 298 [Rochester City Ct 2004]).

County Court reversed, concluding that section 44-4 (H) was content-neutral, sufficiently narrowly tailored, and left open ample alternative channels of communication. The court observed that section 44-4 (H) was "aimed specifically at a certain type of conduct engaged in at a certain location"--the "use [of] spoken or written words or acts, for the purpose of immediately obtaining money or any other thing of value from an occupant of a motor vehicle that is on a street or other public place" (12 Misc 3d 322, 330 [Monroe County Ct 2006]). The ***75** court further pointed out that section 44-4 (H) was not overbroad because it applied to bona fide charitable canvassing as well as to defendant's soliciting. "Because a statute is evenhanded and applies equally to all persons conducting the same unwanted conduct does not make a statute overbroad" (*id.*) In short, section 44-4 (H)'s "overbreadth, if any, [was] not substantial when judged in relation to the [provision's] plainly legitimate sweep" (*id.*). Upon defendant's application, a Judge of this Court granted leave to appeal. We now affirm.

(1) As an initial matter, for purposes of this appeal the People do not contest, and we therefore assume, that panhandling is speech or expressive conduct safeguarded by the First Amendment, entitled to protection tantamount to that afforded eleemosynary appeals by organized charities (*see Schaumburg v Citizens for a Better Environment*, 444 US 620 [1980] [holding that there is sufficient nexus between solicitation by organized charities and a variety of speech interests to implicate First Amendment]). The United States Supreme Court has yet to rule on this issue, and lower courts have expressed differing views (*e.g. compare Young v New*

York City Tr. Auth., 903 F2d 146, 154 [2d Cir 1990], *cert denied* 498 US 984 [1990] [sustaining prohibition on begging in subways, reasoning that panhandling is not constitutionally ****4** protected speech or expressive conduct analogous to solicitation by organized charities: "Whether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct"], *with Loper v New York City Police Dept.*, 999 F2d 699, 704 [2d Cir 1993] [enjoining enforcement of statute prohibiting public loitering for purposes of begging, concluding that there is "little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed," and that "(t)he distinction is not a significant one for First Amendment purposes"]). Second, even though defendant's own conduct may be unshielded by the First Amendment, he nonetheless may challenge section 44-4 (H) as overbroad on behalf of others whose constitutionally-protected expression is potentially "chilled" by the provision's very existence (*Broadrick v Oklahoma*, 413 US 601, 610-613 [1973]).

The test for determining overbreadth is whether the law on its face prohibits a real and substantial amount of constitutionally protected conduct (*see Houston v Hill*, 482 US 451, 458 [1987]; *Broadrick*, 413 US at 615). "[T]he mere fact that one ***76** can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge" (*Members of City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789, 800 [1984]). Here, section 44-4 (H) reaches any solicitation intended to obtain immediate funds or things of value from occupants of motor vehicles in Rochester's streets or other public places. Defendant claims that because section 44-4 (H) on its face concededly reaches "passive" panhandling targeting motorists--specifically, someone standing mute on the sidewalk, facing traffic in the street and holding a sign requesting immediate money or food--it is unconstitutionally overbroad. According to defendant, section 44-4 (H) thus runs afoul of the First Amendment because it is not limited to panhandlers who act aggressively, or solicit motorists successfully or actually walk into a lane of stopped or moving traffic. As this appeal is presented to us then, the parties dispute whether section 44-4 (H) is a reasonable time, place and manner restriction once it sweeps defendant's hypothetical passive panhandler within its coverage.

(2) "[C]ontent-neutral regulations of time, place, and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" (*International Socy. for Krishna Consciousness of New Orleans, Inc. v City of Baton Rouge*, 876 F2d 494, 497 [5th Cir 1989] [citing *Perry*, 460 US at 45]; *see also Matter of Rogers v New York City Tr. Auth.*, 89 NY2d 692 [1997] [indicating that public forum analysis under article I, § 8 of State Constitution mirrors federal standard]). In this case, the governmental interests served by section 44-4 (H)--to eliminate a source of distraction for motorists and thus promote the free and safe flow of traffic-- ****5** are significant. Further, section 44-4 (H) is not a blanket ban (*cf. Loper*, 999 F2d at 705). This provision does not prohibit requests seeking something other than a handout. Moreover, section 44-4 (H) does not proscribe nonaggressive soliciting directed at pedestrians on the sidewalk; therefore, it leaves open ample alternative avenues to communicate any message of indigency or need through begging.

In determining whether a regulation is content neutral, the principal inquiry is

> "whether the government has adopted a regulation of speech because of disagreement with the message ***77** it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech" (*Ward v Rock Against Racism*, 491 US 781, 791 [1989] [internal quotation marks and citations omitted]).

Content neutrality is not negated because a sign must be read by the police in order to determine whether section 44-4 (H) has been violated (i.e., whether the sign's message seeks to obtain money or any other thing of value on the spot), as defendant argues. The Council's reason for adopting section 44-4 (H)--to promote the free and safe flow of traffic--is the relevant consideration, and the ban covers all those asking motorists for immediate donations, regardless of their message (*see Heffron v International Soc. for Krishna Consciousness, Inc.*, 452 US 640, 648-649 [1981] [speech restriction applying impartially to all persons or organizations, whether charitable or commercial, is content neutral]). Section 44-4 (H) does not attempt to silence one particular message; it does not frown on any particular viewpoint. Nor is it important that section 44-4 (H) may not reach every speech-related side-of-the-road distraction or source of traffic disruption in downtown Rochester; i.e., that

it has "an incidental effect on some speakers or messages but not others."

Next, although "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests . . . it need not be the least restrictive or least intrusive means of doing so" (*Ward*, 491 US at 798). Instead,

> "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some ****6** less-speech-restrictive alternative. The validity of [time, place, or manner] regulations does not turn on a judge's agreement ***78** with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted" (*id.* at 799-800 [internal quotation marks and citations omitted]).

Section 44-4 (H) was designed to address a specific problem brought to the Council's attention: individuals seeking handouts from occupants of motor vehicles on a public thoroughfare or place, thereby creating a hazard and slowing or snarling traffic. Because section 44-4 (H) focuses on specific conduct that the City has an interest in controlling in order to further a significant content-neutral government interest, it is narrowly tailored.

Accordingly, the order of County Court should be affirmed.

Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo, Smith and Pigott concur.

Order affirmed.

94 N.Y.2d 668, 731 N.E.2d 123, 709
N.Y.S.2d 467, 2000 N.Y. Slip Op. 03641

The People of the State of
New York, Respondent,
v.
Thomas R. Foley, Sr., Appellant.

Court of Appeals of New York
17
Argued and submitted February 16, 2000;

Decided April 11, 2000

CITE TITLE AS: People v Foley

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 18, 1999, which affirmed a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered upon a verdict convicting defendant of promoting a sexual performance by a child (two counts) and attempted disseminating indecent material to minors in the first degree (two counts).

People v Foley, 257 AD2d 243, affirmed.

HEADNOTES

Crimes
Disseminating Indecent Material to Minors
Constitutionality--Overbreadth

(1) Penal Law § 235.22, which criminalizes the use of sexually explicit communications, via a computer communications system, designed to lure children into harmful conduct, is not overbroad on the ground that it exposes individuals to criminal liability who unintentionally address a minor through sexually-oriented communication. Under the First Amendment overbreadth doctrine, statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn, but a statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from pure speech toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate State interests. Where conduct and not merely speech is involved, the overbreadth doctrine can be invoked only where the overbreadth is substantial. Section 235.22 is not directed at the mere transmission of certain types of communication over the Internet. The terms "importune," "invite" or "induce" used in the second part of the statute--the "luring prong"--describe acts of communication, not the content of one's views, and they identify forms of conduct which may provide a predicate for criminal liability. Moreover, the statute should be read as requiring that an individual intend to initiate this kind of communication with a minor and thereby further intend to "importune, invite or induce" the minor to engage in sexual conduct for the sender's benefit. The term "harmful to minors" found in Penal Law § 235.22 (1) is not overbroad on the ground that it allows New York to impose its community standards nationwide. Thus, the legitimate reach of Penal Law § 235.22 outweighs its arguably impermissible applications.

Crimes
Disseminating Indecent Material to Minors
Constitutionality--Overbreadth of Term "Harmful to Minors"

(2) With respect to Penal Law § 235.22, entitled "Disseminating indecent material to minors in the first degree," which was enacted to address the ***669** convergence of predatory pedophile activity with Internet technology, the term "harmful to minors," used to describe the type of communication deemed indecent, is not overbroad on the ground that it allows New York to impose its community standards nationwide. Rather, that term was specifically defined according to the guidelines enunciated by the Supreme Court in *Miller v California* (413 US 15), and was further limited to "actual or simulated nudity, sexual conduct or sado-masochistic abuse" (*see also,* Penal Law § 235.20 [2], [3], [5]). It is difficult to envision a situation where that conduct would not be considered harmful to minors outside New York when the statute seeks specifically to prohibit the intentional dissemination of this type of material to a minor in conjunction with the sender's enticement or invitation to the child to engage in sexual activity.

Crimes
Disseminating Indecent Material to Minors
Constitutionality--Predatory Pedophile Activity on Internet--Vagueness

(3) Penal Law § 235.22, which is entitled "Disseminating indecent material to minors in the first degree," and was enacted to address the convergence of predatory pedophile activity with Internet technology, is not unconstitutional on the ground of vagueness. The phrases "importunes, invites or induces," and "sexual conduct for [the defendant's] benefit," used to describe how and why a defendant influences the conduct of his minor victim, provide adequate notice of what is prohibited and permit evenhanded application of the law both by law enforcement authorities and fact finders called to interpret the speech at issue. Each and every term in the statute is either defined in the Penal Law (*see,* § 235.20) or has a plain and ordinary meaning. A person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful, sexual images. There is no possibility of arbitrary or discriminatory enforcement: the combination of precise terms and the clearly pronounced elements adequately define the criminal conduct. The statute employs objective, ascertainable standards which do not provide room for law enforcement officials to apply the statute based upon their own personal ideas of right and wrong.

Crimes
Disseminating Indecent Material to Minors
Constitutionality--Predatory Pedophile Activity on Internet--Content-Based Restriction--Strict Scrutiny

(4) Penal Law § 235.22, which is entitled "Disseminating indecent material to minors in the first degree," and was enacted to address the convergence of predatory pedophile activity with Internet technology, is not an unconstitutional content-based restriction. Although the statute is content-based, since it affects sexually explicit communication, it survives First Amendment strict scrutiny because it curtails the use of speech in a way which does not merit First Amendment protection, and is a carefully tailored means of serving a compelling State interest of protecting children from sexual exploitation. The speech conduct sought to be prohibited by the statute--the endangerment of children through the dissemination of sexually graphic material over the Internet--does not merit First Amendment protection, and, in any event, the statute does not effectuate a total ban on the dissemination of sexual content communication, but merely limits its use. While the statute may incidentally burden some protected expression in carrying out its objective, it serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve its purpose. ***670**

Crimes
Disseminating Indecent Material to Minors
Constitutionality--Predatory Pedophile Activity on Internet--Commerce Clause--Burden on Interstate Trade

(5) Penal Law § 235.22, which is entitled "Disseminating indecent material to minors in the first degree," and was enacted to address the convergence of predatory pedophile activity with Internet technology, does not unduly burden interstate trade in violation of the Commerce Clause. The statute, which prohibits individuals from luring children into sexual conduct, does not discriminate against or burden interstate trade; it regulates the conduct of individuals who intend to use the Internet to endanger the welfare of children. There is no legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity. The conduct sought to be sanctioned by the statute is of the sort that deserves no "economic" protection. Thus, section 235.22 is a valid exercise of the State's general police powers.

Crimes
Promoting Sexual Performance by Child
Constitutionality--Overbreadth

(6) Penal Law § 263.15, which prohibits the promotion of any performance which includes sexual conduct by a child under the age of 16, is not unconstitutional on the ground of overbreadth. The statutory scheme allows the fact finder to make a determination on the evidence submitted whether the performance involves an individual under 16, and defendant was permitted to introduce expert testimony challenging whether the images he transmitted to the undercover police officer posing as a 15-year-old girl actually depicted children or had been digitally spliced to "manufacture" the picture of a child performing a sexual act. Of the many images

transmitted by defendant, defendant's expert could point to only one that may have been digitally altered, and defendant did not object to the court's charge concerning the proof of age of the children in the pictures. The jury was thus instructed to consider, from the evidence before it, if a child who participated in the performance was under 16. Accordingly, the statute is not unconstitutionally overbroad as applied to defendant.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Constitutional Law, §§ 450-462; Lewdness, Indecency, and Obscenity, §§ 27-39.

McKinney's, Penal Law § 235.20 (2), (3), (5); §§ 235.22, 263.15.

NY Jur 2d, Criminal Law, §§ 4950-4952, 5130-5132, 5135.

ANNOTATION REFERENCES

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors. 93 ALR3d 297.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 ALR4th 239. ***671**

POINTS OF COUNSEL

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, L. L. P., Buffalo (*Roger W. Wilcox, Jr.,* and *Paul J. Cambria, Jr.,* of counsel), for appellant.

I. Penal Law § 235.22 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution and article I, § 8 of the Constitution of the State of New York. (*Reno v American Civ. Liberties Union,* 521 US 844; *American Libs. Assn. v Pataki,* 969 F Supp 160; *American Civ. Liberties Union v Johnson,* 4 F Supp 2d 1029; *People v Barrows,* 174 Misc 2d 367; *Broadrick v Oklahoma,* 413 US 601; *Grayned v City of Rockford,* 408 US 104; *People v Dietze,* 75 NY2d 47; *Sable Communications v Federal Communications Commn.,* 492 US 115.) II. Penal Law § 235.22 violates the Commerce Clause and is therefore invalid. (*Homier Distrib. Co. v City of Albany,* 90 NY2d 153; *C & A Carbone v Town of Clarkstown,* 511 US 383; *Hood & Sons v DuMond,* 336 US 525; *Pike v Bruce Church, Inc.,* 397 US 137; *People v Concert Connection,* 211 AD2d 310; *American Libs. Assn. v Pataki,* 969 F Supp 160; *People v Barrows,* 174 Misc 2d 367; *Brown-Forman Distillers Corp. v New York State Liq. Auth.,* 476 US 573; *Reno v American Civ. Liberties Union,* 521 US 844; *Wabash, St. Louis & Pac. Ry. Co. v Illinois,* 118 US 557.) III. Penal Law § 235.22 is unconstitutionally vague and must be declared void. (*Kolender v Lawson,* 461 US 352; *Connally v General Constr. Co.,* 269 US 385; *Coates v City of Cincinnati,* 402 US 611; *Grayned v City of Rockford,* 408 US 104; *Pro-Choice Network v Schenck,* 67 F3d 359; *People v New York Trap Rock Corp.,* 57 NY2d 371; *Smith v Goguen,* 415 US 566; *People v Barrows,* 174 Misc 2d 367.) IV. Penal Law § 235.22 is a content-based restriction on speech which cannot survive strict scrutiny. (*Boos v Barry,* 485 US 312; *Sable Communications v Federal Communications Commn.,* 492 US 115; *Simon & Schuster v Members of N. Y. State Crime Victims Bd.,* 502 US 105; *Times Sq. Books v City of Rochester,* 223 AD2d 270; *Matter of Children of Bedford v Petromelis,* 77 NY2d 713; *Reno v American Civ. Liberties Union,* 521 US 844; *People v Barrows,* 174 Misc 2d 367.) V. Penal Law § 263.15 is overbroad in violation of the Federal and State Constitutions. (*Grayned v City of Rockford,* 408 US 104; *New York v Ferber,* 458 US 747; *Miller v California,* 413 US 15.) VI. Appellant's convictions for promoting the sexual performance of a child in violation of Penal Law § 263.15 are not supported by legally sufficient evidence. (*New York v Ferber,* 458 US 747; *People v Keyes,* 75 NY2d 343; *People v Wong,* 81 NY2d 600; ***672** *People v Hawkins-Rusch,* 212 AD2d 961.) VII. The trial court's restriction of cross-examination by appellant denied appellant's constitutionally protected right as guaranteed by the Sixth Amendment to the United States Constitution and article I, § 6 of the New York State Constitution. (*People v Chin,* 67 NY2d 22; *Davis v Alaska,* 415 US 308; *Chambers v Mississippi,* 410 US 284; *People v Brown,* 162 AD2d 695; *People v Freeland,* 36 NY2d 518.) VIII. The prosecution failed to establish an unbroken chain of custody for crucial physical evidence. (*People v Julian,* 41 NY2d 340; *People v McGee,* 49 NY2d 48; *People v Connelly,* 35 NY2d 171; *People v Snyder,* 90 AD2d 894.)

Michael A. Arcuri, District Attorney of Oneida County, Utica (*William M. Weber* of counsel), for respondent.

I. Penal Law § 235.22 is not impermissibly overbroad in violation of any of the provisions of the Federal or State Constitutions. (*Ginsberg v New York,* 390 US 629; *New York v Ferber,* 458 US 747; *Reno v American Civ. Liberties Union,* 521 US 844; *Globe Newspaper Co. v Superior Ct.,* 457 US 596; *Miller v California,* 413 US 15; *Broadrick v Oklahoma,* 413 US 601; *Secretary of State of Md. v Munson Co.,* 467 US 947; *Members of City Council v Taxpayers for Vincent,*

466 US 789; *People v Hollman,* 68 NY2d 202.) II. Penal Law § 235.22 does not violate the Commerce Clause of the Federal Constitution. (*Gibbons v Ogden,* 9 Wheat [22 US] 1; *Pike v Bruce Church, Inc.,* 397 US 137; *City of Philadelphia v New Jersey,* 437 US 617; *Ginsberg v New York,* 390 US 629; *New York v Ferber,* 458 US 747; *Reno v American Civ. Liberties Union,* 521 US 844; *Globe Newspaper Co. v Superior Ct.,* 457 US 596; *American Libs. Assn. v Pataki,* 969 F Supp 160; *Pharmaceutical Mfrs. Assn. v Whalen,* 54 NY2d 486; *Matter of Chemical Specialties Mfrs. Assn. v Jorling,* 85 NY2d 382.) III. Penal Law § 235.22 is not unconstitutionally vague. (*Miller v California,* 413 US 15.) IV. Penal Law § 235.22 is not an impermissible regulation on free speech. (*Matter of Children of Bedford v Petromelis,* 77 NY2d 713; *Boos v Barry,* 485 US 312; *City of Renton v Playtime Theatres,* 475 US 41; *Ginsberg v New York,* 390 US 629; *Reno v American Civ. Liberties Union,* 521 US 844; *Globe Newspaper Co. v Superior Ct.,* 457 US 596; *New York v Ferber,* 458 US 747; *American Libs. Assn. v Pataki,* 969 F Supp 160.) V. The constitutionality of Penal Law § 263.15 has been upheld by the United States Supreme Court and the New York State Court of Appeals. (*New York v Ferber,* 458 US 747.) VI. Defendant's convictions for promoting the sexual performance of a child in violation of Penal Law § 263.15 are supported by sufficient evidence and are not against the weight ofthe ***673** evidence. (*People v Lipsky,* 57 NY2d 560; *People v Contes,* 60 NY2d 620; *People v Benzinger,* 36 NY2d 29; *People v Kennedy,* 47 NY2d 196; *People v Vigo,* 170 AD2d 192.) VII. The trial court did not improperly restrict defendant's right to cross-examination. (*People v Walker,* 83 NY2d 455; *People v Freeland,* 36 NY2d 518; *People v Perotti,* 233 AD2d 936, 89 NY2d 945; *People v Van Nostrand,* 217 AD2d 800, 87 NY2d 851.) VIII. The prosecution established an adequate chain of custody. (*People v Clarke,* 81 NY2d 777; *People v Montgomery,* 195 AD2d 886; *People v Julian,* 41 NY2d 340; *People v Sarmiento,* 168 AD2d 328, 77 NY2d 976; *People v Newman,* 129 AD2d 742; *People v Waite,* 243 AD2d 820; *People v Miller,* 242 AD2d 896.)

Eliot Spitzer, Attorney General, New York City (*Preeta D. Bansal, Robin A. Forshaw, Mark H. Levine* and *James M. Hershler* of counsel), in his statutory capacity under Executive Law § 71. I. Penal Law § 235.22 complies with the free speech provisions of the State and Federal Constitutions because it is narrowly tailored to effectuate the State's compelling interest in protecting children from pedophiles who seek to use the Internet to lure them into sexual encounters. (*People v Bright,* 71 NY2d 376; *People v Davis,* 43 NY2d 17, 435 US 998; *People v Epton,* 19 NY2d 496, 390 US 29; *Fenster v Leary,* 20 NY2d 309; *Brockett v Spokane Arcades,* 472 US 491; *Broadrick v Oklahoma,* 413 US 601; *New York v Ferber,* 458 US 747; *Members of City Council v Taxpayers for Vincent,* 466 US 789; *Osborne v Ohio,* 495 US 103.) II. Penal Law § 235.22 does not violate the Commerce Clause either facially or as applied because it serves a compelling State interest without unduly burdening interstate commerce. (*Brecht v Abrahamson,* 507 US 619; *Associated Indus. v Lohman,* 511 US 641; *Kassel v Consolidated Freightways Corp.,* 450 US 662; *Lewis v BT Inv. Mgrs.,* 447 US 27; *United States v Lopez,* 514 US 549; *General Motors Corp. v Tracy,* 519 US 278; *People v Cooper,* 90 NY2d 292; *People v Cooper,* 78 NY2d 476; *People v Kibbe,* 35 NY2d 407; *People v Bell,* 73 NY2d 153.) III. There is no merit to defendant's claim that Penal Law § 263.15 is overbroad because it fails to specify that it applies only to actual as opposed to fictional children. (*New York v Ferber,* 458 US 747, 57 NY2d 256; *Osborne v Ohio,* 495 US 103; *People v Hollman,* 68 NY2d 202; *Broadrick v Oklahoma,* 413 US 601.)

OPINION OF THE COURT

Wesley, J.

(1- 5) The main issue in this appeal focuses on the constitutionality ***674** of Penal Law § 235.22, enacted to address the convergence of predatory pedophile activity with Internet technology. Defendant contends that Penal Law § 235.22 is overbroad and vague, that it is a content-based restriction that cannot survive strict scrutiny under the First Amendment, and that it violates the Commerce Clause. We disagree. The statute has a significant and distinct feature: it criminalizes the use of sexually explicit communications designed to lure children into harmful conduct. We thus hold that the statute withstands defendant's challenges.

In October 1996, a State Trooper assigned to the Computer Crime Unit logged onto the Internet and entered a chat room entitled "KidsofFamilySex." The Trooper used the screen name "Aimee_" and began a discussion with defendant, Thomas R. Foley, Sr., who was using the screen name "JustMee." JustMee inquired whether Aimee_ wanted to "chat sex?" Aimee_ answered "OK," identifying herself as a 15-year-old girl who had sex with her father. JustMee identified himself as a 51-year-old male. The conversation lasted approximately two hours and was almost exclusively about sex. JustMee asked Aimee_ how she enjoyed having sex with her father, described how he would have sex with her and encouraged her to masturbate during their

conversation. Aimee_ mentioned that she lived in Utica and JustMee informed her that he lived near Buffalo. During the conversation, JustMee sent several pictures to Aimee_ of "preteen girls and men" engaging in sexual acts.

During November 1996, JustMee had three other private on-line chats with Aimee_. In each conversation Aimee_ indicated that she was 15 years old. The conversations centered around sex; JustMee would encourage Aimee_ to masturbate and to describe having sex with her father. He said that he wanted to have sex with her, described how he would do so, and sent her pictures of minors engaging in sexual acts with other minors and with adults. In their third conversation, JustMee expressed his interest in meeting Aimee_ but cautioned that they would have to be careful. Aimee_ answered that she had cousins in Buffalo and that she could possibly arrange a visit. During their fourth conversation, JustMee again discussed their meeting, stating that they would have to be discreet and make the arrangements ahead of time. The discussion turned to the possibility of meeting over Thanksgiving weekend.

The police obtained the identity of JustMee when they served a subpoena on the Internet service provider. As JustMee and ***675** Aimee_, in their fifth on-line conversation, discussed where they could meet in Buffalo, the police executed a no-knock search warrant at defendant's residence and found him typing at his computer. Defendant admitted that he had used the screen name JustMee and had several chats with Aimee_, whom he believed to be 15 years old.

Defendant was indicted on three counts of promoting an obscene sexual performance by a child (Penal Law § 263.10), three counts of promoting a sexual performance by a child (Penal Law § 263.15), three counts of obscenity in the third degree (Penal Law § 235.05 [1]) and two counts of attempted disseminating indecent material to minors in the first degree (Penal Law §§ 110.00, 235.22 [1], [2]). Prior to trial, defendant moved to dismiss the indictment on several grounds, among them that the statute defining each count of the indictment was unconstitutional. County Court denied the motion.

During trial, defendant introduced the testimony of a computer expert who explained that with current technology, computer images could be easily manipulated. Of the many graphics sent by defendant to Aimee_, however, the expert could only point to one that appeared as if it had been altered. The jury was permitted to examine the pictures and was instructed as follows:

"Section 263.25 of the Penal Law of the State of New York reads: Whenever it becomes necessary, for the purposes of the article, to determine whether a child who participated in a sexual performance was under the age of 16 years, the Court or jury may make such determination by any of the following: Personal inspection of the child, inspection of a photograph or motion picture which constituted the sexual performance, oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance, expert medical testimony based upon the appearance of the child in the sexual performance, and any other method authorized by any applicable provision of law or by the rules of evidence at common law."

The jury found defendant guilty of two counts of promoting a sexual performance by a child and two counts of attempted disseminating indecent material to minors in the first degree.

The Appellate Division unanimously affirmed the conviction, holding that Penal Law § 235.22 is constitutional. The Court ***676** noted that Penal Law § 235.22 is a precise means of accomplishing the Legislature's objective to protect children from sexual abuse by prohibiting the dissemination of graphic images to a minor depicting nudity, sexual conduct or sadomasochistic abuse that is "harmful to minors," and the use of that material to lure the minor to engage in sexual activity. The Court determined that Penal Law § 235.22 is neither impermissibly vague nor overbroad. The Court further determined that the statute met First Amendment standards as a carefully drawn means of serving a compelling State interest. Finally, the Court concluded that the statute did not violate the Commerce Clause and rejected defendant's contention that Penal Law § 263.15 is unconstitutionally overbroad. We affirm.

I.

Penal Law § 235.22 provides:

"A person is guilty of disseminating indecent material to minors in the first degree when:

"1. Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, *he intentionally uses any computer communication system* allowing the input, output,

examination or transfer, of computer data or computer programs from one computer to another, *to initiate or engage in such communication with a person who is a minor; and*

"2. By means of such communication he *importunes, invites or induces* a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct *for his benefit* [emphasis added]."

Our analysis in this appeal focuses on two requirements that must be established before an individual can be subjected to criminal liability under the statute. First, an individual must intentionally use a computer system to initiate or engage in the transmission of actual or simulated depictions of sexual activity for the purpose of communicating with a minor, knowing the character and content of such communication (Penal Law § 235.22 [1]). The communication must be "harmful to ***677** minors" as defined by Penal Law § 235.20 (6).[1] Second, the statute requires that an individual must "[b]y means of such communication" importune, invite or induce the minor to engage in sexual activity for his or her benefit (Penal Law § 235.22 [2]). The statute was enacted to address the growing concern that pedophiles are using the Internet as a forum to lure children (*see,* Governor's Mem approving L 1996, ch 600, 1996 McKinney's Session Laws of NY, at 1900-1901).

As a preamble to our analysis, we note that an enactment of the Legislature, a coequal branch of government, is presumed to be valid, and that one seeking to invalidate a statute bears the heavy burden of showing that it is unconstitutional (*People v Bright,* 71 NY2d 376, 382; *People v Davis,* 43 NY2d 17, 30).

II.

The Overbreadth Doctrine

(1) Defendant contends that, on its face, Penal Law § 235.22 is overbroad because it exposes individuals to criminal liability who unintentionally address a minor through sexually oriented communication. We reject defendant's challenge.

As a general rule, a court will not hear a challenge to a statute from a person to whom the statute may be constitutionally applied on the ground that its application to others, not before the court, may possibly impair their constitutional rights (*New York v Ferber,* 458 US 747, 767; *Broadrick v Oklahoma,* 413 US 601, 610; *see also, People v Hollman,* 68 NY2d 202, 208). An exception has been carved out in the area of the First Amendment.

It has been recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society" (*Broadrick v Oklahoma, supra,* 413 US 601, 611-612). Thus, a statute that attempts to proscribe constitutionally protected speech will not be enforced ***678** unless a limiting construction effectively removes the apparent threat to constitutionally protected expression (*id.,* at 613).

A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests" (*id.,* at 615). Even though the statute, "if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe" (*id.; see also, People v Hollman,* 68 NY2d 202, 209, *supra*). Thus, where conduct and not merely speech is involved, the overbreadth doctrine can be invoked only where the overbreadth is "substantial" (*New York v Ferber, supra,* 458 US 747, 769; *Broadrick v Oklahoma, supra,* 413 US 601, 615). The First Amendment overbreadth doctrine is " 'strong medicine;' " it has been invoked by the courts with hesitation and " 'only as a last resort' " (*New York v Ferber, supra,* at 769, quoting *Broadrick v Oklahoma,* 413 US 601, 613, *supra; see also, People v Hollman, supra,* 68 NY2d 202, 208).

In *Reno v American Civ. Liberties Union* (521 US 844), the Supreme Court of the United States struck down the Communications Decency Act (47 USC § 223) as unconstitutionally overbroad. The Act prohibited the knowing transmission of "obscene or indecent" comments to any person under the age of 18 (47 USC § 223 [a] [1] [B]) and using the Internet to send or display any comment or image that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to any person under the age of 18 (47 USC § 223 [d] [1] [B]). The Court noted that the breadth of the Act was unprecedented in that its scope was not limited to commercial speech

or commercial entities; the statute's prohibitions embraced all entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors (*Reno v American Civ. Liberties Union, supra,* 521 US, at 877).[2] ***679**

Penal Law § 235.22 is readily distinguishable from the Communications Decency Act addressed in *Reno*. Unlike the Federal statute, Penal Law § 235.22 is not directed at the mere transmission of certain types of communication over the Internet. The second part of the statute--the "luring prong"--is significant. An invitation or enticement is distinguishable from pure speech. The terms "importune," "invite" or "induce" can be likened to terms such as "procure" or "solicit" used to define the advancement of prostitution (Penal Law § 230.15) or the terms "request" or "command" used to describe criminal liability for the conduct of another (Penal Law § 20.00). They describe *acts* of communication; they do not describe the content of one's views. The terms identify forms of conduct which may provide a predicate for criminal liability. Penal Law § 235.22 is a preemptive strike against sexual abuse of children by creating criminal liability for conduct directed toward the ultimate acts of abuse.

Defendant contends that constitutionally protected speech among adults on the Internet may be affected by the statute because the statute does not require an individual "know" that he or she is communicating with a minor. For example, a "chat room" participant who sends a sexually explicit graphic image file with an accompanying message inviting other "chat room" participants to get together for lawful sexual activities runs the risk that a minor may have access to the "chat room" and receive the transmission. Such a participant, according to defendant, could thus be exposed to criminal liability.

Penal Law § 235.22 (1) provides that a person is guilty of disseminating indecent material to a minor if, knowing the content of the communication, he "intentionally" uses any communication system to initiate or engage in such communication with a person who is a minor. The placement of the word "intentionally" in Penal Law § 235.22 (1) should be read to modify everything that follows. Where a statute contains only one reference to a particular mental state (such as "intentionally"), there is a presumption that the mental state applies to "every element of the offense unless an intent to limit its application clearly appears" (Penal Law § 15.15 [1]). Thus, contrary to defendant's assertion, the statute should be ***680** read as requiring that an individual intend to initiate this kind of communication with a minor and thereby further intend to "importune, invite or induce" the minor to engage in sexual conduct for the sender's benefit.

Defendant suggests that the legislative history of Penal Law § 235.22 indicates that the statute was not to be so circumscribed. We conclude that the statute provides for the mental state of "intent" to limit the proscribed conduct. As one of the sponsors of the legislation stated, "[t]he purpose of this bill is [to] deter individuals who would use computer networks to lure children into sexual relations by intentionally transmitting indecent materials to children through the computer networks. The bill would not hold liable a computer network or other individual who did not intentionally transmit the materials to minors" (Letter from Senator Sears to Governor, July 11, 1996, Bill Jacket, L 1996, ch 600).

(2) Finally, we reject defendant's assertion that the term "harmful to minors" found in Penal Law § 235.22 (1) is overbroad because it allows New York to impose its community standards nationwide. The term "harmful to minors" is specifically defined according to the guidelines enunciated by the Supreme Court in *Miller v California* (413 US 15, 24) and is further limited to actual or simulated "nudity," "sexual conduct" or "sado-masochistic abuse" (*see,* Penal Law § 235.22 [1]; § 235.20 [2], [3], [5]). It is difficult to envision a situation where this conduct would not be considered harmful to minors outside New York when the statute seeks specifically to prohibit the intentional dissemination of this type of material to a minor *in conjunction with* the sender's enticement or invitation to the child to engage in sexual activity.

In short, the legitimate reach of Penal Law § 235.22 outweighs its "arguably impermissible applications" (*New York v Ferber, supra,* 458 US 747, 773). Thus, we conclude that the statute is not substantially overbroad.

Vagueness

(3) Defendant also challenges Penal Law § 235.22 as unconstitutionally vague, arguing that the luring prong of Penal Law § 235.22 (2) defines the prohibited conduct in unacceptably ambiguous terms. According to defendant, the phrase "importunes, invites or induces" and the phrase "sexual conduct for his benefit" not only fail to provide adequate notice of what is prohibited but also permit the arbitrary and discriminatory application of the law by both law enforcement ***681** authorities and fact finders called upon to interpret the speech at issue. We disagree.

A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement (*Grayned v City of Rockford,* 408 US 104, 108; *see also, People v Shack,* 86 NY2d 529, 538-539; *People v Bright, supra,* 71 NY2d, at 382). A vague law impermissibly delegates basic policy matters to law enforcement officials, Judges and juries for resolution on an ad hoc, subjective basis "with the attendant dangers of arbitrary and discriminatory application" (*Grayned v City of Rockford, supra,* 408 US, at 109). However, imprecise language does not render a statute fatally vague so long as that language " 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices' " (*People v Shack, supra,* 86 NY2d 529, 538, citing *United States v Petrillo,* 332 US 1, 8).

In *Reno,* the major defect of the Communications Decency Act was its vagueness. Absent any definitions for the terms "indecent" and "patently offensive," the Act lacked the precision that the First Amendment requires when a statute regulates the content of speech (521 US, at 874). The Supreme Court noted that the open-ended nature of the proscribed material added to the threat that the statute would censor speech that, in fact, would fall outside its scope (*id.*).

Unlike the terms "indecent" or "patently offensive" held to be vague in the Communications Decency Act, each and every term of Penal Law § 235.22 is either defined in the Penal Law or has a plain and ordinary meaning (*see,* Penal Law § 235.20). The term "benefit" as used in "for his benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary" (Penal Law § 10.00 [17]). While "importune," "invite" and "induce" are not defined terms, a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful, sexual images.

Moreover, we find no possibility of arbitrary or discriminatory enforcement of the statute. The combination of the precise terms described in the statute and the clearly pronounced elements "adequately defines the criminal conduct for the police ***682** officers, Judges and juries who will enforce the statute" (*People v Shack, supra,* 86 NY2d, at 539). Unlike the subjective terms used in the Federal Act, Penal Law § 235.22 employs objective, ascertainable standards which do not provide room for law enforcement officials to apply the statute based upon their own personal ideas of right and wrong (*People v Bright, supra,* 71 NY2d, at 383). We therefore conclude that Penal Law § 235.22 is not unconstitutionally vague.

Content-Based Restriction

In addition to contesting the validity of Penal Law § 235.22 on First Amendment overbreadth and vagueness grounds, defendant asserts that the statute is an unconstitutional content-based restriction. Because Penal Law § 235.22 proscribes "sexually oriented" communications, defendant maintains that it is an impermissible regulation on speech.

Content-based speech restrictions are presumptively invalid and will not survive strict scrutiny unless the government can show that the regulation promotes a compelling State interest and that it chose the least restrictive means to further the articulated interest (*see, Sable Communications v Federal Communications Commn.,* 492 US 115, 126; *Boos v Berry,* 485 US 312, 321; *see also, People ex rel. Arcara v Cloud Books,* 68 NY2d 553, 559).

(4) Sexually explicit communication is affected by the statute and thus the statute *is* content-based (*see, Reno v American Civ. Liberties Union, supra,* 521 US 844, 868); Penal Law § 235.22 prohibits the dissemination of a certain category of images to minors (Penal Law § 235.22 [1]). The justification for the statute is related to the impact on the minor listener and cannot be properly analyzed as a content-neutral, time, place and manner restriction (*Reno v American Civ. Liberties Union, supra,* at 868; *compare, City of Erie v Pap's A.M.,* ___ US ___, 120 S Ct 1382, 1391). We nevertheless hold that Penal Law § 235.22 survives First Amendment strict scrutiny, because as noted earlier, it curtails the *use* of speech in a way which does not merit First Amendment protection and is a carefully tailored means of serving a compelling State interest (*see, New York v Ferber, supra,* 458 US 747, 773).

The primary legislative purpose behind the statute is "to protect the children of this State from high-tech cybersex abuse and actual sexual abuse" (Governor's Mem approving L 1996, ch 600, 1996 McKinney's Session Laws of NY, at 1901). The State plainly has a "compelling" interest in protecting children ***683** from sexual exploitation in order to safeguard their " 'physical and psychological well-being' " (*New York v Ferber, supra,* 458 US 747, 756-757, quoting *Globe Newspaper Co. v Superior Ct.,* 457 US 596, 607). " 'It

rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute' " (*New York v Ferber, supra,* 458 US 747, 761-762, quoting *Giboney v Empire Stor. & Ice Co.,* 336 US 490, 498; *see also, Osborne v Ohio,* 495 US 103, 110). As a result, courts have recognized that speech used to further the sexual exploitation of children does not enjoy constitutional protection (*see, New York v Ferber, supra,* 458 US 747, *on remand to People v Ferber,* 57 NY2d 256, 259; *United States v Kufrovich,* 997 F Supp 246, 254 [D Conn]; *United States v Powell,* 1 F Supp 2d 1419, 1422 [ND Ala]).

The speech-conduct sought to be prohibited by Penal Law § 235.22--the endangerment of children through the dissemination of sexually graphic material over the Internet--does not merit First Amendment protection. In any event, the statute does not effectuate a total ban on the dissemination of sexual content communication, but merely limits its use (*compare, City of Erie v Pap's A.M., supra,* ___ US ___, 120 S Ct 1382, 1392-1393; *Sable Communications v Federal Communications Commn., supra,* 492 US 115, 129). Although the statute may incidentally burden some protected expression in carrying out its objective, Penal Law § 235.22 serves the compelling interest of preventing the sexual abuse of children and is no broader than necessary to achieve that purpose (*see, People ex rel. Arcara v Cloud Books, supra,* 68 NY2d 553, 558).

The Commerce Clause

Defendant's final assault on Penal Law § 235.22 is premised on the Commerce Clause. Relying on a recent Federal court decision--*American Libs. Assn. v Pataki* (969 F Supp 160 [SD NY])--defendant contends that Penal Law § 235.22 unduly burdens interstate trade.

In *American Libs.,* the court struck down Penal Law § 235.21 (3) as a violation of the Commerce Clause. Penal Law § 235.21 (3) prohibits sending a sexually explicit depiction to a minor over the Internet. Because the Internet represents an instrument of interstate commerce, the court deemed Penal Law § 235.21 (3) to be "closely concerned with interstate commerce, and scrutiny of the [statute] under the Commerce Clause" was therefore "entirely appropriate" (*id.,* at 173). The court ***684** expressly distinguished Penal Law § 235.21 (3) from Penal Law § 235.22, recognizing that "plaintiffs do not challenge the sections of the statute that criminalize the sale of obscene materials to children, over the Internet or otherwise, and prohibit adults from luring children into sexual contact by communicating with them via the Internet" (*id.,* at 179).

(5) Penal Law § 235.22 does not discriminate against or burden interstate trade; it regulates the conduct of individuals who intend to use the Internet to endanger the welfare of children. Although Penal Law § 235.22 contains some of the same language as the provision in Penal Law § 235.21 (3) struck down in *American Libs.,* the statute challenged here contains the additional "luring" prong. We are hard pressed to ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity. Indeed, the conduct sought to be sanctioned by Penal Law § 235.22 is of the sort that deserves no "economic" protection (*see, New York v Ferber, supra,* 458 US 747, 761-762). Thus, we conclude that Penal Law § 235.22 is a valid exercise of the State's general police powers (*see, Lewis v BT Inv. Mgrs.,* 447 US 27, 36).

III.

Finally, we address defendant's constitutional challenge to Penal Law § 263.15, which prohibits promoting a sexual performance by a child. Although the Supreme Court in *New York v Ferber* (*supra,* 458 US 747) has held that Penal Law § 263.15 is not unconstitutionally overbroad, defendant attempts to revisit the matter. Defendant notes that today's computer technology permits the manipulation of images such that the concerns addressed in *Ferber* regarding the harm caused to children as a result of the production of sexual performances are not presented here. Defendant argues that in the absence of an express instruction from the trial court that the People must prove the actual use of children in the prohibited performances, the statute is fatally overbroad.

Penal Law § 263.15 prohibits the promotion of any performance which includes sexual conduct by a child younger than 16 years of age. In *Ferber,* the Supreme Court held that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct was de minimis (458 US, at 762). Since this class of material bears heavily on the welfare of children, in the balance of competing interests, "it is permissible to consider these materials as ***685** without the protection of the First Amendment" (*id.,* at 764). The Court then rejected the overbreadth challenge to Penal Law § 263.15, holding that the statute's legitimate reach in addressing the harm of child pornography outweighs any arguably impermissible application (*id.,* at 773). The Court concluded that any

overbreadth which may exist should be cured on a "case-by-case analysis" (*id.,* at 774).

(6) We are unpersuaded by defendant's speculative and broad reading of Penal Law § 263.15. Defendant fails to demonstrate any real or substantial overbreadth to invalidate the statute.

The statutory scheme allows the fact finder to make a determination on the evidence submitted whether the performance involves an individual under the age of 16 (Penal Law § 263.25). In this case, defendant was permitted to introduce expert testimony challenging whether the images transmitted by defendant to Aimee_ actually depicted children or had been digitally spliced to "manufacture" the picture of a child performing a sexual act. Of the many images transmitted by defendant to Aimee_, defendant's expert could point to only one that may have been digitally altered. Defendant did not object to the trial court's charge on Penal Law § 263.25. The jury was thus instructed to consider, from the evidence before it, whether or not a child who participated in the performance was under the age of 16. Under these circumstances, we cannot conclude that, as applied to defendant, the statute is unconstitutionally overbroad. We reject defendant's remaining contentions.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Rosenblatt concur.
Order affirmed. ***686**

Footnotes

1 Under Penal Law § 235.20 (6), "harmful to minors" is described as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse" when it "[c]onsidered as a whole, appeals to the prurient interest in sex of minors," is "patently offensive" to the "prevailing standards in the adult community" as to what is suitable material for minors and "[c]onsidered as a whole, lacks serious literary, artistic, political and scientific value for minors" (Penal Law § 235.20 [6]).

2 One New York court has held that Penal Law § 235.22 similarly implicates the First Amendment. In *People v Barrows* (177 Misc 2d 712), the court turned to the second subdivision of Penal Law § 235.22 pertaining to the violator's conduct in "importun[ing], invit[ing] or induc [ing] a minor to engage" in sexual activity for his or her benefit and determined that this devolved to nothing more than "speech in its purest form" (*id.,* at 732). Then, analogizing Penal Law § 235.22 to the Communications Decency Act, the court concluded that Penal Law § 235.22 was unconstitutionally overbroad and vague (*id.,* at 733-734). We disagree with that analysis (*see, People v Barrows,* 174 Misc 2d 367).

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**1 The People of the State of New York, Respondent,

v

Darryl Watts, Appellant.

Court of Appeals of New York
10
Argued January 10, 2024

Decided February 22, 2024

CITE TITLE AS: People v Watts

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 29, 2022. The Appellate Division affirmed an order of the Supreme Court, Bronx County (Diane R. Kiesel, J.; op 58 Misc 3d 552 [2017]), which had adjudicated defendant a risk level two sexually violent offender pursuant to the Sex Offender Registration Act.

People v Watts, 210 AD3d 595, affirmed.

HEADNOTES

Crimes
Sex Offenders
Sex Offender Registration Act—Due Process—Offender's Competency

(1) When there is a possibility that a sex offender may lack capacity to fully comprehend a Sex Offender Registration Act (SORA) (Correction Law art 6-C) risk-level assessment proceeding, due process does not preclude a court from determining the offender's risk level because the many safeguards already provided under SORA minimize the risk of inaccurate risk-level classification and adequately balance the competing private and State interests. Accordingly, where defendant was represented by counsel and provided the other protections listed in Correction Law article 6-C, his due process rights were not were violated when Supreme Court declined to order a competency hearing before adjudicating him a level two sex offender. Although the liberty interest at stake was not to be discounted, it was more limited than the interest threatened by a criminal proceeding. Defendant had not demonstrated that his proposed safeguard—which amounted to exempting incompetent registrants from SORA classification for the duration of their disability—would meaningfully reduce inaccurate risk-level classifications, even if the robust existing procedures left gaps through which a rare incompetent registrant might fall. Even admitting the possibility of an initial misclassification, defendant could still seek modification of his risk level on an annual basis. Finally, beyond the obvious financial and administrative costs associated with the additional proposed safeguard, the State also has a compelling interest in protecting its citizens by promptly notifying the public of registrants who pose a heightened threat of recidivism. Delaying the classification of incompetent registrants threatens that interest, in that it risks that some dangerous registrants will be released into the community for lengthy periods without accurate risk-level designations or public notice.

Crimes
Sex Offenders
Sex Offender Registration Act—Classification of Civilly Confined Offender

(2) The Sex Offender Registration Act (SORA) (Correction Law art 6-C) does not require courts to indefinitely postpone SORA classification until a *61 registrant's release from civil confinement, and doing so would inject a degree of uncertainty into the classification process not contemplated or intended by the legislature. Accordingly, a SORA classification hearing which adjudicated defendant a level two sex offender while he remained civilly committed to an Office of Mental Health psychiatric facility pursuant to Mental Hygiene Law article 9 was not premature. SORA's plain text and structure authorize risk-level determinations "[30] calendar days prior" to a registrant's release from incarceration following the completion of their prison sentence, regardless of pending civil commitment proceedings (*see* Correction Law § 168-n [2]). Unlike a registrant's release from incarceration, a registrant's release from civil confinement does not typically occur on a date scheduled far in advance: it is premised on

changing conditions and can occur abruptly or on short notice (*see e.g.* Mental Hygiene Law §§ 9.33, 9.35). Given that unpredictability, defendant had not shown that it would be possible for the Board of Examiners of Sex Offenders, district attorneys' offices, and courts to reliably comply with the carefully developed SORA classification process—instituted to protect both the public and registrants' due process rights—if the various deadlines and milestones in that process were to be measured from release from civil confinement.

RESEARCH REFERENCES

Am Jur 2d Mentally Impaired Persons §§ 131, 134.

NY Jur 2d Penal and Correctional Institutions §§ 34, 382, 396, 397, 402.

ANNOTATION REFERENCE

See ALR Index under Incompetent or Insane Persons; Sex Offender Registration and Notification.

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POINTS OF COUNSEL

Twyla Carter, The Legal Aid Society, New York City (*Rachel L. Pecker* of counsel), for appellant.

Holding a Sex Offender Registration Act (Correction Law art 6-C) hearing when a registrant lacks mental competency violates a registrant's constitutional rights, and thus, where there is evidence that a registrant lacks competency, fundamental fairness precludes the court from proceeding without first ordering a competency determination. (US Const Amends VI, XIV; NY Const, art I, § 6.) (*People v David W.*, 95 NY2d 130; *People v Baxin*, 26 NY3d 6; *Doe v Pataki*, 3 F Supp 2d 456; ***62** *People v Lashway*, 25 NY3d 478; *People v Mingo*, 12 NY3d 563; *People v Gillotti*, 23 NY3d 841; *Mathews v Eldridge*, 424 US 319; *Doe 1 v Marshall*, 367 F Supp 3d 1310; *Drope v Missouri*, 420 US 162.)

Darcel D. Clark, District Attorney, Bronx (*Joshua P. Weiss* and *Yael V. Levy* of counsel), for respondent.

I. Because a Sex Offender Registration Act (Correction Law art 6-C) risk-level classification hearing is a civil proceeding intended to protect the public rather than to punish the sex offender, defendant had no statutory or due process right to a competency assessment prior to the hearing. (*LaRossa, Axenfeld & Mitchell v Abrams*, 62 NY2d 583; *People v Ramos*, 85 NY2d 678; *Mathews v Eldridge*, 424 US 319; *Doe v Pataki*, 3 F Supp 2d 456; *People v Windham*, 10 NY3d 801; *People v David W.*, 95 NY2d 130; *People v Williams*, 19 NY3d 100; *People v Finnegan*, 85 NY2d 53; *People v Kupprat*, 6 NY2d 88; *Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36.) II. The Sex Offender Registration Act's (Correction Law art 6-C) plain language, legislative history, and overall scheme confirm that a court's duty to conduct the hearing is triggered upon an offender's release from incarceration. (*People v Staley*, 104 AD3d 583; *People v Lashway*, 25 NY3d 478; *People v Sherard*, 73 AD3d 537; *People v Rodriguez*, 102 AD3d 457; *People v Gillette*, 189 AD3d 512; *People v Norris*, 168 AD3d 1003; *People v Blum*, 166 AD3d 571; *People v Gordon*, 147 AD3d 988; *Matter of Charles B. v State of New York*, 192 AD3d 1583; *Matter of Christopher PP. v State of New York*, 151 AD3d 1334.)

Natalie M. Chin, *Disability Rights and Justice Clinic, Washington Square Legal Services, Inc.*, New York City, for Mental Hygiene Legal Service, amicus curiae.

I. Registrants have significant liberty interests that require protections under the due process clause of the New York and United States Constitutions. (*Doe v Pataki*, 3 F Supp 2d 456; *Matter of Lopez v Evans*, 25 NY3d 199.) II. Registrants' liberty interests are protected by the Due Process Clause of the New York and United States Constitutions and New York's Correction Law. (*People ex rel. Garling v Van Allen*, 55 NY 31; *Ajaeb v Ajaeb*, 276 App Div 1094, 301 NY 605; *Lunney v Graham*, 91 AD2d 592; *Carlisle v County of Nassau*, 64 AD2d 15; *Shepherd v Swatling*, 36 Misc 2d 881; *Matter of Daniel Aaron D.*, 49 NY2d 788; *People v Richetti*, 302 NY 290; *People v Johnson*, 1 NY3d 302; *People v Bradley*, 8 NY3d 124; *Crawford v Washington*, 541 US 36.) III. Participation by a registrant in Sex Offender Registration Act (Correction Law art 6-C) hearings is required ***63** given the dynamic and variable factors at issue. (*People ex rel. Rivera v Superintendent, Woodbourne Corr. Facility*, 40 NY3d 307; *People v Gillotti*, 23 NY3d 841; *People v Crandall*, 90 AD3d 628; *People v Krull*, 208 AD3d 163; *People v Palmer*, 20 NY3d 373; *People v Cousin*, 209 AD3d 1047; *People v Snyder*, 175 AD3d 1331; *People v S.G.*, 4 Misc 3d 563; *People v Santiago*, 137 AD3d 762; *People v Marsh*, 116 AD3d 680.) IV. While the remedy may lie with

the Legislature, this Court may take necessary interim steps to ensure that Sex Offender Registration Act (Correction Law art 6-C) proceedings comport with due process. (*People v Schaffer*, 86 NY2d 460; *People v Lally*, 19 NY2d 27; *People v Mendez*, 1 NY3d 15; *People v Gensler*, 72 NY2d 239; *People v Armlin*, 37 NY2d 167; *Tennessee v Lane*, 541 US 509.)

OPINION OF THE COURT

Cannataro, J.

The Sex Offender Registration Act (SORA) (Correction Law art 6-C) requires that every person convicted of a sex offense be given a risk-level classification corresponding to their assessed likelihood of recidivism and potential danger to the community. This risk level, in turn, determines the scope of information available to the public concerning the offender. To protect against erroneous classification, judicial determination of an offender's risk level can occur only after the offender has been provided notice, counsel, disclosure of relevant information, and an opportunity to object and present evidence at a hearing, at which the People must prove the appropriateness of the classification by clear and convincing evidence. An offender's risk level is also subject to re-evaluation on an annual basis.

The primary question on this appeal is whether due process precludes a court from determining a sex offender's risk level when there is a possibility that the offender—although represented by counsel and provided the other protections listed above—may lack capacity to fully comprehend risk-level assessment proceedings. We hold that the many safeguards already provided under SORA minimize the risk of inaccurate risk-level classification and adequately balance the competing private and State interests in these civil proceedings.

I.

In July 2011, defendant Darryl Watts was arrested and charged with various offenses, including sexual abuse in the ***64** first degree and assault in the second degree, after he knocked a 66-year-old woman to the ground and attempted to rape her (*see* Penal Law §§ 120.05 [12]; 130.65 [1]). Defendant, who suffers from severe schizophrenia and psychosis, "was responding to internal voices" and claimed that "the victim was chosen for him." Six days after his arrest, a competency examination was conducted pursuant to CPL article 730 and Supreme Court determined that ****2** defendant was not mentally fit to stand trial. He was therefore placed in the custody and care of the Office of Mental Health (OMH), where he remained for more than five years and underwent six additional competency examinations.[1] In February 2017, after he was examined for a seventh time and found competent to stand trial, defendant pleaded guilty to sexual abuse and assault. The court sentenced him to a determinate term of incarceration of six years, followed by 10 years of postrelease supervision.

Defendant's sexual abuse conviction subjected him to the registration and classification requirements of SORA (*see* Correction Law §§ 168-a [3] [a]; 168-d [1] [a]; 168-l [6]). In anticipation of his 2017 release from incarceration, the Board of Examiners of Sex Offenders (the Board) prepared a case summary and risk assessment instrument (RAI) recommending that defendant be classified as a level two (moderate risk) sex offender. On the date initially scheduled for the SORA classification hearing, defendant's new attorney requested and was granted an adjournment to familiarize herself with the case. Because he was due to be released imminently, the court gave defendant a provisional level two designation "without prejudice to reconsideration," on consent of the parties.

At the next hearing date, counsel informed the court that defendant had been transferred and confined to an OMH facility for treatment pursuant to Mental Hygiene Law article 9. His mental state was unstable and deteriorating such that OMH staff did not feel "comfortable" transporting him to court. Based on conversations with her client and OMH staff, counsel expressed concern that defendant would not be able to understand the nature of the SORA classification hearing or the requirements of the Act. Relying on the language of SORA, counsel argued that the hearing should be adjourned until defendant's ***65** release into the community. Alternatively, counsel argued that "[a]lthough [defendant] doesn't have a full set of due process rights at [a SORA classification] hearing, he does have some due process rights," and therefore asked the court to order a competency examination before proceeding with classification. The court briefly adjourned the hearing without deciding these issues.

At the next hearing date, defendant was unable to appear due to a conflicting court appearance relating to his article 9 confinement. Although Supreme Court expressed its view that a competency hearing was not required to proceed with SORA risk-level classification, it granted another adjournment to give defendant an opportunity to attend in person.

The risk assessment hearing finally took place in October 2017. Defendant was physically present, but his attorney maintained that he was unable to understand the nature of the proceedings, the RAI, or his obligations under SORA, and reiterated her request for a competency hearing. Counsel further argued that it was premature to conduct the hearing because defendant was still confined to an OMH facility and would not be released into the community for an indefinite period of time. Citing *People v Parris* (153 AD3d 68 [2d Dept 2017], *lv denied* 30 NY3d 904 [2017]), the court rejected defense counsel's argument that due process requires a competency examination prior to a SORA classification hearing. The court then proceeded with the hearing and formally adjudicated defendant a level two sex offender (*see* 58 Misc 3d 552 [Sup Ct, Bronx County 2017]). The Appellate Division unanimously affirmed (*see* ****3** 210 AD3d 595 [1st Dept 2022]). Defendant appeals to this Court as of right based on the existence of a substantial constitutional question (*see* 39 NY3d 1103 [2023]; CPLR 5601 [b] [1]).

II.

The fundamental principle at the core of the Constitution's due process guarantee "is that when the State seeks to take life, liberty or property from an individual, the State must provide effective procedures that guard against an erroneous deprivation" (*People v David W.*, 95 NY2d 130, 136 [2000]; *see* US Const, Amend XIV, § 1). "The bedrock of due process is notice and opportunity to be heard" (*David W.*, 95 NY2d at 138). However, the United States Supreme Court has made clear that due process is a flexible requirement, cautioning that "not ***66** all situations calling for procedural safeguards call for the same kind of procedure" (*Morrissey v Brewer*, 408 US 471, 481 [1972]; *see also Medina v California*, 505 US 437, 453 [1992]).

This Court has recognized that SORA classification proceedings are civil and not punitive in nature. Thus, although the State must provide "more than mere summary process" at a classification hearing, the safeguards required "are not as extensive as those required in a plenary criminal or civil trial" (*People v Baxin*, 26 NY3d 6, 10 [2015] [internal quotation marks omitted]). Determination of whether a particular safeguard must be provided requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the additional or substitute procedural safeguard; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail (*Mathews v Eldridge*, 424 US 319, 334-335 [1976]; *David W.*, 95 NY2d at 136-137).

We begin, then, with consideration of the private interest at stake. This Court has recognized that SORA registrants have a substantial interest in not being stigmatized by classifications that overstate their danger to the community (*David W.*, 95 NY2d at 137; *see also People v Knox*, 12 NY3d 60, 66-67 [2009]; *Doe v Pataki*, 3 F Supp 2d 456, 469 [SD NY 1998]). "More than 'name calling by public officials,' [a SORA risk level] 'is a determination of status' that can have a considerable adverse impact on an individual's ability to live in a community and obtain or maintain employment" (*see David W.*, 95 NY2d at 137, quoting *Paul v Davis*, 424 US 693, 703 [1976]). Specifically, when a registrant is classified as a level two (moderate risk) or level three (high-risk) sex offender, they must register for life, and information about the registrant appears in a public Internet directory (Correction Law §§ 168-b [6]; 168-l [6] [b], [c]; 168-q). Classification as a level three sex offender also subjects a registrant to more periodic verification requirements (*see id.* § 168-b [1] [b]), and to the residency restrictions of the Sexual Assault Reform Act (SARA) (Executive Law § 259-c [14]; *see People ex rel. Rivera v Superintendent, Woodbourne Corr. Facility*, 40 NY3d 307, 311 [2023]).

Thus, SORA risk-level classification implicates a private liberty interest and triggers due process safeguards (*see* ***67** *David W.*, 95 NY2d at 138). Nonetheless, this liberty interest does not rise to the level of a fundamental right or trigger a requirement that the State shield a sex offender from the social stigma flowing from their criminal conviction or an accurate assessment of their risk to the community (*see Vega v Lantz*, 596 F3d 77, 82 [2d Cir 2010]; *Knox*, 12 NY3d at 67). For that reason, although the liberty interest at stake here is not to be discounted, it is more limited than the interest threatened by a criminal proceeding, where an innocent person may be inaccurately branded a criminal and subjected not only to unjust stigma but the complete curtailment of liberty through a prison sentence. ****4**

The second factor to consider is the risk of an erroneous deprivation of the private liberty interest as a result of the procedures used, and the probable value, if any, of additional or substitute procedural safeguards (*David W.*, 95 NY2d at 136, citing *Mathews*, 424 US at 335). Although SORA classification is a civil rather than criminal undertaking,

courts have required and this State has long provided a panoply of safeguards aimed at protecting registrants from erroneous SORA classifications (*see Doe v Pataki*, 3 F Supp 2d at 471-472; *see also* Budget Rep on Bills, Bill Jacket, L 1999, ch 453 at 4 [amending SORA to cure the due process deficiencies identified in *Pataki*]). SORA risk levels are based on factors developed and applied in the first instance by an agency practiced in evaluating such matters (the Board), and then tested at an adversarial hearing before a judge (Correction Law §§ 168-l [5]-[6]; 168-n [2]); the registrant is entitled to an attorney at the hearing, including one appointed by the court if the registrant is unable to afford an attorney of their own choosing (*id.* § 168-n [3]); the registrant and counsel must be provided advance notice of the hearing, the Board's recommendation, its bases, and any contrary assessment by the People sufficiently in advance to allow a meaningful opportunity to prepare a defense (*id.* § 168-n [2]-[3]); the registrant is entitled to prehearing discovery of material relied upon by the Board in making its recommendation (*id.* § 168-n [3]); the People must prove, by clear and convincing evidence, that the assigned classification is warranted (*id.*); the registrant must have the opportunity to appeal the classification (*id.*); and the registrant can seek modification of their risk level once per year—with a right to counsel at the modification hearing—for as long as they remain registered (*id.* § 168-o; *see generally Pataki*, 3 F Supp 2d at 471-472; *David W.*, 95 NY2d at 133; *Baxin*, 26 NY3d at 10-11; *People v Lashway*, 25 NY3d 478, 483-484 [2015]).

***68** Defendant argues that his incompetency prevented him from taking full advantage of these protections, from being truly "present" at the hearing, and from assisting his counsel in preparing a defense. He therefore asks us to supplement the SORA procedures by requiring a competency examination when it appears that a registrant may lack capacity to understand the risk-level assessment proceeding. In addition, he "suggests that, upon a finding of incompetency, the SORA hearing and appropriate risk level designation would either be foreclosed or postponed indefinitely" (*see Parris*, 153 AD3d at 78).

Defendant has not demonstrated that his proposed safeguard —which amounts to exempting incompetent registrants from SORA classification for the duration of their disability—would meaningfully reduce inaccurate risk-level classifications, even if the robust existing procedures leave gaps through which a rare incompetent registrant might fall. If anything, defendant's proposal seems certain to create inaccuracy, especially with respect to registrants who meet the criteria for heightened risk levels. It would result in every incompetent registrant, including those who could justly be adjudicated level three (high-risk) offenders, being treated more favorably than a level one (low-risk) offender regardless of the particular circumstances or risk to the public[2] (*see* ****5** *Doe v Sex Offender Registry Bd.*, 81 Mass App Ct 610, 616, 966 NE2d 235, 242 [2012] [hereafter *Doe (Massachusetts)*] ["due process does not entitle (incompetent) offenders to greater protection than that afforded their competent counterparts"]).

In contrast, it is far from inevitable that incompetent registrants will be misclassified when courts follow the ordinary procedures, particularly given a registrant's right to counsel and the People's heightened burden of proof at a classification hearing. Here, no showing was made that postponing defendant's classification would have resulted in him being adjudicated a level one offender, rendering the value of the proposed additional safeguard conjectural rather than "probable" ***69** (*see Mathews*, 424 US at 343).[3] And even admitting the possibility of an initial misclassification, defendant can still seek modification of his risk level on an annual basis (*see Parris*, 153 AD3d at 82). This being the case, defendant simply has not shown that exempting incompetent registrants from SORA classification for indefinite periods is necessary or likely to make this civil process meaningfully more reliable or accurate (*see Doe [Massachusetts]*, 81 Mass App Ct at 615, 966 NE2d at 240 [concluding that "(t)he robust, adversary character of the classification process minimizes the risk of . . . erroneous classification," even when a defendant is incompetent (internal quotation marks omitted)]).

The final *Mathews* factor requires us to consider "the public interest" and the administrative and societal costs associated with the additional proposed safeguard (*Mathews*, 424 US at 347; *see David W.*, 95 NY2d at 136-137). Obviously, conducting a psychiatric examination and additional hearing to determine a registrant's mental competency would impose additional burdens on the government, as would the task of continually monitoring registrants found to be incompetent over indefinite periods to determine whether they have regained fitness and can be accurately classified. In this case, it took over five years and seven competency examinations before defendant was found competent to stand trial, a timeframe that could have been extended even further had he elected not to plead guilty.

Beyond the financial and administrative costs, the State also has a "compelling interest" in protecting its citizens by promptly notifying the public of registrants who pose a heightened threat of recidivism (*see Pataki*, 3 F Supp 2d at 470). Delaying the classification of incompetent registrants threatens that interest, in that it risks that some dangerous registrants will be released into the community for lengthy periods without accurate risk-level designations or public notice. Defendant and the dissent dispute this point, noting that ***70** offenders must still register with the Division of Criminal Justice Services at least 10 days prior to their release (*see* dissenting op at 81-82); however, risk-level classification determines the scope of information available to the public upon registration. Because the online sex offender database lists only level two and level three offenders (****6** Correction Law § 168-q), members of the public who search the database will not be informed of a registrant without a risk level, regardless of the actual risk they pose.[4]

The dissent asserts that the State's interest in protecting the public is not advanced by classifying offenders while they are in OMH custody under Mental Hygiene Law article 9. However, defendant has never limited his due process argument to his specific situation. Rather, defendant argues that it is unconstitutional to classify *any* incompetent registrant during the period of their disability. As *Mathews* itself holds, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions" (424 US at 344). The dissent is also selective in its analysis of the effects of Mental Hygiene Law article 9 confinement. Just as article 9 confinement shields the public from offenders, it also shields offenders from the public and its stigma, which cannot in this context impact any offender's "ability to live in a community and obtain or maintain employment" (*David W.*, 95 NY2d at 137). Further, although it is possible that an offender may be denied placement at a particular residential treatment facility, such as a nursing home, as a result of their risk level (dissenting op at 90), this merely reinforces that an offender's risk level is useful in determining which custodial settings are suitable, and to avoid placing a potentially dangerous offender in an inappropriate facility.

(1) In the end, although the consequences of misclassification to registrants when they reenter society are "sufficiently serious to warrant more than mere summary process," the ***71** State nevertheless maintains a compelling interest in an "expedited" process "without the burden of a new adversary criminal trial" and its greater concomitant due process protections (*see Pataki*, 3 F Supp 2d at 470 [internal quotation marks omitted]). As we have further recognized, " 'the Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations' " (*Pringle v Wolfe*, 88 NY2d 426, 434 [1996] [brackets omitted], quoting *Mackey v Montrym*, 443 US 1, 13 [1979]). What is required is a process that reasonably balances the competing interests at stake (*see Tulsa Professional Collection Services, Inc. v Pope*, 485 US 478, 484 [1988] ["The focus is on the reasonableness of the balance"]). Balancing the *Mathews* factors, we agree with the weight of authority that the State's substantial interest in efficiently assessing registrants' risk to the community outweighs that of incompetent registrants to a delay of SORA classification during an indefinite period of disability (*see Parris*, 153 AD3d at 78, 80-81; *accord State v Khan*, 2017-Ohio-4067, ¶ 17 [Ohio Ct App 2017]; *Doe [Massachusetts]*, 81 Mass App Ct at 615-616, 966 NE2d at 240-242).

Our conclusion that incompetency does not preclude SORA classification is fully consistent with jurisprudence in analogous contexts. In *Matter of Lopez v Evans*, this Court held that due process requires that a parolee be competent before the Division of Parole can adjudicate an alleged violation of the terms and conditions of their release (25 NY3d 199 [2015]). But as the Appellate Division recognized, there are significant distinguishing factors between parole revocation ****7** proceedings and SORA classification hearings. Most notably, parole revocation proceedings are punitive in nature and their purpose is to adjudicate wrongdoing, the consequence of which may be a defendant's re-incarceration (*Parris*, 153 AD3d at 78-79; *see Lopez*, 25 NY3d at 206 ["Clearly salient are constitutional concerns about the fundamental fairness of a proceeding in which a (defendant) who is unable to make decisions about his defense may be returned to prison"]). In contrast, SORA classification hearings are not intended to serve as a form of punishment, and incarceration is not a potential consequence of SORA classification in and of itself. That restriction of liberty can occur only if a registrant later violates the rules applicable to their classification, at which point additional procedures ***72** must be followed before the registrant may be penalized by incarceration.[5]

The People more aptly analogize this situation to the multitude of civil proceedings in which comparatively greater private interests are threatened, but which under current law may proceed notwithstanding questions regarding a party's competency. These include civil commitment proceedings

under the Sex Offender Management and Treatment Act (SOMTA) (*see e.g. Matter of State of New York v Daniel OO.*, 88 AD3d 212 [3d Dept 2011], *appeal dismissed* 21 NY3d 1038 [2013]; *United States v Comstock*, 627 F3d 513 [4th Cir 2010], *cert denied* 564 US 1030 [2011]; *Matter of Oxner*, 440 SC 5, 889 SE2d 586 [2023]; *In re Detention of Morgan*, 180 Wash 2d 312, 330 P3d 774 [2014]; *Moore v Superior Ct.*, 50 Cal 4th 802, 237 P3d 530 [2010]; *Commonwealth v Burgess*, 450 Mass 366, 878 NE2d 921 [2008]; *In re Commitment of Weekly*, 2011 IL App [1st] 102276, 956 NE2d 634 [Ill App Ct 2011], *appeal denied* 963 NE2d 246, 357 Ill Dec 293 [2012]; *State ex rel. Nixon v Kinder*, 129 SW3d 5 [Mo Ct App 2003], *cert denied* 543 US 979 [2004]), federal immigration removal proceedings (*Munoz-Monsalve v Mukasey*, 551 F3d 1 [1st Cir 2008]; *Brue v Gonzales*, 464 F3d 1227, 1232-1233 [10th Cir 2006]; *Nee Hao Wong v Immigration & Naturalization Serv.*, 550 F2d 521 [9th Cir 1977]), and termination of parental rights proceedings (*Matter of Joyce T.*, 65 NY2d 39, 50 [1985]). In addition, the Appellate Division has held that an order of protection can be issued against an incompetent respondent in a family offense proceeding (*see Matter of Julie G. v Yu-Jen G.*, 81 AD3d 1079, 1081 [3d Dept 2011]). Under defendant's and the dissent's logic, incompetency would prevent the State from issuing such orders for the protection of domestic violence victims because they "place [the respondent] in jeopardy of criminal prosecution" in the event the respondent proceeds to contact (or harm) the subjects of the ***73** protective order (*see* dissenting op at 83). Due process has not been held to require competency determinations in these types of proceedings—even though they can result in civil confinement, deportation, the severing of family relationships, and the threat of future prosecution—and it therefore follows that due process is not offended by the failure to hold a competency hearing before determining which of three risk-level classifications should be assigned to a convicted sex offender (*see Parris*, 153 AD3d at 80). ****8**

The dissent's broader assertion that there is "no need to balance interests" under *Mathews* because the "courts and the legislature have already struck a balance favoring" a competency requirement (dissenting op at 80) finds no support in statute or case law. We cannot "presume" that the legislature contemplated a CPL article 730 equivalent for SORA through silence, or through the provision of basic procedural safeguards like notice, counsel, and a hearing held on a specific timeline prior to a registrant's release (*see id.* at 78). The decision to foreclose the classification of incompetent registrants during the period of their disability would create very real administrative burdens and public safety risks which do not exist under the current scheme and which must be weighed against the conjectured additional benefit to incompetent registrants.[6] Our decision today respects the need for flexibility and limiting principles outside the criminal context to facilitate the government's ability to protect the citizens of this State whose interests may come into conflict with those of incompetent registrants. Balance and pragmatism are not antithetical to fundamental fairness; rather, they are essential to the administration of justice and demanded by the Constitution (*see Lassiter v Department of Social Servs. of Durham Cty.*, 452 US 18, 24-25 [1981] [instructing that "what 'fundamental fairness' consists of in a particular situation" cannot be determined without "assessing the several interests that are at stake"]; *see Morrissey*, 408 US at 481 ["To say that the concept of due process is flexible does not mean that judges are at large to apply ***74** it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure"]).

For these reasons, we reject the argument that defendant's due process rights were violated when Supreme Court declined to order a competency hearing before adjudicating him a level two sex offender.

III.

Defendant's counsel also argued below that the classification hearing was premature under SORA itself, and should not have been held while defendant remained civilly committed to an OMH psychiatric facility pursuant to Mental Hygiene Law article 9. More particularly, counsel argued that "the SORA Act itself says that the SORA hearing should be held before someone is released," and that the most sensible reading of that requirement is that the hearing must occur "at the time [the registrant] is actually being released into the community," not merely upon release from incarceration. We disagree.

(2) SORA's plain text and structure authorize risk-level determinations "[30] calendar days prior" to a registrant's release from incarceration following the completion of their prison sentence, regardless of pending civil commitment proceedings (*see* Correction Law § 168-n [2]). The statute does not require courts to indefinitely postpone SORA classification until a registrant's release from civil confinement, and doing so would inject a degree of uncertainty into the classification process not contemplated or intended by the legislature. Unlike a registrant's release from

incarceration, a registrant's release from civil confinement does not typically occur on a date scheduled far in **9 advance: it is premised on changing conditions and can occur abruptly or on short notice (*see e.g.* Mental Hygiene Law §§ 9.33, 9.35). Given that unpredictability, defendant has not shown that it would be possible for the Board, district attorneys' offices, and courts to reliably comply with the carefully developed SORA classification process—instituted to protect both the public and registrants' due process rights—if the various deadlines and milestones in that process were to be measured from release from civil confinement.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Rivera, J. (dissenting). It is a matter of fundamental fairness *75 and due process that a person called to appear before a court where their liberty is at stake should have the mental capacity to understand the nature of the proceedings, consult with counsel, and assist in their defense. A defendant's competency is also a prerequisite to the constitutional and statutory due process safeguards that expressly apply to Sex Offender Registration Act (SORA) (Correction Law art 6-C) risk classification proceedings.

Defendant has a mental disability. He is also a convicted sex offender who for most of his prosecution was found unfit to stand trial. After his release and during his SORA risk classification hearing defendant was confined to a psychiatric facility. His counsel requested a competency hearing to determine whether defendant understood the nature and consequences of the SORA proceedings and was capable of assisting with his defense. No one disputes that this request was well founded given defendant's chronic mental illness, history of unfitness to stand trial, immediate commitment upon completion of his sentence, and disorganized and illogical communications with counsel. Nor does anyone dispute that defendant has a protected liberty interest that entitled him to a hearing adequate to guard against the risk of an erroneous risk classification, as due process requires. I cannot agree with the majority that the SORA hearing held with defendant's competency in doubt satisfies due process. If he could not understand the proceedings, could not lucidly communicate with his counsel in preparing arguments to the court, and lacked the ability to understand the consequences of the court's judgment, the hearing was a mockery. We are a society of laws and those laws protect the mentally disabled. I dissent from the majority's endorsement of this injustice.

I.

Defendant Darryl Watts is mentally disabled. His illness dates back over 50 years. The majority acknowledges that defendant "suffers from severe schizophrenia and psychosis," and at the time of his offense "was responding to internal voices" and believed that "the victim was chosen for him" (majority op at 64). During the six-year pendency of his criminal prosecution, he was found mentally unfit to stand trial five times. His CPL article 730 examiners reported that he was "actively psychotic" such that he had no "rational or factual understanding of the roles of courtroom personnel or legal proceedings," did not recognize his lawyer, and was "unable to discuss his *76 case in a rational manner." At one point, he expressed belief that the victim had been stalking him and that his lawyer was working for "both sides." In 2013, defendant was admitted to Mid-Hudson Forensic Psychiatric Center for treatment.

After he was deemed competent at his seventh examination in December 2016, defendant pleaded guilty to first-degree sexual abuse (Penal Law § 130.65 [1]) and second-degree assault (Penal Law § 120.05 [12]), automatically subjecting him to SORA registration requirements. The court sentenced him to six years in prison and 10 years of postrelease supervision. Due to the length of time he had already spent in custody during his periods of incompetence, his release was set for July 2017. In preparation for that release date, the Board of Examiners of Sex Offenders (Board) recommended that defendant be adjudicated a level two (moderate risk) offender under SORA. However, in August 2017, shortly after his anticipated release date, defendant was transferred from Department of Corrections and Community Supervision (DOCCS) custody to involuntary confinement at South Beach Psychiatric Center—an Office of Mental Health (OMH) facility—pursuant to Mental Hygiene Law article 9.[1]

Prior to defendant's release and psychiatric confinement, the same judge that presided over defendant's several incompetency determinations, plea, and sentence adjourned the SORA hearing to a future date but provisionally designated defendant a level two risk "without prejudice" pending a final determination. Thereafter, defendant's counselor from the psychiatric center notified defense counsel that defendant "had a vastly different mental state presentation than the week before," and that the facility did not "feel comfortable or think it was appropriate to transport him with their staff." The counselor described defendant as "having very disorganized thinking, mood fluctuations, [and]

unpredictable and . . . degenerative tendencies." The staff, in fact, did not transfer defendant to his rescheduled SORA hearing, but counsel appeared and informed the court of the staff's decision to hold defendant.

Counsel also expressed her "grave concerns" that defendant was not competent to understand his SORA hearing or its consequences. She explained that during her attempts to engage ***77** defendant, "his spe[ech] is illogical. It is disorganized. He doesn't follow a fluid narrative so it is very difficult for me to follow what he is telling me as well as for me to comprehend whether he understands what I am saying." Counsel further argued that SORA required the court to hold the hearing closer in time to defendant's release into the community, and that holding the hearing while defendant was incompetent would violate his due process rights. The prosecution consented to an adjournment, and the court adjourned the case to consider defense counsel's arguments and to see if defendant's mental condition would improve.

Thirty days later, at the next court date, defendant was unavailable because he was appearing in Mental Hygiene Court the same morning. Defense counsel confirmed to the court that the psychiatric center was seeking to retain defendant, and again moved for a competency hearing. The court denied the motion, concluding that it was authorized to move forward with the SORA hearing without a competency determination, but granted another adjournment since defendant was only absent because of a conflicting court date.

The parties reconvened a few weeks later with defendant in attendance. Defense counsel stated her continued belief that defendant was not able to understand the nature of the proceedings and again argued that the hearing should be adjourned until closer in time to defendant's release from psychiatric confinement. The court proceeded with the hearing over counsel's objection, leaving counsel to present her arguments in support of a downward departure without defendant's assistance. Counsel focused on the difficulties defendant would have finding housing as a level two offender and ****10** his lack of any prior violent criminal history. She also submitted studies showing that mental illness is not a reliable predictor of recidivism and that offenders above the age of 50 reoffend at a lower rate. Counsel supported her arguments with evidence from the existing record and outside expert sources, not on communications with or input from defendant.

In its written decision adjudicating defendant a level two sexually violent offender, the court acknowledged counsel's representations that defendant was committed to a secure psychiatric facility at the time of the hearing, and that in the eight months between defendant's sentencing and the hearing, "defendant was described as having 'decompensated' and according to counsel was traveling on a downward spiral into another ***78** bout of mental illness." Based on its own observations, the court found that during the hearing defendant "sat at counsel table with a vacant stare and did not appear to have said a word to his lawyers." The court further acknowledged that defendant was being held at a psychiatric facility pursuant to a civil commitment order for at least another four months. On the merits, the court found defendant was properly assessed 90 points, placing him in the level two risk category. The court rejected defendant's request for a downward departure, in part, because it did "not know [defendant's] current mental state, [and] it hardly seems possible we can predict his future psychiatric condition and how it might impact his likelihood of offending."

II.

Defendant argues that competency is a fundamental right at a SORA classification hearing because an incompetent registrant is unable to meaningfully exercise the rights and procedural protections afforded them under the statute. Defendant also contends that his classification hearing was held prematurely because it was held long before he was set to be released into the community. The prosecution responds that SORA's list of procedural requirements is exhaustive and does not include a right to a competency hearing, and that the statute plainly mandates a hearing upon release from a correctional facility.

Contrary to the majority's conclusion, SORA's procedural safeguards presume the offender's competence to understand the nature and consequences of the hearing and meaningfully participate in and assist with his defense. The question before us does not require a rebalancing of defendant's interests against those of the State. Instead, the analysis here is controlled by prior case law recognizing an offender's right to due process, SORA's codification of judicially-identified procedural requirements, and the fundamental tenet of fairness at the core of any due process analysis.

We have previously recognized, as have federal courts, an offender's liberty interest in "not being required to register

under an incorrect label" (*People v Knox*, 12 NY3d 60, 66 [2009], citing *Paul v Davis*, 424 US 693, 701-710 & n 5 [1976]; *People v David W.*, 95 NY2d 130, 137 [2000]; *People v Gillotti*, 23 NY3d 841, 863 [2014]). As we reaffirmed in *People v Brown*, an offender has a "liberty interest in a criminal designation that ***79** rationally fits [their] conduct and public safety risk" (41 NY3d 279, 290 [2023]). The protections afforded an offender in a SORA risk classification proceeding were recognized in the *Doe v Pataki* federal litigation, wherein the courts held offenders have a right to constitutional due process and invalidated the prior framework that lacked those safeguards (3 F Supp 2d 456 [SD NY 1998], *on remand from* 120 F3d 1263 [2d Cir 1997]). The federal district court observed that risk level classification hearings fall "somewhere ****11** between a criminal proceeding . . . and a simple administrative proceeding," and that, although the due process protections required for these proceedings "are not as extensive" as those required in a criminal trial, registrants are entitled to, at a minimum: a hearing; notice of the hearing which explains the proceeding's purpose and discloses the Board's recommendation; counsel; prehearing discovery of evidence that informed the Board's recommendation; a requirement that the State prove the facts supporting each risk factor by clear and convincing evidence; and the right to appeal the determination (3 F Supp 2d at 470-472).

To comply with the federal court's order, the legislature codified these procedural safeguards by amending SORA (*see* Mem of NY St Atty Gen Legis Bur Chief, Bill Jacket, Bill Jacket, L 1999, ch 453 at 6 [explaining that the changes to Correction Law § 168-n respond to the concerns set forth in *Doe*]). SORA thus provides that a court shall make a risk level determination prior to a sex offender's "discharge, parole, release to post-release supervision or release . . . by the sentencing court" (Correction Law § 168-n [1]; *People v Boone*, 41 NY3d 573 [2024] [reading this language to mean release from DOCCS custody]). The court shall also make a determination on the level of notification after receiving a recommendation from the Board (*id.* § 168-n [2]). In advance of the risk assessment, a sex offender is entitled to counsel, notice of the SORA hearing date, a copy of the Board's risk level recommendation to the court with the Board's reasons, notice that the purpose of the hearing is to determine the offender's risk level (one, two or three) and the registration requirements (*id.* § 168-n [3]). The notice must also advise the offender that "[f]ailure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney" (*id.*). The notice must also advise the offender that they have a right to a hearing and to be represented by counsel—and, if the offender ***80** is eligible, one will be appointed—and the right to the prosecution's statement with its proposed determinations and reasons therefore (*id.*). The offender has a right to discovery and to present evidence on their behalf, including witnesses and documentary materials, as well as the right to testify in support of their arguments and downward departure request, if any (*id.*). The prosecutor bears the burden to establish by clear and convincing evidence the facts supporting its recommendation (*id.*). The court must set forth its written factual findings and conclusions of law supporting its risk level determination (*id.*).

The majority plows unnecessarily through a thicket of legal issues that are irrelevant because an offender's liberty interest and their constitutional right to due process in a risk classification proceeding are constitutionally and statutorily established. There is simply no need to balance interests under *Mathews v Eldridge* (424 US 319 [1976]) because the courts and the legislature have already struck a balance favoring offenders' rights to procedural safeguards.

The question is not whether defendant is entitled to a competency hearing prior to his risk classification as some additional form of due process, but whether it violates an offender's extant due process rights to conduct a risk level assessment hearing when they are not competent to participate in the proceeding or their competence is in question. Put another way, the question is whether an offender must be competent for the procedural safeguards to be meaningful. The answer is so obvious it hardly bears discussion and yet the majority ignores first principles and concludes that a competency requirement is unnecessary because the procedural safeguards are sufficient without consideration of the offender's mental capacity. That analysis is fatally flawed because it fails to recognize that the existing safeguards presume the offender's competence to invoke their protections. ****12**

As a matter of fundamental fairness and common sense, this panoply of due process guarantees acquires significance only when the offender is competent to participate in the hearing.[2] Notice is meaningless unless the offender understands its ***81** contents. The right to counsel is meaningless if the offender cannot communicate lucidly with their legal representative. Indeed, as appellate counsel argues on this appeal, an offender is denied effective representation by

counsel if due to their mental disability they are unable to engage counsel and provide information to assist in their defense. The right to be present and participate is illusory if an offender attends court physically without the mental capacity to understand and participate in the proceedings. And an offender's rights to controvert the prosecution's evidence and recommended risk level classification, to challenge an upward departure request and argue in support of a downward departure are made a mockery if the offender is mentally unable to articulate their thoughts, express remorse to the court, or explain why they present a lower risk of offense than the Board and the prosecution contend.

Nor does this inherent competency requirement undermine "the purpose underlying SORA—to protect the public from sex offenders" (*People v Mingo*, 12 NY3d 563, 574 [2009]). Under SORA, an offender must register with the Division of Criminal Justice Services "at least ten calendar days prior to discharge, parole, release to post-release supervision or release from any state or local correctional facility, hospital or institution where [they were] confined or committed" or "at the time sentence is imposed for any sex offender released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge" (Correction Law § 168-f [1]). The legislature ensured with this pre-risk classification mandate that there would be no lapse in registration during any potential delay between an offender's release from custody and the court's risk classification determination. In other words, an offender will not "slip through the cracks" if they were released into the community without having been designated a SORA risk level. The risk level classification sets the community notification level that applies to an already-registered offender. Level one offenders and those who have not yet received a risk ***82** level classification must register annually for 20 years from the date of their registration, while level two and three offenders must register annually for life (*id.* § 168-h [1]-[2]). Level three offenders must also verify their address every 90 calendar days with local law enforcement (*id.* § 168-h [3]). All registered offenders—classified or not—are listed in a telephone database available to the public (*id.* § 168-p [1]), while level two and three offenders also appear in the online database which makes public the offender's name, address, place of employment, photo, crimes of conviction, and other identifying ****13** information (*id.* § 168-q [1]).[3] Thus, there is no lapse in law enforcement notification and the public has a mechanism for learning certain information about an offender even without a risk level classification. Of course, persons like defendant, whose mental disability renders them incompetent to participate in a SORA hearing may very well not be released into the community for some time. As of this appeal, defendant is still confined in a psychiatric facility. He poses no danger to the public.

III.

Even under the majority's unnecessary analysis, the *Mathews v Eldridge* balancing test leads to the same conclusion: an offender's competency at the risk classification hearing is an indispensable requirement of the process due (*see* 424 US at 335). Indeed, contrary to the majority's view, all three *Mathews* factors tip in favor of a competency requirement.

As to the first factor, the majority acknowledges an offender's liberty interest in an accurate risk classification but concludes that the interest is limited based on the civil nature of SORA registration and risk classification proceedings (majority op at 66-67). Only by constricting the lens through which it views this interest can the majority reach such a conclusion. ***83** Offenders who are not competent or whose competence is in doubt have an additional interest at stake because they are at greater risk of failing to comply with SORA due to their mental disability. Failure to comply with SORA registration requirements—and for offenders subject to Sexual Assault Reform Act (SARA), the additional requirements that flow from a level two or three designation—places an offender in jeopardy of criminal prosecution, with an attendant loss of liberty. Reporting requirements differ by risk level. For example, level one and two offenders must report in person for a current photograph every three years, while level three offenders must appear every year. Level three offenders designated as a sexual predator must also verify their address every 90 days. An incompetent registrant who cannot understand the nature of the proceeding—particularly ones who, like defendant here, have a long history of mental illness—may be incapable of complying with these heightened requirements year after year. As one Ohio court queried, how could "an individual in the throes of Alzheimer's disease . . . functionally be able to comply with the annual registration requirements"? (*State v Chambers*, 151 Ohio App 3d 243, 248, 783 NE2d 965, 969 [2002]). Of course, noncompliance puts the individual at risk of incarceration. Failure to register or verify is a class E felony for a first offense and a class D felony for a second or subsequent offense, and may also be a basis for parole revocation (Correction Law § 168-t). Further, a level three designation subjects an offender to the residency restrictions of SARA (Executive Law § 259-c [14]). Level two and three offenders are ineligible for

certain housing, including with the New York City Housing Authority, making it significantly more difficult to find a suitable, SARA-compliant residence. If the offender is unable to find compliant housing, they may be confined past their conditional or maximum release date.[4] Thus, the outcome of a SORA hearing may directly result in continued incarceration and may indirectly result in re-incarceration should the mentally disabled offender be unable to comply with the heightened reporting requirements of a moderate or high-risk designation. The ***84** majority fails to account for and accommodate this liberty interest of a mentally incompetent offender.

As to the second factor—the likelihood of an erroneous determination absent the procedure sought by an offender—the majority bootstraps its way to a conclusion that there are already "robust" procedural requirements in a SORA hearing that sufficiently protect against erroneous deprivation of the narrow interest it believes is at stake (majority op at 68). As discussed, the Constitution and SORA guarantee an offender a host of rights (Correction Law §§ 168-n [2], [3]; 168-o [2]; *Doe*, 3 F Supp 2d at 470-472). The majority fails to recognize that these statutorily codified constitutional rights cannot be exercised by an incompetent defendant.

Indeed, many of these rights are identical to the ones afforded to defendants in parole revocation hearings, which this Court has expressly held cannot be exercised by an incompetent individual (*see Matter of Lopez v Evans*, 25 NY3d 199, 206 [2015]). The majority attempts to distinguish *Lopez* on the ground that parole revocation proceedings are "punitive in nature and their primary purpose is to adjudicate wrongdoing, the consequence of which may be a defendant's re-incarceration," compared with SORA risk classification hearings which "are not intended to serve as a form of punishment, and incarceration is not a potential consequence of SORA classification in and of itself" (majority op at 71). This minimizes the interest at stake in SORA hearings. Although the Court has stated that SORA is not a penal statute, there is no question that its "consequences" are "unlimited," and that registration—especially at a higher risk level classification—carries stigma that "pervades into every aspect of an offender's life" (*Doe*, 120 F3d at 1279). Additionally, as discussed with respect to the offender's interest under the first *Mathews* factor, the threat of incarceration is implicated in a SORA classification hearing, particularly for incompetent registrants.

The majority holds that SORA hearings are "more aptly analogize[d]" to civil commitment proceedings under the Sex Offender Management and Treatment Act (SOMTA), which "may proceed notwithstanding questions regarding a party's competency" (majority op at 72). But those proceedings are instituted only where the State believes there is sufficient evidence that the defendant is "a detained sex offender who suffers from a mental abnormality," defined in the statute as "a congenital or acquired condition, disease or disorder that affects ***85** the emotional, cognitive, or volitional capacity of a person" in a manner that predisposes them to criminal sexual conduct (Mental Hygiene Law §§ 10.07 [a]; 10.03 [i]). It is self-evident that such proceedings can go forward without a competency ****14** determination; they are instituted precisely because the individual has some alleged mental condition or disorder. That mental condition or disorder cannot hinder a SOMTA proceeding when it is the very reason for the proceeding. Moreover, the purposes of SOMTA and SORA hearings are not the same. While a SOMTA hearing is, in part, designed to protect the community, its purpose is also to provide care and treatment to mentally ill sex offenders (Mental Hygiene Law § 10.01 [c], [f] ["The goal of a comprehensive system should be to protect the public, reduce recidivism, and ensure offenders have access to proper treatment," and "the system should offer meaningful forms of treatment to sex offenders in all criminal and civil phases, including during incarceration, civil commitment, and outpatient supervision"]). Although a SORA risk classification is civil, its purpose is in no way to assist the offender but solely to set the proper risk level to ensure public safety (*Brown*, 41 NY3d at 284; *Mingo*, 12 NY3d at 574).

The majority references other types of civil hearings but those comparisons are similarly inapt (*see* majority op at 72). In the immigration context, the federal government has "broad power" to "make[ ] rules that would be unacceptable if applied to citizens" (*Reno v Flores*, 507 US 292, 305-306 [1993], quoting *Fiallo v Bell*, 430 US 787, 792 [1977]). Thus, the individual's interest is outweighed by federal authority. The termination of parental rights can be effected where a parent is, "by reason of mental illness or intellectual disability, [unable] to provide proper and adequate care" for their child (Social Services Law § 384-b [4] [c]). Those termination proceedings, like SOMTA proceedings, necessarily involve an incompetent party. It would be impractical and contradictory to create a rule that would require a parent to argue that they are too mentally ill to understand the proceeding but are mentally fit to care for

their child. The majority also cites one Appellate Division decision for the proposition that "an order of protection can be issued against an incompetent respondent in a family offense proceeding" (majority op at 72, citing *Matter of Julie G. v Yu-Jen G.*, 81 AD3d 1079, 1081 [3d Dept 2011]). *Julie G.* says no such thing. The Appellate Division held that "the competency procedures under CPL article 730, applicable in criminal actions, ***86** do not govern in family offense proceedings in Family Court" but nevertheless "[i]n civil proceedings, the court can appoint a guardian ad litem for a party who cannot understand the proceedings, defend [their] rights or assist counsel" (*id.*, citing CPLR 1201). Thus, the Appellate Division recognized what the majority chooses to ignore: the law does not run roughshod over the mentally disabled but instead protects their rights.

Two of the most critical rights that an incompetent offender cannot fully exercise is the right to counsel and the right to be present at the hearing. SORA guarantees the right to counsel, including assigned counsel for eligible offenders. But that right is rendered meaningless unless counsel can communicate with their client because the client "provide[s] the factual underpinnings of the presentation" (*Lopez*, 25 NY3d at 206). An attorney cannot advance their client's interests if the client lacks "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding" (*Dusky v United States*, 362 US 402, 402 [1960]).

Defendant's case illustrates the lawyer's quandary. Defendant gave such a limited personal history that counsel was not even sure what grade level defendant completed in school. There was no way for counsel to seek relevant documentary evidence outside of the record, such as medical records related to defendant's family history of schizophrenia or letters of support from loved ones. Defendant also at one point had suggested his trial attorney was working "on both sides," indicating that, as a result of his mental disability, he might not have trusted counsel enough to disclose personal information to her. Medical records in particular often require a defendant to sign medical ****15** release forms that someone who is paranoid as a result of their mental disability may refuse to sign, without understanding the consequences of this decision. This defendant was without the benefit of any additional mitigating evidence that counsel might have been able to find with defendant's assistance, and thus counsel was hampered in her presentation of relevant materials under Correction Law § 168-n (3).

Being forced to present a defense without the participation of the client doubtless causes an ethical dilemma for defense attorneys. "To be meaningful the right to counsel 'requires the guiding hand of counsel at every step in the proceedings' " (*People v Joseph*, 84 NY2d 995, 997 [1994], citing *Powell v Alabama*, 287 US 45, 69 [1932]). The Court's decision today will require counsel in a SORA proceeding to present their client's ***87** defense knowing they have not "guided" their client at all, nor, with the assistance of their client, collected mitigating evidence that would ordinarily be their responsibility to present in support of a defense or an affirmative request for a downward departure. The Appellate Division has held counsel ineffective at SORA hearings where counsel failed to sufficiently communicate with their client (*see e.g. People v Moore*, 208 AD3d 1514, 1515 [3d Dept 2022] [counsel at SORA hearing was ineffective where he "had not had a chance to speak with defendant" and further failed to present a defense]; *People v VonRapacki*, 204 AD3d 41, 44 [3d Dept 2022] [counsel "did not communicate with his client at all" and "essentially agreed to the Board's recommendation"]). The majority's decision ignores our effective assistance of counsel standards by sanctioning an attorney's inability to adequately discuss the defense with their client or seek mitigating evidence based on their client's input—conduct that would be considered ineffective in any other context where assistance of counsel is guaranteed (*see People v Oliveras*, 21 NY3d 339, 344-345 [2013] [counsel in criminal trial was ineffective where he argued that the defendant "was not playing with a full deck" but did not obtain or review any of the defendant's psychiatric records (internal quotation marks omitted)]; *Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1093 [3d Dept 2009] [assigned counsel in Family Court was ineffective where he represented what he believed to be in his child client's best interest but revealed he "had neither met nor spoken with the child"], *lv denied* 15 NY3d 715 [2010]).

The majority's decision also fails to account for and accommodate a mentally disabled offender's right to be present at the SORA hearing, as provided in SORA (Correction Law § 168-n [3]). The prosecution in this case and the Appellate Division in *People v Parris* (153 AD3d 68, 82 [2d Dept 2017])—which the majority cites approvingly (majority op at 69, 71)—acknowledged that an incompetent defendant is not "present" to participate in the SORA proceeding. That is correct as an incompetent defendant is present physically but does not possess the mental acuity necessary to understand the proceedings and assist in their defense (*see Drope v Missouri*, 420 US

162, 171 [1975] ["Some have viewed the common-law prohibition" against trials of incompetent defendants "as a by-product of the ban against trials *in absentia;* the mentally incompetent defendant, though physically present in the courtroom, is in ***88** reality afforded no opportunity to defend himself" (internal quotation marks omitted)]). Indeed, the SORA court found that during the hearing defendant had "a vacant stare" and did not say "a word to his lawyers." This is not even due process in name only.

The majority recognizes that errors will occur but rather than avoid them up front, unwisely adopts the approach taken in *Parris* and declares that a misclassified offender can simply seek modification on an annual basis (majority op at 68-69, citing *Parris*, 153 AD3d at 82). A modification hearing is legally inadequate for several reasons. First, a post-deprivation proceeding cannot remedy the due process violation suffered by a mentally disabled offender who is unable to understand the ****16** proceedings and assist in their defense. The hearing held under these circumstances *is* the violation. Indeed, pre-deprivation hearings are the norm. "Due process requires that a person whose constitutional rights are affected by government action is entitled to be heard and it makes obvious sense in most cases 'to minimize substantially unfair or mistaken deprivations' by insisting that the hearing be granted at a time when the deprivation can still be prevented" (*Matter of Lee TT. v Dowling*, 87 NY2d 699, 713 [1996], citing *Fuentes v Shevin*, 407 US 67, 79-82 [1972]). Second, post-deprivation proceedings are particularly inappropriate in cases like this one involving reputational harm (*id.*). That is obvious here because once an individual is classified as a level two or three offender and placed on the online database, that bell cannot be unrung and the stigma is near impossible to shake off (*Doe v Pataki*, 940 F Supp 603, 626-627 [SD NY 1996] ["the consequences of community notification are unlimited" and cause stigma that "by its very nature pervades into every aspect of an offender's life" (brackets omitted)]; *see also* brief for Office of the Public Defender for the State of New Jersey et al., amici curiae, in *Smith v Doe*, 538 US 84 [2003], available at 2002 WL 1798881, *7-21 [discussing examples of ostracism and vigilante violence against sex offenders]). Third, a modification hearing is meaningless to an offender determined to be incompetent for the rest of their life.

As to the third *Mathews* factor, I agree that the State has an interest in protecting the public from sex offenders (*People v Mingo*, 12 NY3d 563, 574 [2009] [referring to SORA's purpose of protecting the public as a "significan(t) . . . mission"]). That interest is not furthered by adjudicating defendant's risk level ***89** at a time when he is civilly committed in a secure OMH facility for treatment pursuant to article 9 and must register as a sex offender now (*see* Correction Law § 168-f). The majority cannot explain how defendant poses a risk to public safety serious enough to outweigh the other *Mathews* factors while he is locked up with no release date in sight.[5] Instead, the majority and the prosecution raise the specter of "dangerous registrants" (who are incompetent) possibly being released into the community for "lengthy periods" without the additional notice that accompanies a SORA level two or level three classification. To be sure, we must take seriously the legislature's determination that SORA's three-tiered classification scheme effectively serves the critical purpose of "protect[ing] the public from sex offenders" (*Mingo*, 12 NY3d at 574). But the prosecution has offered no details about who this group might include and how sizable it might be, nor has the prosecution answered with any precision why incompetent offenders cannot be treated similarly to other individuals who register first and have their SORA level adjudicated after they are living in the community (i.e., when a person moves to New York from a different jurisdiction or is released from ****17** federal custody, or when for some other reason a court is unable to hold a hearing prior to the offender's release) (*see* Correction Law § 168-l [8]).[6]

***90** Additionally, as we recognized in *Brown*, "[p]opulating the registry with the names and information of individuals who do not pose a danger of sexual recidivism to children undermines the usefulness of the registry and wastes government resources on tracking people who are not the intended targets of SORA nor implicate the public risk and law enforcement needs that first necessitated SORA registries" (41 NY3d at 297 [internal quotation marks and some brackets omitted]). The usefulness of the registry is similarly undermined when its classification system is inaccurate, and government resources are wasted when individuals who pose a lower risk of recidivism are subjected to the heightened notification requirements of a high-risk classification (*see E.B. v Verniero*, 119 F3d 1077, 1107-1108 [3d Cir 1997] [holding that the government has no "interest in notifying those who will come into contact with a registrant who has erroneously been identified as a moderate or high risk"]). There is no way to guarantee that an offender is accurately assessed when they are not competent to understand the proceeding or participate in their defense.

The majority puts its thumb on the scale in favor of the State's interest in protecting the public by minimizing the harm to a mentally ill offender that inheres in a hearing violative of due process. Indeed, the majority suggests that, because defendant is civilly confined, he is "shield[ed]" from "the public and its stigma" (majority op at 70). First, the majority ignores that the deprivation of defendant's right to counsel and right to be present at his SORA hearing was harm in and of itself. Second, mentally ill sex offenders—including those who are institutionalized—are whole human beings who may still experience stigma and reputational harm. The fact that the public cannot immediately act upon that stigma by denying the offender a job or refusing them service does not render the stigmatizing label meaningless; to the contrary, an erroneous overclassification creates real and practical harms for committed offenders. For example, a high-risk classification increases the risk that an otherwise clinically-appropriate residential treatment setting will deny the offender placement. In this way, an inaccurate classification while hospitalized may doom the offender to commitment more restrictive than their actual risk of recidivism warrants, potentially denying them access to ***91** the least restrictive alternative. Indeed, defense counsel represented to the Court that OMH doctors have recommended a nursing home as the "best place" for defendant, but his level two classification has "hampered" their ability to find placement for him.

Finally, the majority considers the "additional burdens on the government" posed by "a psychiatric examination and additional hearing to determine a registrant's mental competency" and the ****18** "continual[ ] monitoring [of] registrants found to be incompetent over indefinite periods to determine whether they have regained fitness and can be accurately classified" (majority op at 69). That concern is without factual basis in the record. Indeed, the courts below did not find—nor did the prosecution ever specifically argue—that pre-hearing competency evaluations would burden the State. The defense also represents that, in at least one case, the prosecution agreed that "a registrant is entitled to a competency determination if the SORA court is aware of the possibility of incompetence" (brief for defendant-appellant at 32, citing *People v Hood*, 35 AD3d 1138 [3d Dept 2006]). Moreover, while administrative burden is a relevant consideration under *Mathews*, it is not enough to override the substantial liberty interest at stake in a SORA proceeding, especially when the offender, as is the case here, is civilly committed at the time of hearing.

IV.

The majority is wrong on the law that due process tolerates a SORA risk classification hearing conducted when the offender is not competent to understand the nature and consequences of the proceeding and is unable to assist counsel with their defense. The majority endorses two systems of justice: one for competent offenders and one less protective for those with mental illness. It is time for the legislature to act where the Court has failed and accord equal rights to mentally disabled offenders.

Judges Garcia, Singas and Troutman concur. Judge Rivera dissents in an opinion, in which Chief Judge Wilson concurs. Judge Halligan dissents, would apply the *Mathews v Eldridge* (424 US 319 [1976]) balancing test and, doing so, reverse for reasons stated in part III of the dissenting opinion.

Order affirmed, without costs.

Footnotes

1 In July 2012, defendant was found fit to proceed and was arraigned. But in April 2013, he was again declared unfit and criminal proceedings paused. Subsequent competency examinations conducted in November 2013, November 2014, and April 2016 reaffirmed his unfitness.

2 The dissent suggests that exempting incompetent registrants from SORA classification would treat them no differently than persons who "move[ ] to New York from a different jurisdiction or [are] released from federal custody, or when for some other reason a court is unable to hold a hearing prior to the offender's release" (dissenting op at 89). The classes of offenders the dissent is referencing are required to be given risk levels "expeditiously" (Correction Law § 168-l [8]). SORA does not permit the type of avoidable and indefinite delay in risk-level classification the dissent and defendant are advocating for here.

3 Defendant was represented by counsel who diligently defended his interests. Among other things, counsel successfully argued against the Board's assessment of points based on defendant's purported failure to accept responsibility at his parole intake interview, because there was "no evidence whether [he] was fully competent or fit" at the time of his alleged denial of guilt. Counsel also made creditable arguments in support of a request for a downward modification from level two based on defendant's age and mental health issues, with supporting literature. Defendant does not seek our review of the court's discretionary determination to deny a downward departure based on those factors.

4 The dissent also references a telephone number the public can call, but only limited information is available to the public through that method. Calling the number allows a person to "inquire whether a named individual required to register pursuant to [SORA] is listed," if the caller can supply the individual's "exact street address, including apartment number, driver's license number or birth date, along with additional information that may include social security number, hair color, eye color, height, weight, distinctive markings, ethnicity[,] or . . . any combination of the above listed characteristics if an exact birth date or address is not available" (Correction Law § 168-p [1]).

5 Specifically, a registrant who fails to register or verify in the manner and within the time periods provided for under SORA may be prosecuted for committing a class E felony (*see* Correction Law § 168-t). Although we have no occasion here to decide the culpable mental state required for the crime of failure to register, we note that the Criminal Jury Instructions provide that, to be guilty, "a sex offender must know that he or she is required to register and must know the manner and time periods within which he or she is required to do so" (CJI2d[NY] Correction Law § 168-t, Failure to Register or Verify as a Sex Offender, https://www.nycourts.gov/judges/cji/4-SORA/SORA/Correction_168-t.SORA.pdf; *see People v Haddock*, 48 AD3d 969, 970-971 [3d Dept 2008], *lv dismissed* 12 NY3d 854 [2009]; Gary Muldoon, Handling a Criminal Case in New York § 23:91 [Sept. 2023 update]).

6 For precisely the same reason, we cannot avoid *Mathews* and circumvent consideration of a registrant's liberty interest simply by "presuming" that prior courts and the legislature weighed the interests involved and decided *against* a competency requirement, which after all appears nowhere in SORA, its legislative history, or this Court's precedents. As the dissent acknowledges, "this Court has no authority to replace its preferred policy for that of the legislature" (dissenting op at 82 n 3, citing *People v Davis*, 43 NY2d 17, 30 [1977]).

1 Under article 9, a person with a mental illness may be involuntarily committed for care and treatment essential to their welfare when their "judgment is so impaired that [they are] unable to understand the need for such care and treatment" (Mental Hygiene Law § 9.01).

2 The importance of a defendant's competence throughout the legal proceedings against them has been recognized since the mid-eighteenth century. Blackstone's Commentaries discussed an earlier law in place during the reign of Henry VIII which said that a person who commits a crime while "being compos mentis" and then later "fall[s] into madness" may "be tried in [their] absence" and even "suffer death, as if [they] were of perfect memory." Blackstone called this law "savage and inhuman," and observed that, even for an individual who commits a crime while sane, they "ought not to be arraigned for it" if they are not competent "to plead to it with that advice and caution that [they] ought," and should not be tried if they cannot "make [their] defense" (4 William Blackstone, Commentaries on the Laws of England at 24-25). The critical observation holds true in the SORA context: an incompetent individual cannot defend themselves.

3 The majority asserts that incompetent, unclassified offenders would not be listed on the online sex offender database, and that the telephone hotline would only disclose the offender's presence on the registry to callers who can supply certain identifying information about the offender (majority op at 70 & n 4). This distinction matters little with respect to offenders who, like defendant, are civilly committed to a secure treatment facility and therefore pose no danger to the public. Moreover, this pre-classification registration applies to *all* offenders until the time that their risk level can be correctly classified, after a hearing in which they are able to participate. To the extent the majority believes it to be inadequate, this Court has no authority to replace its preferred policy for that of the legislature (*see People v Davis*, 43 NY2d 17, 30 [1977]).

4 This is a significant problem for offenders with additional housing requirements. Disabled offenders, for example, are "held in prison an average of three years past their release date awaiting [SARA]-compliant housing" (Kevin Bliss, *New York's SARA Requirements Force Sex-Offenders into Homelessness Then Hold Them in Prison Due to Their Homelessness*, Criminal Legal News [Apr. 2020]).

5 The prosecution suggests without any data that a risk classification might provide protection to patients, staff, and visitors at his treatment facility. There is no basis to conclude that defendant poses any greater risk to those individuals than he did to corrections officers, other inmates, and visitors while he was in DOCCS custody, nor that the OMH facility's knowledge of a risk level classification would in any way change its treatment or handling of defendant. Staff at secure treatment facilities are aware of their patients' diagnoses and criminal history and are equipped to handle individuals who may pose a danger to others (*see* OMH Official Policy Manual § A-3018, Criminal Histories [Aug. 25, 2023] ["To provide a safe environment at OMH facilities criminal histories of adult patients are checked on admission to the facility"]; *see also* § A-3024, Responding to Crisis Situations [Aug. 25, 2023] [explaining OMH policy on "Responding to Behavioral Codes and Psychiatric Crisis Situations"]).

6 The majority posits that because SORA mandates an "expeditious [ ]" hearing for such offenders, it cannot permit "indefinite delay[s]" for incompetent offenders (majority op at 68 n 2). The majority misses the point: the sole purpose of the statute is public safety, yet the legislature expressly contemplated that in some cases, strict adherence to its timing scheme would not be feasible and an individual may be living in their community before a risk level hearing can take place. It is illogical to say that, although some offenders will rejoin their community—where they will pose some risk of recidivism—without a risk level adjudication, an incompetent individual who is civilly confined and therefore presents no risk to the public must be adjudicated a risk level upon their transfer from one kind of custody to another.

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15 Cal.5th 292
Supreme Court of California.

PICO NEIGHBORHOOD ASSOCIATION et al., Plaintiffs and Respondents,

v.

CITY OF SANTA MONICA, Defendant and Appellant.

S263972
|
August 24, 2023
|
As Modified September 20, 2023

Synopsis

Background: Neighborhood organization and registered voter brought action alleging that city's at-large voting system for nonpartisan elections for city council discriminated against Latinos, in violation of California Voting Rights Act and California Constitution's Equal Protection Clause. Following bench trial, the Superior Court, Los Angeles County, No. BC616804, Yvette M. Palazuelos, J., 2019 WL 10854474, entered judgment in plaintiffs' favor on constitutional and statutory claims and ordered city to switch to district-based voting. City appealed. The Court of Appeal, 51 Cal.App.5th 1002, 265 Cal.Rptr.3d 530, reversed. Review was granted.

[Holding:] The Supreme Court, Evans, J., held that plaintiffs, after establishing existence of racially polarized voting, were not required to prove that minority group of Latino voters would constitute a majority, or near majority, of hypothetical single-member district.

Court of Appeal reversed; remanded.

Opinion, 51 Cal.App.5th 1002, 265 Cal.Rptr.3d 530, depublished.

West Headnotes (17)

[1] **Election Law** Vote Dilution

Election Law Compactness and cohesiveness of minority group

In two significant respects, California Voting Rights Act (CVRA) makes it easier than § 2 of VRA to challenge State's or political subdivision's at-large method of election: first, CVRA, unlike VRA, does not require plaintiff to demonstrate that members of minority group would be geographically compact or concentrated enough to constitute a majority of hypothetical single-member district, and second, while plaintiff can succeed under either VRA or CVRA by showing that at-large method dilutes minority group's voting power by impairing its ability to elect candidates of its choice, only CVRA allows plaintiff to prevail by demonstrating, in the alternative, that at-large method impairs minority group's ability to influence election outcome. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b); Cal. Elec. Code §§ 14027, 14028(c).

[2] **Election Law** Vote Dilution

A court presented with a vote-dilution claim challenging an at-large voting system under § 2 of the VRA, or under the California Voting Rights Act (CVRA), which applies to nonpartisan elections, should undertake a searching evaluation of the totality of the facts and circumstances, including the characteristics of the specific locality, its electoral history, and an intensely local appraisal of the design and impact of the contested electoral mechanisms, as well as the design and impact of the potential alternative electoral system. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b); Cal. Elec. Code §§ 14026(a, c), 14027, 14028(e).

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

Election Law Racially polarized or bloc voting

An at-large electoral system or multimember district can qualify as a prohibited vote-dilution practice under § 2 of the VRA when the plaintiff can show that a bloc-voting majority is usually able to defeat candidates supported by a politically cohesive, geographically insular minority group, and the greater the degree to which the electoral minority is homogenous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Racially polarized or bloc voting

Plaintiff asserting vote-dilution challenge to at-large voting system, under § 2 of VRA, must satisfy three threshold conditions under *Gingles*: first, minority group must be sufficiently large and geographically compact to constitute majority in single-member district, second, minority group must be politically cohesive, and third, white majority must vote sufficiently as bloc to enable it, in absence of special circumstances, such as minority candidate running unopposed, usually to defeat minority group's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[5] **Election Law** Vote Dilution

Once the plaintiff asserting vote-dilution challenge to at-large voting system, under § 2 of VRA, has satisfied the three threshold conditions under *Gingles*, trial court is to consider totality of the circumstances and determine, based upon a searching practical evaluation of past and present reality, whether the political process is equally open to minority voters, and this determination is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and impact of contested electoral mechanisms. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[6] **Election Law** Vote Dilution

Under totality of circumstances approach for considering vote-dilution challenge to at-large voting system, under § 2 of VRA, court considers a number of factors that typically may be relevant, including: history of voting-related discrimination in State or political subdivision; extent to which voting is racially polarized; extent to which State or political subdivision has used voting practices or procedures that tend to enhance opportunity for discrimination against minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; exclusion of members of minority group from candidate slating processes; extent to which minority group members bear effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in political process; use of overt or subtle racial appeals in political campaigns; and extent to which members of minority group have been elected to public office in the jurisdiction. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Racially polarized or bloc voting

For a vote-dilution challenge to an at-large method of election under Section 2 of the VRA, or under the California Voting Rights Act (CVRA), which applies to nonpartisan elections, a plaintiff must show polarized voting, i.e., members of minority group vote as a politically cohesive unit, while the majority votes sufficiently as a bloc usually to defeat minority group's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Cal. Elec. Code §§ 14026(a, c, e), 14027, 14028(a).

[8] **Statutes** Context

A court construing a statute does not view a fragment in isolation, but considers the statute as a whole, in context with related provisions and the overall statutory structure, so that it may best identify and effectuate the scheme's underlying purpose.

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

To establish vote dilution under § 2 of the VRA, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

While the existence of racially polarized voting is relevant to a vote-dilution claim under § 2 of the VRA, and is indeed a key element for the claim, it is not in itself sufficient, and dilution requires a showing that the minority group has less ability to elect its preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The existence of racially polarized voting is not, in itself, sufficient for a vote-dilution claim under the California Voting Rights Act (CVRA) challenging a nonpartisan at-large voting system, and dilution requires a showing that the minority group has less ability to elect its preferred candidate or influence the election's outcome than it would have if the at-large system had not been adopted. Cal. Elec. Code §§ 14026(a, c), 14027.

1 Case that cites this headnote

[12] **Election Law** Vote Dilution

To establish the dilution element for a vote-dilution claim under the California Voting Rights Act (CVRA) challenging a nonpartisan at-large voting system, the plaintiff must identify a reasonable alternative voting practice to the existing at-large electoral system that will serve as the benchmark undiluted voting practice. Cal. Elec. Code §§ 14026(a, c), 14027.

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

The rationale for requiring, in a vote-dilution challenge under § 2 of the VRA to an at-large voting system, that the challenger demonstrate that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district is that if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[14] **Municipal Corporations** Nature and constitution of body in general

To prevail on vote-dilution challenge under California Voting Rights Act (CVRA) to at-large method of nonpartisan elections for city council, challengers, after establishing existence of racially polarized voting, were not required to prove that minority group of Latino voters would constitute a majority, or near majority, of hypothetical single-member district, where winning candidates often earned only plurality of vote; accordingly, what was required to establish dilution of Latino voters' ability to elect candidates of their choice was proof that, under some lawful alternative electoral system, Latino voters would have potential, on their own or with help of crossover voters, to elect their preferred candidate, and lawful alternative electoral systems could include, but were not

limited to, single-member district elections. Cal. Elec. Code §§ 14026(a, c, e), 14027, 14028(a).

1 Case that cites this headnote

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

To establish, under the California Voting Rights Act (CVRA), that an at-large voting system for nonpartisan elections dilutes a minority group's ability to elect its preferred candidate, a plaintiff must demonstrate the potential to elect representatives under some lawful alternative electoral method, and one way to do this would be to show that minority group would be sufficiently large and geographically compact to constitute a majority in a single-member district, but that is not the only way, and plaintiff could demonstrate minority group's ability to attract crossover votes for its preferred candidate, or plaintiff may identify nondistrict remedies that would enable minority group, on its own or with assistance of crossover votes, to elect its preferred candidate. Cal. Elec. Code §§ 14026(a, c, e), 14027.

1 Case that cites this headnote

[16] **Election Law** Vote Dilution

Key inquiry in establishing dilution, in vote-dilution challenge to at-large voting system for nonpartisan elections under California Voting Rights Act (CVRA), of minority group's ability to elect its preferred candidate is what percentage of vote would be required to win, an inquiry that is not short-circuited merely because minority group may fall short of absolute majority or something close to it, and in predicting how many candidates are likely to run and what percentage may be necessary to win, courts may consider experiences of similar jurisdictions that use district elections or other alternatives to traditional at-large elections, and courts should keep in mind that the inquiry at liability stage is simply to prove that a solution is possible, and not necessarily to present final solution. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b); Cal. Elec. Code §§ 14026(a, c), 14027, 14028(e).

[17] **Election Law** Vote Dilution

The dilution element for a vote-dilution challenge to an at-large voting system under § 2 of the VRA, or under the California Voting Rights Act (CVRA), which applies to nonpartisan elections, ensures that the minority group is not made worse off, and to replace at-large elections with district elections under a dilution theory, a successful plaintiff must show not merely that the minority group would have a real electoral opportunity in one or more hypothetical districts, but also that the incremental gain in the group's ability to elect its candidate of choice in such districts would not be offset by a loss of the group's potential to elect its candidates of choice elsewhere in the locality. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b); Cal. Elec. Code §§ 14026(a, c), 14027.

****57** *****322** Second Appellate District, Division Eight, B295935, Los Angeles County Superior Court, BC 616804, Yvette M. Palazuelos, Judge

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Opinion

Opinion of the Court by Evans, J.

***305** ****58** *****323** Local governments make many of the most important decisions that affect Californians' everyday lives. They build and repair public streets, they define a neighborhood's character through planning and zoning, and they decide where to place public parks and where to allow restaurants, bars, and liquor stores to operate. They make decisions about public transit and decide where to site industries that cause pollution. They provide police services and determine the level and type of policing and other first responder services, they educate our children, they operate or regulate local utilities, and they have the power to levy taxes. The people exercise control over these choices by electing representatives to city councils, county boards, boards of education, community college boards, special district boards, and other bodies.

The genius of representative government, in all its guises, is that it is responsive to the people it serves. But its ability to be responsive is dependent in a fundamental way on the assumption that each *****324** person's vote is of equal weight. While we often take that assumption for granted, sometimes the actual value of one's vote can vary based on the way the voting is structured. For example, a minority of voters may find itself unable to elect even a single member of a multimember body when the members are elected ***306** at large, but would be able to elect one or more representatives if the members were elected by districts or by another lawful method.

In such circumstances, the voting rules may effectively decide whether a group of voters can have a voice in the myriad decisions made by local representatives. With a seat at the table, the voters' representative can have a say in the topics and terms of the debate on the many crucial decisions that local governments make. Without a seat, though, the voters'

voice may be effectively muted or silenced and their needs and preferences may be ignored or given less weight.

To address this problem, federal and state law restrict at-large voting systems from unfairly submerging or diluting the votes of a minority in the majority's greater numbers. Section 2 of the federal Voting Rights Act of ****59** 1965 (52 U.S.C. § 10301; VRA) prohibits states and their political subdivisions from using an at-large method of election when such a scheme would "result in unequal access to the electoral process" based on protected characteristics of race, color, or membership in a language minority group. (*Thornburg v. Gingles* (1986) 478 U.S. 30, 46, 106 S.Ct. 2752, 92 L.Ed.2d 25 (*Gingles*).) In an effort to provide greater protections to California voters than those provided by the VRA, the Legislature subsequently enacted the California Voting Rights Act of 2001 (Elec. Code, § 14025 et seq.; CVRA). The CVRA prohibits an at-large method of election "that impairs the ability of a protected class" (*id.*, § 14027) — as defined by race, color, or language minority group (*id.*, § 14026, subd. (d)) — "to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class" (*id.*, § 14027).

[1] Both statutory schemes require a plaintiff to show racially polarized voting — i.e., that the protected class members vote as a politically cohesive unit, while the majority votes "sufficiently as a bloc usually to defeat" the protected class's preferred candidate. (*Gingles*, *supra*, 478 U.S. at p. 56, 106 S.Ct. 2752; accord, Elec. Code, §§ 14026, subd. (e) [providing that "racially polarized voting" may be established by "[t]he methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the [VRA]"], 14028, subd. (a).) The CVRA, however, "make[s] it easier to successfully challenge at-large districts" in two significant respects. (Assem. Com. on Elections, Reapportionment and Const. Amends., Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Mar. 18, 2002, p. 4.) First, the CVRA, unlike the VRA, does not require a plaintiff to demonstrate that the members of the protected class would be geographically compact or concentrated enough to constitute a majority of a hypothetical single-member district. (Compare Elec. Code, § 14028, subd. (c) with *Gingles*, at p. 50, 106 S.Ct. 2752.) ***307** Second, while a plaintiff can succeed under either the VRA or the CVRA by showing that the at-large method dilutes a protected class's voting power by impairing its ability "to elect" candidates of its choice (52 U.S.C. § 10301(b); Elec. Code, § 14027), only the CVRA allows the plaintiff to prevail by demonstrating, in the alternative, that the at-large method impairs the class's ability "to *influence* the outcome of an election." *****325** (Elec. Code, § 14027, italics added; cf. *League of United Latin American Citizens v. Perry* (2006) 548 U.S. 399, 446, 126 S.Ct. 2594, 165 L.Ed.2d 609 (*LULAC*) (plur. opn. of Kennedy, J.) ["The failure to create an influence district ... does not run afoul of § 2 of the [VRA]"].)

In this case, the trial court determined that because of racially polarized voting, the at-large method of electing city council members in the City of Santa Monica (the City) diluted Latino voters' ability to elect their preferred candidates and their ability to influence the outcome of council elections, as compared to several alternative electoral methods, including district elections. To remedy this violation, the trial court ordered the City to promptly conduct a special election using a seven-district map drafted by an expert who testified at trial.

The Court of Appeal granted a stay of the judgment and then reversed. It disagreed with the trial court's finding that the at-large method of election had "impaired Latinos' ability to elect candidates of their choice or to influence the outcome of an election." In the Court of Appeal's view, there had been no dilution of Latino voters' ability to elect their preferred candidates because Latino voters were too few and too geographically dispersed "to muster a majority, no matter how the City might slice itself into districts." The court likewise found no dilution of Latino voters' ability to influence the outcome of an election because a group's ability to influence an election, the Court of Appeal reasoned, has no meaning independent of the group's ability to elect its preferred candidate. In light of its findings, the Court of Appeal found it unnecessary to consider whether racially polarized voting had been established.

We conclude the Court of Appeal misconstrued the CVRA. To prevail on a CVRA ****60** claim, a plaintiff who has established the existence of racially polarized voting in an at-large system need not prove that the protected class would constitute a majority — or, as the City proposes, a near majority — of a hypothetical single-member district. City council elections, after all, are nonpartisan (Cal. Const., art. II, § 6), and the record here shows that winning candidates often earn only a plurality of the vote. Accordingly, what is required to establish "dilution" of a protected class's "ability ... to elect candidates of its choice" (Elec. Code, § 14027) is proof that, under some lawful alternative electoral system, the protected class would have the ***308** potential, on its own or with the

help of crossover voters, to elect its preferred candidate. The lawful alternative electoral system may include, but is not limited to, single-member district elections.

[2] A court presented with a dilution claim should undertake a searching evaluation of the totality of the facts and circumstances (see, e.g., Elec. Code, § 14028, subd. (e)), including the characteristics of the specific locality, its electoral history, and " 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms" as well as the design and impact of the potential alternative electoral system. (*Gingles*, *supra*, 478 U.S. at p. 79, 106 S.Ct. 2752; see *Allen v. Milligan* (2023) 599 U.S. 1, ——, 143 S.Ct. 1487 [216 L.Ed.2d 60, 75] (*Milligan*).) In predicting how many candidates are likely to run and what percentage may be necessary to win, courts may also consider the experiences of other similar jurisdictions that use alternative electoral systems. (Cf. *Gingles*, at p. 56, 106 S.Ct. 2752.)

Because the Court of Appeal did not evaluate the dilution element of the CVRA under this standard, we reverse the judgment and remand the matter to the Court ***326** of Appeal for it to reconsider in the first instance the CVRA claim presented here.

I. Background

Defendant, the City of Santa Monica, has a seven-member city council. Members are elected at large through staggered elections: four are elected during the year of a presidential election, while the other three are elected during the year of a gubernatorial election. Plaintiff Pico Neighborhood Association is a nonprofit organization dedicated to advancing the interests of the residents of the City's Pico neighborhood, where its Latino residents are concentrated. While Latinos constitute only 13.64 percent of the City's citizen-voting-age population, they make up 30 percent of Pico's citizen-voting-age population.

In April 2016, plaintiffs Pico Neighborhood Association and Maria Loya, a Latina registered voter, filed this action against the City, alleging that the City's at-large method of electing its city council unlawfully impaired the ability of Latino voters to elect their preferred candidates or, alternatively, to influence the outcome of council elections. The at-large scheme, in plaintiffs' view, violated the CVRA as well as the equal protection clause of the California Constitution (Cal. Const., art. I, § 7, subd. (a)).

Following a six-week trial, the Los Angeles County Superior Court ruled in plaintiffs' favor on both claims, but this appeal concerns only the CVRA claim. After reviewing elections over the preceding 24 years, the court *309 declared that "a consistent pattern of racially-polarized voting emerges. In most elections where the choice is available, Latino voters strongly prefer a Latino candidate running for Defendant's city council, but, despite that support, the preferred Latino candidate loses." Indeed, at the time of the court's ruling, "only one Latino ha[d] been elected to the Santa Monica City Council in the 72 years of the current election system."[1] The court further observed that the statistical evidence of racially polarized voting was corroborated by multiple qualitative factors within the meaning of Elections Code section 14028, subdivision (e): a history of discrimination against Latinos in Los Angeles County generally and in the City specifically; the use **61 of staggered elections, which may have discriminatory effects in some circumstances; an income disparity between the City's Latinos and its majority population that is "far greater than the national disparity"; the use of racist appeals in city council campaigns; and the lack of responsiveness to the interests and concerns of the City's Latino community, including the substantial underrepresentation of Latinos on the City's various commissions.

The trial court further found that the City's at-large voting system unlawfully diluted the electoral strength of its Latino residents within the meaning of the CVRA, in that several alternative voting systems — e.g., district-based elections, cumulative voting, limited voting, and ranked choice voting — would better enable Latino voters "to elect candidates of their choice or influence the outcomes of elections." In light of "the national, state and local experiences with district elections, particularly those involving districts in which the minority group is not a majority of eligible voters," the court adopted the election map drafted by plaintiffs' expert, ***327** which created seven council districts. The court ordered a special, district-based election for all seven seats to be held on July 2, 2019.

The City successfully petitioned for a writ of supersedeas to stay the trial court's order for new elections pending resolution of its appeal. In that appeal, the Second Appellate District, Division Eight, reversed the trial court judgment, finding that the City's at-large voting system violated neither the CVRA nor the California Constitution. The Court of Appeal began by rejecting plaintiffs' one-sentence argument that a

CVRA violation could be established merely by evidence of racially polarized voting without any further showing that the City's at-large voting system "diluted" Latino voting power as compared to " 'some alternative method of election.' " The court next concluded that changing from an at-large system (where Latinos constituted approximately 14 percent of the voting population) to a district system ***310** (where Latinos would constitute 30 percent of a district centered around the Pico neighborhood) would not enhance Latino voters' ability to elect their candidates of choice or influence the outcome of an election in a "legally significant" way and therefore failed to demonstrate that the City's at-large system "dilut[ed]" their voting power within the meaning of the CVRA. Plaintiffs' theory, the Court of Appeal reasoned, "would create absurd results," in that "any unrealized increase in a group's percentage would satisfy the dilution element," even if the group had "a vanishingly small numerical presence." The court likewise rejected plaintiffs' contention that other voters might " 'cross over' and vote for Latino candidates, buoying Latino power and clearing the 50 percent threshold to electoral success." Such a suggestion, the Court of Appeal claimed, "arbitrarily embraces racially polarized voting when it helps and abandons it when it hurts." In light of its conclusion that plaintiffs had failed to demonstrate dilution, the court did not consider whether plaintiffs had demonstrated the existence of racially polarized voting.

We granted plaintiffs' petition for review to determine what constitutes dilution of a protected class's ability to elect candidates of its choice or to influence the outcome of an election within the meaning of the CVRA. We also ordered depublication of the Court of Appeal opinion. (*Pico Neighborhood Assn. v. City of Santa Monica* (2020) 270 Cal.Rptr.3d, 474 P.3d 635 .)

II. Discussion

Different electoral systems can lead to different outcomes. (See Engstrom, *Modified Multi-Seat Election Systems As Remedies for Minority Vote Dilution* (1992) 21 Stetson L.Rev. 743, 743 (Engstrom).) For example, where a racial minority and a racial majority consistently prefer different candidates, "multimember districts and at-large voting schemes may ' "operate to minimize or cancel out the voting strength of racial [minorities in] the voting population." ' " (*Gingles*, *supra*, 478 U.S. at p. 47, 106 S.Ct. 2752.) The use of at-large voting schemes in such circumstances allows the majority, by virtue of its numerical superiority, not only to regularly defeat the candidates preferred by the minority (*id.* at p. 48, 106 S.Ct. 2752), but also to " 'ignore [minority] interests without fear of political consequences,' [citation] leaving ****62** the minority effectively unrepresented." (*Id.* at p. 48, fn. 14, 106 S.Ct. 2752.) If, on the other hand, the political unit were "divided into single-member districts," those same minority groups "may be able to elect several representatives." (*Rogers v. Lodge* (1982) 458 U.S. 613, 616, 102 S.Ct. 3272, 73 L.Ed.2d 1012.) This potential disparity is why the high court has "stated on many occasions that multimember districting *****328** plans, as well as at-large plans, generally pose greater threats to minority-voter ***311** participation in the political process than do single-member districts." (*Growe v. Emison* (1993) 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388.)

The VRA and the CVRA each offer an opportunity for racial and language minority groups to challenge the dilution of their voting power caused by at-large voting systems. But they do so in somewhat different ways. Because the CVRA bears some similarities to the VRA, while also seeking to address perceived inadequacies in the VRA, we begin with a review of both statutory schemes.

A. The VRA and the CVRA, Compared

1. The VRA

[3] The VRA, as amended in 1982, prohibits a state or its political subdivisions from using any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group]" where, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [the protected] class of citizens ... in that its members have less opportunity than other members of the electorate ... to elect representatives of their choice." (52 U.S.C. § 10301(a), (b).) An at-large electoral system or multimember district[2] can qualify as a prohibited practice under the VRA when the plaintiff can show that a bloc-voting majority is "*usually* ... able to defeat candidates supported by a politically cohesive, geographically insular minority group." (*Gingles*, *supra*, 478 U.S. at p. 49, 106 S.Ct. 2752.) " '[T]he greater the degree to which the electoral minority is homogenous and insular and the greater the degree that bloc

voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting.' " (*Id.* at p. 50, 106 S.Ct. 2752.)

[4] **[5]** **[6]** A plaintiff asserting a "vote dilution" challenge to an at-large voting system under the VRA must satisfy "three threshold conditions." (*Voinovich v. Quilter* (1993) 507 U.S. 146, 157, 113 S.Ct. 1149, 122 L.Ed.2d 500.) "First, the minority group must be able to demonstrate that it is sufficiently large and ***312** geographically compact to constitute a majority in a single-member district. ... Second, the minority group must be able to show that it is politically cohesive. ... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed, [citation] — usually to defeat the minority's preferred candidate." (*Gingles*, *supra*, 478 U.S. at pp. 50–51, 106 S.Ct. 2752, fn. omitted.) Once those predicate facts have been established, "the trial court is to consider the 'totality of the circumstances' and to determine, based 'upon a searching practical evaluation of the "past and present reality," ' [citation], whether the political process is equally open to minority voters. ' "This determination is peculiarly dependent *****329** upon the facts of each case," ' [citation], and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." (*Id.* at p. 79, 106 S.Ct. 2752.) In undertaking this analysis, the court considers a number of factors that "typically may be relevant" to a claim under the VRA (*Gingles*, at p. 44, 106 S.Ct. 2752) and that are sometimes called " 'the Senate factors' ****63** "[3] because they appeared in the 1982 Senate Judiciary Committee majority report that accompanied the bill amending the VRA (*Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 394, 273 Cal.Rptr.3d 437).

2. The CVRA

While the CVRA is "much like" the VRA in some ways, there are notable differences between the two statutory schemes. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.) Four stand out in this proceeding. First, unlike the VRA, the CVRA applies only to "[a]n at-large method of election" (Elec. Code, § 14027) for nonpartisan offices (*id.*, § 14026, subds. (a), (c); see Cal. Const., art. II, § 6). Second, the CVRA addresses not only impairments to a protected class's "ability ... to elect candidates of its choice" (Elec. Code, § 14027; cf. 52 U.S.C. § 10301(b) ["opportunity ... to elect representatives of their choice"]), but also the class's "ability to *influence* the outcome of an election" (Elec. Code, § 14027, italics added). Third, the CVRA made it easier to challenge at-large electoral systems by explicitly rejecting the first *Gingles* ***313** precondition: "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." (Elec. Code, § 14028, subd. (c).) Fourth, the CVRA includes its own list of potentially probative factors, many of which overlap with the Senate factors above, but cautions that they are "not necessary factors to establish a violation" of the CVRA. (Elec. Code, § 14028, subd. (e).)[4]

[7] Despite these differences, the CVRA, like the VRA, requires a plaintiff claiming vote dilution arising from an at-large voting system to establish the existence of racially polarized voting — i.e., that the protected class members vote as a *****330** politically cohesive unit, while the majority votes "sufficiently as a bloc usually to defeat" the protected class's preferred candidate. (*Gingles*, *supra*, 478 U.S. at p. 56, 106 S.Ct. 2752; accord, Elec. Code, §§ 14026, subd. (e) [providing that "racially polarized voting" may be established by "[t]he methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the [VRA]"], 14028, subd. (a).)[5]

B. Defining Terms in the CVRA

The CVRA prohibits the use of an at-large method of election when it "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who ****64** are members of a protected class." (Elec. Code, § 14027.) Plaintiffs contend that the City's at-large city council elections prevent Latino voters from electing, either on their own or with the support of crossover voters, their preferred candidate. They argue this diluted their ability to elect their candidate of choice as well as their ability to influence the outcome of an election. The statute, however, does not define "dilution," "ability ... to elect candidates of its choice," or "ability ... to influence the outcome of an election." (*Ibid.*) The meaning of these ***314** undefined terms presents a pure question of law that we review de novo. (See *Lopez v. Ledesma* (2022) 12 Cal.5th 848, 857, 290 Cal.Rptr.3d 532, 505 P.3d 212.)

1. "Dilution"

In plaintiffs' view, proof of racially polarized voting, in itself, establishes "dilution" within the meaning of the CVRA. They rely on the "plain language" of Elections Code section 14028, subdivision (a), which provides, "A violation of Section 14027 *is established* if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision ...." (Italics added.) According to plaintiffs, "Section 14028 expressly states how a violation of Section 14027 is shown" — i.e., simply by demonstrating the existence of racially polarized voting in an at-large jurisdiction.

[8] **[9]** **[10]** When considered in isolation, this single sentence might arguably be susceptible to plaintiffs' reading. However, a court construing a statute does not view a fragment in isolation, but considers the statute as a whole, in context with related provisions and the overall statutory structure, so that it may best identify and effectuate the scheme's underlying purpose. (See *People v. Pennington* (2017) 3 Cal.5th 786, 795, 221 Cal.Rptr.3d 448, 400 P.3d 14.) As plaintiffs concede, and as the legislative history reveals, the CVRA is in many ways "very similar" to the VRA. (Governor's Off. of Planning & Research, Enrolled Bill Rep. on Sen. Bill No. 976 (2001–2002 Reg. Sess.) July 1, 2002, p. 4.) When we construe "dilution" under the CVRA, we must therefore be mindful that it is a term of art with a settled meaning under section 2 of the VRA: " 'The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.' " (*Holder v. Hall* (1994) 512 U.S. 874, 880, 114 S.Ct. 2581, 129 L.Ed.2d 687 (plur. opn. of Kennedy, J.).) To establish vote dilution under the VRA, "a court must find a reasonable alternative practice as a benchmark *****331** against which to measure the existing voting practice." (*Holder*, at p. 880, 114 S.Ct. 2581 (plur. opn. of Kennedy, J.); *id*. at p. 887, 114 S.Ct. 2581 (conc. opn. of O'Connor, J.) ["On this, there is general agreement"]; *id*. at p. 951, 114 S.Ct. 2581 (dis. opn. of Blackmun, J.) ["There is widespread agreement"].) So while the existence of racially polarized voting " 'is relevant to a vote dilution claim' " under the VRA (*Gingles*, *supra*, 478 U.S. at p. 55, 106 S.Ct. 2752) — and is indeed "a key element" (*ibid*.) — it is not in itself sufficient.

[11] We find, for several reasons, the same is true under the CVRA. The similarities between the two schemes strongly suggest that "dilution" requires not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate or ***315** influence the election's outcome than it would have if the at-large system had not been adopted. (Cf. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 874, 280 Cal.Rptr.3d 783, 489 P.3d 1166 [concluding that the Legislature intended to adopt the " 'widely understood' " meaning of a term in federal law]; *Davis v. City of Berkeley* (1988) 47 Cal.3d 512, 533, 253 Cal.Rptr. 839, 765 P.2d 46 [concluding that undefined "terms of art" in a statute refer to the definitions provided by federal law].) Although the legislative history materials can be read in different ways, one committee analysis recognized that the CVRA targets racially polarized voting in at-large elections only "if it Impairs the Right of Protected Groups" to elect their preferred candidates or influence the outcome of an election. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976, *supra*, as amended Apr. 9, 2002, p. 2.) After all, "the very concept of vote dilution implies — and, indeed, necessitates — the existence of an 'undiluted' practice against which the fact of dilution may be measured." (****65** *Reno v. Bossier Parish School Bd.* (1997) 520 U.S. 471, 480, 117 S.Ct. 1491, 137 L.Ed.2d 730.)

[12] Plaintiffs' construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system. Moreover, such a construction would render the word "dilution" in Elections Code section 14027 surplusage. Accordingly, we agree with the Court of Appeal that dilution is a separate element under the CVRA. To establish the dilution element, a plaintiff in a CVRA action must identify "a reasonable alternative voting practice" to the existing at-large electoral system that will "serve as the benchmark 'undiluted' voting practice." (*Reno v. Bossier Parish School Bd.*, *supra*, 520 U.S. at p. 480, 117 S.Ct. 1491.)

2. "The Ability ... to Elect Candidates of Its Choice"

The CVRA does not explicitly define what it means to "impair[ ] the ability of a protected class to elect candidates of its choice." (Elec. Code, § 14027.) On this question, we find the VRA illuminating, but not dispositive.

[13] An at-large electoral system impairs a protected class's ability "to elect representatives of their choice" under the federal act (52 U.S.C. § 10301(b)) only when the class can "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member

district." (*Gingles*, *supra*, 478 U.S. at p. 50, 106 S.Ct. 2752.) The rationale for the VRA approach is that "if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute ***332** a majority in a single-member district, these minority voters *316 cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." (*Gingles,* at p. 50, fn. 17, 106 S.Ct. 2752.)

For some period after *Gingles*, it was uncertain whether the first *Gingles* requirement (i.e., whether the minority group is sufficiently large and compact) could be satisfied by proof that the minority population "is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." (*Bartlett v. Strickland* (2009) 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (plur. opn. of Kennedy, J.) (*Strickland*).) *Strickland* settled the question. It held that the VRA does not impose "a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." (*Strickland*, at p. 15, 129 S.Ct. 1231 (plur. opn. of Kennedy, J.).) Dispensing with the requirement that the minority group, by itself, be sufficiently large and compact to constitute a majority in the hypothetical district, the court reasoned, "would call in question the *Gingles* framework." (*Strickland*, at p. 16, 129 S.Ct. 1231 (plur. opn. of Kennedy, J.).)

The Court of Appeal effectively embraced the *Strickland* approach in construing the CVRA. It required a showing that Latino voters could constitute a majority, all by themselves, in a hypothetical single-member district. Indeed, it noted that "30 percent is not enough to win a majority" and rejected plaintiffs' contention that an ability to elect a preferred candidate could be shown in this case if non-Latino voters were to " 'cross over' and vote for Latino candidates, buoying Latino power and clearing the 50 percent threshold to electoral success."

The Court of Appeal erred in importing the VRA's majority-minority requirement into the CVRA. In enacting the CVRA, the Legislature wanted to make it "easier" for protected classes to demonstrate an ability to elect their preferred candidates under an alternative voting system. (Assem. Com. on Elections, Reapportionment and Const. Amends., Analysis of Sen. Bill No. 976, *supra*, as amended Mar. 18, 2002, p. 4.) No longer would plaintiffs need to show the protected class was sufficiently large and geographically compact to muster a majority in a hypothetical district: "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation **66 of Section 14027 and this section ...." (Elec. Code, § 14028, subd. (c); see Sen. Com. on Elections and Reapportionment, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended May 1, 2001, p. 3 ["Unlike the preconditions established by the Supreme Court in Thornburg v. Gingles, this bill does not require that the minority community be geographically compact or concentrated"]; Assem. Com. on Elections, Reapportionment and Const. *317 Amends., Analysis of Sen. Bill No. 976, *supra*, as amended Mar. 18, 2002, p. 4 ["This bill requires that only two of those [*Gingles*] conditions be met"].)

The Legislature's rationale for rejecting the majority-minority requirement seems clear enough: It would make little sense to require CVRA plaintiffs to show that the protected class could constitute a majority of a hypothetical district, given that the CVRA is not limited to ability-to-elect claims nor are its remedies limited to district elections. (See, e.g., *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 670, 51 Cal.Rptr.3d 821 ["In a cumulative voting system, a politically cohesive but geographically dispersed minority group can ***333** elect a single candidate ... although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system"].) Though the parties have focused in this court on district elections, the trial court found that, in addition to district elections, several alternative at-large election methods — cumulative voting, [6] limited voting, [7] and ranked choice voting [8] — would each enhance Latino voting power and their ability to elect candidates of their choice. None of these methods would require a winning candidate to muster a majority in a hypothetical district. We can think of no reason why a CVRA claim based on any of these alternate at-large election methods should depend on such a showing. (Cf. Elec. Code, § 14028, subd. (c) ["that members of a protected class are not geographically compact or concentrated ... may be a factor in determining an appropriate remedy"].) Furthermore, the Legislature clearly intended to make the CVRA more expansive than the VRA — by, for example, explicitly recognizing claims based on dilution of the "ability to influence the outcome of an election." (Elec. Code, § 14027.)

Even in the context of district elections, the Court of Appeal's focus on a majority-minority district was misguided. The

Court of Appeal feared that allowing a plaintiff to rely on crossover votes "arbitrarily embraces racially polarized voting when it helps and abandons it when it hurts," which it viewed as creating "a manipulable standard boiling down to plaintiff always wins." But far from embracing racially polarized voting "when it ***318** helps" and abandoning it "when it hurts," plaintiffs are merely pointing out the differing effects of racially polarized voting in two different settings. To challenge an at-large electoral system, a plaintiff must first demonstrate the existence of racially polarized voting — i.e., cognizable differences "in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." (Elec. Code, § 14026, subd. (e).) The plaintiff must next show that the protected class would have the potential to elect its preferred candidate or candidates under a different electoral system (say, district elections). In calculating the protected class's voting strength under the alternative system, the plaintiff does not "abandon[ ]" racially polarized voting. Rather, the plaintiff must ****67** prove that, assuming the *same* degree of racial polarization, the greater concentration of protected class voters in the hypothetical district would nonetheless be sufficient to enable them to elect their preferred candidate when combined with the available crossover votes. Alternatively, the plaintiff may be able to demonstrate sufficient voting strength where racially polarized voting by other *****334** voters *in the hypothetical district* is lower than in the community as a whole. In neither instance is the plaintiff seeking to "abandon" racially polarized voting "when it hurts."[9]

[14] The City's position in this court is slightly more nuanced, but no more persuasive. The City allows that there may be "room to expand vote-dilution claims beyond section 2's narrow ambit," but only "where the relevant minority group would account for a near-majority of voters in a hypothetical district with a history of reliable crossover support from other voters." The City does not dispute, however, that defining a near majority presents a new set of line-drawing problems. And in any case the CVRA permits consideration of at-large remedies such as cumulative voting, limited voting, or ranked choice voting — none of which would depend on the existence of a near majority in some hypothetical district that would never be drawn or used.

***319** These omissions counsel against adoption of the City's position. Rather than quibble over whether a protected class falls on one side or the other of an undefined near-majority line, we think it more sensible to inquire directly whether the prospect of crossover support from other voters under a lawful alternative electoral scheme would offer the protected class, whatever its size, the potential to elect its preferred candidate. When the hypothetical alternative is district elections, a high degree of racially polarized voting may, in many cases, effectively require the protected class to constitute a substantial or very substantial minority of voters. The higher the degree of racial polarization, the greater the percentage required by the protected class to demonstrate it would be able, in combination with crossover voters, to elect its preferred candidate. But there is no reason to layer this inquiry with an additional predicate showing of some undefined near majority. All that is required is that the protected class be "sufficiently large ... to elect candidates of its choice," even if it falls short of "an absolute majority of the relevant population." (*De Grandy*, *supra*, 512 U.S. at pp. 1008, 1009, 114 S.Ct. 2647.)[10]

We are also sensitive to the fact that *Gingles*'s majority-minority requirement is a poor fit for the CVRA, which applies *****335** exclusively to nonpartisan elections. (See Cal. Const., art. II, § 6.) In the City, for example, multiple candidates may vie for office, and a plurality can be sufficient to win. Requiring a protected class to demonstrate it could constitute a majority or near-majority of a hypothetical district would impose a threshold far higher than what the protected class's preferred candidate would actually need to be ****68** elected. (See *Romero v. City of Pomona* (9th Cir. 1989) 883 F.2d 1418, 1424, fn. 7 ["Less than a majority, of course, might suffice in a district where candidates are elected by plurality"], overruled on other grounds in *Townsend v. Holman Consulting Corp.* (9th Cir. 1990) 929 F.2d 1358, 1363.) We therefore decline to require a protected class demonstrate it would constitute a majority or near majority of a hypothetical district in all circumstances.

3. "Dilution" of "the Ability ... to Elect Candidates of Its Choice"

[15] Accordingly, to establish dilution of a protected class's ability to elect its preferred candidate under the CVRA, a plaintiff must demonstrate "the *potential* to elect representatives" under some lawful alternative electoral ***320** method. (*Gingles*, *supra*, 478 U.S. at p. 50, fn. 17, 106 S.Ct. 2752.) One way to demonstrate the class's potential to elect its preferred candidates would be to show, as the VRA requires, that the class would be "sufficiently

large and geographically compact to constitute a majority in a single-member district." (*Gingles*, at p. 50, 106 S.Ct. 2752.) But that is not the only way. (See Elec. Code, § 14028, subd. (c).) Because the CVRA applies exclusively to nonpartisan elections, where there may be more than two candidates, the winner may prevail with far less than a majority of the vote. Moreover, the protected class may be able to demonstrate its ability to attract crossover votes for its preferred candidate. Finally, a plaintiff may identify nondistrict remedies that would enable the class, on its own or with the assistance of crossover votes, to elect its preferred candidate. The minority population percentage necessary to win an election under some alternative at-large electoral systems — cumulative or ranked-choice voting, for example — may be less than 25 percent. (See *Dillard v. Chilton County Bd. of Education* (M.D.Ala. 1988) 699 F.Supp. 870, 874 (*Dillard*) ["in a jurisdiction with seven seats, the threshold of exclusion[11] would be 12.5% plus" in a cumulative voting system]; Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies* (1998) 33 Harv. C.R.-C.L. L.Rev. 333, 342 [threshold for ranked-choice voting "is identical to that of cumulative voting"].)

Determining whether the protected class has the potential to elect its preferred candidate under some alternative system requires a " 'functional' analysis of the political process" in that locality and a " 'searching practical evaluation of the "past and present reality." ' " (*Gingles*, *supra*, 478 U.S. at pp. 62–63, 106 S.Ct. 2752.) Courts should consider the totality of the facts and circumstances of the particular case (see, e.g., Elec. Code, § 14028, subd. (e)), including the characteristics of the specific locality, its electoral history, and " 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms" as well as the design and impact of the potential alternative system. (*Gingles*, at p. 79, 106 S.Ct. 2752; see ***336 *Milligan*, *supra*, 599 U.S. 1, 143 S.Ct. 1487 [216 L.Ed.2d at p. 75].) This fact-specific inquiry accords with the legislative understanding that California is a large and diverse state that needs a flexible approach to address our changing demographics. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976, *supra*, as amended Apr. 9, 2002, p. 2 ["In California, we face a unique situation where we are all minorities"].)

[16] The key inquiry in establishing dilution of a protected class's ability to elect its preferred candidate under the CVRA, therefore, is what percentage of the vote would be required to win — an inquiry that is not short-circuited *321 merely because the protected class may fall short of an absolute majority (or something close to that). In predicting how many candidates are likely to run and what percentage may be necessary to win, courts may also consider the experiences of other similar jurisdictions that use district elections or other alternatives to traditional at-large elections. Courts should likewise keep in mind that the inquiry at the liability **69 stage "is simply 'to prove that a solution is possible, and not necessarily to present the final solution to the problem.' " (*Pope v. County of Albany* (2d Cir. 2012) 687 F.3d 565, 576; see *Gingles*, *supra*, 478 U.S. at p. 50, fn. 17, 106 S.Ct. 2752.)

At the remedial stage the focus will shift to which electoral system is "appropriate" and "tailored to remedy the violation." (Elec. Code, § 14029.) If the court selects a district remedy, then there must also be at least two public hearings before the maps are drafted and at least two more hearings once the maps have been drawn and published. (*Id.*, § 10010, subds. (a)(1), (2), (c).) In other words, the remedy the court ends up selecting under section 14029 may, but need not, be the benchmark the plaintiff offered to show the element of dilution.

The Court of Appeal feared that failing to craft a majority-minority requirement "would give a winning cause of action to any group, no matter how small, that can draw a district map that would improve its voting power by any amount, no matter how miniscule." To prove its point, the court offered a hypothetical in which a protected class's share of the electorate could increase from 0.1 percent under an at-large system to 1.5 percent in a proposed district. Even though the group's voting power would increase 15-fold, it could have "no practical numerical influence in any voting system" because there would be "simply too few voters ... to be numerically effective in an environment of race-based voting." This would, the Court of Appeal warned, "merely ensure plaintiffs always win."

We agree with the Court of Appeal that a plaintiff cannot prove dilution of its ability to elect its preferred candidate under the CVRA by showing that its voting share would increase 15-fold, from 0.1 percent to 1.5 percent, in a hypothetical district. In that circumstance, as the Court of Appeal explained, "[t]here are simply too few voters ... to be numerically effective in an environment of race-based voting." But it does not follow that a majority (or near-majority) requirement should be judicially engrafted onto the CVRA. After all, by eliminating *Gingles*'s geographic compactness requirement, the Legislature rejected any

requirement that the protected class constitute a majority of a hypothetical district. (See Elec. Code, § 14028, subd. (c).) What enables courts to sort successful claims from unsuccessful claims is the dilution element itself, which requires the plaintiff to show that the protected class would, under some lawful alternative, have a "real ***322** electoral opportunity" to elect its candidate of choice, either on its own or with the aid of crossover voters. (*****337** *LULAC*, *supra*, 548 U.S. at p. 428, 126 S.Ct. 2594; see *Pope v. County of Albany*, *supra*, 687 F.3d at p. 575, fn. 8.)[12]

[17] The dilution element also ensures the protected class is not made worse off. To replace at-large with district elections under a dilution theory, a successful plaintiff must show not merely that the protected class would have a real electoral opportunity in one or more hypothetical districts, but also that the incremental gain in the class's ability to elect its candidate of choice in such districts would not be offset by a loss of the class's potential to elect its candidates of choice elsewhere in the locality. (Cf. *Georgia v. Ashcroft* (2003) 539 U.S. 461, 479, 123 S.Ct. 2498, 156 L.Ed.2d 428 ["in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole"].) While "[t]he fact that the proposed remedy does not benefit *all* of the [protected class] in the City does not justify denying any remedy at all" (*Gomez v. Watsonville* (9th Cir. 1988) 863 F.2d 1407, 1414, italics added), it remains the plaintiff's burden to demonstrate that some lawful alternative method of election would improve the protected class's overall ability to elect its preferred candidates. As both sides in this proceeding agree, unless the plaintiff can demonstrate a net gain in the protected class's potential to elect candidates under an alternative system, it has not shown the at-large method of election "impairs" the ability of the protected class to elect its preferred ****70** candidates. (Elec. Code, § 14027; cf. *Beer v. United States* (1976) 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 ["the purpose of § 5 [of the VRA] has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"].)

We also reject the City's contention that a majority-minority requirement — or something close to it in the form of a near-majority requirement — is necessary to avoid difficult constitutional questions under the equal protection clause. In the City's view, it would be perilous for courts to draw race-based districts in the absence of a compelling justification. (See *Cooper v. Harris* (2017) 581 U.S. 285, 291–293, 137 S.Ct. 1455, 197 L.Ed.2d 837.) Merely increasing the percentage of minority voters in a hypothetical district where "the increase will have no real-world effect," the City warns, is not a compelling justification. But the CVRA does not require a court to grant relief that has no real world effect. As stated above, the alternative voting system must offer the protected class at least a "*potential*" to elect its preferred candidates that did not exist under the at-large system. (***323** *Gingles*, *supra*, 478 U.S. at p. 50, fn. 17, 106 S.Ct. 2752.) Moreover, nothing in the CVRA requires a municipality or a court to select a district-based remedy or, even if it chooses to do so, to draw district lines, as the City contends, based "principally on race." To the contrary: California law directs that district boundaries comply with the state and federal Constitutions (as well as the VRA) (Elec. Code, § 21621, subd. (b)) and requires, to the extent practicable, that boundaries be "geographically contiguous" and maintain the integrity of "any local neighborhood or local community of interest." (*Id.*, subd. (c)(1), (2).) State law also encourages district lines to be drawn along *****338** "natural and artificial barriers" and with "geographical compactness." (*Id.*, subd. (c)(3), (4).) The City does not explain how or why districts drawn in accordance with the above criteria would run afoul of the Constitution. (See *Miller v. Johnson* (1995) 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 ["legislatures will ... almost always be aware of racial demographics"]; cf. *ibid.* [strict scrutiny applies only where "race was the predominant factor motivating the legislature's decision" and "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations"].) Indeed, assuming lines are drawn "based on proper factors," whether to create a district where a protected class has the potential to elect its candidate of choice is "a matter of legislative choice or discretion." (*Strickland*, *supra*, 556 U.S. at p. 23, 129 S.Ct. 1231 (plur. opn. of Kennedy, J.); see *Higginson v. Becerra* (9th Cir. 2019) 786 Fed.Appx. 705, 707–708.) That's precisely the choice the Legislature made in enacting the CVRA: "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice ...." (Elec. Code, § 14027.)

4. "Dilution" of "the Ability ... to Influence the Outcome of an Election"

Unlike its federal analogue, the CVRA prohibits the use of an at-large electoral system that dilutes not only the ability of a protected class "to elect candidates of its choice," but also "its ability to influence the outcome of an election." (Elec. Code, § 14027.) The inclusion of the latter phrase further supports our conclusion that the CVRA cannot be read in the limited manner the City would like; indeed, the influence prong suggests a focus broader than the class's ability to elect its preferred candidates (with or without the help of crossover voters). (Cf. *Strickland*, *supra*, 556 U.S. at p. 13, 129 S.Ct. 1231 (plur. opn. of Kennedy, J.) ["a minority group can influence the outcome of an election even if its preferred candidate cannot be elected"]; *LULAC*, *supra*, 548 U.S. at pp. 445–446, 126 S.Ct. 2594 (plur. opn. of Kennedy, J.) [distinguishing between a group's "ability to influence the outcome [of an election] between some candidates, none of whom is their candidate of choice," and the ability to elect "their candidate of choice"]; ****71** 10 Ill. Comp. Stat. 120/5-5(b) ["The phrase ***324** 'influence district' means a district where a racial minority or language minority can influence the outcome of an election even if its preferred candidate cannot be elected"].) As the Attorney General (who is appearing in this action as amicus curiae) suggests, a protected class's ability to influence the outcome of an election could include, for example, "forming a coalition with another group to elect a candidate acceptable to each" or "blocking an unacceptable candidate."

We need not decide the scope of the CVRA's ability-to-influence prong in this case, however. Plaintiffs did not argue in the trial court or in this court an influence theory distinct from their claim that the City's at-large election system diluted their ability to elect their candidates of choice.

III. Conclusion

A group's ability "to compete successfully at electoral politics, in short, is often dependent on how the competition is structured." (Engstrom, *supra*, 21 Stetson L.Rev. at p. 743.) The CVRA represents the Legislature's effort to make that competition more fair. It bars the use of an at-large method of election if that method *****339** dilutes a protected class's ability to elect candidates of its choice or its ability to influence the outcome of an election. Dilution occurs when an at-large system denies a protected class the potential to elect its preferred candidate or influence the election's outcome. The plaintiff in a CVRA action must identify a lawful alternative to the existing at-large electoral system that will serve as the benchmark undiluted voting system.

A protected class has the ability to elect its preferred candidate if it would have the potential to elect that candidate, on its own or with the assistance of crossover support from other voters, under an alternative voting system; there is no additional requirement that the protected class constitute a majority or near-majority of a hypothetical district. A court presented with a dilution claim should undertake a searching evaluation of the totality of circumstances (see, e.g., Elec. Code, § 14028, subd. (e)), including the characteristics of the specific locality, its electoral history, and the design and impact of the at-large system as well as the potential impact of lawful alternative electoral systems. In predicting how many candidates are likely to run and what percentage may be necessary to win, courts may also consider the experiences of other similar jurisdictions that use district elections or some method other than traditional at-large elections.

We express no view on the ultimate question of whether the City's at-large voting system is consistent with the CVRA. The parties vigorously contested in the Court of Appeal whether plaintiffs had established two elements of a ***325** CVRA claim: whether voting in city council elections was racially polarized and whether the at-large method of election diluted the voting power of Latino residents in those elections. Because the Court of Appeal concluded that plaintiffs had failed to demonstrate dilution of the Latino vote, it did not consider whether voting in council elections was racially polarized. We have determined that the Court of Appeal relied on an incorrect legal standard to conclude that plaintiffs had failed to satisfy the dilution element of their CVRA claim. Under the circumstances, we find it appropriate to remand the matter to the Court of Appeal to decide in the first instance whether, under the correct legal standard, plaintiffs have established that at-large elections dilute their ability to elect their preferred candidate; whether plaintiffs have demonstrated the existence of racially polarized voting; and any of the other unresolved issues in the City's appeal. (See *Central Coast Forest Assn. v. Fish & Game Com.* (2017) 2 Cal.5th 594, 606, 214 Cal.Rptr.3d 265, 389 P.3d 840.)

Disposition

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

We Concur:

GUERRERO, C. J.

CORRIGAN, J.

LIU, J.

KRUGER, J.

GROBAN, J.

JENKINS, J.

All Citations

15 Cal.5th 292, 534 P.3d 54, 312 Cal.Rptr.3d 319, 23 Cal. Daily Op. Serv. 8126, 2023 Daily Journal D.A.R. 8739

Footnotes

1 The City asserts that in the 2020 city council election, four and one-half years after plaintiffs filed this action, three of the five winning candidates were Latino. Plaintiffs dispute this characterization of the winning candidates' ethnicities. Given the limited issue before us, we express no view on the dispute.

2 "In an at-large (or multi-member district) system, all voters elect all representatives, and each voter has as many ballots as there are positions available. This system contrasts with a single-member district plan, under which the entire political jurisdiction is divided into districts roughly equal in population, each of which selects one representative by vote within the district." (*Badillo v. Stockton* (9th Cir. 1992) 956 F.2d 884, 889.)

3 The Senate factors include "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction." (*Gingles*, *supra*, 478 U.S. at pp. 44–45, 106 S.Ct. 2752.)

4 The CVRA factors include "the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns." (Elec. Code, § 14028, subd. (e).)

5 We do not consider here whether the City's elections are racially polarized — an issue the Court of Appeal has not yet addressed — but we do note that, under the CVRA, "[e]lections conducted prior to the filing of an action ... are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action." (Elec. Code, § 14028, subd. (a).)

6 Under cumulative voting, "a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate." (*Portugal v. Franklin County* (Wash. 2023) 530 P.3d 994, 1002 (*Portugal*).)

7 Under limited voting, "a voter receives fewer votes than there are candidates to elect." (*Portugal*, *supra*, 530 P.3d at p. 1002.)

8 Under ranked choice voting, a voter ranks candidates in order of preference. In an election to fill more than one seat, such as for a city council, each ballot is counted at the start of tabulation as one vote for its first-choice ranked candidate. Any candidate with more votes than the election threshold (see fn. 11, *post*) is declared elected. If the first round of the vote counting does not fill all the seats, then the system consults the next-ranked choices from the ballots supporting the candidate with the least number of votes, the next-ranked choices from the surplus ballots (i.e., those in excess of what was needed for the elected candidate to win), or both. Jurisdictions use a variety of methods to determine when

and how to transfer the nextranked choices from surplus ballots. This form of tabulation continues until all seats are filled. (See Tideman, *The Single Transferable Vote* (Winter 1995) 9 J. Econ. Persp. 27, 27–28, 32–35; see generally Note, *The Madisonian Case for Ranked Choice Voting: Federalist No. 10, Preferential Voting, and the American Democratic Tradition* (2021) 23 N.Y.U. J. Legis. & Pub. Pol'y 953, 963.)

9 We recognize that where there is *complete* racial polarization, the protected class may itself need to make up a majority of the district in order to have an ability to elect its preferred candidate. But " '[*i*]*n practice, such extreme conditions are never present.*' " (*Strickland*, *supra*, 556 U.S. at p. 45, 129 S.Ct. 1231 (dis. opn. of Breyer, J.) ["No voting group is 100% cohesive"]; see *id*. at pp. 32–33, 129 S.Ct. 1231 (dis. opn. of Souter, J.) ["of course minority voters constituting less than 50% of the voting population can have an opportunity to elect the candidates of their choice, as amply shown by empirical studies confirming that such minority groups regularly elect their preferred candidates with the help of modest crossover by members of the majority"].) As the high court has acknowledged, "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." (*Johnson v. De Grandy* (1994) 512 U.S. 997, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (*De Grandy*).)

10 An amicus curiae letter submitted in support of Pico Neighborhood Association's petition for review by the chairs of the Assembly's Latino, Black, and Asian and Pacific Islander caucuses recites that while some members were elected in majority-minority districts, many others were elected in districts in which their membership group made up only 20 to 40 percent of the eligible voters. The trial court here similarly found that candidates from minority groups who had been "unsuccessful in at-large elections have won district elections" in districts "where the minority group is one-third or less of a district's electorate."

11 "The threshold of exclusion 'is the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances.' " (*Dillard*, *supra*, 699 F.Supp. at p. 874.) It "is calculated according to the following formula: 1/(1 + number of seats available)." (*U.S. v. Vill. of Port Chester* (S.D.N.Y. 2010) 704 F.Supp.2d 411, 450.)

12 Plaintiffs suggest it would be rare for a group constituting less than 25 percent of the relevant voting population to make the required showing. We have no occasion here to explore that suggestion, since the Latino population in the proposed district exceeds that threshold.

1 Wash.3d 629
Supreme Court of Washington,
En Banc.

Gabriel PORTUGAL, Brandon Paul Morales, Jose Trinidad Corral, and League of United Latin American Citizens, Respondents,

v.

FRANKLIN COUNTY, a Washington municipal entity, Clint Didier, Rodney J. Mullen, Lowell B. Peck, in their official capacities as members of the Franklin County Board of Commissioners, Defendants,

James Gimenez, Appellant.

No. 100999-2
|
Argued May 11, 2023
|
Filed June 15, 2023

Synopsis

Background: Latino voters brought action against county and county board of commissioners, alleging that county's system for electing board members diluted votes of Latino/a voters by cracking the population into different districts in violation of Washington Voting Rights Act (WVRA). After intervenor's motion to intervene was granted and intervenor's motion to dismiss was denied, the Superior Court, Franklin County, Alexander Ekstrom, J., entered a final order approving parties' settlement agreement. Intervenor appealed, and plaintiffs requested attorney fees and costs on appeal against intervenor.

Holdings: The Supreme Court, Yu, J., held that:

[1] voters had standing;

[2] as a matter of first impression, legislature had not implicitly repealed WVRA:

[3] facial equal protection claim triggered rational basis review, not strict scrutiny;

[4] WVRA survived rational basis review on facial equal protection challenge;

[5] plaintiffs were entitled to nongovernmental, prevailing party trial and appellate attorney fees and costs under WVRA; and

[6] Supreme Court would decline to assess nongovernmental prevailing party attorney fees against county commissioner.

Affirmed, request for attorney fees granted, and remanded.

West Headnotes (40)

[1] Election Law Discriminatory practices proscribed in general

An abridgement of the right to vote, within meaning of the federal Voting Rights Act (VRA), refers to an electoral system or practice that impairs voting rights on the basis of race, color, or language minority group, regardless of whether there was outright denial of the right to vote. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[2] Election Law Vote Dilution

Dilution of voting rights under § 2 of the Voting Rights Act (VRA) is a specific type of abridgment, which arises from the features of legislative districting plans. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[3] Election Law Vote Dilution

Under § 2 of the Voting Rights Act (VRA), vote dilution can be caused by the use of multimember districts and at-large voting schemes, as opposed to single-member districts and district-based elections. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[4] Election Law Vote Dilution

Under § 2 of the Voting Rights Act, at-large elections, in which voters of the entire jurisdiction elect the members to the governing body, may minimize or cancel out the voting strength of racial minorities because the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a); Wash. Rev. Code Ann. § 29A.92.010(1)(a).

[5] **Election Law** Vote Dilution

Under § 2 of the Voting Rights Act (VRA), vote dilution can occur in district-based elections through the manipulation of district lines. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[6] **Election Law** Dispersal or concentration of minority voters

"Cracking" occurs when a group of voters is split up among multiple districts so that they fall short of a majority in each one.

1 Case that cites this headnote

[7] **Election Law** Dispersal or concentration of minority voters

"Packing" occurs when a group of voters is concentrated in a few districts that they win by overwhelming margins, thus preventing the group from electing its preferred candidates in other districts.

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

Under § 2 of the Voting Rights Act (VRA), in majority-minority voting districts, a minority group composes a numerical, working majority of the voting-age population, thereby creating an opportunity for the minority group to elect its candidate of choice in that district. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

Federal courts may order the creation of majority-minority voting districts if necessary to remedy a violation of federal law.

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

Section 2 of the Voting Rights Act (VRA) does not require remedies such as so-called influence districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected, or crossover districts in which the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate; instead, courts adjudicating § 2 claims are generally limited to ordering single-member districts and, in some cases, majority-minority districts. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[11] **Election Law** Vote Dilution

A plaintiff asserting a § 2 vote dilution claim under the Voting Rights Act (VRA) must prove three threshold conditions: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

Gingles factors are necessary in § 2 vote dilution cases under the Voting Rights Act (VRA) to ensure that the plaintiff has stated a redressable injury. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Vote Dilution

The *Gingles* factors require the plaintiff bringing a vote-dilution case under the Voting Rights Act (VRA) to show that the plaintiff's concerns could, at least potentially, be addressed by implementing single-member districts, majority-minority districts, or both. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Compactness and cohesiveness of minority group

The showings of geographically compact majority and minority political cohesion for a vote-dilution case under § 2 of the Voting Rights Act (VRA) are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, and the minority political cohesion and majority bloc voting showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger voting population. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Only when a party has established the *Gingles* requirements for a vote-dilution case under the Voting Rights Act (VRA) does a court proceed to analyze whether a violation of Section 2 has occurred based on the totality of the circumstances. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

States Dilution of voting power in general

States are free to implement remedies for vote dilution that are not required pursuant to § 2 of the Voting Rights Act (VRA), so long as those remedies are not otherwise prohibited. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Compactness and cohesiveness of minority group

If the plaintiff in a case under the Washington Voting Rights Act (WVRA) seeks the creation of a so-called majority-minority district, the plaintiff may be required at the remedy stage to show that the minority group is sufficiently geographically compact to constitute a majority in the proposed district, just as a plaintiff bringing a claim under § 2 of the federal Voting Rights Act (VRA) would need to do at the threshold stage; by contrast, if the plaintiff in a WVRA case seeks only the implementation of a ranked choice voting system for at-large elections, a showing of geographical compactness would be both irrelevant and unnecessary at any stage. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b); Wash. Rev. Code Ann. § 29A.92.010(3).

[18] **Appeal and Error** Statutory or legislative law

Statutory interpretation is a matter of law, so Supreme Court review is de novo.

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

Constitutional challenges to the Washington Voting Rights Act (WVRA) are subject to de novo review. Wash. Rev. Code Ann. § 29A.92.020.

[20] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Burden of Proof

Courts presume statutes are constitutional, and the party challenging constitutionality bears the burden of proving otherwise.

[21] **Constitutional Law** Facial invalidity

Facial challenges must be rejected unless there is no set of circumstances in which the statute can constitutionally be applied.

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

Strict scrutiny could certainly be triggered in an as-applied equal protection challenge to districting maps that sort voters on the basis of race or to some other race-based sorting of voters. U.S. Const. Amend. 14.

[23] **Election Law** Racial and language minorities in general

Under its plain language, Washington Voting Rights Act (WVRA) prohibiting voting discrimination against members of a protected class or classes of voters who are members of a race, color, or language minority group applies to all Washington voters; last antecedent rule shows that "minority group" modifies only "language," not "race" or "color," if legislature had intended otherwise, then WVRA would refer to "racial" groups, not "race" groups, WVRA allows for a challenge by any voter who resides in a political subdivision where a violation is alleged, it would improperly frustrate WVRA's purpose to hold that WVRA's protections are inapplicable to many Washington voters, and it would be both absurd and contrary to precedent to hold that statement of legislative findings negates plain language of WVRA's operative provisions. Wash. Rev. Code Ann. §§ 29A.92.010(5), 29A.92.020, 29A.92.090(1).

[24] **Statutes** Relative and qualifying terms and provisions, and their relation to antecedents

When evaluating the language of a statute, courts apply the last antecedent rule absent evidence of a contrary legislative intent.

[25] **Statutes** Construction based on multiple factors

Statutory language must be interpreted in the context of the statute, related provisions, and the statutory scheme as a whole.

1 Case that cites this headnote

[26] **Statutes** Purpose

In resolving a question of statutory construction, the Supreme Court will ultimately adopt the interpretation which best advances the legislative purpose.

[27] **Statutes** Other Jurisdictions

Absent contrary legislative intent, when a state statute is taken substantially verbatim from another jurisdiction, it carries the same construction.

[28] **Constitutional Law** Judicial rewriting or revision

Courts may not rewrite unambiguous statutory language under the guise of interpretation.

1 Case that cites this headnote

[29] **Statutes** Statements of purpose, intent, or policy in general

Declarations of legislative intent are not controlling; instead, they serve only as an important guide in determining the intended effect of the operative sections.

[30] **Election Law** Racial and language minorities in general

Under the Washington Voting Rights Act (WVRA), abridgment of the right to vote can occur regardless of which racial group is in the majority. Wash. Rev. Code Ann. § 29A.92.020.

[31] **Counties** Nature and constitution in general

Latino voters had standing to bring action against county and county board of commissioners, alleging that county's system for electing board members diluted votes of Latino/a voters by cracking the population into different districts in violation of Washington Voting Rights Act (WVRA) which protects all Washington voters from discrimination on the basis of race, color, or language minority group. Wash. Rev. Code Ann. § 29A.92.020.

[32] **Counties** Constitutional and statutory provisions

Election Law In general; power to prohibit discrimination

On its face, Washington Voting Rights Act (WVRA) requires equality, not race-based favoritism, in electoral systems, such that WVRA did not irreconcilably conflict with section providing that when a county engages in periodic redistricting after a census, population data may not be used for purposes of favoring or disfavoring any racial group or political party, and therefore legislature had not implicitly repealed WVRA; WVRA's protections applied to all Washington voters, all Washington voters had standing to bring a WVRA challenge, and a political subdivision could not be compelled to do anything pursuant to WVRA based on the single factor of racially polarized voting, meaning the fact that voters of different races tend to vote for different candidates. Wash. Rev. Code Ann. §§ 29A.76.010(4)(d), 29A.92.020.

[33] **Constitutional Law** In General; State Constitutional Provisions

For a violation of privileges and immunities clause of the state constitution to occur, the law must confer a privilege to a class of citizens. Wash. Const. art. 1, § 12.

[34] **Constitutional Law** Elections

Election Law In general; power to prohibit discrimination

Washington Voting Rights Act (WVRA), which protects the equal opportunity of voters of all races, colors, and language minority groups to elect candidates of their choice, does not confer any privilege to any class of citizens, and thus WVRA does not facially violate privileges and immunities clause of the state constitution; all Washington voters have equal rights to challenge their local governments for alleged WVRA violations. Wash. Const. art. 1, § 12; Wash. Rev. Code Ann. § 29A.92.020.

[35] **Constitutional Law** Elections, Voting, and Political Rights

Washington Voting Rights Act (WVRA) on its face did not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote, but instead mandated equal voting opportunities for members of every race, color, and language minority group, and therefore, facial equal protection claim triggered rational basis review, not strict scrutiny. U.S. Const. Amend. 14; Wash. Rev. Code Ann. § 29A.92.020.

[36] **Constitutional Law** Statutes and other written regulations and rules

In an equal protection case, rational basis review is satisfied if there is a rational relationship between the challenged statute and any legitimate governmental interests. U.S. Const. Amend. 14.

[37] **Constitutional Law** Equality of Voting Power (One Person, One Vote)

Election Law In general; power to prohibit discrimination

Washington Voting Rights Act's (WVRA) mandate for equal voting opportunities was clearly rationally related to the state's legitimate interest in protecting Washington voters from discrimination, and thus WVRA survived rational basis review on facial equal protection

challenge in vote-dilution case. U.S. Const. Amend. 14; Wash. Rev. Code Ann. § 29A.92.020.

[38] **Constitutional Law** Statutes and other written regulations and rules

A law directing state actors to provide equal protection is facially neutral, and cannot violate the Constitution. U.S. Const. Amend. 14.

[39] **Counties** Costs

Latino voters, as nongovernmental prevailing parties, were entitled to trial and appellate attorney fees and costs under Washington Voting Rights Act (WVRA) attributable to their litigation against intervenor in vote-dilution action against county; intervenor's appeal forced Latino voters to spend an entire year litigating case after county had settled their WVRA claim. Wash. Rev. Code Ann. §§ 4.84.010, 29A.92.020, 29A.92.130(1).

[40] **Counties** Costs

Supreme Court would decline to assess nongovernmental prevailing party attorney fees against county commissioner, in Latino voters' vote-dilution action against county and members of county board of commissioners under Washington Voting Rights Act (WVRA), notwithstanding evidence that commissioner was involved in intervenor's intervention or appeal of settlement between county, board members, and Latino voters; commissioner had not filed anything on appeal. Wash. Rev. Code Ann. §§ 29A.92.020, 29A.92.130(1).

****998** Appeal from Franklin County Superior Court, Docket No: 21-2-50210-4, Honorable Alexander C. Ekstrom, Judge

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Opinion

YU, J.

***632** ¶1—This case presents matters of first impression concerning the interpretation and facial validity of the Washington Voting Rights Act of 2018 (WVRA), ch. 29A.92 RCW.[1] As detailed below, the WVRA protects the rights of Washington voters in local elections. In this case, three Latino[2] voters from ****999** Franklin County alleged that the county's system for electing its board of commissioners violated the WVRA by "dilut[ing] the votes of Latino/a voters." Clerk's Papers (CP) at 1. The plaintiffs (respondents on appeal) ultimately settled with defendants Franklin County and the Franklin County Board of Commissioners. The defendants are not participants on appeal. We are not asked to ***633** review the merits of the plaintiffs' claim or the parties' settlement agreement.

¶2 The issues on appeal were raised by James Gimenez, a Franklin County voter who was allowed to intervene by the trial court. Immediately after his motion to intervene was granted, Gimenez moved to dismiss the plaintiffs' claim, arguing that the plaintiffs do not have standing and that the WVRA is facially invalid. The trial court denied Gimenez's motion to dismiss, and he was not an active participant in the case thereafter. After the trial court entered a final order approving the parties' settlement, Gimenez appealed directly to this court.

¶3 Gimenez's arguments are all based on his view that the WVRA protects some Washington voters but excludes others. The WVRA's protections apply to "a class of voters who are members of a race, color, or language minority group."[3] RCW 29A.92.010(5). Gimenez interprets this language to mean that the WVRA protects only members of " 'race minority groups,' 'color minority groups,' or 'language minority group[s].' " Br. of Appellant at 2 (underlining added) (alteration in original). Based on this interpretation, Gimenez argues that the plaintiffs do not have standing because the WVRA does not protect Latinx voters from Franklin County as a matter of law. Gimenez also argues that the WVRA has been repealed by implication and is facially unconstitutional because it requires local governments to implement electoral systems that favor protected voters and disfavor others on the basis of race.

¶4 Gimenez's arguments cannot succeed because his reading of the statute is incorrect. The WVRA protects *all* Washington voters from discrimination on the basis of race, color, and language minority group. On its face, the WVRA ***634** does not require race-based favoritism in local electoral systems, nor does it trigger strict scrutiny by granting special privileges, abridging voting rights, or otherwise classifying voters on the basis of race. Therefore, we hold that the plaintiffs have standing and that the WVRA is valid and constitutional on its face.[4] We affirm the trial court, grant the plaintiffs' request for attorney fees and costs on appeal against Gimenez, and remand for a determination of fees and costs incurred at the trial court.

OVERVIEW OF THE WVRA

¶5 No Washington appellate court has previously considered the WVRA. To provide context for this case, it is important to begin with an overview of the relevant law and terminology.

A. General provisions

¶6 The WVRA recognizes "that electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice are inconsistent with the right to free and equal elections." RCW 29A.92.005 (citing Wash. Const. art. I, § 19, art. VI, § 1; U.S. Const. amends. XIV, XV). However, prior to the WVRA's enactment, Washington law "often prohibited" local governments from making changes to their electoral systems, even in response to changing demographics. *Id.* The legislature found that "in some cases, this has resulted in an improper dilution of voting power," particularly as applied to "minority groups." *Id.*

¶7 To protect the rights of Washington voters in local elections, the legislature ****1000** passed the WVRA in 2018. The WVRA provides that

> no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs the ***635** ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or classes.

RCW 29A.92.020. A " '[p]rotected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal voting rights act [of 1965 (FVRA)], 52 U.S.C. 10301 et seq." RCW 29A.92.010(5). A " '[p]olitical subdivision' " includes "any county, city, town, school district, fire protection district, port district, or public utility district, but does not include the state." RCW 29A.92.010(4). Small cities, towns, and school

districts are exempt from most of the WVRA's provisions. RCW 29A.92.700.

¶8 Two elements must be shown before a political subdivision may be found in violation of the WVRA:

> (a) Elections in the political subdivision exhibit polarized voting[5]; and
>
> (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes.

RCW 29A.92.030(1). There are definitions and guidelines for applying these elements in individual cases. *See* RCW 29A.92.010, .030(2)-(6).

B. Types of prohibited voting discrimination

¶9 The WVRA expressly protects against two types of voting discrimination: "abridgment" and "dilution." RCW 29A.92.020, .030(1)(b). These terms are not statutorily defined, and their meaning is not necessarily obvious. However, "courts may rely on relevant federal case law for guidance" in interpreting the WVRA. RCW 29A.92.010.

***636** ¶10 Federal cases use "abridgment" as a relatively general term. Practices that "abridge" the right to vote on the basis of race or color have been expressly prohibited by the Fifteenth Amendment since 1870 and by section 2 of the FVRA (Section 2) since 1965. U.S. Const. amend. XV, § 1; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. ___, 141 S. Ct. 2321, 2331, 210 L. Ed. 2d 753 (2021) (citing 79 Stat. 437). In its current form, Section 2 prohibits electoral systems and practices "which result[U.S.] in a denial or abridgement" of voting rights based on "race," "color," or membership in a "language minority group." 52 U.S.C. §§ 10301(a), 10303(f)(2).

[1] ¶11 A Section 2 violation may be found if "the totality of circumstances" show

> that the political processes leading to nomination or election in the [jurisdiction] are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). Thus, "an 'abridgement' of the right to vote" refers to an electoral system or practice that impairs voting rights on the basis of race, color, or language minority group, regardless of whether there was "outright denial of the right" to vote. *Brnovich*, 141 S. Ct. at 2341.

¶12 For example, abridgment may be caused "by the requirement of the payment of a poll tax as a precondition to voting" or by "the discriminatory use of literacy tests." 52 U.S.C. § 10306(a); *Oregon v. Mitchell*, 400 U.S. 112, 132, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (plurality opinion). For many years, Washington State abridged voting rights by imposing an English-language literacy requirement for voter registration, while at the same time "vesting unlimited discretion in state registration officers" to decide whether ****1001** to administer a literacy test before registering any particular individual to vote. 1967 Op. Att'y Gen. No. 21, at ***637** 5; *see* Laws of 1901, ch. 135, § 4; Laws of 1965, ch. 9, § 29.07.070(13).

[2] ¶13 In contrast to "abridgment," federal courts use "dilution" as a technical term of art. Dilution is a specific type of abridgment, which arises from the "features of legislative districting plans." *Brnovich*, 141 S. Ct. at 2331. In a dilution claim, the plaintiff alleges that their jurisdiction's districting plan "dilute[s] the ability of particular voters to affect the outcome of elections." *Id.* Federal cases recognize two primary forms of vote dilution.

[3] **[4]** ¶14 First, vote dilution can be caused by the use of "multimember districts and at-large voting schemes,"[6] as opposed to single-member districts and district-based elections.[7] *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). At-large elections may " 'minimize or cancel out the voting strength of racial [minorities]' " because "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 47-48 (alteration in original) (internal quotation marks omitted) (quoting *Burns v. Richardson*, 384 U.S. 73, 88, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966)).

[5] **[6]** **[7]** ¶15 Second, vote dilution can occur in district-based elections through "the manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993). This often involves so-called " 'cracking' and 'packing.' " *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916, 1923, 201 L. Ed. 2d 313 (2018) (quoting record). "Cracking" occurs when a group of voters is split up " 'among multiple districts so that they fall short of a majority in each one.' " *Id.* at 1924 (quoting record). "Packing" occurs when a group of voters is concentrated " 'in a few districts that they

win by overwhelming margins,' " thus preventing the group from ***638** electing its preferred candidates in other districts. *Id.* (quoting record).

¶16 Both the WVRA and Section 2 of the FVRA prohibit vote dilution. RCW 29A.92.020; *Brnovich*, 141 S. Ct. at 2333. However, there are significant differences between the two, which affect both the range of available remedies and the elements required for a successful claim.

C. The WVRA recognizes a broader range of redressable claims for vote dilution than those recognized by Section 2 of the FVRA

[8] **[9]** **[10]** ¶17 Section 2 recognizes only a few potential remedies for vote dilution. Federal courts "have strongly preferred single-member districts" as the remedy of choice. *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993). In addition, federal courts may order "the creation of majority-minority[8] districts [if] necessary to remedy a violation of federal law." *Quilter*, 507 U.S. at 156. However, Section 2 does not require other remedies, such as so-called "influence districts"[9] or "crossover district[s]."[10] *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion). Instead, courts adjudicating Section 2 claims are generally limited to ordering single-member districts and, in some cases, majority-minority districts.

****1002** **[11]** ¶18 Due to these limits on available remedies, a plaintiff asserting a Section 2 vote dilution claim

> must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute ***639** a majority in a single-member district"; second, "that [the minority group] is politically cohesive"; and third, "that the ... majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

Emison, 507 U.S. at 40 (some alterations in original) (quoting *Gingles*, 478 U.S. at 50-51). These threshold conditions are generally referred to as the "*Gingles* factors" or "*Gingles* requirements."

[12] **[13]** **[14]** **[15]** ¶19 As the United States Supreme Court has explained, the *Gingles* factors are necessary in Section 2 vote dilution cases to ensure that the plaintiff has stated a redressable injury. In other words, the *Gingles* factors require the plaintiff to show that their concerns could, at least potentially, be addressed by implementing single-member districts, majority-minority districts, or both:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, [a]nd the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger ... voting population.

Id. (citing *Gingles*, 478 U.S. at 50 n.17, 51). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation [of Section 2] has occurred based on the totality of the circumstances." *Strickland*, 556 U.S. at 11-12.

¶20 By contrast, the WVRA contemplates a much broader range of available remedies. Similar to Section 2, the WVRA permits courts to order a political subdivision to implement "a district-based election system" and "to draw or redraw district boundaries." RCW 29A.92.110(1). However, unlike Section 2, courts adjudicating WVRA claims are "not limited to" these examples, and any remedy must be "tailor[ed]" to the political subdivision at issue. RCW 29A.92.110(1)-(2).

***640** ¶21 For example, in direct contrast to the FVRA, the WVRA explicitly allows for the creation of a crossover or "coalition"[11] district "that provides the protected class the opportunity to join in a coalition of two or more protected classes to elect candidates of their choice if there is demonstrated political cohesion among the protected classes." RCW 29A.92.110(2). Other potential remedies include, but are not necessarily limited to,

- limited voting, where a voter receives fewer votes than there are candidates to elect;
- cumulative voting, where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate; and
- single transferrable or ranked choice voting, where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached.

Final B. Rep. on Engrossed Substitute S.B. 6002, at 2, 65th Leg., Reg. Sess. (Wash. 2018).

[16] ¶22 Thus, on its face, the WVRA permits remedies that Section 2 does not. This does not create a conflict between state and federal law because the states are free to implement remedies that are not *required* pursuant to Section 2, so long as those remedies are not otherwise *prohibited*. *See Strickland*, 556 U.S. at 23 ("Our holding that [Section] 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*) ("To be sure, [Section] 2 ****1003** does not forbid the creation of a noncompact majority-minority district.").

¶23 Because the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable injury under a broader range of circumstances ***641** than a Section 2 plaintiff. This is reflected in the elements required to prove a WVRA claim.

¶24 Similar to Section 2, the WVRA requires the plaintiff to show that "[e]lections in the political subdivision exhibit polarized voting." RCW 29A.92.030(1)(a). This requirement corresponds to the second and third *Gingles* factors, discussed above: "the minority group must be able to show that it is politically cohesive" and that the "majority [group] votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51; *see* RCW 29A.92.010(3). The WVRA is also similar to Section 2 in placing the ultimate burden on the plaintiff to prove that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(b); *cf.* 52 U.S.C. § 10301(b).

¶25 However, unlike Section 2, the WVRA specifically rejects the first *Gingles* factor as a *threshold* requirement: "The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation under this chapter." RCW 29A.92.030(2). *Contra Gingles*, 478 U.S. at 50. Instead, the WVRA provides that geographical compactness "may be a factor in determining a *remedy*." RCW 29A.92.030(2) (emphasis added).

[17] ¶26 Thus, if the plaintiff in a WVRA case seeks the creation of a so-called "majority-minority" district, they may be required at the remedy stage to show that the minority group is sufficiently geographically compact to constitute a majority in the proposed district—just as a Section 2 plaintiff would need to do at the threshold stage. *Cf. Gingles*, 478 U.S. at 50 & n.17. By contrast, if the plaintiff in a WVRA case seeks only the implementation of a ranked choice voting system for at-large elections, a showing of geographical compactness would be both irrelevant and unnecessary at any stage.

***642** D. Enforcement of the WVRA

¶27 The WVRA includes two mechanisms to promote compliance: voluntary changes by political subdivisions and challenges by local voters.

¶28 A political subdivision may voluntarily "change its electoral system ... to remedy a potential violation" of the WVRA. RCW 29A.92.040(1). If the political subdivision wishes to draw or redraw its election districts, then it must comply with specific criteria. RCW 29A.92.050(3). In addition, before implementing any voluntary changes, "the political subdivision must provide public notice" and "hold at least one public hearing." RCW 29A.92.050(1)(a)-(b).

¶29 Local voters may also "challenge a political subdivision's electoral system" for alleged WVRA violations. RCW 29A.92.060(1). The voter must "first notify the political subdivision," which must work with the voter "in good faith." *Id.*; RCW 29A.92.070(1). If the political subdivision wishes to implement a remedy at this stage, it must "seek a court order acknowledging that the ... remedy complies with RCW 29A.92.020 and was prompted by a plausible violation." RCW 29A.92.070(2). There is "a rebuttable presumption that the court will decline to approve the political subdivision's proposed remedy." *Id.*

¶30 If a political subdivision receives notice of an alleged WVRA violation but fails to implement a court-approved remedy within a specified time frame, then "any voter who resides in [the] political subdivision ... may file an action" in superior court. RCW 29A.92.090(1). Such an action is subject to the WVRA's provisions on venue, time for trial, statute of limitations, and similar issues. *See* RCW 29A.92.090-.100. If the trial court finds that the political subdivision has violated the WVRA, then it "may order appropriate remedies," as discussed above. RCW 29A.92.110(1). Once the political subdivision ****1004** implements a court-approved remedy, it is largely shielded from WVRA challenges for the next four years. *See* RCW 29A.92.070(3), .080(3), .120(1).

***643** ¶31 Since the WVRA was enacted in 2018, several political subdivisions have made changes to their electoral systems. However, this will be the first time that any Washington appellate court addresses the WVRA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶32 This case arises from a voter-initiated challenge to Franklin County's system for electing its three-member board of commissioners. Franklin County is located in southeastern Washington, with its county seat in the city of Pasco. *Find Us*, Franklin County, https://www.franklincountywa.gov/508/Find-Us (last visited June 5, 2023). About 54 percent of the county's total population is "Hispanic or Latino."[12] *QuickFacts, Franklin County, Washington*, U.S. Census Bureau, https://www.census.gov/quickfacts/franklincountywashington (last visited June 5, 2023). "Latino citizens make up over one third, or 34.4%, of Franklin County's citizen voting age population." CP at 5.

A. The plaintiffs notify Franklin County of an alleged WVRA violation and ultimately file suit

¶33 Prior to this case, Franklin County used "a 'hybrid' election system," which combined district-based primaries with at-large general elections:

> [P]otential candidates [ran] in their respective districts and the top two candidates proceed[ed] to the general election. The general election [was] then conducted as an at-large election, in which all voters in the County cast votes to seat a county commissioner in each seat the year that position is up for election.

***644** *Id.* at 1010. In October 2020, counsel for the plaintiffs[13] sent Franklin County a notice alleging that its electoral system violated the WVRA.

¶34 According to the plaintiffs' notice, the county's "at-large general elections for commissioners prevent Latinos from electing a candidate of choice" and "Franklin County has diluted the Latino community's votes by cracking the population into different districts." *Id.* at 116-17. The notice further alleged that "as a result of the County's discriminatory electoral scheme, there are no Latino preferred candidates currently serving on the Franklin County Board of Commissioners, nor has there ever been one elected to serve on the commission." *Id.* at 116.

¶35 Franklin County did not take remedial action within the then applicable six-month time frame. *See* RCW 29A.92.080(1). The plaintiffs subsequently filed a WVRA claim in Franklin County Superior Court against Franklin County and each member of the Franklin County Board of Commissioners (Clint Didier, Rodney J. Mullen, and Lowell B. Peck) in their official capacities.

B. James Gimenez intervenes to defend Franklin County's electoral system

¶36 The procedural history of this litigation is fairly complicated, but many of the details are irrelevant to our review. To briefly summarize, the plaintiffs moved for partial summary judgment on the issue of whether Franklin County's electoral system violated the WVRA. The defendants conceded the WVRA violation because they could not make a contrary argument "in good faith." CP at 170. The trial court granted partial summary judgment and ordered the parties to "work cooperatively together on the development ***645** of the district map." *Id.* at 259. However, this ****1005** order was vacated shortly after it was entered.

¶37 Three days after the trial court granted partial summary judgment, Gimenez moved to intervene to defend Franklin County's existing electoral system, alleging that the plaintiffs lack standing and that the WVRA is facially unconstitutional. One week later, the Franklin County Board of Commissioners adopted a resolution directing the county prosecutor to "seek reconsideration of the order granting Summary Judgement [sic]." *Id.* at 275. As directed, the prosecutor moved to vacate the summary judgment order, asserting that the "Board of Commissioners never authorized or gave direction in an open public meeting to the Franklin County Prosecutor to stipulate to an order granting summary judgment in favor of the Plaintiffs." *Id.* at 318.

¶38 Over the plaintiffs' objections, the trial court granted the defendants' motion to vacate and Gimenez's motion to intervene.

C. The trial court denies Gimenez's motion to dismiss and approves the parties' CR 2A settlement agreement

¶39 After his motion to intervene was granted, Gimenez immediately moved for dismissal pursuant to CR 12(c), arguing that the plaintiffs lack standing and that the WVRA is facially invalid. The trial court denied Gimenez's CR 12(c) motion on its merits.

¶40 The plaintiffs subsequently filed a second motion for partial summary judgment. As they had done in their first motion, the plaintiffs sought a ruling that Franklin County's electoral system violated the WVRA, leaving only "the question of an appropriate remedial map" for trial. *Id.* at 682. The defendants initially opposed summary judgment, but the parties ultimately entered into a CR 2A settlement agreement, "which was ratified by Defendant Commissioners in a Franklin County commissioner meeting." *Id.* at 1288.

***646** ¶41 The settlement agreement allowed Franklin County to use a district map that its board of commissioners had already "approved and adopted" following the 2020 U.S. Census. *Id.* at 1292. However, "[b]eginning with the 2024 election cycle, all future elections for the office of Franklin County Commissioner will be conducted under a single-member district election system for both primary and general elections." *Id.* The plaintiffs also agreed to accept a reduced award of attorney fees and costs from the defendants. Over Gimenez's objection, the trial court approved the parties' CR 2A settlement and dismissed the plaintiffs' claims with prejudice.

¶42 Gimenez appealed directly to this court. The plaintiffs opposed Gimenez's arguments on the merits, but they agreed that direct review was appropriate. We retained the case for a decision on the merits and accepted six amici briefs for filing.[14] We have not received any appellate filings from Franklin County or any member of the Franklin County Board of Commissioners.

ISSUES

¶43 A. Do the plaintiffs have standing to bring a WVRA claim?

¶44 B. Did the legislature repeal the WVRA by implication?

¶45 C. Does the WVRA facially violate the privileges and immunities clause of article I, section 12 of the Washington Constitution?

¶46 D. Does the WVRA facially violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

***647** ¶47 E. Should we reach the additional issues raised by plaintiffs and amici?

¶48 F. Should we grant the plaintiffs' request for attorney fees and costs?

****1006** ANALYSIS

¶49 Each of Gimenez's arguments is based on his interpretation of the WVRA's definition of a "protected class." He believes that this definition protects some racial groups, while excluding others. As a result, Gimenez believes that the WVRA requires local governments to implement electoral systems that favor some racial groups, while disfavoring others.

[18] ¶50 Statutory interpretation is a matter of law, so our review is de novo. *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 238, 481 P.3d 1060 (2021), *cert. denied*, 142 S. Ct. 1094 (2022). We reject Gimenez's interpretation of the WVRA. The plain language of the statute and basic principles of statutory interpretation show that the WVRA protects *all* Washington voters from discrimination on the basis of race, color, and language minority group. Therefore, the plaintiffs in this case have standing and the WVRA has not been repealed by implication.

[19] **[20]** **[21]** ¶51 Gimenez's constitutional challenges to the WVRA are also subject to de novo review. *Id.* "We presume statutes are constitutional, and the party challenging constitutionality bears the burden of proving otherwise." *Id.* at 239. Because Gimenez makes facial challenges, his arguments "must be rejected unless there is '*no set of circumstances* in which the statute ... can constitutionally be applied.' " *Id.* at 240 (quoting *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)). The WVRA can clearly be applied in a manner that does not violate article I, section 12 because, on its face, the WVRA does not grant any privilege or immunity to any class of citizens.

***648** **[22]** ¶52 Finally, contrary to Gimenez's view, his federal equal protection claim does not trigger strict scrutiny because the WVRA, on its face, does not "create racial classifications." *Contra* Br. of Appellant at 17. Strict scrutiny could certainly be triggered in an *as-applied* challenge to "districting maps that sort voters on the basis of race" or to some other "race-based sorting of voters." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. ___, 142 S. Ct. 1245, 1248,

212 L. Ed. 2d 251 (2022) (per curiam). However, on its face, the WVRA requires "equal opportunit[ies]" for voters of all races, colors, and language minority groups, not race-based sorting of voters. RCW 29A.92.020.

¶53 Gimenez appears to argue that the WVRA makes "racial classifications" by recognizing the existence of race, color, and language minority groups and prohibiting discrimination on that basis. Br. of Appellant at 17. He also appears to argue that the WVRA *must* favor some racial groups and disfavor others because "[e]lections are quintessentially zero-sum." *Id.* at 53. We cannot agree. If Gimenez's position were correct, then every statute prohibiting racial discrimination or mandating equal voting rights would be subject to facial equal protection challenges triggering strict scrutiny. No authority supports that position. Therefore, we hold that Gimenez's equal protection claim triggers only rational basis review, which the WVRA easily satisfies on its face.

¶54 We grant the plaintiffs' request for attorney fees in part. We award fees and costs incurred at trial and on appeal against Gimenez, and we remand to the trial court for a calculation of the fees and costs incurred at the trial court. However, we decline the plaintiffs' request to assess fees against Commissioner Didier.

A. The plaintiffs have standing

¶55 According to Gimenez, the WVRA's protections simply do not apply to members of a race, color, or language minority group that comprises a numerical majority of the ***649** total population in their local jurisdiction. Slightly over 50 percent of Franklin County's total population is Latinx. Therefore, according to Gimenez, it is impossible for *any* Latinx voter in Franklin County to have standing to bring a WRVA claim, unless they happen to be a member of some other protected class. The trial court rejected Gimenez's interpretation and ruled that the plaintiffs have standing. We affirm.

****1007** 1. The plain statutory language and principles of statutory interpretation show that the WVRA's protections apply to all Washington voters

[23] ¶56 The plain meaning of the WVRA applies to all Washington voters. As discussed above, the WVRA prohibits voting discrimination against "members of a protected class or classes." RCW 29A.92.020. A "protected class" is "a class of voters who are members of a race, color, or language minority group." RCW 29A.92.010(5). Everyone can be a member of a race or races, everyone has a color, and "language minority group" includes ethnic groups that might otherwise be wrongfully excluded—"persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[15] 52 U.S.C. § 10310(c)(3). As a result, every Washington voter is a member of at least one protected class, so every Washington voter is protected by the WVRA.

***650** **[24]** ¶57 The statute's plain meaning is confirmed by "traditional rules of grammar." *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 196 Wn.2d 1, 8, 468 P.3d 1056 (2020). For instance, "[w]hen evaluating the language of a statute, we apply the last antecedent rule" absent evidence of a contrary legislative intent. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). The last antecedent rule shows that "minority group" modifies only "language," not "race" or "color." *See id.*; RCW 29A.92.010(5). If the legislature had intended otherwise, then the WVRA would refer to "racial" groups, not "race" groups.

[25] ¶58 Principles of statutory interpretation further confirm that the WVRA " 'says what it means and means what it says.' " *City of Seattle v. Long*, 198 Wn.2d 136, 149, 493 P.3d 94 (2021) (quoting *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004)). Statutory language must be interpreted in "the context of the statute, related provisions, and the statutory scheme as a whole." *Id.* at 148. The WVRA recognizes that voters must have an "*equal* opportunity to elect candidates of their choice." RCW 29A.92.020, .030(1)(b) (emphasis added). Equality would not be possible if the WVRA protected the members of some racial groups and excluded others. Moreover, the WVRA does not say that a political subdivision's electoral system may be challenged by "minorities," "minority voters," "minority groups," or anything similar. Instead, the WVRA allows for a challenge by "*any* voter who resides in a political subdivision where a violation of RCW 29A.92.020 is alleged."[16] RCW 29A.92.090(1) (emphasis added).

[26] ¶59 In addition, as the trial court correctly ruled, Gimenez's narrow statutory interpretation is inconsistent with the WVRA's remedial purpose. "Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose." *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990). ***651** The stated legislative purpose of the WVRA is to prohibit "electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice." RCW 29A.92.005. It would improperly

frustrate this purpose to hold that the WVRA's protections are inapplicable to many Washington voters, as Gimenez claims.

**1008 ¶60 Finally, we consider persuasive authority from California and federal courts. The WVRA's definition of a protected class is identical to the definition of a protected class in California's voting rights act. *Compare* RCW 29A.92.010(5), *with* Cal. Elec. Code § 14026(d). In 2006, the California Court of Appeals recognized that this definition "simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 666, 51 Cal. Rptr. 3d 821 (2006). The WVRA adopted the same definition 12 years later.

[27] ¶61 If our legislature intended to enact a different definition of a protected class, it had ample time to change the language. Instead, our legislature adopted California's definition verbatim. Absent "contrary legislative intent, when a state statute is 'taken substantially verbatim' " from another jurisdiction, " 'it carries the same construction.' " *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (internal quotation marks omitted) (quoting *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)). Thus, California's broad interpretation of the definition of a protected class is highly persuasive when interpreting the same language in the WVRA.

¶62 In addition, "courts may rely on relevant federal case law for guidance" when interpreting the WVRA. RCW 29A.92.010. As the California Court of Appeals explained, "In a variety of contexts, the [United States] Supreme Court has held that the term 'race' is expansive and covers all ethnic and racial groups." *Sanchez*, 145 Cal. App. 4th at 684. Notably, the Supreme Court has held that the Fifteenth *652 Amendment's prohibition on "deny[ing] or abridg[ing] the right to vote on account of race ... grants protection to *all* persons, not just members of a particular race." *Rice v. Cayetano*, 528 U.S. 495, 512, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000) (emphasis added).

¶63 Like the United States Supreme Court, this court has previously refused to apply narrow definitions when deciding whether a person is protected from discrimination on the basis of "race." *See State v. Zamora*, 199 Wn.2d 698, 704 n.6, 512 P.3d 512 (2022) (quoting *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 214, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017)). We decline to change our approach now. Instead, we apply the plain statutory language and hold that the WVRA's protections apply to all Washington voters.

2. We decline Gimenez's invitation to rewrite the statute

[28] ¶64 Gimenez acknowledges that it is both "plausible" and "grammatically permissible" to interpret the WVRA as protecting all Washington voters. Br. of Appellant at 13-14. Nevertheless, he argues that we must restructure and rewrite the statute as follows:

> "U.S.'Protected class' means
>
> (a) a class of voters who are members of a race minority group; or
>
> (b) a class of voters who are members of a color minority group; or
>
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq*."

Id. at 10 (underlining added). "Courts may not 'rewrite unambiguous statutory language under the guise of interpretation.' " *State v. Hawkins*, 200 Wn.2d 477, 492, 519 P.3d 182 (2022) (quoting *Jespersen v. Clark County*, 199 Wn. App. 568, 578, 399 P.3d 1209 (2017)). However, Gimenez argues that this court must judicially rewrite the WVRA. He is incorrect.

*653 ¶65 First, Gimenez points to the WVRA's statement of legislative findings and intent, which appears to use "minority groups" as a shorthand for "race, color, or language minority groups." RCW 29A.92.005. However, there is no indication that this was intended to exclude certain racial groups from the WVRA's protections. Indeed, the stand-alone phrase "minority groups" is not defined (or even used) anywhere else in the WVRA.

[29] ¶66 It would be both absurd and contrary to precedent to hold that the statement of legislative findings negates the plain language of the WVRA's operative provisions. "Declarations of intent are not controlling; **1009 instead, they serve 'only as an important guide in determining the intended effect of the operative sections.'U.S." *State v. Reis*, 183 Wn.2d 197, 212, 351 P.3d 127 (2015) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 23, 50 P.3d 638 (2002) (plurality opinion)). The legislature may have found that minority groups would benefit from the WVRA, but that does not mean the legislature intended to exclude everyone else.

¶67 Next, Gimenez appears to argue that the WVRA cannot be intended to protect all racial groups because it is "impossible" for a majority group to experience voting discrimination. Br. of Appellant at 26. According to Gimenez, "if the 'protected class' constitutes a majority of the political subdivision ... it would not lack an equal opportunity to elect candidates of choice due to vote dilution within that subdivision." *Id.* at 25-26 (emphasis omitted).

[30] ¶68 In this argument, Gimenez appears to assume that the WVRA recognizes only vote *dilution* claims. To the contrary, as discussed above, the WVRA prohibits both "dilution" and "abridgment" of voting rights on the basis of race, color, or language minority group. RCW 29A.92.020. Abridgment of the right to vote can occur regardless of which racial group is in the majority.

¶69 For instance, abridgment would likely be found if voting registration officials "administered literacy tests to Mexican-American members of the plaintiffs' class more ***654** frequently, more carefully, and more stringently than they have administered them to other persons, including Anglo-Americans whose ability to read and speak English is imperfect or limited." *Mexican-Am. Fed'n-Wash. State v. Naff*, 299 F. Supp. 587, 593 (E.D. Wash. 1969), *judgment vacated sub nom. Jimenez v. Naff*, 400 U.S. 986 (1971); *see also* 1967 Op. Att'y Gen. No. 21. "Indeed, the most egregious examples of Jim Crow era voter suppression—such as poll taxes and literacy tests—were specifically designed to prevent Black majorities from participating in elections." Amicus Br. of State of Wash. at 11-12 (citing Brad Epperly et al., *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 Persps. on Pol. 756, 761-64 (2020)).

¶70 Moreover, it is entirely possible to dilute the voting power of majority groups through the manipulation of district lines. The United States Supreme Court has already explained how:

> Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts.

Johnson v. De Grandy, 512 U.S. 997, 1016, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994). Thus, to the extent that Gimenez believes that the WVRA does not protect majority groups because they do not need the WVRA's protection, he is simply incorrect.

[31] ¶71 In sum, the WVRA means exactly what it says. All Washington voters are protected from discrimination on the basis of race, color, or language minority group. That includes the plaintiffs. Therefore, the trial court correctly ruled that the plaintiffs have standing to bring their WVRA claim.

***655** B. The WVRA has not been repealed by implication

¶72 Next, Gimenez argues that the WVRA gives minority groups the exclusive "right to sue to compel redistricting, and require[s] the county to favor the racial group which sued in drawing new district lines." Br. of Appellant at 17-18. He contends that this irreconcilably conflicts with RCW 29A.76.010(4)(d), which provides that when a county engages in periodic redistricting after a census, "[p]opulation data may not be used for purposes of favoring or disfavoring any racial group or political party." Due to this alleged conflict, Gimenez believes that every time RCW 29A.76.010 was amended, the WVRA was implicitly repealed, at least as applied to counties. He is incorrect. The WVRA neither requires nor allows the kind ****1010** of race-based favoritism that RCW 29A.76.010(4)(d) prohibits.

¶73 First, as discussed above, the WVRA's protections apply to all Washington voters, and all Washington voters have standing to bring a WVRA challenge. The WVRA does not compel race-based favoritism; it explicitly requires "an equal opportunity" in local elections for voters of all races, colors, and language minority groups. RCW 29A.92.020.

¶74 Second, contrary to Gimenez's interpretation, a political subdivision cannot be compelled to do *anything* pursuant to the WVRA based on the "single factor" of "racially polarized voting, *i.e.*, the fact that voters of different races tend to vote for different candidates." *Contra* Br. of Appellant at 45. In fact, the plain language of the WVRA provides that a plaintiff must prove *both* that "[e]lections in the political subdivision exhibit polarized voting" *and* that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(a)-(b). Thus, the WVRA does not require local governments to favor "race minority 'haves' " at the expense of "race majority 'have-nots.' " *Contra* Reply Br. of Appellant at ***656** 18. The WVRA does not compel local governments to do anything based on *race*. Instead,

the WVRA may compel local governments to change their electoral systems to remedy proven *racial discrimination*.

¶75 Gimenez appears to believe that actions to remedy proven racial discrimination are indistinguishable from actions based on race alone. He also argues that the WVRA actually "*forbids* consideration of ... past discrimination" because the WVRA does not require "[p]roof of intent on the part of the voters or elected officials to discriminate against a protected class." Br. of Appellant at 4 (emphasis added); RCW 29A.92.030(5). We disagree. On its face, the WVRA simply codifies the following, indisputable propositions:

¶76 (1) Voters can be "members of a race, color, or language minority group." RCW 29A.92.010(5). Recognizing the existence of race, color, and language minority groups does not, in itself, "create racial classifications." *Contra* Br. of Appellant at 17. *See* U.S. Const. amend. XV; 52 U.S.C. §§ 10301(a), 10303(f)(2).

¶77 (2) "Polarized voting" is possible. RCW 29A.92.010(3). Recognizing the possibility of racially polarized voting is neither novel nor unique to the WVRA. *See generally Gingles*, 478 U.S. 30. Moreover, even where polarized voting is proved to exist, that is not sufficient, by itself, to prove a WVRA violation. RCW 29A.92.030(1).

¶78 (3) A combination of polarized voting and "dilution or abridgment" of voting rights can deprive members of a race, color, or language minority group of an "equal opportunity to elect candidates of their choice" in local elections. RCW 29A.92.030(1)(b); *cf.* U.S. Const. amend. XV; 52 U.S.C. §§ 10301, 10303(f)(2).

¶79 (4) Where a class of voters has been deprived of equal electoral opportunities on the basis of race, color, or language minority group, the law can provide a remedy based on "discriminatory effect alone," even in the absence of discriminatory intent. *Gingles*, 478 U.S. at 35; *see* U.S. Const. amend. XV, § 2; 52 U.S.C. §§ 10301, 10303(f)(2).

***657** **[32]** ¶80 We hold that the WVRA does not irreconcilably conflict with RCW 29A.76.010(4)(d) because on its face, the WVRA requires equality, not race-based favoritism, in electoral systems. Thus, the legislature has not implicitly repealed the WVRA.

C. The WVRA does not facially violate article I, section 12

¶81 Next, Gimenez argues that the WVRA violates article I, section 12 on its face because "it grants to a specific identified class the right and privilege to have county commissioner boundaries drawn so that members of that identified class—but not the public at large, or members of other definable classes—can elect a 'candidate of choice.' " Br. of Appellant at 52. As detailed above, Gimenez fundamentally misinterprets what ****1011** the WVRA says and does. We therefore reject his article I, section 12 argument.

[33] **[34]** ¶82 " 'For a violation of article I, section 12 to occur, the law ... must confer a privilege to a class of citizens.' " *Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007) (plurality opinion) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004)). The WVRA does not confer any privilege to any class of citizens. Instead, the WVRA protects the "*equal* opportunity" of voters of *all* races, colors, and language minority groups "to elect candidates of their choice." RCW 29A.92.020, .030(1)(b) (emphasis added). Therefore, all Washington voters have equal rights to challenge their local governments for alleged WVRA violations. If, in some future case, the WVRA is applied or interpreted in a way that grants privileges to some racial groups while excluding others, then the WVRA will be subject to an as-applied challenge. But on its face, the WVRA simply does not implicate article I, section 12.

D. The WVRA does not facially violate the equal protection clause

[35] **[36]** ¶83 Finally, Gimenez argues that the WVRA facially violates the equal protection clause of the Fourteenth ***658** Amendment because the WVRA cannot survive strict scrutiny. However, as explained above, the WVRA on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. Instead, the WVRA mandates *equal* voting opportunities for members of every race, color, and language minority group. Therefore, Gimenez's facial equal protection claim triggers rational basis review, not strict scrutiny. *Cf. Madison*, 161 Wn.2d at 103. Rational basis review is satisfied if "there is a rational relationship between" the WVRA "and any legitimate governmental interests." *Id.* at 106.

[37] **[38]** ¶84 To the extent that Gimenez's equal protection argument is based on his misinterpretation of the WVRA, we reject it. The WVRA's mandate for equal voting opportunities is clearly rationally related to the State's legitimate interest in

protecting Washington voters from discrimination. "[A] law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution." *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 318, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014) (Scalia, J., concurring in the judgment).

¶85 Gimenez further points out, correctly, that Section 2 of the FVRA has a threshold requirement for vote dilution claims that the WVRA does not have. As discussed above, before a federal court will reach the merits of a Section 2 vote dilution claim, a "group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. By contrast, the WVRA provides that "[t]he fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation under this chapter, but may be a factor in determining a remedy." RCW 29A.92.030(2).

¶86 Gimenez argues that the WVRA is unconstitutional on its face because "[w]ithout the compactness precondition, the [United States] Supreme Court has made clear, ***659** Section 2 could never" satisfy the equal protection clause. Br. of Appellant at 40-41. However, he does not cite a single case—from any court—that actually says what he claims. Instead, Gimenez relies on cases addressing as-applied challenges to specific redistricting plans based on allegations of racial gerrymandering. *See id.* at 37-50.[17] These ****1012** cases consistently hold that *Section 2* requires a threshold showing of compactness in a vote dilution claim. *E.g.*, *Strickland*, 556 U.S. at 10-16, 20-21; *Emison*, 507 U.S. at 40-41. However, Gimenez cites no case holding that the *equal protection clause* imposes the same requirement in every voting discrimination claim.

¶87 Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, Gimenez did not bring an as-applied challenge. He brought a facial challenge. As detailed above, the WVRA, on its face, does not require unconstitutional actions.

¶88 Moreover, as amici point out, "entire pages of Gimenez's argument on this point are word-for-word identical" to the briefing from a recent challenge to California's voting rights act. Br. of Law Sch. Clinics Focused on C.R. as Amici Curiae at 14 n.1. *Compare* Br. of Appellant at 37-43, *with* Appellant's Opening Br. at 3-7, 32, *Higginson v. Becerra*, No. 19-55275 (9th Cir. June 17, 2019), *and* Pet. for Writ of Cert. at 4-6, *Higginson v. Becerra*, No. 19-1199 (U.S. Apr. 2, 2020). The Ninth Circuit Court of Appeals rejected the arguments Gimenez makes here and the United States ***660** Supreme Court denied certiorari. *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020). Gimenez does not explain why we should reach a different conclusion based on the same arguments.

¶89 Finally, even under federal law, the threshold compactness requirement applies only in the specific context of a vote *dilution* claim. It does not apply to all voting rights cases. As the United States Supreme Court has explained:

> The reason that a minority group making such a [vote dilution] challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50 n.17.

¶90 The WVRA protects voters from all forms of abridgment, not just dilution. Gimenez does not explain why a group must demonstrate compactness to prove that their voting rights have been abridged by, for instance, the discriminatory administration of literacy tests. *See Mexican-Am. Fed'n*, 299 F. Supp. 587. Thus, even if the equal protection clause does require a threshold compactness inquiry for a vote dilution claim, that would not make the WVRA facially unconstitutional. At most, the WVRA would be unconstitutional as applied in the context of vote dilution claims. Gimenez did not bring an as-applied challenge.

¶91 Gimenez argues that he cannot be required to prove that the WVRA is unconstitutional in all of its potential applications "because it is impossible to explore and describe every possible circumstance" that might arise. Reply Br. of Appellant at 9. However, that is the standard that applies to a facial constitutional challenge in accordance with this court's controlling precedent. *Woods*, 197 Wn.2d at 240. Gimenez does not show that our precedent is "U.S.'incorrect and harmful' " or that its " 'legal underpinnings' " have ***661** changed. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rts. to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); *W.G. Clark Constr. Co.*

v. Pac. Nw. Reg'l Council of Carpenters, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)).

¶92 Therefore, because it is impossible for Gimenez to show that the WVRA is unconstitutional in all of its potential applications, his facial equal protection challenge to the WVRA must be rejected.

E. We decline to reach the additional issues raised by the plaintiffs and amici

¶93 As detailed above, each of Gimenez's arguments fails on its merits. We affirm the trial court on that basis alone. We therefore decline to reach the alternative arguments ****1013** raised by the plaintiffs and amici concerning RCW 7.24.110 and Gimenez's standing to appeal.[18]

F. We award the plaintiffs' request for attorney fees and costs against Gimenez and remand for a calculation of fees incurred at the trial court

¶94 Finally, the plaintiffs request attorney fees and costs based on the WVRA, as well as the statutes and court rules governing frivolous claims. We need not decide whether Gimenez's claims are frivolous. Instead, we award the plaintiffs' request for fees against Gimenez pursuant to the WVRA.

***662** **[39]** ¶95 The WVRA allows, but does not require, an award of "reasonable attorneys' fees, all nonattorney fee costs as defined by RCW 4.84.010, and all reasonable expert witness fees" to "the prevailing plaintiff or plaintiffs, other than the state or political subdivision thereof." RCW 29A.92.130(1). Here, the plaintiffs are the prevailing parties, they are not the state or a political subdivision, and Gimenez's appeal forced the plaintiffs to spend an entire year litigating this case *after* Franklin County settled their WVRA claim. We therefore exercise our discretion to award the plaintiffs' request for fees and costs attributable to their litigation against Gimenez.[19]

¶96 The plaintiffs request their appellate attorney fees, as well as "a fee award at trial" for the "time and expense incurred litigating with Gimenez." Br. of Resp'ts at 52 & n.16. The WVRA's fee provision is explicitly discretionary, providing that "the court *may* allow" fees to a prevailing, nongovernmental plaintiff. RCW 29A.92.130(1) (emphasis added). Thus, we grant both trial and appellate fees, but we remand the calculation of trial court fees to the trial court's discretion.

1. The WVRA's fee provision is constitutional

¶97 Gimenez argues that we cannot assess fees against him because "it is unconstitutional to permit a group of lawyers who are funded by another state's government[20] to collect fees from an individual Washington Hispanic citizen because of his exercise of his fundamental right to access the state courts and petition the government." Reply Br. of Appellant at 26. However, he misrepresents the authorities he cites to support this argument.

¶98 Gimenez relies primarily on ***663** *Miller v. Bonta*, No. 22cv1446-BEN(JLB), 2022 WL 17811114, 2022 U.S. Dist. LEXIS 228197 (S.D. Cal. 2022) (court order). According to Gimenez, *Miller* considered "a California punitive fee-shifting provision such as this one that Plaintiffs seek to exercise" in this case, and "the California attorney general refused to even defend such a statute." Reply Br. of Appellant at 26. In fact, the statute in *Miller* was nothing like the fee provision in the WVRA.

¶99 The fee-shifting statute in *Miller* "applie[d] only to cases challenging firearm restrictions." 2022 WL 17811114, at *1, 2022 U.S. Dist. LEXIS 228197, at *3. The statute "insulate[d] laws from judicial review by permitting fee awards in favor of the government, tilting the table in the government's favor, and making a plaintiff's attorney jointly and severally liable for fee awards." 2022 WL 17811114, at *1, 2022 U.S. Dist. LEXIS 228197, at *3. The statute also provided that "[a]s a matter of law, a California plaintiff ****1014** cannot be a prevailing party." 2022 WL 17811114, at *1, 2022 U.S. Dist. LEXIS 228197, at *3. The WVRA, by contrast, allows prevailing plaintiffs to recover fees, but only if they are *not* the government. RCW 29A.92.130(1). Moreover, the WVRA does not "tilt the table" in favor of any government entity, and it does not automatically make any party's attorney jointly and severally liable for fees. *Miller* simply does not apply here.

¶100 Gimenez also suggests that applying the WVRA's fee provision in this case would violate *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). *Boddie* struck down "state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict[ed the appellants'] access to the courts in their effort to bring an action for divorce." *Id.* at 372. The WVRA's prevailing party

fee provision applies at the conclusion of an action, not its commencement. *Boddie* does not apply.

***664** 2. We decline to assess fees against Commissioner Didier

[40] ¶101 Finally, the plaintiffs argue that "Commissioner Didier, who is a named party in the suit in their official capacity, should also be held responsible for any fee award where he was in cahoots with Gimenez's action designed to torpedo the WVRA settlement." Br. of Resp'ts at 54-55. We decline to assess fees against Commissioner Didier.

¶102 To be sure, there is significant evidence in the record supporting the plaintiffs' factual allegations. Initially, Commissioner Didier planned to intervene in his personal capacity to challenge the validity of the WVRA. However, after the plaintiffs questioned how a named defendant could also be an intervenor, Gimenez intervened instead. Gimenez has at all times been represented by the same attorney who had originally intended to represent Commissioner Didier in his personal capacity.

¶103 Thus, the plaintiffs may be correct that "Commissioner Didier's involvement in Gimenez's intervention was transparent to all those involved in the matter." *Id.* at 55. Indeed, the trial court's order denying Gimenez's CR 12(c) motion begins by stating, "This matter came before the court for hearing on December 13, 2021 on Intervenor, *Clint Didier's*, Motion for Judgment on the Pleadings." CP at 678 (emphasis added). However, that appears to be a typo, not a finding of fact. The plaintiffs do not cite any trial court findings that Commissioner Didier is the real party behind Gimenez's intervention or appeal.

¶104 This court is not a fact-finding court. Moreover, the plaintiffs settled their claims with the defendants, including Commissioner Didier, and Commissioner Didier has not filed anything on appeal. We therefore decline to assess fees against Commissioner Didier based on the plaintiffs' allegations. We express no opinion as to whether Gimenez may have viable claims against Commissioner Didier or anyone else arising from this litigation.

***665** CONCLUSION

¶105 All of Gimenez's arguments are based on his interpretation of the WVRA's definition of a protected class. His interpretation is incorrect. We therefore affirm the trial court, award attorney fees and costs to the plaintiffs against Gimenez, and remand for a calculation of fees incurred at the trial court.

González, C.J.; Johnson, Madsen, Owens, Stephens, Gordon McCloud, and Montoya-Lewis, JJ.; and Judge, J. Pro Tem., concur.

References Annotated Revised Code of Washington by LexisNexis United States Code Service (USCS) by LexisNexis

All Citations

1 Wash.3d 629, 530 P.3d 994

Footnotes

1 The legislature amended the WVRA while this appeal was pending, effective January 1, 2024. *See* Laws of 2023, ch. 56, § 14. This opinion does not address those amendments.

2 When referring to the race or ethnicity of specific individuals, this opinion uses the terminology used by that individual. When quoting from another source, this opinion uses the terminology from the source material. Otherwise, this opinion uses gender-neutral terminology.

3 "Language minority group" is a term that is "referenced and defined in the federal voting rights act [of 1965 (FVRA)], 52 U.S.C. 10301 et seq." RCW 29A.92.010(5). The FVRA, in turn, defines "language minority group" as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S.C. § 10310(c)(3).

4 We decline to reach the plaintiffs' argument that Gimenez failed to comply with RCW 7.24.110 and amici's argument that Gimenez lacks standing to appeal as a matter of right.

5 As discussed further below, “polarized voting” is “a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.” RCW 29A.92.010(3).

6 In an “at-large” election system, “voters of the entire jurisdiction elect the members to the governing body.” RCW 29A.92.010(1)(a).

7 In a “district-based” election system, “the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.” RCW 29A.92.010(2).

8 “In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population,” thereby creating an opportunity for the minority group to elect its candidate of choice in that district. *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion).

9 In an “influence district[U.S.] ... a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.” *Id.*

10 “[I]n a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate.” *Id.*

11 In a coalition district, “two minority groups form a coalition to elect the candidate of the coalition's choice.” *Id.*

12 “The [United States] Office of Management and Budget (OMB) requires federal agencies to use a minimum of two ethnicities in collecting and reporting data: Hispanic or Latino and Not Hispanic or Latino. OMB defines ‘Hispanic or Latino’ as a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.” CP at 558.

13 The individual plaintiffs are Gabriel Portugal, Brandon Paul Morales, and Jose Trinidad Corral, “Latino registered voters who reside in Franklin County.” *Id.* at 2. League of United Latin American Citizens (LULAC) is also a named plaintiff. *Id.* at 3. None of the parties or amici distinguish between the individual plaintiffs and LULAC.

14 An amicus brief supporting Gimenez was filed by the American Civil Rights Project (ACRP). Amici briefs supporting the plaintiffs were filed by (1) the Civil Rights and Justice Clinic at the University of Washington School of Law and the Election Law Clinic at Harvard Law School, (2) OneAmerica and the Campaign Legal Center, (3) the Fred T. Korematsu Center for Law and Equality and the American Civil Liberties Union of Washington, (4) the Brennan Center for Justice, and (5) the State of Washington.

15 Gimenez and amicus ACRP argue that “Spanish heritage” does not refer to ethnicity but to “those who speak Spanish.” Br. of Appellant at 36; *see generally* Br. of ACRP as Amicus Curiae in Supp. of Intervenor Def.-Appellant (Amicus Br. of ACRP). They acknowledge that no case law supports this interpretation. To the contrary, United States Supreme Court precedent has applied the FVRA's protections to Latinx voters. *E.g.*, *LULAC*, 548 U.S. 399 (partial plurality opinion). Nevertheless, Gimenez argues that if “Spanish heritage” refers to ethnicity, then it is “superfluous” because ethnicity is “already captured by the preceding categories” of race and color. Br. of Appellant at 36. However, elsewhere in his briefing, Gimenez questions whether “ ‘Hispanics’ are a race,” and amicus argues that they are not. Reply Br. of Appellant at 1 n.1; *see also* Amicus Br. of ACRP at 13-14 n.30. Including Latinx ethnicities within “language minority groups,” as other courts have consistently done based on the statute's plain language, forecloses the need for such arguments and, therefore, is not superfluous.

16 It is undisputed that the voter bringing the challenge must be a member of the race, color, or language minority group whose rights they seek to vindicate.

17 Citing *Shaw v. Reno*, 509 U.S. 630, 642-43, 647, 651, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); *Miller v. Johnson*, 515 U.S. 900, 926-28, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Georgia v. Ashcroft*, 539 U.S. 461, 491, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003) (Kennedy, J., concurring); *Strickland*, 556 U.S. at 10-13, 15-16, 20-21; *Shaw v. Hunt*, 517 U.S. 899, 906-08, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Emison*, 507 U.S. at 40-41; *De Grandy*, 512 U.S. at 1016 (majority), 1028-29 (Kennedy, J., concurring in part and concurring in the judgment); *Cooper v. Harris*, 581 U.S.

285, 292, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189-90, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017); *LULAC*, 548 U.S. at 446 (plurality portion); *Abrams v. Johnson*, 521 U.S. 74, 85-86, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997); *United States v. Hays*, 515 U.S. 737, 744-45, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995).

18 The plaintiffs and amici argue that Gimenez's constitutional claims should not be considered on their merits because Gimenez did not serve his pleading on the attorney general pursuant to RCW 7.24.110. It is undisputed that Gimenez did not serve the attorney general before filing his CR 12(c) motion for judgment on the pleadings. Yet, arguably, Gimenez did not file any pleading seeking declaratory judgment that would be subject to RCW 7.24.110. Gimenez attached a *proposed* pleading to his motion to intervene, which included counterclaims for declaratory judgment. However, the trial court's order granting the motion to intervene did not address the proposed pleading, and Gimenez did not subsequently file his proposed pleading as a separate document. Instead, he chose to file a CR 12(c) motion for judgment on the *existing* pleadings—the plaintiffs' amended complaint and the defendants' answer. We decline to interpret RCW 7.24.110 as applied to these specific facts.

19 The plaintiffs were already awarded fees attributable to their litigation with Franklin County and its board of commissioners in the parties' settlement agreement.

20 Some, but not all, of the plaintiffs' attorneys are affiliated with the UCLA (University of California, Los Angeles) Voting Rights Project.

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Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois,
Eastern Division.

Christine RADOGNO, in her official capacity as Minority Leader of the Illinois Senate, Thomas Cross, in his official capacity as Minority Leader of the Illinois House of Representatives, Adam Brown, in his official capacity as a state representative from the 101st Representative District and individually as a registered voter, Veronica Vera, Chloe Moore, Joe Trevino, Angel Garcia, Elidia Mares, Edwin Tolentino, and the Illinois Republican Party, Plaintiffs,

v.

ILLINOIS STATE BOARD OF ELECTIONS, Rupert Borgsmiller, Executive Director of the Illinois State Board of Elections, Harold D. Byers, Bryan A. Schneider, Betty J. Coffrin, Ernest C. Gowen, William F. McGuffage, Judith C. Rice, Charles W. Scholz, Jesse R. Smart, all named in their official capacities as members of the Illinois State Board of Elections, African Americans for Legislative Redistricting, and Latino Coalition for Fair Representation, Defendants.

No. 1:11–cv–04884.
|
Oct. 21, 2011.

Attorneys and Law Firms

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ELAINE E. BUCKLO, District Judge, DIANE S. SYKES, District Judge, PHILIP P. SIMON, Chief Judge.

OPINION AND ORDER

***1** Like a periodic comet, once every ten years this Court sees a challenge to the redistricting of Illinois's state legislative districts. The comet is back before us in the form of an Amended Complaint brought by a mix of citizen-voters, Republican state legislators, and interested parties who claim, for one reason or another, that the redistricting plan recently passed by the Illinois Legislature runs afoul of various state and federal laws. The Defendants—the Illinois State Board of Elections and its members—have now filed a motion to dismiss [DE 28] which, for the reasons stated below, will be granted in part and denied in part.

BACKGROUND

The federal Census occurs once every ten years, which provides states with new population data and an opportunity to redraw their legislative districts. In Illinois, the state Constitution provides that "in the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative and the Representative Districts." Ill. Const., art. IV, § 3(b). Illinois has 59 Legislative (or "Senate") districts and 118 Representative (or "House") districts; each Senate district is composed of two House districts.

Illinois's 2011 redistricting process occurred throughout the spring and summer of this year. The Illinois Senate and House each formed redistricting committees. Those committees held public hearings throughout the state during March, April, and May. Plans for the new districts were proposed and amended throughout late May, and on June 3, 2011 the General Assembly Redistricting Act of 2011 was signed into law, which cemented the new map of 118 House districts and 59 Senate districts.

Plaintiffs Christine Radogno, Thomas Cross, Adam Brown, Veronica Vera, Chloe Moore, Joe Trevino, and Angel Garcia filed their complaint on July 20, 2011, and then filed an amended complaint on August 10, 2011. The Amended Complaint adds two more plaintiffs—Elidia Mares and Edwin Tolentino—and challenges the redistricting map in eight counts that raise, variously, the federal Voting Rights Act of 1965, the First and Fourteenth Amendments, the Illinois Voting Rights Act of 2011, and the Illinois Constitution. The Illinois Republican Party was granted leave to intervene as a plaintiff in the case on August 20, 2011, and it has adopted the Amended Complaint as its own.

DISCUSSION

The Defendants raise a variety of arguments in favor of dismissal for each of the eight counts in the Amended Complaint. Simplifying things somewhat, Plaintiffs agree that the Illinois State Board of Elections should be dismissed as a defendant from Counts 3 through 8 and that Counts 7 and 8 should be dismissed in their entirety. So Defendants' motion will be granted as to that Defendant and those counts without further discussion. We will consider the remaining six counts in detail below.

Counts 1 and 2

The first two counts of the Amended Complaint allege that some of the House districts dilute the voting power of African–Americans (Count 1) and Latinos (Count 2), in violation of Section 2 of the federal Voting Rights Act. Count 1 focuses on House districts 7 and 114; Count 2 focuses on House districts 1, 2, 21, 22, 23, 60, 77 and 83, but also states that it is "not limited to" these districts. [DE 21 at 18.]

***2** Section 2 violations exist when minority plaintiffs prove that they have been denied an equal opportunity to participate in the political process and to select candidates of their choice in a particular representative district. 42 U.S.C.1973(b). The Supreme Court in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) established a three-prong framework for analyzing Section 2 claims:

> Plaintiffs must show three threshold conditions: first, the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, the minority group is "politically cohesive"; and third, the majority "votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." Once plaintiffs establish these conditions, the court considers whether, "on the totality of circumstances," minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Abrams v. Johnson, 521 U.S. 74, 91, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) (quoting Gingles) (ellipsis in original; internal citations omitted).

The first thing to note about Section 2 claims is that they are district-specific, which means, among other things, that for plaintiffs to have standing to bring a claim in any given district they must be registered voters residing in that district. *See United States v. Hays,* 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (as a matter of standing, plaintiffs stating race-based equal protection challenges to redistricting must be voters who actually reside in the districts they are challenging); *Whitcomb v. Chavis,* 403 U.S. 124, 137 n. 17, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) (in electoral districting cases, the plaintiff must be a resident of the challenged district to have standing to sue). As Defendants rightly point out, with respect to districts 1, 22, 23, 77, 83, and 114, the Amended Complaint alleges that one of the Plaintiffs resides in the district, but it fails to make the additional allegation that the resident-plaintiff is also registered to vote in that district. Moreover, with respect to districts 2, 7, 21, and 60, the Amended Complaint does not identify any registered voter residing in the district. Therefore, Plaintiffs have not adequately alleged standing for any of the specifically identified districts that they seek to challenge. Plaintiffs now acknowledge this oversight and have proposed that they be given leave to file a Second Amended Complaint in order to insert the necessary allegations. That request will be granted.

There are, however, additional defects in Counts 1 and 2 that also need to be corrected if those counts are to go forward. First, while Plaintiffs have specifically pointed to some of the challenged districts, the Amended Complaint also states that the counts are "not limited to" these districts. Since *Gingles* claims are district-specific, this qualifier is unacceptable. Plaintiffs must specifically identify each district they are challenging and demonstrate that at least one of them has standing to challenge that district.

***3** Moreover, Plaintiffs have failed to sufficiently allege the third *Gingles* prong—i.e., that in each of the challenged districts the majority "votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51. The closest they ever get to this

prong is in Paragraph 106 of the Amended Complaint, where they allege that "racial bloc voting is pervasive in Illinois, both among majority and minority groups." [DE 21 at 15.] But this allegation is entirely too broad: it is not specific to any of the challenged districts, nor does it actually allege that the purported racial bloc voting is sufficient to defeat the minority's preferred candidate in each of those districts.

Plaintiffs counter by saying that fact-pleading of every element is not required in federal court. That's true, but "[e]ven notice pleading requires pleading the elements" of a claim, *Stark Trading v. Falconbridge Ltd.,* 552 F.3d 568, 574 (7th Cir.2009), and Plaintiffs' Amended Complaint doesn't come close to sufficiently pleading the third *Gingles* element. In fact, we are skeptical as to whether the Amended Complaint even sufficiently pleads the first *Gingles* element —whether the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"—for each challenged district. *Gingles,* 478 U.S. at 50. Plaintiffs only make the allegation that districts 7, 23, 60, and 114 are "sufficiently large and geographically compact," but never make this allegation with respect to districts 1, 2, 21, 22, 77, and 83.

Therefore, in amending Counts 1 and 2 of their Amended Complaint, Plaintiffs must include allegations for *each* challenged district sufficient to indicate that at least one of the plaintiffs has standing to challenge that district and that it satisfies *each* of the three *Gingles* prongs for *each* of the districts they believe violates Section 2 of the federal Voting Rights Act.

Counts 3 and 4

Counts 3 and 4 bring claims for political gerrymandering under the First and Fourteenth Amendments, respectively.

We'll first address the standing issue raised by these two counts before turning to the murky world of the merits of political gerrymandering claims. Plaintiff Radogno is the Minority Leader of the Illinois Senate and brings her claims only in her official capacity. Plaintiff Cross is the Minority Leader of the Illinois House and also brings his claims only in his official capacity. Plaintiff Brown is a state representative from what is currently the 101st Representative District. His claims are alleged in both his official capacity and individually as a registered voter and citizen living in what would be District 96, if the new redistricting plan is upheld. (Brown's individual standing to challenge District 96—the subject of Count 6—is discussed below.)

Plaintiffs' Response brief did not address the challenge to the official-capacity standing of Brown. Plaintiffs did respond to the challenges to Radogno and Cross, though they are not particularly specific as to which counts they believe Radogno and Cross have standing to assert. Nevertheless, all of their arguments on this issue really revolve around the political gerrymandering claims, so it makes sense to address the challenge to the standing of Radogno and Cross here. [*See* DE 40 at 12 ("[T]he Redistricting Plan ... systematically and unequally burdens the ability of Leaders Cross and Radogno to carry out their constitutionally prescribed duty of representing the interests of their caucuses and Republican voters throughout the State.").]

***4** The standing analysis for political gerrymandering claims is complicated by the largely unresolved status of political gerrymandering claims in general. That is, even if such claims are theoretically viable—which we discuss more below—it is not particularly clear who would have standing to bring them. In *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), for example, Justice Stevens suggested that the standing analysis for racial and political gerrymander claims should be the same, which would require that plaintiffs bringing political gerrymander claims be registered voters who reside in the challenged districts. *Vieth,* 541 U.S. at 328 (Stevens, J., dissenting). Justices Souter and Ginsburg proposed the same analysis. *Vieth,* 541 U.S. at 347 (Souter, J., dissenting).

Moreover, the standing analysis for Radogno and Cross to bring these claims is further complicated by the limited circumstances under which legislators have standing in their official capacity. Under the standard set in *Raines v. Byrd,* 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997), a legislator-plaintiff only has official-capacity standing when actions "deprive individual legislators of something to which they are personally entitled ... [like] the 'effectiveness of their votes.' " *Alaska Legislative Council v. Babbitt,* 181 F.3d 1333, 1337 (D.C.Cir.1999) (citing *Raines*). But when a legislator only alleges an "abstract dilution of institutional legislative power," that is insufficient to confer any official-capacity standing. *Raines,* 521 U.S. at 826.

In this case, Plaintiffs allege that the redistricting plan burdens their ability "to carry out their constitutionally prescribed duty of representing the interests of their caucuses and Republican voters throughout the State." This allegation seems more like an "abstract dilution of institutional legislative power" that

would not confer any official-capacity standing under *Raines*. However, given the unsettled question of who has standing to bring a political gerrymandering claims, and giving Plaintiffs the benefit of the doubt under notice pleading, we find their allegations sufficient to meet the *Raines*-standard solely for the political gerrymandering counts.

Now on to the merits of the political gerrymandering claims. For reasons of expediency and simplicity, we'll start with Count 4 of Plaintiff's Amended Complaint, which claims that the redistricting map passed by Democrats is an unconstitutional political gerrymander in violation of Republicans' equal protection rights under the Fourteenth Amendment. The caselaw addressing political gerrymandering claims under the Equal Protection Clause is foggy at best. The two most recent decisions on the issue from the Supreme Court—*Vieth* and *League of United Latin American Citizens (LULAC) v. Perry,* 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006)—are cobbled-together plurality opinions that place district courts in the untenable position of evaluating political gerrymandering claims without any definitive standards. *See LULAC,* 548 U.S. at 512 (Scalia, J., concurring in part and dissenting in part) (the Court's political gerrymandering jurisprudence "provides no guidance to lower court judges and perpetuates a cause of action with no discernible content").

***5** The two critical questions raised—and left basically unanswered—by *Vieth* and *L ULAC* are: 1) Are political gerrymandering claims justiciable as equal protection claims under the Fourteenth Amendment? 2) If so, is there a manageable and reliable standard of fairness by which to evaluate these claims?

In *Vieth,* a district court sitting with a three-judge panel granted a motion to dismiss the plaintiffs' political gerrymandering claims. On direct appeal to the Supreme Court, a four-justice plurality opinion affirmed this dismissal, concluding that political gerrymandering claims are nonjusticiable political questions because no judicially discernible and manageable standard for adjudicating such claims exists. *Vieth,* 541 U.S. at 305–06 (plurality). Justice Kennedy concurred with the plurality in so much as he agreed that plaintiffs' political gerrymandering claims had to be dismissed, but he would not "foreclose all possibility of judicial relief if some limited and precise rationale were found to" decide political gerrymandering claims in the future. *Vieth,* 541 U.S. at 306 (Kennedy, J., concurring).

The plurality judgment of the Court in *Vieth* thus appears to be that political gerrymandering claims are justiciable, but subject to dismissal because no definitive standard yet exists to judge them. This leaves lower courts evaluating political gerrymandering claims in a difficult position. Justice Scalia invited lower courts to treat Justice Kennedy's opinion "as a reluctant fifth vote against justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable." *Vieth,* 541 U.S. at 305 (plurality).

Two years later, *LULAC* did little to clarify the issues for lower courts. In another plurality opinion, the Court punted on the question of justiciability—finding that the issue was not before it—but held that plaintiffs' claims must nevertheless be dismissed because of "the absence of any workable test for judging partisan gerrymanders." *LULAC,* 548 at 420 (plurality). As summarized by Justice Kennedy, writing for the plurality: "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must ... show a burden, *as measured by a reliable standard,* on the complainants' representational rights." *LULAC,* 548 at 418 (plurality) (emphasis added). *See also Vieth,* 541 at 307–08 (Kennedy, J., concurring) (concurring in dismissal of political gerrymandering claims because "there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights").

In the wake of these two cases, some courts have read *Vieth* to mean that political gerrymandering claims are simply not justiciable. *Lulac of Texas v. Texas Democratic Party,* 651 F.Supp.2d 700, 712 (W.D.Tex.2009) (*Vieth* held "political gerrymandering to be non justiciable"); *Miller v. Cunningham,* 512 F.3d 98, 102 (4th Cir.2007) (same); *Meza v. Galvin,* 322 F.Supp.2d 52, 58 (D.Mass.2004) (*Vieth* concluded "that political gerrymandering cases are nonjusticiable").

***6** Other courts and commentators have reached the conclusion that "partisan gerrymanders are justiciable yet unsolvable." David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment,* 36 Cap. U.L.Rev. 1, 1 (Fall 2007). *See, e.g., Kidd v. Cox,* 2006 WL 1341302, at *15 (N.D.Ga.2006) ("[T]he Court cannot ascertain from the materials submitted what manageable or politically-neutral standards might exist in this case that would make a political gerrymandering dispute based on the Equal Protection Clause

justiciable."); *Shapiro v. Berger,* 328 F.Supp.2d 496, 504 (S.D.N.Y.2004) (dismissing political gerrymandering claim because Plaintiff had "not suggested any manageable standard under which I could evaluate such a claim if one had been advanced").

On our reading of *Vieth* and *LULAC,* political gerrymandering claims are justiciable *in principle,* but also currently unsolvable. This means that Plaintiffs' political gerrymandering claim based on the Equal Protection Clause may be justiciable, but only if they articulate a workable standard of fairness by which to assess that claim and make allegations sufficient to give rise to a plausible inference that the redistricting plan violates the standard. Plaintiffs have not stated any such standard in their Amended Complaint. Indeed, since the Supreme Court was unable on two occasions to agree on any standard, it may be an exercise in futility. Nevertheless, Plaintiffs will be given leave to amend Count 4 of their Amended Complaint in order to attempt to provide a "workable test" or a "reliable standard" for judging partisan gerrymanders under the Equal Protection Clause of the Fourteenth Amendment.

As noted, the preceding substantive analysis all applies to political gerrymandering claims brought under the Equal Protection Clause of the Fourteenth Amendment. But in Count 3, Plaintiffs also allege a political gerrymandering claim under the First Amendment, a claim that grows out of a theory offered by Justice Kennedy in his *Vieth* concurrence. He wrote:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest.... First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

***7** *Vieth,* 541 U.S. at 314 (Kennedy, J., concurring) (citations omitted).

The four justice plurality opinion in *Vieth* rejected the idea that the First Amendment could be used to bring political gerrymandering claims because "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." *Vieth,* 541 U.S. at 294 (plurality). Nevertheless, Plaintiffs read Justice Kennedy's concurrence as an opening for political gerrymandering claims under the First Amendment, and they thus allege in Count 3 that the redistricting plan "systematically and intentionally unfairly burdens the rights to political expression and expressive association of voters who vote Republican because of their political views" and that this is done without a "compelling reason." [DE 21 at 22.]

So from Plaintiffs' viewpoint, because the redistricting plan means that Republican voters in some districts are less likely to be successful in electing their preferred candidate, these voters' First Amendment rights of expression and association have been violated. Even assuming that this claim is justiciable—something of a big assumption, as the previous section demonstrates—we find it unpersuasive.

It is of course true that the First Amendment protects political expression and political association, particularly in the context of campaigns for political office. *Citizens United v. Fed. Election Comm'n,* —— U.S. ——, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal quotations omitted). But what is the connection between the alleged burden imposed on Plaintiffs' ability to elect their preferred candidate and a restriction on their freedom of political expression? There is none. As another court rejecting these sorts of claims explained: "Plaintiffs are every bit as free under the new [redistricting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." *Kidd,* 2006 WL 1341302, at **17.* Plaintiffs' freedom of expression is simply not burdened by the redistricting plan. It may very well be that Plaintiffs' ability to *successfully elect* their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights. *See, e.g., Washington v. Finlay,* 664 F.2d 913, 927–28 (4th Cir.1981) ("The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot,

and present one's views to the electorate do not also include entitlement to success in those endeavors.").

Nor does the redistricting plan inhibit Plaintiffs' freedom of association. It is true that fielding candidates for political office and participating in campaigns are acts of political association and thus receive First Amendment protection. *See Eu v. S.F. County Democratic Cent. Comm.,* 489 U.S. 214, 224, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (noting freedom of association includes the freedom "to select a standard bearer who best represents the party's ideologies and preferences") (internal quotations omitted). But the redistricting plan at issue here "has no effect on Plaintiffs' ability to field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs." *Kidd,* 2006 WL 1341302, at * 17. It thus does not restrict in any way Plaintiffs' freedom of association under the First Amendment.

***8** In the end, the Amended Complaint does not allege a cognizable claim for political gerrymandering under the First Amendment. We entirely endorse the conclusion reached by *Kidd:*

> [B]ased on our review of First Amendment jurisprudence in the election context, we find the deleterious effects of political gerrymandering on the ability of a political party and its voters to elect a member of the party to a seat in the state legislature implicates no recognized First Amendment right. The party and its voters remain free to associate with whom they please, field candidates of their choice, campaign, vote, and express their political views. What Plaintiffs demand is the right to have their views represented in state government by the representative of their choice. We decline to recognize such a right under the First Amendment.

Kidd, 2006 WL 1341302, at *19. Count 3 of Plaintiffs' Amended Complaint will therefore be dismissed with prejudice.

Count 5

Plaintiffs' fifth count challenges the constitutionality of the Illinois Voting Rights Act of 2011 ("IVRA"), both facially and as-applied.

The IVRA is a concise piece of legislation—barely 400 words in total—focused entirely on the redistricting process. It is intended to prevent what is commonly known as the "fracturing" of minority voting districts—i.e., it is intended to preserve a cluster of minority voters within a given legislative district if they are of a size and cohesion that could exert collective electoral power. 10 ILCS 120/5–5. The IVRA thus explicitly directs that "racial minorities or language minorities" be taken into account in the redistricting process. 10 ILCS 120/5–5(b).

Plaintiffs first argue that, by explicitly taking race into account, the IVRA is facially unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Thus, Plaintiffs believe that "redistricting laws that use racial classifications, such as those contained in the text of IVRA, are expressly prohibited under the Equal Protection Clause, even those that appear neutral on their face." [DE 40 at 9.] But Plaintiffs' position is simply not the law in redistricting cases. Rather, as the Supreme Court recognized in *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines." *Shaw,* 509 U.S. at 646 (emphasis in original). Thus, unlike in many other contexts, redistricting laws *can* take race into consideration.

It is true that redistricting laws cannot elevate race to be the *predominant* factor in the way a district is drawn. *Easley v. Cromartie,* 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (for a district to violate equal protection, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision") (italics in original; internal citations and quotations omitted). But the IVRA expends a large percentage of its words ensuring that it complies with this rule. Subsection 5(a) of the IVRA states: "The requirements imposed by this Article are in addition and subordinate to any requirements or obligations imposed by the United States Constitution, any federal law regarding redistricting Legislative Districts or Representative Districts, including but not limited to the federal Voting Rights Act, and the Illinois Constitution." 10 ILCS 120/5–5(a). Subsection 5(d) reiterates the point: "Nothing in this Act shall be construed, applied, or implemented in a way that imposes any requirement or obligation that conflicts with the United States Constitution, any federal law regarding redistricting Legislative Districts or Representative Districts, including but not limited to the federal Voting Rights Act, or the Illinois Constitution." 10 ILCS 120/5–5(d). The IVRA is thus not unconstitutional on its face.

***9** Count 5 also raises an as-applied constitutional challenge to the IVRA. The Amended Complaint is less than entirely clear exactly which districts this challenge applies to—other than District 96, which in Plaintiffs' view demonstrates that "the Illinois Voting Rights Act of 2011 violates the Plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution on its face and as applied." [DE 21 at 25.] Plaintiffs may have intended this as-applied challenge to apply to other districts, but in responding to Defendants' motion to dismiss, Plaintiffs only pursued the argument with respect to District 96, thus waiving a challenge to any of the other districts. *Lekas v. Briley,* 405 F.3d 602, 614–15 (7th Cir.2005) (a plaintiff waives an argument by failing to raise it in response to a motion to dismiss).

Count 5 thus remains as only a constitutional challenge to the IVRA as it is applied to District 96. That claim amounts to nothing more than a *Shaw* challenge—i.e., that race was the *predominate* factor in the creation of District 96—and is, as we will see, identical to the claim brought in Count 6. Since the only remaining part of Count 5 is thus duplicative, it will be dismissed with prejudice.

Count 6

The Amended Complaint's sixth count is a straightforward *Shaw* challenge: Plaintiffs claim that District 96 was drawn in such a way that race was the *predominant* factor. Defendants originally sought to dismiss this count because it was unclear whether it was a racial gerrymandering challenge or a political gerrymandering challenge. Plaintiffs clarified that Count 6 was a race-based *Shaw* challenge, however, and Defendants subsequently dropped their challenge to this count in their reply brief. Defendants' Motion to Dismiss will therefore be denied with respect to Count 6 of Plaintiffs' Amended Complaint.

As for the standing for Count 6, Adam Brown is a registered voter and citizen living in what would be District 96. Therefore, he has standing to challenge the drawing of District 96. *Hays,* 515 U.S. at 745.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Amended Complaint [DE 28] is **GRANTED** in part and **DENIED** in part. Counts 3, 5, 7 and 8 of Plaintiffs' Amended Complaint are **DISMISSED WITH PREJUDICE.** Counts 1, 2 and 4 of Plaintiffs' Amended Complaint are **DISMISSED WITH LEAVE TO REPLEAD,** and any newly amended complaint repleading these counts must be filed within 7 days of the date of this Order. Defendants' Motion is **DENIED** with respect to Count 6 of Plaintiffs' Amended Complaint. Defendant Illinois State Board of Elections is **DISMISSED WITH PREJUDICE** from Counts 3 though 8 of Plaintiffs' Amended Complaint.

SO ORDERED.

All Citations

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117 S.Ct. 1491
Supreme Court of the United States

Janet RENO, Attorney General, Appellant,
v.
BOSSIER PARISH SCHOOL BOARD et al.
George PRICE, et al., Appellants,
v.
BOSSIER PARISH SCHOOL BOARD et al.

Nos. 95–1455, 95–1508.
|
Argued Dec. 9, 1996.
|
Decided May 12, 1997.

Synopsis

Louisiana parish school board sought preclearance under Voting Rights Act for its

proposed redistricting plan. The United States District Court for the District of Columbia, Silberman, Circuit Judge, 907 F.Supp. 434, granted request. Attorney General appealed. The Supreme Court, Justice O'Connor, held that: (1) preclearance under Voting Rights Act may not be denied solely on basis that covered jurisdiction's new voting standard, practice, or procedure violates Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color; (2) evidence that covered jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to inquiry whether covered jurisdiction acted with purpose of denying or abridging right to vote on account or race or color under Voting Rights Act preclearance section; and (3) whether district court considered relevant proffered evidence showing that board's redistricting plan diluted minorities' voting power was unclear.

Vacated and remanded.

Justice Thomas, concurred and filed opinion.

Justice Breyer, concurred in part and in judgment and filed opinion in which Justice Ginsburg joined.

Justice Stevens, dissented in part and concurred in part and filed opinion in which Justice Souter joined.

West Headnotes (14)

[1] **Election Law** In general; covered jurisdictions

Preclearance under Voting Rights Act may not be denied solely on basis that covered jurisdiction's new voting standard, practice, or procedure violates Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color. Voting Rights Act of 1965, §§ 2(a), 5, 42 U.S.C.A. §§ 1973(a), 1973c.

16 Cases that cite this headnote

[2] **Election Law** Bailout suits; judicial preclearance

To obtain judicial preclearance under Voting Rights Act, covered jurisdiction bears burden of proving that electoral change does not have purpose and will not have effect of denying or abridging right to vote on account of race. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

7 Cases that cite this headnote

[3] **Election Law** In general; covered jurisdictions

Voting Rights Act preclearance section focuses on freezing election procedures, and thus, plan has impermissible "effect" under section only if it would lead to retrogression in position of racial minorities with respect to their effective exercise of electoral franchise. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

21 Cases that cite this headnote

[4] **Election Law** In general; covered jurisdictions

Under Voting Rights Act preclearance section, proposed voting practice is measured against existing voting practice to determine whether retrogression would result from proposed

change. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

23 Cases that cite this headnote

[5] **Election Law** In general; covered jurisdictions

Under Voting Rights Act preclearance section, covered jurisdiction's existing voting plan is benchmark against which "effect" of voting changes is measured. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

19 Cases that cite this headnote

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

Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must initially establish the following: racial group is sufficiently large and geographically compact to constitute majority in single member district; group is politically cohesive; and white majority votes sufficiently as bloc to enable it usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

21 Cases that cite this headnote

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

Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must demonstrate that totality of circumstances supports finding that voting scheme is dilutive. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

20 Cases that cite this headnote

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

Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must postulate reasonable alternative voting practice to serve as benchmark undiluted voting practice. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

32 Cases that cite this headnote

[9] **Constitutional Law** Fifteenth Amendment

Election Law Discriminatory practices proscribed in general

Election Law Dilution of voting power in general

Violation of Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color is not a fortiori violation of Fourteenth or Fifteenth Amendment to Constitution; plaintiff bringing constitutional vote dilution challenge must establish that state or political subdivision acted with discriminatory purpose, which Act section does not require. U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

43 Cases that cite this headnote

[10] **Election Law** Discrimination; Voting Rights Act

Although Supreme Court normally accords Attorney General's construction of Voting Rights Act great deference, Supreme Court only does so if Congress has not expressed its intent with respect to question, and then only if administrative interpretation is reasonable. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

5 Cases that cite this headnote

[11] **Equity** Constitutional and statutory provisions

Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.

5 Cases that cite this headnote

[12] **Election Law** Evidence

Evidence that covered jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to inquiry whether covered jurisdiction acted with purpose of denying or abridging right to vote on account of race or color under Voting Rights Act preclearance section. Voting Rights Act of 1965, §§ 2(a), 5, 42 U.S.C.A. §§ 1973(a), 1973c.

12 Cases that cite this headnote

[13] **Federal Courts** Particular cases

Whether district court considered relevant proffered evidence showing that parish school board's reapportionment plan diluted minorities' voting power in determining whether to grant board preclearance under Voting Rights Act was unclear, requiring remand of that aspect of district court's holding. Voting Rights Act of 1965, §§ 2(a), 5, 42 U.S.C.A. §§ 1973(a), 1973c.

2 Cases that cite this headnote

[14] **Constitutional Law** Intentional or purposeful action

Important starting point for assessing discriminatory intent under *Arlington Heights*, which sets forth framework for analyzing whether invidious discriminatory purpose was motivating factor in government body's decision making, is impact of official action, whether it bears more heavily on one race than another; other relevant considerations include historical background of jurisdiction's decision, specific sequence of events leading up to challenged decision, departures from normal procedural sequence, and legislative or administrative history, especially any contemporary statements by members of decision making body.

64 Cases that cite this headnote

**1493 *Syllabus* [*]

***471** Appellee Bossier Parish School Board (Board) is subject to the preclearance requirements **1494 of § 5 of the Voting Rights Act of 1965 (Act) and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." Based on the 1990 census, the Board redrew its 12 single-member districts, adopting the redistricting plan that the Attorney General had recently precleared for use in elections of the parish's primary governing body (the Jury plan). In doing so, the Board rejected a plan proposed by the National Association for the Advancement of Colored People (NAACP), which would have created two majority-black districts. The Attorney General objected to preclearance, finding that the NAACP plan, which had not been available when the Jury plan was originally approved, demonstrated that black residents were sufficiently numerous and geographically compact to constitute a majority in two districts; that, compared with this alternative, the Board's plan unnecessarily limited the opportunity for minority voters to elect their candidates of choice and thereby diluted their voting strength in violation of § 2 of the Act; and that the Attorney General must withhold preclearance where necessary to prevent a clear § 2 violation. The Board then filed this action with the District Court, and appellant Price and others intervened as defendants. A three-judge panel granted the preclearance request, rejecting appellants' contention that a voting change's failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5 and their related argument that a court must still consider evidence of a § 2 violation as evidence of discriminatory purpose under § 5.

Held:

1. Preclearance under § 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2. This Court has consistently understood § 5 and § 2 to combat ***472** different evils and, accordingly, to impose very different duties upon

the States. See *Holder v. Hall,* 512 U.S. 874, 883, 114 S.Ct. 2581, 2587, 129 L.Ed.2d 687 (plurality opinion). Section 5 freezes election procedures in a covered jurisdiction until that jurisdiction proves that its proposed changes do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race. See *Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629. It is designed to combat only those effects that are retrogressive. Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan, see *Holder, supra,* at 883, 114 S.Ct., at 2587 (plurality opinion), and necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. Section 2, on the other hand, applies in *all* jurisdictions and uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan. Making compliance with § 5 contingent upon compliance with § 2, as appellants urge, would, for all intents and purposes, replace the standards for § 5 with those for § 2, thus contradicting more than 20 years of precedent interpreting § 5. See, *e.g., Beer, supra.* Appellants' contentions that their reading of § 5 is supported by the *Beer* decision, by the Attorney General's regulations, and by public policy considerations are rejected. Pp. 1496–1501.

2. Evidence showing that a jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to establish a jurisdiction's "intent to retrogress" under § 5, so there is no need to decide today whether such evidence is relevant to establish other types of discriminatory intent or whether § 5's purpose inquiry ever extends beyond the search for retrogressive intent. Because this Court cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, this aspect of that court's holding must be vacated. Pp. 1501–1503.

(a) Section 2 evidence may be "relevant" within the meaning of Federal Rule of Evidence 401, for the fact that a plan has a dilutive impact makes it "more probable" that the jurisdiction adopting that plan acted ****1495** with an intent to retrogress than "it would be without the evidence." This does not, of course, mean that evidence of a plan's dilutive impact is dispositive of the § 5 purpose inquiry. Indeed, if it were, § 2 would be effectively incorporated into § 5, a result this Court finds unsatisfactory. In conducting their inquiry into a jurisdiction's motivation in enacting voting changes, courts should look for guidance to *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450, which sets forth a framework for examining discriminatory purpose. Pp. 1501–1503.

(b) This Court is unable to determine whether the District Court deemed irrelevant all evidence of the dilutive impact of the redistricting ***473** plan adopted by the Board. While some language in its opinion is consistent with today's holding that the existence of less dilutive options was at least relevant to the purpose inquiry, the District Court also appears to have endorsed the notion that dilutive impact evidence is irrelevant even to an inquiry into retrogressive intent. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction to remedy any remaining vestiges of a dual school system. P. 1503.

907 F.Supp. 434, vacated and remanded.

O'CONNOR, J., , delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined in full, and in which GINSBURG and BREYER, JJ., joined except insofar as Part III is inconsistent with the views expressed in the concurrence of BREYER, J., THOMAS, J., filed a concurring opinion, *post,* p. 1503. BREYER, J., iled an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post,* p. 1505. STEVENS, J., filed an opinion dissenting in part and concurring in part, in which SOUTER, J., joined, *post,* p. 1507.

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Opinion

***474** Justice O'CONNOR delivered the opinion of the Court.

Today we clarify the relationship between § 2 and § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 439, as amended, 42 U.S.C. §§ 1973, 1973c. Specifically, we decide two questions: (i) whether preclearance must be denied under § 5 whenever a covered jurisdiction's new voting "standard,

practice, or procedure" violates § 2; and (ii) whether evidence that a new "standard, practice, or procedure" has a dilutive impact is always irrelevant to the inquiry whether the covered jurisdiction acted with "the purpose ... of denying or abridging the right to vote on account of race or color" under § 5. We answer both in the negative.

I

Appellee Bossier Parish School Board (Board) is a jurisdiction subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." The Board has 12 members who are elected from single-member districts by majority vote to serve 4–year terms. When the 1990 census revealed wide population disparities among its districts, see App. to Juris. Statement 93a (Stipulations of Fact and Law ¶ 82), the Board decided to redraw the districts to equalize the population distribution.

During this process, the Board considered two redistricting plans. It considered, and initially rejected, the redistricting plan that had been recently adopted by the Bossier ****1496** Parish Police Jury, the parish's primary governing body (the Jury plan), to govern its own elections. Just months before, the Attorney General had precleared the Jury plan, which also contained 12 districts. *Id.,* at 88a (Stipulations ¶ 68). None of the 12 districts in the Board's existing plan or in the Jury plan contained a majority of black residents. *Id.,* at ***475** 93a (Stipulations ¶ 82) (under 1990 population statistics in the Board's existing districts, the three districts with highest black concentrations contain 46.63%, 43.79%, and 30.13% black residents, respectively); *id.,* at 85a (Stipulations ¶ 59) (population statistics for the Jury plan, with none of the plan's 12 districts containing a black majority). Because the Board's adoption of the Jury plan would have maintained the status quo regarding the number of black-majority districts, the parties stipulated that the Jury plan was not "retrogressive." *Id.,* at 141a (Stipulations ¶ 252) ("The ... plan is not retrogressive to minority voting strength compared to the existing benchmark plan ..."). Appellant George Price, president of the local chapter of the National Association for the Advancement of Colored People (NAACP), presented the Board with a second option —a plan that created two districts each containing not only a majority of black residents, but a majority of voting-age black residents. *Id.,* at 98a (Stipulations ¶ 98). Over vocal opposition from local residents, black and white alike, the Board voted to adopt the Jury plan as its own, reasoning that the Jury plan would almost certainly be precleared again and that the NAACP plan would require the Board to split 46 electoral precincts.

But the Board's hopes for rapid preclearance were dashed when the Attorney General interposed a formal objection to the Board's plan on the basis of "new information" not available when the Justice Department had precleared the plan for the Police Jury—namely, the NAACP's plan, which demonstrated that "black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." *Id.,* at 155a–156a (Attorney General's August 30, 1993, objection letter). The objection letter asserted that the Board's plan violated § 2 of the Act, 42 U.S.C. § 1973, because it "unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice," App. to Juris. Statement, at 156a, as compared to the new alternative. Relying on 28 CFR § 51.55(b)(2) (1996), which ***476** provides that the Attorney General shall withhold preclearance where "necessary to prevent a clear violation of amended Section 2 [42 U.S.C. § 1973]," the Attorney General concluded that the Board's redistricting plan warranted a denial of preclearance under § 5. App. to Juris. Statement 157a. The Attorney General declined to reconsider the decision. *Ibid.*

The Board then filed this action seeking preclearance under § 5 in the District Court for the District of Columbia. Appellant Price and others intervened as defendants. The three-judge panel granted the Board's request for preclearance, over the dissent of one judge. 907 F.Supp. 434, 437 (1995). The District Court squarely rejected the appellants' contention that a voting change's alleged failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5: "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of section 5 cannot be denied preclearance because of an alleged section 2 violation." *Id.,* at 440–441. Given this holding, the District Court quite properly expressed no opinion on whether the Jury plan in fact violated § 2, and its refusal to reach out and decide the issue in dicta does not require us, as Justice STEVENS insists, to "assume that the record discloses a 'clear violation' of § 2." See *post,* at 1508 (opinion dissenting in part and concurring in part). That issue has yet to be decided by any court. The District

Court did, however, reject appellants' related argument that a court "must still consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5." *Id.,* at 445. We noted probable jurisdiction on June 3, 1996. 517 U.S. 1232, 116 S.Ct. 1874, 135 L.Ed.2d 171.

II

[1] The Voting Rights Act of 1965(Act), 42 U.S.C. § 1973 *et seq.,* was enacted by Congress in 1964 to "attac[k] the blight of ****1497** voting discrimination" across the Nation. S.Rep. No. 97–417, ***477** 2d Sess., p. 4 (1982) U.S.Code Cong. & Admin.News 1982 pp. 177, 180; *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). Two of the weapons in the Federal Government's formidable arsenal are § 5 and § 2 of the Act. Although we have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder v. Hall,* 512 U.S. 874, 883, 114 S.Ct. 2581, 2587, 129 L.Ed.2d 687 (1994) (plurality opinion) (noting how the two sections "differ in structure, purpose, and application"), appellants nevertheless ask us to hold that a violation of § 2 is an independent reason to deny preclearance under § 5. Unlike Justice sTEVENS, *post,* at 1509–1510, and n. 5 (opinion dissenting in part and concurring in part), we entertain little doubt that the Department of Justice or other litigants would "routinely" attempt to avail themselves of this new reason for denying preclearance, so that recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

[2] **[3]** Section 5, 42 U.S.C. § 1973c, was enacted as

> "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.... Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' " *Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976) (quoting H.R.Rep. No. 94–196, pp. 57–58 (1970)).

In light of this limited purpose, § 5 applies only to certain States and their political subdivisions. Such a covered jurisdiction ***478** may not implement any change in a voting "qualification, prerequisite, standard, practice, or procedure" unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 42 U.S.C. § 1973c. To obtain judicial preclearance, the jurisdiction bears the burden of proving that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.; City of Rome v. United States,* 446 U.S. 156, 183, n. 18, 100 S.Ct. 1548, 1565, n. 18, 64 L.Ed.2d 119 (1980) (covered jurisdiction bears burden of proof). Because § 5 focuses on "freez[ing] election procedures," a plan has an impermissible "effect" under § 5 only if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer, supra,* at 141, 96 S.Ct., at 1364.

[4] **[5]** Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. See *Holder, supra,* at 883, 114 S.Ct., at 2587 (plurality opinion) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change"). It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. In *Beer,* for example, we concluded that the city of New Orleans' reapportionment of its council districts, which created one district with a majority of voting-age blacks where before there had been none, had no discriminatory "effect." 425 U.S., at 141–142, 96 S.Ct., at 1364 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5"). Likewise, in *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983), we found that the city's new charter had no retrogressive "effect" even though it maintained ***479** the city's prior ****1498** practice of electing its council members at-large from numbered posts, and instituted a new practice of electing two of the city's four council members every year (instead of electing all the council members every two years). While each practice could "have a discriminatory effect under some circumstances," *id.,* at 135, 103 S.Ct., at 1004, the

fact remained that "[s]ince the new plan did not *increase* the degree of discrimination against [the city's Mexican–American population], it was entitled to § 5 preclearance [because it was not retrogressive]," *id.,* at 134, 103 S.Ct., at 1004 (emphasis added).

[6] **[7]** **[8]** Section 2, on the other hand, was designed as a means of eradicating voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups," S.Rep. No. 97–417, at 28, U.S.Code Cong. & Admin.News 1982 pp. 177, 205. Under this broader mandate, § 2 bars *all* States and their political subdivisions from maintaining any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote on account of race or color." 42 U.S.C. § 1973(a). A voting practice is impermissibly dilutive within the meaning of § 2

> "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a class defined by race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

A plaintiff claiming vote dilution under § 2 must initially establish that: (i) "[the racial group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (ii) the group is "politically cohesive"; and (iii) "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." ***480** *Thornburg v. Gingles,* 478 U.S. 30, 50–51, 106 S.Ct. 2752, 2766–2767, 92 L.Ed.2d 25 (1986); *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993). The plaintiff must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive. *Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994); see *Gingles, supra,* at 44–45, 106 S.Ct., at 2762–2764 (listing factors to be considered by a court in assessing the totality of the circumstances). Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an "undiluted" practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice. *Holder v. Hall,* 512 U.S., at 881, 114 S.Ct., at 2586 (plurality opinion); *id.,* at 950–951, 114 S.Ct., at 2621–2622 (Blackmun, J., dissenting).

Appellants contend that preclearance must be denied under § 5 whenever a covered jurisdiction's redistricting plan violates § 2. The upshot of this position is to shift the focus of § 5 from nonretrogression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan.

But § 5, we have held, is designed to combat only those effects that are retrogressive. See *supra,* at 1497–1498. To adopt appellants' position, we would have to call into question more than 20 years of precedent interpreting § 5. See, *e. g., Beer, supra; City of Lockhart, supra.* This we decline to do. Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect. See, *e.g., Elkins v. United States,* 364 U.S. 206, 218, 80 S.Ct. 1437, 1445, 4 L.Ed.2d 1669 (1960) ("[A]s a practical matter it is never easy to prove a negative"). To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive "result" before it can implement that plan—even if the Attorney General bears the burden of proving that "result"—is to increase further the serious federalism costs already implicated by § 5. See *Miller v. Johnson,* 515 U.S. 900, 926, 115 S.Ct. 2475, 2493, 132 L.Ed.2d 762 (1995) (noting the "federalism costs exacted by § 5 preclearance").

****1499** ***481** Appellants nevertheless contend that we should adopt their reading of § 5 because it is supported by our decision in *Beer,* by the Attorney General's regulations, and by considerations of public policy. In *Beer,* we held that § 5 prohibited only retrogressive effects and further observed that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct., at 1364. Although there had been no allegation that the redistricting plan in *Beer* "so ... discriminate[d] on the basis of race or color as to be unconstitutional," we cited in dicta a few cases to illustrate when a redistricting plan might be found to be constitutionally offensive. *Id.,* at 142, n. 14, 96 S.Ct., at 1364, n. 14. Among them was our decision in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), in which we sustained a vote dilution challenge, brought under the Equal Protection Clause, to the use of multimember election districts in two Texas counties. Appellants argue that "[b]ecause vote dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer* ' s discussion meant that practices that violated Section 2 would not be entitled to preclearance under Section 5." Brief for Federal Appellant 36–37.

[9] Even assuming, *arguendo,* that appellants' argument had some support in 1976, it is no longer valid today because the applicable statutory and constitutional standards have changed. Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose. See *City of Mobile v. Bolden,* 446 U.S. 55, 62, 100 S.Ct. 1490, 1497, 64 L.Ed.2d 47 (1980) (plurality opinion) ("Our decisions ... have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); *id.,* at 66, 100 S.Ct., at 1499 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection ***482** Clause of the Fourteenth Amendment"); see also *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component, see S.Rep. No. 97–417, at 2, U.S.Code Cong. & Admin.News 1982 pp. 177, 178 ("Th[e 1982] amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2"). Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution. Congress itself has acknowledged this fact. See *id.,* at 39 ("The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself").

Justice STEVENS argues that the subsequent divergence of constitutional and statutory standards is of no moment because, in his view, we "did not [in *Beer*] purport to distinguish between challenges brought under the Constitution and those brought under the [Voting Rights] statute." *Post,* at 1510 (opinion dissenting in part and concurring in part). Our citation to *White,* he posits, incorporated *White* 's standard into our exception for nonretrogressive apportionments that violate § 5, whether or not that standard continued to coincide with the constitutional standard. In essence, Justice sTEVENS reads *Beer* as creating an exception for nonretrogressive apportionments that so discriminate on the basis of race or color as to violate any federal law that happens to coincide with what would have amounted to a constitutional violation in 1976. But this reading flatly contradicts the plain language of the exception we recognized, which applies solely to apportionments that "so discriminat[e] on the basis of race or color as to violate *the Constitution.*" *Beer, supra,* at 141, 96 S.Ct., at 1364 (emphasis added). We cited *White,* not for itself, but because it embodied the current ***483** *constitutional* standard for a violation of the ****1500** Equal Protection Clause. See also 425 U.S., at 142, n. 14, 96 S.Ct., at 1364, n. 14 (noting that New Orleans' plan did "not remotely approach a violation of the *constitutional* standards enunciated in" *White* and other cited cases (emphasis added)). When *White* ceased to represent the current understanding of the Constitution, a violation of its standard—even though that standard was later incorporated in § 2—no longer constituted grounds for denial of preclearance under *Beer.*

[10] Appellants' next claim is that we must defer to the Attorney General's regulations interpreting the Act, one of which states:

> "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 CFR § 51.55(b)(2) (1996).

Although we normally accord the Attorney General's construction of the Act great deference, "we only do so if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley v. Etowah County Comm'n,* 502 U.S. 491, 508, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992). Given our longstanding interpretation of § 5, see *supra,* at 1496–1498, 1498–1500, which Congress has declined to alter by amending the language of § 5, *Arkansas Best Corp. v. Commissioner,* 485 U.S. 212, 222, n. 7, 108 S.Ct. 971, 977, n. 7, 99 L.Ed.2d 183 (1988) (placing some weight on Congress' failure to express disfavor with our 25–year interpretation of a tax statute), we believe Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments, S.Rep. No. 97–417, *supra,* at 12, n. 31, U.S.Code Cong. & Admin.News 1982 pp. 177, 189, does not ***484** change our view. With those amendments, Congress, among other things, renewed § 5 but did so without changing its applicable standard. We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5, see *supra,* at 1498, by dropping a footnote in a

Senate Report instead of amending the statute itself. See *Pierce v. Underwood,* 487 U.S. 552, 567, 108 S.Ct. 2541, 2551, 101 L.Ed.2d 490 (1988) ("Quite obviously, reenacting precisely the same language would be a strange way to make a change"). See also *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983) (reaching its holding over Justice Marshall's dissent, which raised the argument now advanced by appellants regarding this passage in the Senate Report).

Nor does the portion of the House Report cited by Justice sTEVENS unambiguously call for the incorporation of § 2 into § 5. That portion of the Report states:

> "[M]any voting and election practices currently in effect are outside the scope of [§ 5] ... because they were in existence before 1965.... Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under § 2] or preclearance [under § 5]." H.R.Rep. No. 97–227, p. 28 (1981).

The obvious thrust of this passage is to establish that pre–1965 discriminatory practices are not free from scrutiny under the Act just because they need not be precleared under § 5: Such practices might still violate § 2. But to say that pre–1965 practices can be reached solely by § 2 is not to say that all post–1965 changes that might violate § 2 may be reached by both § 2 *and § 5* or that "the substantive standards for § 2 and § 5 [are] the same," see *post,* at 1511 (opinion dissenting in part and concurring in part). Our ultimate conclusion is also not undercut by statements found in the "postenactment legislative record," see *post,* at 1511, n. 9, given that "the views of a subsequent Congress form a hazardous ***485** basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960). We therefore decline to give these sources controlling weight.

****1501** Appellants' final appeal is to notions of public policy. They assert that if the district court or Attorney General examined whether a covered jurisdiction's redistricting plan violates § 2 at the same time as ruling on preclearance under § 5, there would be no need for two separate actions and judicial resources would be conserved. Appellants are undoubtedly correct that adopting their interpretation of § 5 would serve judicial economy in those cases where a § 2 challenge follows a § 5 proceeding. But this does not always happen, and the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding.

[11] Appellants lastly argue that preclearance is an equitable remedy, obtained through a declaratory judgment action in district court, see 42 U.S.C. § 1973c, or through the exercise of the Attorney General's discretion, see 28 CFR § 51.52(a) (1996). A finding that a redistricting plan violates § 2 of the Act, they contend, is an equitable "defense," on the basis of which a decisionmaker should, in the exercise of its equitable discretion, be free to deny preclearance. This argument, however, is an attempt to obtain through equity that which the law—*i.e.,* the settled interpretation of § 5—forbids. Because "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law,' " *INS v. Pangilinan,* 486 U.S. 875, 883, 108 S.Ct. 2210, 2216, 100 L.Ed.2d 882 (1988) (citing *Hedges v. Dixon County,* 150 U.S. 182, 192, 14 S.Ct. 71, 74–75, 37 L.Ed. 1044 (1893)), this argument must fail.

Of course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting "qualification, prerequisite, standard, practice, or procedure" may violate that section. All we hold today is that preclearance under § 5 may not be denied on that basis alone.

***486** III

[12] **[13]** Appellants next contend that evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities is at least *relevant* in a § 5 proceeding because it tends to prove that the jurisdiction enacted its plan with a discriminatory "purpose." The District Court, reasoning that "[t]he line [between § 2 and § 5] cannot be blurred by allowing a defendant to do indirectly what it cannot do directly," 907 F.Supp., at 445, rejected this argument and held that it "will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* Because we hold that some of this "§ 2 evidence" may be relevant to establish a jurisdiction's "intent to retrogress" and cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, we vacate this aspect of the District Court's holding and remand. In light of this conclusion, we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent. See *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454,

465, n. 5, 109 S.Ct. 1904, 1911, n. 5, 104 L.Ed.2d 506 (1989) (declining to decide an issue that "is not necessary to our decision"). Reserving this question is particularly appropriate when, as in this suit, it was not squarely addressed by the decision below or in the parties' briefs on appeal. See Brief for Federal Appellant 23; Brief for Appellant Price et al. 31–33, 34–35; Brief for Appellee 42–43. But in doing so, we do not, contrary to Justice sTEVENS' view, see *post,* at 1507-1508 (opinion dissenting in part and concurring in part), necessarily assume that the Board enacted the Jury plan with some nonretrogressive, but nevertheless discriminatory, "purpose." The existence of such a purpose, and its relevance to § 5, are issues to be decided on remand.

Although § 5 warrants a denial of preclearance if a covered jurisdiction's voting change "ha[s] the purpose [or] ... the effect of denying or abridging the right to vote on account ***487** of race or color," 42 U.S.C. § 1973c, we have consistently interpreted this language in light of the purpose underlying § 5—"to insure that no voting-procedure ****1502** changes would be made that would lead to a retrogression in the position of racial minorities." *Beer,* 425 U.S., at 141, 96 S.Ct., at 1364. Accordingly, we have adhered to the view that the only "effect" that violates § 5 is a retrogressive one. *Ibid.; City of Lockhart,* 460 U.S., at 134, 103 S.Ct., at 1004.

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. As we observed in *Arlington Heights,* 429 U.S., at 266, 97 S.Ct., at 563–564, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions. Thus, a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact. A jurisdiction that acts with an intent to dilute minority voting strength is more likely to act with an intent to worsen the position of minority voters—*i.e.,* an intent to retrogress—than a jurisdiction acting with no intent to dilute. The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance ... is a liberal one," *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 587, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469 (1993), and one we think is met here.

That evidence of a plan's dilutive impact may be relevant to the § 5 purpose inquiry does not, of course, mean that such evidence is dispositive of that inquiry. In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, without ***488** more, suffice to establish that the jurisdiction acted with a discriminatory purpose. *Shaw v. Hunt,* 517 U.S. 899, 914, n. 6, 116 S.Ct. 1894, 1904, n. 6, 135 L.Ed.2d 207 (1996) ("[W]e doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5"). This is true whether the jurisdiction chose the more dilutive plan because it better comported with its traditional districting principles, see *Miller v. Johnson,* 515 U.S., at 922, 115 S.Ct., at 2491 (rejecting argument that a jurisdiction's failure to adopt the plan with the greatest possible number of majority black districts establishes that it acted with a discriminatory purpose); *Shaw, supra,* at 912–913, 116 S.Ct., at 1904 (same), or if it chose the plan for no reason at all. Indeed, if a plan's dilutive impact were dispositive, we would effectively incorporate § 2 into § 5, which is a result we find unsatisfactory no matter how it is packaged. See Part II, *supra.*

As our discussion illustrates, assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights,* 429 U.S., at 266, 97 S.Ct., at 564. In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. *Ibid.* In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades, see, *e. g., Shaw v. Reno,* 509 U.S. 630, 644, 113 S.Ct. 2816, 2825, 125 L.Ed.2d 511 (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test); *Mobile,* 446 U.S., at 70–74, 100 S.Ct., at 1501–1503 (same), the *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous § 5 cases. See *Pleasant Grove v. United States,* 479 U.S. 462, 469–470, 107 S.Ct. 794, 798–799, 93 L.Ed.2d 866 (1987) (considering city's history

in rejecting annexation of ***489** black neighborhood and its departure from normal procedures when calculating costs of annexation ****1503** alternatives); see also *Busbee v. Smith,* 549 F.Supp. 494, 516–517 (D.C. 1982), summarily aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States,* 517 F.Supp. 987, 1019, aff'd, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982) (same).

[14] The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.' " 429 U.S., at 266, 97 S.Ct., at 564 (citing *Washington v. Davis,* 426 U.S. 229, 242, 96 S.Ct. 2040, 2048–2049, 48 L.Ed.2d 597 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body." 429 U.S., at 268, 97 S.Ct., at 565.

We are unable to determine from the District Court's opinion in this action whether it deemed irrelevant all evidence of the dilutive impact of the redistricting plan adopted by the Board. At one point, the District Court correctly stated that "the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot *by itself* give rise to the inference of discriminatory intent." 907 F.Supp., at 450 (emphasis added). This passage implies that the District Court believed that the existence of less dilutive options was at least relevant to, though not dispositive of, its purpose inquiry. While this language is consistent with our holding today, see *supra,* at 1501–1502, the District Court also declared that "we will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* With this statement, the District Court appears to endorse the notion that evidence ***490** of dilutive impact is irrelevant even to an inquiry into retrogressive intent, a notion we reject. See *supra,* at 1501–1502.

The Board contends that the District Court actually "presumed that white majority districts had [a dilutive] effect," Brief for Appellee 35, and "cut directly to the dispositive question 'started' by the existence of [a dilutive] impact: did the Board have 'legitimate, nondiscriminatory motives' for adopting its plan[?]" *Id.,* at 33. Even if the Board were correct, the District Court gave no indication that it was assuming the plan's dilutive effect, and we hesitate to attribute to the District Court a rationale it might not have employed. Because we are not satisfied that the District Court considered evidence of the dilutive impact of the Board's redistricting plan, we vacate this aspect of the District Court's opinion. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction "to 'remedy any remaining vestiges of [a] dual [school] system,' " 907 F.Supp., at 449, n. 18.

* * *

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

Justice THOMAS, concurring.

Although I continue to adhere to the views I expressed in *Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 2591, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment), I join today's opinion because it is consistent with our vote dilution precedents. I fully anticipate, however, that as a result of today's holding, all of the problems we have experienced in § 2 vote dilution cases will now be replicated and, indeed, exacerbated in the § 5 retrogression inquiry.

I have trouble, for example, imagining a reapportionment change that could not be deemed "retrogressive" under our ***491** vote dilution jurisprudence by a court inclined to find it so. We have held that a reapportionment plan that "enhances the position of racial minorities" by increasing the number ****1504** of majority-minority districts does not "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). But in so holding we studiously avoided addressing one of the necessary consequences of increasing majority-minority districts: Such action *necessarily decreases* the level of minority influence in surrounding districts, and to that extent "dilutes" the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole. See, *e.g., Hays v. Louisiana,* 936 F.Supp.

360, 364, n. 17 (W.D.La.1996) (three-judge court) (noting that plaintiffs' expert "argues convincingly that our plan, with its one black majority and three influence districts, empowers more black voters statewide than does" a plan with two black-majority districts and five "bleached" districts in which minority influence was reduced in order to create the second black-majority district); cf. *Johnson v. De Grandy,* 512 U.S. 997, 1007, 114 S.Ct. 2647, 2655, 129 L.Ed.2d 775 (1994) (noting that dilution can occur by "fragmenting the minority voters among several districts ... or by packing them into one or a small number of districts to minimize their influence in the districts next door").

Under our vote dilution jurisprudence, therefore, a court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts). A court could presumably even strike down a new reapportionment plan that did not significantly alter the status quo at all, on the theory that such a plan did not measure up to some hypothetical ideal. With such an indeterminate "rule," § 5 ceases to be primarily a prophylactic tool in the important war against discrimination in voting, and instead becomes the means whereby the Federal Government, and particularly the Department of Justice, usurps ***492** the legitimate political judgments of the States. And such an empty "rule" inevitably forces the courts to make political judgments regarding which type of apportionment best serves supposed minority interests —judgments that the courts are ill equipped to make.

I can at least find some solace in the belief that today's opinion will force us to confront, with a renewed sense of urgency, this fundamental inconsistency that lies at the heart of our vote dilution jurisprudence.

Beyond my general objection to our vote dilution precedent, the one portion of the majority opinion with which I disagree is the majority's new suggestion that preclearance standards established by the Department of Justice are "normally" entitled to deference. See *ante,* at 1500.[*] Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may *obtain* preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to *preclude* judicial preclearance). Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Moreover, given our own "longstanding interpretation of § 5," see *ante,* at 1500, deference to the particular preclearance regulation addressed in this action would be inconsistent with another of the Attorney General's regulations, which provides: "In making determinations [under § 5] the Attorney General will be guided by the relevant decisions of the ***493** Supreme Court of the United States and of other Federal courts." 28 CFR § 51.56 (1996). Thus, while I agree with the majority's decision ****1505** not to defer to the Attorney General's standards, I would reach that result on different grounds.

Justice BREYER, with whom Justice GINSBURG joins, concurring in part and concurring in the judgment.
I join Parts I and II of the majority opinion, and Part III insofar as it is not inconsistent with this opinion. I write separately to express my disagreement with one aspect of the majority opinion. The majority says that we need not decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante,* at 1501. In my view, we should decide the question, for otherwise the District Court will find it difficult to evaluate the evidence that we say it must consider. Cf. *post,* at 1512 (STEVENS, J ., dissenting in part and concurring in part). Moreover, the answer to the question is that the "purpose" inquiry does extend beyond the search for retrogressive intent. It includes the purpose of unconstitutionally diluting minority voting strength.

The language of § 5 itself forbids a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," where that change either (1) has the "purpose" or (2) will have the "effect" of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. These last few words reiterate in context the language of the Fifteenth Amendment itself: "The right of citizens ... to vote shall not be denied or abridged ... on account of race [or] color...." This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally. And a new plan enacted with the purpose of unconstitutionally diluting minority votes is an unconstitutional plan. *Mobile v. Bolden,* 446 U.S. 55, 62–63, 66, 100 S.Ct. 1490, 1497–1498, 1499, 64 L.Ed.2d 47 (1980) (plurality opinion); *ante,* at 1499.

***494** Of course, the constitutional language also applies to § 5's prohibition that rests upon "effects." The Court assumes, in its discussion of "effects," that the § 5 word "effects" does not now embody a *purely* constitutional test, whether or not it ever did so. See *ante,* at 1497; *City of Rome v. United States,* 446 U.S. 156, 173, 177, 100 S.Ct. 1548, 1559–1560, 64 L.Ed.2d 119 (1980). And that fact, here, is beside the point. The separate argument about the meaning of the word "effect" concerns *how far beyond* the Constitution's requirements Congress intended that word to reach. The argument about "purpose" is simply whether Congress intended the word to reach *as far as* the Constitution itself, embodying those purposes that, in relevant context, the Constitution itself would forbid. I can find nothing in the Court's discussion that shows that Congress intended to restrict the meaning of the statutory word "purpose" short of what the Constitution itself requires. And the Court has previously expressly indicated that minority vote dilution is a harm that § 5 guards against. *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 833–834, 22 L.Ed.2d 1 (1969).

Consider a hypothetical example that will clarify the precise legal question here at issue. Suppose that a covered jurisdiction is choosing between two new voting plans, A and B. Neither plan is retrogressive. Plan A violates every traditional districting principle, but from the perspective of minority representation, it maintains the status quo, thereby meeting the "effects" test of § 5. See *ante,* at 1497–1498. Plan B is basically consistent with traditional districting principles and it also creates one or two new majority-minority districts (in a State where the number of such districts is significantly less than proportional to minority voting age population). Suppose further that the covered jurisdiction adopts Plan A. Without any other proposed evidence or justification, ordinary principles of logic and human experience suggest that the jurisdiction would likely have adopted Plan A with "the purpose ... of denying or abridging the right to vote on account of race or color." § 1973c. It is reasonable ***495** to assume that the Constitution would forbid the use of such a plan. See *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982) (Fourteenth Amendment covers vote dilution claims); *Mobile,* 446 U.S., at 66, 100 S.Ct., at 1499 (plurality opinion) (same). And compare *id.,* at 62–63, 100 S.Ct., at 1497–1498 ****1506** (intentional vote dilution may be illegal under the Fifteenth Amendment) and *Gomillion v. Lightfoot,* 364 U.S. 339, 346, 81 S.Ct. 125, 129–130, 5 L.Ed.2d 110 (1960) (Fifteenth Amendment covers municipal boundaries drawn to exclude blacks), with *Mobile, supra,* at 84, n. 3, 100 S.Ct., at 1509, n. 3 (STEVENS, J., concurring in judgment) (*Mobile* plurality said that Fifteenth Amendment does not reach vote dilution); *Voinovich v. Quilter,* 507 U.S. 146, 159, 113 S.Ct. 1149, 1158, 122 L.Ed.2d 500 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims ..."); *Shaw v. Reno,* 509 U.S. 630, 645, 113 S.Ct. 2816, 2825–2826, 125 L.Ed.2d 511 (1993) (endorsing the *Gomillion* concurrence's Fourteenth Amendment approach); and *Beer v. United States,* 425 U.S. 130, 142, n. 14, 96 S.Ct. 1357, 1364, n. 14, 47 L.Ed.2d 629 (1976). Then, to read § 5's "purpose" language to require approval of Plan A, even though the jurisdiction cannot provide a neutral explanation for its choice, would be both to read § 5 contrary to its plain language and also to believe that Congress would have wanted a § 5 court (or the Attorney General) to approve an unconstitutional plan adopted with an unconstitutional purpose.

In light of this example, it is not surprising that this Court has previously indicated that the purpose part of § 5 prohibits a plan adopted with the purpose of unconstitutionally diluting minority voting strength, whether or not the plan is retrogressive in its effect. In *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); for example, the Court doubted "that a showing of discriminatory effect under § 2, *alone,* could support a claim of discriminatory purpose under § 5." *Id.,* at 914, n. 6, 116 S.Ct., at 1904, n. 6 (emphasis added). The word "alone" suggests that the evidence of a discriminatory effect there at issue—evidence of dilution—could be relevant to a discriminatory purpose claim. And if so, the more natural understanding of § 5 is that an unlawful purpose includes more than simply a purpose to ***496** retrogress. Otherwise, dilution would either dispositively show an unlawful discriminatory effect (if retrogressive) or it would almost always be irrelevant (if not retrogressive). Either way, it would not normally have much to do with unlawful purpose. See also the discussions in *Richmond v. United States,* 422 U.S. 358, 378–379, 95 S.Ct. 2296, 2307–2308, 45 L.Ed.2d 245 (1975) (annexation plan did not have an impermissible dilutive effect but the Court remanded for a determination of whether there was an impermissible § 5 purpose); *Pleasant Grove v. United States,* 479 U.S. 462, 471–472, and n. 11, 107 S.Ct. 794, 800, and n. 11, 93 L.Ed.2d 866 (1987) (purpose to minimize *future* black voting strength is impermissible under § 5); *Port Arthur v. United States,* 459 U.S. 159, 168, 103 S.Ct. 530, 536, 74 L.Ed.2d 334 (1982) (a plan adopted for a discriminatory purpose is invalid under § 5 even if it "might otherwise be said to reflect the

political strength of the minority community"); *post,* at 1512 (STEVENS, J., dissenting in part and concurring in part).

Miller v. Johnson, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), also implicitly assumed that § 5's "purpose" stretched beyond the purely retrogressive. There, the Justice Department pointed out that Georgia made a choice between two redistricting plans, one of which (call it Plan A) had more majority-black districts than the other (call it Plan B). The Department argued that the fact that Georgia chose Plan B showed a forbidden § 5 discriminatory purpose. The Court rejected this argument, but the reason that the majority gave for that rejection is important. The Court pointed out that Plan B embodied traditional state districting principles. It reasoned that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of an unlawful discriminatory purpose. *Id.,* at 924, 115 S.Ct., at 2492. If the only relevant "purpose" were a retrogressive purpose, this reasoning, with its reliance upon traditional districting principles, would have been beside the point. The Court would have concerned itself only with Georgia's intent to worsen the position of minorities, not with the reasons why Georgia could ***497** have adopted one of two potentially ameliorative plans. Indeed, the Court indicated that an ameliorative plan *would* run afoul of the § 5 purpose test if it violated the Constitution. ****1507** *Ibid.* See also *Shaw v. Hunt, supra,* at 912–913, 116 S.Ct., at 1904.

In sum, the Court today should make explicit an assumption implicit in its prior cases. Section 5 prohibits a covered State from making changes in its voting practices and procedures where those changes have the *unconstitutional* "purpose" of unconstitutionally diluting minority voting strength.

Justice STEVENS, with whom Justice SOUTER joins, dissenting in part and concurring in part.

In my view, a plan that clearly violates § 2 is not entitled to preclearance under § 5 of the Voting Rights Act of 1965. The majority's contrary view would allow the Attorney General of the United States to place her stamp of approval on a state action that is in clear violation of federal law. It would be astonishing if Congress had commanded her to do so. In fact, however, Congress issued no such command. Surely no such command can be found in the text of § 5 of the Voting Rights Act.[1] Moreover, a fair review of the text ***498** and the legislative history of the 1982 amendment to § 2 of that Act indicates that Congress intended the Attorney General to deny preclearance under § 5 whenever it was clear that a new voting practice was prohibited by § 2. This does not mean that she must make an independent inquiry into possible violations of § 2 whenever a request for preclearance is made. It simply means that, as her regulations provide, she must refuse preclearance when "necessary to prevent a clear violation of amended section 2." 28 CFR § 51.55(b)(2) (1996).

It is, of course, well settled that the Attorney General must refuse to preclear a new election procedure in a covered jurisdiction if it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). A retrogressive effect or a retrogressive purpose is a sufficient basis for denying a preclearance request under § 5. Today, however, the Court holds that retrogression is the only kind of effect that will justify denial of preclearance under § 5, *ante,* at 1496–1501, and it assumes that "the § 5 purpose inquiry [never] extends beyond the search for retrogressive intent." *Ante,* at 1501. While I agree that this action must be remanded even under the Court's miserly interpretation of § 5, I disagree with the Court's holding/assumption that § 5 is concerned only with retrogressive effects and purposes.

Before explaining my disagreement with the Court, I think it important to emphasize the three factual predicates that underlie our analysis of the issues. First, we assume ***499** that the plan submitted by the Bossier Parish School Board (Board) was not "retrogressive" because it did not make matters any worse than they had been in the past. None of the 12 districts had ever had a black majority and a black person had never been elected to the Board. App. to Juris. Statement 67a. Second, because the majority in ****1508** both the District Court and this Court found that even clear violations of § 2 must be precleared and thus found it unnecessary to discuss whether § 2 was violated in this action, we may assume that the record discloses a "clear violation" of § 2. This means that, in the language of § 2, it is perfectly clear that "the political processes leading to nomination or election [to positions on the Board] are not equally open to participation by members of [the African–American race] in that its members have less opportunity than other members of the electorate to ... elect representatives of their choice." 42 U.S.C. § 1973(b).[2] Third, if the Court is correct in assuming that the purpose inquiry under § 5 may be limited to evidence of "retrogressive intent," it must also be willing to assume that the documents submitted in support of the request for

preclearance clearly establish that the plan was adopted for the specific purpose of preventing African–Americans from obtaining representation on the Board. Indeed, for the purpose of analyzing the legal issues, we must assume that Judge Kessler, concurring in part and dissenting in part, accurately summarized the evidence when she wrote:

> "The evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory ***500** purpose. The adoption of the Police Jury plan bears heavily on the black community because it denies its members a reasonable opportunity to elect a candidate of their choice. The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish. The sequence of events leading up to the adoption of the plan illustrate the Board's discriminatory purpose. The School Board's substantive departures from traditional districting principles is similarly probative of discriminatory motive. Three School Board members have acknowledged that the Board is hostile to black representation. Moreover, some of the purported rationales for the School Board's decision are flat-out untrue, and others are so glaringly inconsistent with the facts of the case that they are obviously pretexts." 907 F.Supp. 434, 463 (D.C.1995).
>
> If the purpose and the effect of the Board's plan were simply to maintain the discriminatory status quo as described by Judge Kessler, the plan would not have been retrogressive. But, as I discuss below, that is not a sufficient reason for concluding that it complied with § 5.

I

In the Voting Rights Act of 1965, Congress enacted a complex scheme of remedies for racial discrimination in voting. As originally enacted, § 2 of the Act was "an uncontroversial provision" that "simply restated" the prohibitions against such discrimination "already contained in the Fifteenth Amendment," *Mobile v. Bolden,* 446 U.S. 55, 61, 100 S.Ct., at 1496–1497 (1980) (plurality opinion). Like the constitutional prohibitions against discriminatory districting practices that were invalidated in cases like *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), § 2 was made applicable to every State and political subdivision in the country. ***501** Section 5, on the other hand, was highly controversial because it imposed novel, extraordinary remedies in certain areas where discrimination had been most flagrant. See *South Carolina v. Katzenbach,* 383 U.S. 301, 334–335, 86 S.Ct. 803, 821–822, 15 L.Ed.2d 769 (1966).[3] ****1509** Jurisdictions like Bossier Parish in Louisiana are covered by § 5 because their history of discrimination against African–Americans was a matter of special concern to Congress. Because these jurisdictions had resorted to various strategies to avoid complying with court orders to remedy discrimination, "Congress had reason to suppose that [they] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.,* at 335, 86 S.Ct., at 822. Thus Congress enacted § 5, not to maintain the discriminatory status quo, but to stay ahead of efforts by the most resistant jurisdictions to undermine the Act's purpose of "rid[ding] the country of racial discrimination." *Id.,* at 315, 86 S.Ct., at 812 ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant").

In areas of the country lacking a history of pervasive discrimination, Congress presumed that voting practices were generally lawful. Accordingly, the burden of proving a violation of § 2 has always rested on the party challenging the voting practice. The situation is dramatically different in covered jurisdictions. In those jurisdictions, § 5 flatly prohibits the adoption of any new voting procedure unless the State or political subdivision institutes an action in the Federal District Court for the District of Columbia and obtains a declaratory judgment that the change will not have a discriminatory purpose or effect. See 42 U.S.C. § 1973c. The burden of proving compliance with the Act rests on the jurisdiction. A proviso to § 5 gives the Attorney General the authority to allow the new procedure to go into effect, but ***502** like the immigration statutes that give her broad discretion to waive deportation of undesirable aliens, it does not expressly impose any limit on her discretion to refuse preclearance. See *ibid.* The Attorney General's discretion is, however, cabined by regulations that are presumptively valid if they "are reasonable and do not conflict with the Voting Rights Act itself," *Georgia v. United States,* 411 U.S. 526, 536, 93 S.Ct. 1702, 1708, 36 L.Ed.2d 472 (1973). Those regulations provide that preclearance will generally be granted if a proposed change "is free of discriminatory purpose and retrogressive effect"; they also provide, however, that in "those instances" in which the Attorney General concludes "that a bar to implementation of the change is necessary to prevent a clear violation of amended section

2," preclearance shall be withheld.[4] There is no basis for the Court's speculation that litigants would so " 'routinely,' " *ante,* at 1497, employ this 10–year–old regulation as to "make compliance with § 5 contingent upon compliance with § 2," *ibid.* Nor do the regulations require the jurisdiction to assume the burden of proving the absence of vote ***503** dilution, see *ante,* at 1498. They merely preclude preclearance when "necessary to prevent a clear violation of ... section 2." While the burden of disproving discriminatory purpose or retrogressive effect is on the submitting jurisdiction, if the Attorney General's conclusion that the change would clearly violate § 2 is challenged, the burden on that issue, as in ****1510** any § 2 challenge, should rest on the Attorney General.[5]

The Court does not suggest that this regulation is inconsistent with the text of § 5. Nor would this be persuasive, since the language of § 5 forbids preclearance of any voting practice that would have "the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Instead the Court rests its entire analysis on the flawed premise that our cases hold that a change, even if otherwise unlawful, cannot have an effect prohibited by § 5 unless that effect is retrogressive. The two cases on which the Court relies, *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), and *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983), do hold (as the current regulations provide) that proof that a change is not retrogressive is normally sufficient to justify preclearance under § 5. In neither case, however, was the Court confronted with the question whether that showing would be sufficient if the proposed change was so discriminatory that it clearly violated some other federal law. ***504** In fact, in *Beer*—which held that a legislative reapportionment enhancing the position of African–American voters did not have a discriminatory effect—the Court stated that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct., at 1364.[6] Thus, to the extent that the *Beer* Court addressed the question at all, it suggested that certain nonretrogressive changes that were nevertheless discriminatory should not be precleared.

The Court discounts the significance of the "unless" clause because it refers to a constitutional violation rather than a statutory violation. According to the Court's reading, the *Beer* dictum at most precludes preclearance of changes that violate the Constitution rather than changes that violate § 2. This argument is unpersuasive. As the majority notes, the *Beer* Court cites *White v. Regester,* 412 U.S., at 766, 93 S.Ct., at 2339–2340, which found unconstitutional a reapportionment scheme that gave African–American residents "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Because, in 1976, when *Beer* was decided, the § 2 standard was coextensive with the constitutional standard, *Beer* did not purport to distinguish between challenges brought under the Constitution and those brought under the statute. Rather *Beer* 's dictum suggests that any changes that violate the standard established in *White v. Regester* should not be precleared.[7]

***505** As the Court recognizes, *ante,* at 1499, the law has changed in two respects since the announcement of the *Beer* dictum. In 1980, in what was perceived by Congress to be a change in the standard applied in *White v. Regester,* a plurality of this Court concluded that discriminatory purpose is an essential ****1511** element of a constitutional vote dilution challenge. See *Mobile v. Bolden,* 446 U.S., at 62, 100 S.Ct., at 1497. In reaction to that decision, in 1982 Congress amended § 2 by placing in the statute the language used in the *White* opinion to describe what is commonly known as the "results" standard for evaluating vote dilution challenges. See 96 Stat. 134 (now codified at 42 U.S.C. §§ 1973(a)-(b)); *Thornburg v. Gingles,* 478 U.S. 30, 35, 106 S.Ct. 2752, 2758, 92 L.Ed.2d 25 (1986).[8] Thus Congress preserved, as a matter of statutory law, the very same standard that the Court had identified in *Beer* as an exception to the general rule requiring preclearance of nonretrogressive changes. Because in 1975 *Beer* required denial of preclearance for voting plans that violated the *White* standard, it follows that Congress, in preserving the *White* standard, intended also that the Attorney General should continue to refuse to preclear plans violating that standard.

That intent is confirmed by the legislative history of the 1982 Act. The Senate Report states:

> "Under the rule of *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U.S. at 141 [96 S.Ct., at 1364]; *see also* 142 n. 14 [96 S.Ct., at 1364, n. 14] (citing to the dilution cases from *Fortson v. Dorsey* [379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965),] through *White v. Regester*). In light of the amendment to section

2, it is intended that a section 5 objection also follow if a new voting procedure itself so ***506** discriminates as to violate section 2." S.Rep. No. 97–417, p. 12, n. 31 (1982) U.S.Code Cong. & Admin.News 1982 pp. 177, 189.

The House Report conveys the same message in different language. It unequivocally states that whether a discriminatory practice or procedure was in existence before 1965 (and therefore only subject to attack under § 2) or is the product of a recent change (and therefore subject to preclearance under § 5) "affects only the mechanism that triggers relief." H.R.Rep. No. 97–227, p. 28 (1981). This statement plainly indicates that the Committee understood the substantive standards for § 2 and § 5 violations to be the same whenever a challenged practice in a covered jurisdiction represents a change subject to the dictates of § 5.[9] Thus, it is reasonable to assume that Congress, by endorsing the "unless" clause in *Beer,* contemplated the denial of preclearance for any change that clearly violates amended § 2. The majority, by belittling this legislative history, abrogates Congress'effort, ***507** in enacting the 1982 amendments, "to broaden the protection afforded by the Voting Rights Act." *Chisom v. Roemer,* 501 U.S. 380, 404, 111 S.Ct. 2354, 2368, 115 L.Ed.2d 348 (1991).

Despite this strong evidence of Congress' intent, the majority holds that no deference to the Attorney General's regulation is warranted. The Court suggests that had Congress wished to alter "our longstanding interpretation" ****1512** of § 5, Congress would have made this clear. *Ante,* at 1500. But nothing in our "settled interpretation" of § 5, *ante,* at 1500, is inconsistent with the Attorney General's reading of the statute. To the contrary, our precedent actually indicates that nonretrogressive plans that are otherwise discriminatory under *White v. Regester* should not be precleared. As neither the language nor the legislative history of § 5 can be said to conflict with the view that changes that clearly violate § 2 are not entitled to preclearance, there is no legitimate basis for refusing to defer to the Attorney General's regulation. See *Presley v. Etowah County Comm'n,* 502 U.S. 491, 508, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992).

II

In Part III of its opinion the Court correctly concludes that this action must be remanded for further proceedings because the District Court erroneously refused to consider certain evidence that is arguably relevant to whether the Board has proved an absence of discriminatory purpose under § 5. Because the Court appears satisfied that the disputed evidence may be probative of an " 'intent to retrogress,' " it concludes that it is unnecessary to decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante,* at 1501. For two reasons, I think it most unwise to reverse on such a narrow ground.

First, I agree with Justice bREYER, see *ante,* at 1505, that there is simply no basis for imposing this limitation on the purpose inquiry. None of our cases have held that § 5's purpose test is limited to retrogressive intent. In ***508** *Pleasant Grove v. United States,* 479 U.S. 462, 469–472, 107 S.Ct. 794, 798–801, 93 L.Ed.2d 866 (1987), for instance, we found that the city had failed to prove that its annexation of certain white areas lacked a discriminatory purpose. Despite the fact that the annexation lacked a retrogressive effect, we found it was subject to § 5 preclearance. *Ibid.;* see also *id.,* at 474–475, 107 S.Ct., at 801–802 (Powell, J., dissenting) (contending that the majority erred in holding that a discriminatory purpose could be found even though there was no intent "to have a retrogressive effect"). Furthermore, limiting the § 5 purpose inquiry to retrogressive intent is inconsistent with the basic purpose of the Act. Assume, for example, that the record unambiguously disclosed a long history of deliberate exclusion of African–Americans from participating in local elections, including a series of changes each of which was adopted for the specific purpose of maintaining the status quo. None of those changes would have been motivated by an "intent to regress," but each would have been motivated by a "discriminatory purpose" as that term is commonly understood. Given the long-settled understanding that § 5 of the Act was enacted to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina v. Katzenbach,* 383 U.S., at 335, 86 S.Ct., at 822, it is inconceivable that Congress intended to authorize preclearance of changes adopted for the sole purpose of perpetuating an existing pattern of discrimination.

Second, the Court's failure to make this point clear can only complicate the task of the District Court on remand. If that court takes the narrow approach suggested by the Court, another appeal will surely follow; if a majority ultimately agrees with my view of the issue, another remand will then be necessary. On the other hand, if the District Court does not limit its consideration to evidence of retrogressive intent, and if it therefore rules against the Board, appellees will bring the

action back and the Court would then have to resolve the issue definitively.

***509** In sum, both the interest in orderly procedure and the fact that a correct answer to the issue is pellucidly clear should be sufficient to persuade the Court to state definitively that § 5 preclearance should be denied if Judge Kessler's evaluation of the record is correct.

Accordingly, while I concur in the judgment insofar as it remands the action for further proceedings, I dissent from the decision insofar as it fails to authorize proceedings in accordance with the views set forth above.

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Footnotes

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

* I do not address the separate question, not presented by this action, whether the Department's *interpretation* of the Voting Rights Act of 1965, as opposed to its articulation of standards applicable to its own preclearance determinations, is entitled to deference. The regulation at issue here only purports to be the latter.

1 As originally enacted, § 5 provided:

"Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 U.S.C. § 2284] and any appeal shall lie to the Supreme Court." 79 Stat. 439.

2 Although the majority in the District Court refused to consider any of the evidence relevant to a § 2 violation, the parties' stipulations suggest that the plan violated § 2. For instance, the parties' stipulated that there had been a long history of discrimination against black voters in Bossier Parish, see App. to Juris. Statement 130a–140a; that voting in Bossier Parish was racially polarized, see *id.,* at 122a–127a; and that it was possible to draw two majority black districts without violating traditional districting principles, see *id.,* at 76a, 82a–83a, 114a–115a.

3 Section 4 of the Act sets forth the formula for identifying the jurisdictions in which such discrimination had occurred, see *South Carolina v. Katzenbach,* 383 U.S., at 317–318, 86 S.Ct., at 812–813.

4 Title 28 CFR § 51.55 (1996) provides:

"Consistency with constitutional and statutory requirements.

"(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements

of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

"(b) *Section 2.* (1) Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate.

"(2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance."

5 Thus, I agree with those courts that have found that the jurisdiction is not required to prove that its proposed change will not violate § 2 in order to receive preclearance. See *Arizona v. Reno,* 887 F.Supp. 318, 321 (D.D.C.1995). Although several three-judge District Courts have concluded that § 2 standards should not be incorporated into § 5, none has held that preclearance should be granted when there is a clear violation of § 2; rather, they appear simply to have determined that a § 2 inquiry is not routinely required in a § 5 case. See, *e.g., Georgia v. Reno,* 881 F.Supp. 7, 12–14 (D.D.C.1995); *New York v. United States,* 874 F.Supp. 394, 398–399 (D.D.C.1994); cf. *Burton v. Sheheen,* 793 F.Supp. 1329, 1350 (D.S.C.1992) (holding that although courts are not "obligated to completely graft" § 2 standards onto § 5, "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2").

6 In *Lockhart* the Court disavowed reliance on the ameliorative character of the change reviewed in *Beer,* see 460 U.S., at 134, n. 10, 103 S.Ct., at 1004, n. 10. It left open the question whether Congress had altered the *Beer* standard when it amended § 2 in 1982, 460 U.S., at 133, n. 9, 103 S.Ct., at 1003, n. 9, and said nothing about the possible significance of a violation of a constitutional or statutory prohibition against vote dilution.

7 In response to this dissent, the majority contends that, at most, *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), allows denial of preclearance for those changes that violate the Constitution. See *ante,* at 1499–1500. Thus, the majority apparently concedes that our "settled interpretation," *ante,* at 1500, of § 5 supports a denial of preclearance for at least some nonretrogressive changes.

8 The amended version of § 2 tracks the language in *White v. Regester,* 412 U.S. 755, 766, 93 S.Ct. 2332, 2339–2340, 37 L.Ed.2d 314 (1973).

9 The postenactment legislative record also supports the Attorney General's interpretation of § 5. In 1985, the Attorney General first proposed regulations requiring a denial of preclearance "based upon violation of Section 2 if there is clear and convincing evidence of such a violation." 50 Fed.Reg. 19122, 19131. Congress held oversight hearings in which several witnesses, including the Assistant Attorney General, Civil Rights Division, testified that clear violations of § 2 should not be precleared. See Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, 99th Cong., 1st Sess., 47, 149, 151–152 (1985). Following these hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a Report in which it concluded "that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations." Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Voting Rights Act: Proposed Section 5 Regulations, 99th Cong., 2d Sess., Ser. No. 9, p. 5 (Comm. Print 1986). Although this history does not provide direct evidence of the enacting Congress' intent, it does constitute an informed expert opinion concerning the validity of the Attorney General's regulation.

86 F.4th 574
United States Court of Appeals, Fifth Circuit.

Press ROBINSON; Edgar Cage; Dorothy Nairne; Edwin Rene Soule; Alice Washington; Clee Earnest Lowe; Davante Lewis; Martha Davis; Ambrose Sims; National Association for the Advancement of Colored People Louisiana State Conference, also known as NAACP;Power Coalition for Equity and Justice, Plaintiffs—Appellees,

v.

Kyle ARDOIN, in his official capacity as Secretary of State for Louisiana, Defendant—Appellant,

Clay Schexnayder; Patrick Page Cortez; State of Louisiana - Attorney General Jeff Landry, Intervenor Defendants—Appellants,

Edward Galmon, Sr.; Ciara Hart; Norris Henderson; Tramelle Howard, Plaintiffs—Appellees,

v.

Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, Defendant —Appellant,

Clay Schexnayder; Patrick Page Cortez; State of Louisiana - Attorney General Jeff Landry, Movants—Appellants.

No. 22-30333
|
FILED November 10, 2023

Synopsis

Background: Black voters brought actions against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, alleging that congressional redistricting map enacted by the state legislature unlawfully diluted their voting rights, in violation of § 2, by including only one majority-minority district rather than two. The actions were consolidated, and voters moved for a preliminary injunction barring use of the legislature's map and requiring adoption of a remedial map. The United States District Court for the Middle District of Louisiana, Shelly D. Dick, Chief Judge, 605 F. Supp. 3d 759, granted voters' motion. Defendants appealed, and on defendants' request, the Court of Appeals initially granted an administrative stay but subsequently, 37 F.4th 208, vacated that stay and denied a stay pending appeal. On defendants' application for a stay, the Supreme Court, 142 S. Ct. 2892, stayed the district court's order pending the decision later issued in *Allen v. Milligan*, 599 U.S. 1, and granted a writ of certiorari before judgment. Upon issuance of the decision in *Allen*, the Supreme Court vacated the stay and dismissed the writ of certiorari as improvidently granted, thereby returning the matter to the Court of Appeals.

Holdings: The Court of Appeals, Southwick, Circuit Judge, held that:

[1] district court did not clearly err in finding that voters were likely to establish first element of *Gingles* framework, namely that the Black voting-age population was sufficiently large and geographically compact to constitute a majority in a reasonably configured district;

[2] district court did not clearly err in finding that illustrative redistricting plans offered by voters were not racially predominant gerrymanders prohibited by Equal Protection Clause;

[3] district court did not clearly err in finding that voters were likely to establish third element of *Gingles* framework, namely that the white majority voted sufficiently as a bloc to usually defeat the minority-preferred candidate;

[4] district court, when assessing the totality of the circumstances in connection with granting preliminary injunction, properly considered racial proportionality as one factor among many;

[5] preliminary injunction granted by district court was not barred, or required to be stayed, because of proximity of injunction's issuance to election that had been upcoming at time of its issuance;

[6] preliminary injunction pending trial was no longer warranted given the amount of time remaining before next election; and

[7] appellate court would afford Louisiana legislature a chance to enact a new redistricting map before further proceedings, and substantive proceedings in district court would be stayed for specified period.

Preliminary injunction vacated; remanded with instructions.

West Headnotes (39)

[1] **Federal Courts** Preliminary injunction; temporary restraining order

An appellate court reviews a grant of a preliminary injunction by a district court for any abuse of discretion.

2 Cases that cite this headnote

[2] **Injunction** Extraordinary or unusual nature of remedy

Injunction Grounds in general; multiple factors

A preliminary injunction is an extraordinary remedy that will be issued only if a movant establishes four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest.

9 Cases that cite this headnote

[3] **Federal Courts** Preliminary injunction; temporary restraining order

Because each of the four elements a movant must show to obtain a preliminary injunction presents a mixed question of fact and law, the district court's legal conclusions as to the elements are reviewed de novo, and its factual findings as to the elements are reviewed for clear error.

[4] **Federal Courts** Preliminary injunction; temporary restraining order

A district court's factual finding with respect to a movant's request for a preliminary injunction is "clearly erroneous" when a reviewing court is left with the definite and firm conviction, after reviewing the entire record, that the district court erred.

[5] **Election Law** Parties; standing

Federal Courts Civil rights and discrimination in general

Congress waived state sovereign immunity in enacting the Voting Rights Act, and § 2 of the act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, can therefore be enforced by any "aggrieved person," including a private party. U.S. Const. Amend. 11; Voting Rights Act of 1965 §§ 2, 3, 52 U.S.C.A. §§ 10301, 10302.

[6] **Election Law** Vote Dilution

Claims under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, for dilution of a minority group's voting rights are evaluated under the *Gingles* framework, which requires a plaintiff to satisfy three preconditions: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district, meaning the district complies with traditional districting criteria, such as being contiguous and reasonably compact; (2) the minority group must be politically cohesive; and (3) the white majority must be shown to vote sufficiently as a bloc to usually defeat the minority-preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The essence of a claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by Black and white voters to elect their preferred representatives.

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

If a plaintiff bringing a claim under § 2 of the Voting Rights Act for dilution of a minority group's voting rights fails to establish any one of the three preconditions under the *Gingles* framework for such a claim, a court need not consider the other two, leaving the plaintiff with no remedy. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

Once a plaintiff has shown the three threshold conditions under the *Gingles* framework for establishing a violation of § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, the plaintiff then must show, under the totality of the circumstances, that the political process is not equally open to minority voters, causing a § 2 violation. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

When addressing the merits of a claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, a court must determine whether plaintiffs have an equal opportunity in the voting process to elect their preferred candidate under the challenged districting map, and if the answer is no, there likely is a § 2 violation. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[11] **Injunction** Redistricting and reapportionment

District court did not clearly err in finding, in connection with granting preliminary injunction to Black voters in their vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, that voters were likely to establish the first element of the *Gingles* framework for their claim, namely that the minority group was sufficiently large and geographically compact to constitute a majority in a reasonably configured district, where voters' experts testified that state's Black population was compacted in easily definable areas, and voters' illustrative redistricting plans were more compact than enacted plan. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

The first *Gingles* precondition for a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, focuses on geographical compactness and numerosity and establishes whether a minority population has the potential to elect its preferred candidate in a single-member district. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Weight and sufficiency

To satisfy the first *Gingles* precondition for a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, the plaintiff must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50%; this percentage is analyzed in terms of the Black voting-age population (BVAP) because only eligible voters can affect the *Gingles* analysis, and the large minority population must also be sufficiently compact such that a reasonably compact majority-minority district can be drawn. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

"Compactness" of a minority population in a potential election district, for purposes of the first *Gingles* precondition for a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, is an imprecise concept, but traditional districting principles like maintaining communities of interest and traditional boundaries should be considered. Voting Rights Act of 1965 § 3, 52 U.S.C.A. § 10302.

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

"Communities of interest," for purposes assessing the compactness of a minority population in a potential election district under the first *Gingles* precondition for a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, vary between states and are generally defined by the given state's districting guidelines. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

When evaluating geographical compactness and numerosity of proposed election districts, the first *Gingles* precondition for a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, courts must determine if the proposed illustrative districts have similar needs and interests beyond race.

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

In a vote-dilution action under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, when assessing the first element of the *Gingles* framework for such a claim, namely that a minority group is sufficiently large and geographically compact to constitute a majority in a reasonably configured district, a court is not required to conduct a beauty contest between a challenged redistricting map and illustrative maps offered by plaintiffs. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[18] **Federal Courts** Definite and firm conviction of mistake

Under the clear-error standard for appellate review of a district court's factual findings, reversal requires the appellate court to be left with a definite and firm conviction that the district court erred after reviewing the record.

[19] **Injunction** Actions and Proceedings

How a party addresses an issue at the time that a preliminary injunction is being sought, particularly when a Supreme Court decision is later handed down before the next stage of the proceedings, does not bind the party as the case moves along further.

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

Impermissible racial gerrymandering in a plaintiff's proposed redistricting maps in vote-dilution action under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, can be found when the minority population is compacted together and there is no integrity in terms of traditional, neutral redistricting criteria. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[21] **Election Law** Method of apportionment

Awareness of race is permissible under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, and redistricting will often require awareness of the demographics of proposed districts; such race consciousness does not inevitably lead to impermissible race discrimination, but awareness of race becomes impermissible racial predominance when district lines are drawn with the traditional, race-neutral districting criteria considered after a race-based decision is made. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[22] **Federal Courts** Elections, voting, and political rights

An appellate court reviews for clear error a district court's finding as to whether race predominated in the drawing of proposed redistricting maps in an action under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[23] **Injunction** Redistricting and reapportionment

District court did not clearly err in finding, in connection with granting preliminary injunction to Black voters in their vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color, that illustrative redistricting plans offered by voters were not racially predominant gerrymanders prohibited by Equal Protection Clause, even though plans had goal of achieving two majority-minority districts, where that goal was considered alongside and subordinate to other race-neutral traditional redistricting criteria such as communities of interest, political subdivisions, parish lines, culture, religion, etc. U.S. Const. Amend. 14; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[24] **Election Law** Method of apportionment

An express racial target for composition of a voting district in a proposed redistricting map is just one consideration in a traditional redistricting analysis under *Gingles* in an action under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

2 Cases that cite this headnote

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

Racial gerrymandering is prohibited by the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. Amend. 14.

1 Case that cites this headnote

[26] **Election Law** Vote Dilution

Racial consciousness as a factor in the drawing of illustrative maps does not defeat a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color; such a claim under § 2 is distinct from a racial gerrymander in violation of the Equal Protection Clause. U.S. Const. Amend. 14; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

A racial gerrymander that violates the Equal Protection Clause is present when citizens are assigned by the state to legislative districts based on race, such that one district will have racially similar individuals who otherwise have little in common geographically or politically. U.S. Const. Amend. 14.

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

The third *Gingles* precondition for a vote-dilution claim under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, focuses on racially polarized voting; it requires establishing the plausibility that the challenged legislative districting thwarts minority voting on account of race, meaning proof not merely that white bloc voting is present, but rather that white bloc voting amounts to legally significant racially polarized voting that can generally minimize or cancel Black voters' ability to elect their preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[29] **Injunction** Redistricting and reapportionment

District court did not clearly err in finding, in connection with granting preliminary injunction to Black voters in their vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color, that, despite the existence of white crossover voting in relevant geographical areas, voters established the third *Gingles* precondition for their claim, namely that the white majority voted sufficiently as a bloc to usually defeat the minority-preferred candidate, where experts concluded that under challenged redistricting plan adopted by state, minority-preferred candidates would usually fail. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

In a vote-dilution action under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, the relevant consideration under the third *Gingles* precondition, which asks whether the white majority votes sufficiently as a bloc to usually defeat the minority-preferred candidate, is the challenged redistricting plan, not some hypothetical plan that could have been, but was not, drawn by the state. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

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

Election Law Racially polarized or bloc voting

The analysis of whether white crossover voting undermines the potential of electing minority-preferred candidates is properly determined in a vote-dilution action under § 2 of the Voting Rights Act under the first *Gingles* precondition, namely whether a minority population is sufficiently large and geographically compact that it has the potential to elect its preferred candidate in a single-member district, and not under the third *Gingles* precondition, namely whether the white majority votes sufficiently as a bloc to usually defeat the minority-preferred candidate; the analysis of crossover voting dictates the answer to whether a minority makes up a sufficient Black voting-age population (BVAP) in the relevant geographic area, not solely whether white bloc voting is legally significant.

1 Case that cites this headnote

[32] **Injunction** Redistricting and reapportionment

District court properly considered racial proportionality as a factor in connection with granting preliminary injunction to Black voters in their vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color, where court did not require racial proportionality and recognized that there was no right to proportional representation, court considered proportionality along with other factors in examining the totality of the circumstances, and court found that the fact that Black representation, under the challenged redistricting plan, was not proportional to the Black population weighed in favor of voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Once the *Gingles* preconditions are achieved, liability in an action under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color, is determined based on the totality of the circumstances, which requires application of the *Gingles* analysis specifically to the facts of each case and the state electoral mechanism while also considering as a guide the factors identified in *Zimmer v. McKeithen*, 485 F.2d 1297. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area is a relevant consideration for courts to make in an action under § 2 of the Voting Rights Act, which bars use by a state of a standard, practice, or procedure in a manner that results in denial or abridgement of voting rights on account of race or color. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[35] **Injunction** Redistricting and reapportionment

Preliminary injunction granted by district court to Black voters in their vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color, enjoining state's use of challenged redistricting map was not barred, or required to be stayed, because of proximity of injunction's issuance to then-upcoming election, where even state officials acknowledged that the injunction would present no difficulties for Louisiana's election calendar, and the injunction was implemented more than five months prior to the election and more than four months prior to early voting

registration. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[36] **Injunction** Redistricting and reapportionment

Absent any need to prevent an irreparable injury to Black voters from occurring before trial in their vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color, and because the balance of equities no longer weighed in favor of voters given the passage of time since they had obtained a preliminary injunction, more than a year earlier, enjoining state's use of challenged redistricting map, and the amount of time remaining before the next election, voters were no longer entitled to the preliminary injunction, where the qualifying deadlines for the next election were over seven months away. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[37] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

To avoid mootness, the controversy posed by the plaintiff's complaint must be live throughout the litigation process.

[38] **Federal Courts** Mootness

Federal Courts Necessity of Objection; Power and Duty of Court

Mootness is a jurisdictional question that must be resolved prior to a federal court having jurisdiction.

[39] **Federal Courts** Directing New Trial or Other Proceedings Below; Remand

Appellate court would afford Louisiana legislature an opportunity to enact a new congressional redistricting map before further proceedings in district court in Black voters' vote-dilution action against Louisiana officials under § 2 of the Voting Rights Act (VRA), which bars use by a state of a standard, practice, or procedure in a way that results in denial or abridgement of voting rights on account of race or color, and substantive proceedings in district court would be stayed for specified period, where appellate court had affirmed that voters had a likelihood of success on the merits in their challenge to existing redistricting plan, and appellate court could not conclude on the record that Louisiana legislature would not take advantage of an opportunity to consider a new map. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

3 Cases that cite this headnote

***582** Appeal from the United States District Court for the Middle District of Louisiana, USDC Nos. 3:22-CV-211, 3:22-CV-214, Shelly Deckert Dick, U.S. District Judge

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Before King, Elrod, and Southwick, Circuit Judges.

Opinion

Leslie H. Southwick, Circuit Judge:

***583** Plaintiffs challenge the Louisiana Legislature's 2022 redistricting map for electing the state's six members of the United States House of Representatives. The district court preliminarily enjoined use of that map for the 2022 congressional elections. The United States Supreme Court stayed that injunction, pending resolution of a case involving Alabama's congressional redistricting plan. About a year later, the Supreme Court resolved the Alabama case. We now apply the Court's reasoning to the Louisiana redistricting.

We are reviewing the grant of a preliminary injunction and not a final judgment in this case. The district court did not clearly err in its necessary fact-findings nor commit legal error in its conclusions that the Plaintiffs were likely to succeed on their claim that there was a violation of Section 2 of the Voting Rights Act in the Legislature's planned redistricting. Nevertheless, the district court's 2022 preliminary injunction, issued with the urgency of establishing a map for the 2022 elections, is no longer necessary. After oral argument, we are convinced the parties can proceed beyond the stage of a preliminary injunction to accomplish the following tasks.

We will allow the Louisiana Legislature time to consider enacting a new congressional redistricting plan before the district court proceeds with the merits of the case. It is true the State did not request such an opportunity in its briefing here, but an ***584** opportunity to adopt a new plan is appropriate since redistricting is a quintessential obligation of a state after a census. Further, in recent filings with the Supreme Court, the State did urge allowing the Legislature to act. The district court is not to conduct any proceedings on the merits of the claim until after the Louisiana Legislature concludes its consideration of adopting a new plan, or the district court is informed that no new plan will be considered, or January 15, 2024, whichever comes first. The district court will also have discretion to grant limited additional time if requested.

The present uncertainty of what will occur by January 15 leaves the next steps contingent. If the Legislature adopts a new plan, then proceedings in district court can begin immediately after that occurs. If the Plaintiffs object to the plan, then the district court will again need to consider whether the plan is consistent with Section 2 of the Voting

Rights Act or, instead, whether another preliminary injunction is needed. On the other hand, as soon as it becomes clear there will be no new plan to consider, the district court should proceed beyond the preliminary injunction stage for review of H.B. 1. It should conduct a trial on the merits of the validity of the plan, and, if held to be invalid, decide on a plan for the 2024 elections.

At oral argument before this court, defense counsel suggested a February 15, 2024, start date for a trial on the merits to allow newly elected officials to play an effective role in the process. He additionally suggested a May 30 deadline for a new map to be drawn, approved, and enacted for the 2024 elections. We mention those only to indicate the State has offered suggestions. The district court will need to make its own decision on the proper scheduling. The court is to conclude all necessary proceedings in sufficient time to allow at least initial review by this court and for the result to be used for the 2024 Louisiana congressional elections.

PROCEDURAL AND FACTUAL BACKGROUND

All states must redraw their congressional district boundaries following each decennial census. U.S. Const. art. I, § 2, cl. 3. The 2020 census showed Louisiana's population had increased since 2010, especially the minority populations. This census data was delivered in April 2021 and revealed that Louisiana would continue to have six congressional seats. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 767 (M.D. La. 2022).

At its 2021 regular session, the Louisiana Legislature adopted Rule 21 of the Joint Rules of the Senate and House of Representatives, which established redistricting criteria.[1] The first paragraph of the Rule states: "To promote the development of constitutionally and legally acceptable redistricting plans, the Legislature of Louisiana adopts the criteria contained in this Joint Rule, declaring the same to constitute minimally acceptable criteria for consideration of redistricting plans in the manner specified in this Joint Rule." La. Leg. J.R. 21A. The district court considered the requirements of the Joint Rule throughout its opinion granting the preliminary injunction.

In preparation for its redistricting session, the Legislature held public meetings throughout the state, starting in October 2021 and ending in January 2022. The meetings presented information about the redistricting process and solicited public ***585** comment. *Robinson*, 605 F. Supp. 3d at 767. Legislators stated these meetings were "absolutely vital to this process." *Id.* The parties refer to these as the "roadshow" meetings. *Id.* The Legislature then convened in an extraordinary session on February 1, 2022, to begin the redistricting process. *Id.* at 767–68. House Bill 1 and Senate Bill 5 were identical bills that set forth a congressional district map for the 2022 election. *Id.* at 768. Each was passed in its respective chamber on February 18, 2022. *Id.* "[T]he congressional districts in the 2022 enacted plan strongly resemble the previous districts" the Legislature adopted in 2011. *Id.* at 796. The Second Congressional District remained the only one of the six with a black majority. *Id.* at 768.

On March 9, 2022, Louisiana Governor John Bel Edwards separately vetoed H.B. 1 and S.B. 5. Governor's Veto Letters to Speaker of the House and President of the Senate, *reprinted in* 2022 Official Journal and Legislative Calendar of the Proceedings of the House of Representatives and Senate of the State of Louisiana, 48th Extraordinary Session and 2nd Veto Session, at 188–89, 194–95 (2022). He wrote each chamber "that this map violates Section 2 of the Voting Rights Act of 1965 and further is not in line with the principle of fundamental fairness that should have driven this process." *Id.* Governor Edwards applauded proposed maps that would have created two majority-black districts. *Id.* On March 30, 2022, the Legislature overrode Governor Edwards's veto of H.B. 1, and the map became law. *Id.* at 189 (House); 195 (Senate).

The same day the veto of H.B. 1 was overridden, two separate Plaintiff groups filed complaints against Louisiana Secretary of State Kyle Ardoin in district court, alleging the enacted map diluted black voting strength. *Robinson*, 605 F. Supp. 3d at 768. The Plaintiffs claimed that the majority of black voters were "packed" into the single black-majority district, and the remaining were "cracked" among the other five districts. *Id.* They argued this caused the black voters to be sufficiently outnumbered so as to ensure unequal participation in the voting process, *id.*, and Louisiana was required under the Voting Rights Act to create a second black-majority district. *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022).

After the complaints were filed, Patrick Page Cortez, President of the Louisiana State Senate; Clay Schexnayder, Speaker of the Louisiana House of Representatives; and Louisiana Attorney General Jeff Landry all moved to intervene as Defendants. *Robinson*, 605 F. Supp. 3d at 768–69. The Louisiana Black Caucus was also allowed to

intervene. *Id.* at 769. The district court then consolidated the two suits. *Id.*

The Plaintiffs filed motions for a preliminary injunction on April 15, 2022. The Plaintiffs sought to enjoin Secretary Ardoin from utilizing the enacted map in the 2022 congressional elections, to set a deadline for the Legislature to enact a Section 2-compliant map, and, if the Legislature failed to do so, to order the November 2022 election be conducted under one of the illustrative plans proposed by the Plaintiffs.

The district court conducted an expedited five-day evidentiary hearing on the preliminary injunction in May 2022. *Id.* Mere days before the hearing was to begin, Attorney General Landry had filed an emergency motion with the district court, arguing the court should wait for the Supreme Court's decision in the Alabama congressional redistricting case on which a writ of certiorari had been granted on February 7, 2022. *See Merrill v. Milligan*, —— U.S. ——, 142 S. Ct. 879, —— L.Ed.2d —— (2022). The motion alleged that the decision ***586** was "likely to substantially affect or be fully dispositive" of this case. The district court denied the motion, reasoning that "[t]he blow to judicial economy and prejudice to Plaintiffs that would result from granting the moved-for stay cannot be justified by speculation over future Supreme Court deliberations."

Following the five-day evidentiary hearing, the district court issued a 99-page Ruling and Order granting the Plaintiffs' motions for a preliminary injunction. *Robinson*, 605 F. Supp. 3d 759. The district court concluded that the Plaintiffs had carried their burden to show "that (1) Louisiana's black population is sufficiently large and compact to form a majority in a second district, (2) the black population votes cohesively, and (3) whites tend to vote as a bloc usually to defeat black voters' preferred candidates." *Robinson*, 37 F.4th at 215–16 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)). The district court gave the Legislature until June 20, 2022, to enact a remedial plan for the November 2022 election. *Id.* at 216. Governor Edwards called a special session of the Legislature to begin on June 15, 2022, but urged that "further action of the legislature should be delayed until the Fifth Circuit can review the merits." *Id.* at n.1.

The State appealed the district court's decision. It also filed a motion with the district court to stay the preliminary injunction pending resolution of the appeal by this court. The district court denied the stay. The State then filed for a stay by this court. After granting a brief administrative stay, this court denied the State's motion for a stay pending appeal. *Robinson*, 37 F.4th at 232. The court determined that the State had failed to make a "strong showing" of likely success on the merits, and that, further, *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam), did not prevent the injunction from being effective. *Robinson*, 37 F.4th at 215.

On June 17, Attorney General Landry filed an application for a stay with the Supreme Court. *Ardoin v. Robinson*, —— U.S. ——, 142 S. Ct. 2892, 213 L.Ed.2d 1107 (2022). The Court treated the stay application as a petition for a writ of certiorari, granted it, and then ordered the case held in abeyance pending resolution of the Alabama congressional redistricting case. *Id.* Argument in that Alabama case was heard in November 2022, and an opinion was released in June 2023. *Allen v. Milligan*, 599 U.S. 1, 143 S.Ct. 1487, 216 L.Ed.2d 60 (2023). The Supreme Court then dismissed as improvident its grant of a writ of certiorari in the case now before us, vacated its stay, and remarked that "[t]his will allow the matter to proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana." *Ardoin v. Robinson*, —— U.S. ——, 143 S. Ct. 2654, —— L.Ed.2d —— (2023).

We received supplemental briefing prior to oral argument. In addition, a separate panel of this court issued a writ of mandamus in October 2023, blocking proceedings in district court regarding the preliminary injunction. *In re Landry*, 83 F.4th 300 (5th Cir. 2023). Though a merits panel is not controlled by an earlier motions panel decision, we agree with the ruling that the Louisiana Legislature has time to create its own remedial plan. Our decision will give the Legislature an opportunity to act or to inform the district court that it will not.

DISCUSSION

[1] **[2]** We review a grant of a preliminary injunction by a district court for any abuse of discretion. ***587** *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 418–19 (5th Cir. 2001). A preliminary injunction is an extraordinary remedy that will only be issued if a movant establishes four elements:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction

is granted, and (4) that the grant of an injunction will not disserve the public interest.

Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009).

[3] **[4]** Each of these four elements presents "a mixed question of fact and law." *Women's Med. Ctr.*, 248 F.3d at 419. The district court's legal conclusions are reviewed *de novo*, and its factual findings for clear error. *Id.* A factual finding is clearly erroneous when the reviewing court is "left with the definite and firm conviction," after reviewing the entire record, that the district court erred. *NAACP v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001) (quotation marks and citations omitted).

The State raises three issues on appeal which we discuss in this order.

I. There is no private right of action under Section 2 of the Voting Rights Act.

II. The Plaintiffs did not clearly establish a likelihood of proving that Louisiana's congressional districts violate Section 2 of the Voting Rights Act.

In its supplemental briefing following the *Milligan* decision, the State makes four arguments that we consider sub-issues of the second issue:

A. The Plaintiffs' illustrative maps did not satisfy the first *Gingles* precondition.

B. The Plaintiffs' illustrative maps are improper racial gerrymanders where race predominates.

C. The Plaintiffs' illustrative maps did not satisfy the third *Gingles* precondition.

D. Proportionality is an improper factor to consider in a *Gingles* analysis.

III. The equities did not warrant a mandatory injunction, and, in light of the fact that the 2022 election has been held, the injunction is moot.

I. Private right of action under Section 2 of the Voting Rights Act.

[5] The parties dispute whether Section 2 can be enforced by private parties such as the Plaintiffs here. Whether Section 2 provides for a private right of action is a legal issue of statutory interpretation that we review *de novo*. *See Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172, 174 (5th Cir. 2011).

There is no cause of action expressly created in the text of Section 2. A plurality of the Supreme Court stated that "the existence of the private right of action under Section 2 ... has been clearly intended by Congress since 1965." *Morse v. Republican Party of Va.*, 517 U.S. 186, 232, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (plurality opinion) (citations omitted). The Court acknowledged its prior consideration of Section 2 violations brought by private litigants. *Id.* (citing *Chisom v. Roemer*, 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991); *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)). More recently, the Court remarked that "the Federal Government and ***588** individuals have sued to enforce § 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect." *Shelby Cnty. v. Holder*, 570 U.S. 529, 537, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (citations omitted).

At least two justices have expressed concern, perhaps even doubt, about a private right. Dissenting in the *Milligan* decision that led to this remand, Justice Thomas referred in a footnote to the fact that the majority declined to "address whether § 2 contains a private right of action, an issue that was argued below but was not raised in this Court." *Milligan*, 599 U.S. at 90 n.22, 143 S.Ct. 1487 (Thomas, J., dissenting). The footnote was appended to a protest that the majority "dismisses grave constitutional questions with an insupportably broad holding based on demonstrably inapposite cases." *Id.* at 90, 143 S.Ct. 1487. Similarly, Justice Gorsuch wrote a separate concurrence in another case, joined by Justice Thomas, solely to "flag" that the Court's "cases have assumed — without deciding — that the Voting Rights Act of 1965 furnishes an implied right of action under § 2." *Brnovich v. Democratic Nat'l Comm.*, —— U.S. ——, 141 S. Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (Gorsuch, J., concurring).

There has not been frequent need in the circuit courts to analyze the issue. The Sixth Circuit once held without any analysis that Section 2 conveys a private right of action. *See Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999). The Eleventh Circuit discussed the issue at length and also concluded there was a private right of action under Section 2. *Alabama State Conf. of NAACP v. Alabama*, 949 F.3d 647, 651–54 (11th Cir. 2020), *cert. granted, opinion vacated, and case dismissed as moot*, —— U.S. ——, 141 S. Ct. 2618, 209 L.Ed.2d 746 (2021). The vacation of that opinion raises

some questions about its analysis, but the reason for vacating was mootness. A dissenting Eleventh Circuit judge argued that the Voting Rights Act had not abrogated state sovereign immunity. *Alabama State Conf.*, 949 F.3d at 662 (Branch, J., dissenting). In her dissent, Judge Branch rejected one of our precedents — binding on this panel, of course — in which we held that the Voting Rights Act had validly abrogated state sovereign immunity. *Id.* (discussing *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017)).

We consider most of the work on this issue to have been done by our *OCA-Greater Houston* holding that the Voting Rights Act abrogated the state sovereign immunity anchored in the Eleventh Amendment. Congress should not be accused of abrogating sovereign immunity without some purpose. The purpose surely is to allow the States to be sued by someone. One section of the Act provides that proceedings to enforce voting guarantees in any state or political subdivision can be brought by the Attorney General or by an "aggrieved person." 52 U.S.C. § 10302. We conclude that the Plaintiffs here are aggrieved persons, that our *OCA-Houston* decision has already held that sovereign immunity has been waived, and that there is a right for these Plaintiffs to bring these claims.

II. Plaintiffs' likelihood of proving that Louisiana's congressional districts violate Section 2 of the Voting Rights Act.

The State challenges the district court's determination that the Plaintiffs established a likelihood of proving a violation of Section 2 of the Voting Rights Act on the merits. The State argues that the preliminary injunction, issued in advance of the 2022 congressional elections, is now moot. We will consider the mootness issue in the final section of the opinion. We state now ***589** that we will hold it is not moot but also is unnecessary at this point because the balance of the equities has changed.

[6] **[7]** Under the first preliminary injunction element, the Plaintiffs were required to establish they had a substantial likelihood of success on the merits of their Section 2 claim. *Byrum*, 566 F.3d at 445. Section 2 claims are evaluated under the three-part *Gingles* framework. *Milligan*, 599 U.S. at 17, 143 S.Ct. 1487. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752.

[8] To succeed in proving a Section 2 vote dilution claim, plaintiffs must first satisfy three preconditions. *Milligan*, 599 U.S. at 18, 143 S.Ct. 1487. "First, the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district." *Id.* (quotation marks and citations omitted). A district is reasonably configured when it complies "with traditional districting criteria, such as being contiguous and reasonably compact." *Id.* Second, the minority group must be politically cohesive. *Id.* Third, the white majority must be shown to vote sufficiently as a bloc to usually defeat the minority-preferred candidate. *Id.* If a plaintiff fails to establish any one of these three preconditions, a court need not consider the other two, leaving the plaintiff with no remedy. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) [hereinafter *LULAC*].

[9] **[10]** Once these three threshold conditions are established, a plaintiff then must "show, under the totality of the circumstances, that the political process is not equally open to minority votes," causing a Section 2 violation. *Milligan*, 599 U.S. at 18, 143 S.Ct. 1487 (quotation marks and citations omitted). Courts consider what are sometimes called the *Zimmer* factors[2] to guide this portion of the analysis. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993). Courts must determine whether plaintiffs have an equal opportunity in the voting process to elect their preferred candidate under the challenged districting map. *Gingles*, 478 U.S. at 44, 106 S.Ct. 2752. If the answer is no, there likely is a Section 2 violation.

The State does not challenge the second *Gingles* precondition, so we discuss only the other preconditions and the totality of the circumstances.

A. The first Gingles *precondition.*

[11] **[12]** **[13]** The first *Gingles* precondition focuses on geographical compactness and numerosity. *Milligan*, 599 U.S. at 18, 143 S.Ct. 1487. It establishes whether a minority population has the potential to elect its preferred candidate in a single-member district. *Id.* The "party asserting § 2 liability must show by a preponderance of the evidence that the minority population in ***590** the potential election district is greater than 50 percent." *Bartlett v. Strickland*, 556 U.S. 1, 19–20, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). This percentage is analyzed in terms of the black voting-age

population ("BVAP") because only eligible voters can affect the *Gingles* analysis. *Robinson*, 605 F. Supp. 3d at 776. The large minority population must also be sufficiently compact such that a reasonably compact majority-minority district can be drawn. *LULAC*, 548 U.S. at 433, 126 S.Ct. 2594. The State does not contest numerosity, so we analyze only whether the illustrative map was sufficiently compact.

[14] **[15]** Compactness under Section 2 is an imprecise concept, but traditional districting principles like maintaining communities of interest and traditional boundaries should be considered. *Id.* Communities of interest vary between states, generally defined by the given state's districting guidelines. *See Milligan*, 599 U.S. at 20–21, 143 S.Ct. 1487. Here, the district court recognized there was no universal definition for "community of interest" in Louisiana, and the Louisiana Legislature did not define what exactly comprises a community of interest. *Robinson*, 605 F. Supp. 3d at 776, 828. In *Milligan*, the Supreme Court examined the illustrative district maps when deciding whether a "reasonably configured" second majority-black district could be formed. *Milligan*, 599 U.S. at 19–20, 143 S.Ct. 1487. The Court found that some of the illustrative maps produced districts at least as compact as the State's plan. *Id.* at 20, 143 S.Ct. 1487. The Court concluded that "some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Id.* (emphasis in original). In addition, there were no "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find" compactness. *Id.* (quoting *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1011 (N.D. Ala. 2022)).

[16] Courts must also determine if the illustrative districts have similar needs and interests beyond race. *LULAC*, 548 U.S. at 435, 126 S.Ct. 2594. The State insists the Plaintiffs' proposed districts are not reasonably configured because they are based solely on race rather than a community of interest. Each illustrative plan connects the Baton Rouge area and St. Landry Parish with the Delta Parishes far to the north along the Mississippi River. The State argues the two areas' only connection is race. It seems undisputed that unless the part of the Baton Rouge area that is majority black is combined with the Delta Parishes to the north, creating a second black-majority district would be difficult. The State contends this proves the Plaintiffs were operating under the "prohibited assumption" that a "group of voters' race [means] that they think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 433, 126 S.Ct. 2594.

The State also argues the district court made no finding of common interests. The Plaintiffs demographic experts effectively admitted no community of interest exists; and the Legislature arrived at its districting plan based on resident concerns and its own analysis. The "sprawling size and diversity" of the joined communities in the Plaintiffs' maps allegedly exemplify expansiveness, not compactness.

The Plaintiffs contend, however, that the district court was correct that the compactness analyzed in the first *Gingles* precondition is the compactness of the *minority population*, not the *contested district*. Certainly, *Milligan* states that the first *Gingles* precondition is that the "minority group must be sufficiently large and [geographically] compact to constitute a majority ***591** in a reasonably configured district." *Milligan*, 599 U.S. at 18, 143 S.Ct. 1487 (quoting *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 142 S. Ct. 1245, 1248, 212 L.Ed.2d 251 (2022) (per curiam)). The district court heard extensive expert and lay witness testimony from the Plaintiffs witnesses explaining how the Baton Rouge area and the Delta Parishes are communities of interest. *Robinson*, 605 F. Supp. 3d at 778–97, 822–31. In its determination, the district court credited this testimony that Louisiana's black population is compacted into easily definable areas; the illustrative plans offered by the Plaintiffs were more compact on average than the enacted plan both mathematically and visually; and the illustrative plans split very few parishes and political subdivisions. *Id.* at 822–31.

The State asserts that the Legislature identifies the communities of interest, not the courts or parties, and "[t]he Legislature did not arrive at its community goals in a vacuum." The Legislature, the State argues, did not intend to combine urban and rural areas differing in poverty, education, household income, economic, and other interests into one district with only one common index: race. Splitting these already enacted communities of interest and the sheer distance — 180 miles — between the illustratively joined communities negates the possibility of a community of interest when combining the districts into one.

The district court found, though, that the State offered no evidence as to what the Louisiana Legislature identified as communities of interest. *Id.* at 829. The State produced no witness testimony concerning communities of interest. *Id.* The district court concluded this was "a glaring omission" since Joint Rule 21 requires communities of interest to be prioritized over the preservation of political subdivisions. *Id.*; La. Leg. J.R. 21. Instead, the State relied on the legislative

comments made during the districting plan's enactment and ignored the witnesses who testified to the commonalities between the areas and communities utilized in the Plaintiffs' illustrative districting plans.[3] *Id.*

Somewhat similar arguments were rejected by the Supreme Court in *Milligan*, where no clear error existed in separating the district formed after the 2010 census in the region along Alabama's Gulf Coast into two different districts. *Milligan*, 599 U.S. at 20–21, 143 S.Ct. 1487. Both the Supreme Court and the Alabama district court found testimony by the same expert used in this case supporting one community of interest as "partial, selectively informed, and poorly supported." *Id.* at 21, 143 S.Ct. 1487 (quoting *Merrill*, 582 F. Supp. 3d at 1015). Similarly, here, the State asserts that the Legislature intended to keep the communities separate, lay testimony at roadshows clearly supported the constituency support of the enacted plan, and there was no need to combine clearly distinct urban and rural communities of interest.

The district court determined that these illustrative districts share many cultural, economic, social, and educational ties despite the distance and distinct community identities. *Robinson*, 605 F. Supp. 3d at 786–97, 828–31. There was unrebutted evidence by the Plaintiffs experts, who utilized ***592** roadshow testimony and socioeconomic data to construct the plans, that there are commonalities between the districts. *Id.* The Plaintiffs further identified the desire by some voters to split Baton Rouge from New Orleans and the legislative priority behind combining the rural communities of the Delta Parishes with East Baton Rouge to protect the common agricultural interests of the regions while strengthening "the voice" of the people. The Plaintiffs argue this shows the illustrative plans united communities of common interest, like in *Milligan*.

[17] The Supreme Court has recognized that urban and rural communities can reasonably be configured into a compact district if they share similar interests, they are in reasonably close proximity, and if the district is not obviously irregular and drawn into "bizarre shapes." *LULAC*, 548 U.S. at 435, 126 S.Ct. 2594; *Milligan*, 599 U.S. at 19–21, 143 S.Ct. 1487. Even if a region is a single community of interest, there is no clear error in a district court's determination that the illustrative plans that focused on other, different, overlapping communities of interest are valid; there is no need to conduct a "beauty contest" between the maps. *Milligan*, 599 U.S. at 21, 143 S.Ct. 1487.

The parties' arguments here are factual disputes as to whether the district court should have found the illustrative maps reasonably configured. The district court evaluated the evidence that described whether the maps protected communities of interest for 19 pages in its published opinion. *Robinson*, 605 F. Supp. 3d at 778–97. Over another 9 pages, the court made credibility determinations on the experts and their evidence. *Id.* at 822–31. It ultimately credited the Plaintiffs' experts over the State's, finding the latter's experts' "analys[e]s lacked rigor and thoroughness," "did not account for all of the relevant redistricting principles," and provided unhelpful conclusions. *Id.* at 824–25 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

[18] We review a district court's factual findings for clear error. *Women's Med. Ctr.*, 248 F.3d at 419. Reversal requires us to be "left with [a] definite and firm conviction" that the district court erred after reviewing the record. *Fordice*, 252 F.3d at 365. We are left with no such a conviction. The district court reviewed the evidence before it and made a factual finding as to what the evidence showed, acknowledging throughout its decision the State's omission of contrary testimony. It concluded that the facts and evidence demonstrated the Plaintiffs were substantially likely to prove the geographic compactness of the minority population. *Robinson*, 605 F. Supp. 3d at 822.

There was no clear error by the district court when it found the illustrative maps created a different community of interest and the first *Gingles* precondition was met.

B. Racial predominance versus racial gerrymandering.

[19] To refute the district court's determination that the Plaintiffs' satisfied the first *Gingles* precondition, the State "put all their eggs in the basket of racial gerrymandering," *Robinson*, 37 F.4th at 217, and "did not meaningfully refute or challenge [the] Plaintiffs' evidence." *Robinson*, 605 F. Supp. 3d at 823. How a party addresses an issue at the time that a preliminary injunction is being sought, particularly when a Supreme Court decision is later handed down before the next stage of the proceedings, does not bind the party as the case moves along further. We do conclude, though, that the State's initial approach was largely rejected by *Milligan*.

***593** **[20]** Impermissible racial gerrymandering can be found when a minority population is compacted together

and there is "no integrity in terms of traditional, neutral redistricting criteria." *Milligan*, 599 U.S. at 28, 143 S.Ct. 1487 (quotation marks and citations omitted). Here, the Plaintiffs' evidence of traditional redistricting criteria went "largely uncontested." *Robinson*, 37 F.4th at 218. Like Alabama in *Milligan*, the State instead argues that the first *Gingles* precondition cannot be established if race predominates the drawing of an illustrative plan in an effort to segregate the races for voting.

[21] **[22]** The Supreme Court recognized "a difference 'between being aware of racial considerations and being motivated by them.' " *Milligan*, 599 U.S. at 30, 143 S.Ct. 1487 (quoting *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)). Awareness of race is permissible, and redistricting will often require awareness of the demographics of proposed districts. *Id.* This "race consciousness does not lead inevitably to impermissible race discrimination" because Section 2 demands such consideration. *Id.* (quotation marks and citations omitted). Awareness becomes racial predominance when the district lines are drawn with the traditional, race-neutral districting criteria considered *after* the race-based decision is made. *Id.* This is admittedly a difficult distinction. *Id.* We review the district court's finding as to whether race predominated for clear error. *Cooper v. Harris*, 581 U.S. 285, 298–99, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017).

[23] The State argues the district court erred in finding that the Plaintiffs' plans were not racially predominant configurations. The State relies on a Supreme Court racial affirmative action opinion that recognized distinctions between citizens solely based on their ancestry as inherently suspect. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023).

The *Students for Fair Admissions* decision concerned a very different set of facts. Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy. The State contends that the Plaintiffs agree predominance occurs when the map-drawer has a specific racial target, and that target has a direct, significant impact on the district. It argues this is exactly what the Plaintiff experts did when they admitted to applying the *Bartlett* standard, *i.e.*, seeking to create congressional districts in which the minority population is greater than 50 percent. *Bartlett*, 556 U.S. at 19–20, 129 S.Ct. 1231.

Certainly, the illustrative plans were designed with the goal of achieving a second majority-minority district of at least 50 percent BVAP, and the Plaintiff mapmakers sought to satisfy this 50 percent standard when drawing the new districts. The 2022 motions panel recognized and the Plaintiff expert testified that he was "specifically asked ... to draw maps with two minority-majority districts." *Robinson*, 37 F.4th at 222. The Plaintiffs contend, though, that this was simply a *consideration* of race, not racial predominance. The Supreme Court allows race-based redistricting in certain circumstances as a remedy for state redistricting maps that violate Section 2. *Milligan*, 599 U.S. at 33, 41, 143 S.Ct. 1487. The Plaintiffs argue this is one of those circumstances. As we will explain, the purpose of illustrative maps is to *illustrate* that creating another majority black district is possible, consistent with other requirements under Section 2 caselaw.

***594** **[24]** The Supreme Court has categorized some districts maps as being drafted with race as the predominant factor. *See Cooper*, 581 U.S. at 300–01, 137 S.Ct. 1455. In *Cooper*, the Court found no clear error in the district court's finding that there had been "an announced racial target that subordinated other districting criteria." *Id.* at 300, 137 S.Ct. 1455. Refusing to allow redistricting maps based on race in *any* respect, though, would require *Gingles* to be overruled. *Milligan*, 599 U.S. at 30–33, 143 S.Ct. 1487. The Supreme Court in *Milligan* held that expert testimony showing redistricting maps were designed to establish two majority-black districts, like the testimony here, does not automatically constitute racial predominance. *Id.* at 32–33, 143 S.Ct. 1487. Instead, an express racial target is just one consideration in a traditional redistricting analysis under *Gingles*. *Id.* at 32, 143 S.Ct. 1487.

The Supreme Court also rejected that a "race-neutral benchmark" must be used. *Id.* 23–24, 143 S.Ct. 1487. The Court clarified that *all* illustrative redistricting "maps [are] created with an express target in mind — they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the [*Gingles*] enterprise." *Id.* at 33, 143 S.Ct. 1487. Thus, the Plaintiffs' mapmakers using the 50 percent BVAP as a factor when drawing the illustrative maps for Louisiana was appropriate.

The Plaintiffs experts testified to using the 50 percent threshold for pulling the black population into the majority-minority district and to consulting the racial data to determine the location of the black population for the district location in

the illustrative plans. The State contends this mirrors *Cooper*, where district borders were moved to incorporate the large black population. The State further argues that racially coded maps presented in the current record establish a consistent tracking of racial patterns by the illustrative plans. The higher, black-populated portions of the parishes were moved from one district to another to create the majority-minority district according to the State.

The Plaintiffs contend their experts acted appropriately under Supreme Court precedent. The Court recognized that the "very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition" and to demonstrate that a majority-minority district is possible. *Id.* at 34 n.7, 143 S.Ct. 1487. Attempting to reach the needed 50 percent threshold does not automatically amount to racial gerrymandering, and *Cooper* does not say otherwise. *Cooper* did not address the first *Gingles* precondition at all, as its focus was racial targeting. *Cooper*, 581 U.S. at 302 n.4, 137 S.Ct. 1455.

The district court mentioned that the State's expert, who testified there was racial predominance, conceded he could not say much about the racial predominance being the intended result of the expert's mapping decisions as opposed to the segregation of the population. *Robinson*, 605 F. Supp. 3d at 824. The district court therefore found the expert's reliability severely undermined. *Id.* at 823–24. The Alabama district court also gave his similar testimony in *Milligan* little weight. *Milligan*, 599 U.S. at 31–32, 143 S.Ct. 1487. The Plaintiff experts testified they did not subordinate other redistricting criteria to race. *Robinson*, 37 F.4th at 223. Instead, their determinations and analysis were based on the traditional factors like communities of interest, and race was only considered "to the extent necessary" under *Gingles*. *Id.*; *Robinson*, 605 F. Supp. 3d at 827.

[25] **[26]** The State attempts to equate an Equal Protection racial gerrymandering claim to its Section 2 Voting Rights Act ***595** claim to overcome the racial awareness that *Gingles* allows. "Racial gerrymandering is prohibited by the Equal Protection Clause of the Fourteenth Amendment." *Robinson*, 37 F.4th at 222 (citations omitted). Racial consciousness as a factor in the drawing of illustrative maps does not, however, defeat a Section 2 *Gingles* claim, which is distinct from an Equal Protection racial gerrymander violation. *Id.*[4]

[27] A racial gerrymander is present when citizens are assigned by the state to legislative districts based on race, such that one district will have racially similar individuals who otherwise have little in common geographically or politically. *Id.* The Supreme Court has implemented a high bar to racial gerrymander challenges, requiring a showing of racial predominance such that traditional redistricting criteria are subordinate to the racial consideration. *Id.* We find that this high bar was not met on this record. Rather, race was properly considered by the Plaintiff experts when drawing their several illustrative maps. The target of reaching a 50 percent BVAP was considered alongside and subordinate to the other race-neutral traditional redistricting criteria *Gingles* requires. The Plaintiff experts considered communities of interest, political subdivisions, parish lines, culture, religion, etc. *Id.* at 219–23.

The district court did not clearly err in its factual findings that the illustrative maps were not racial gerrymanders.

C. The third Gingles *precondition.*

[28] The third *Gingles* precondition focuses on racially polarized voting; it requires establishing the plausibility that the challenged legislative districting thwarts minority voting on account of race. *Milligan*, 599 U.S. at 19, 143 S.Ct. 1487. This precondition requires proof that white bloc voting "can generally minimize or cancel black voters' ability to elect" their preferred candidate. *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. The question is not whether white bloc voting is present, but whether such bloc voting in a given district amounts to legally significant racially polarized voting. *Id.*; *Clements*, 999 F.2d at 850.

The State contends this precondition also requires proof that a white voting bloc will normally defeat a combined minority vote and white "crossover" voting. A white crossover district is created where enough white voters join minority voters to elect the minority-preferred candidate. *Bartlett*, 556 U.S. at 16, 129 S.Ct. 1231. In other words, the BVAP is less than 50 percent but large enough to elect the candidate of its choice with white voters' help. *Id.* at 24, 129 S.Ct. 1231. The Supreme Court has recognized that "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56, 106 S.Ct. 2752. The State argues, however, the Plaintiffs presented evidence of *statistical* significance rather than *legal* significance.

The State argued, and the district court accepted, that there is a difference between legally significant and statistically significant racially polarized voting. *Robinson*, 605 F. Supp. 3d at 842–44. Such a distinction was made by a district court when examining legislative redistricting. ***596** *Covington v. North Carolina*, 316 F.R.D. 117, 170 (M.D.N.C. 2016), *summary aff'd*, 581 U.S. 1015, 137 S.Ct. 2211, 198 L.Ed.2d 655 (2017). We also find the concept in *Gingles*, where the court questioned the statistical evidence that voters of different races select different candidates, and whether that evidence was "substantively significant." *Gingles*, 478 U.S. at 53, 106 S.Ct. 2752. The Court then examined the standard for "legally significant racial bloc voting." *Id.* at 55, 106 S.Ct. 2752. It stated that "[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Id.* at 56, 106 S.Ct. 2752.

[29] The State argues the third *Gingles* precondition cannot be satisfied in the relevant geographical areas because there is sufficient white crossover voting. The Plaintiffs experts testified that effective crossover voting could exist because a different district than the Legislature drew *could* be drawn with less than 50 percent BVAP and still allow for a minority-preferred candidate to be elected. The experts did not testify that the legislative plan would allow sufficient cross-over voting. All Plaintiff experts saw a possibility that districts could be drawn below the required BVAP when combined with sufficiently high levels of white crossover voting. The State contends that an effective crossover district with a BVAP less than 50 percent, like those testified to by the Plaintiff experts, which "could perform [is] tantamount to a concession that white bloc voting is not legally significant." The State argues this is an admission that no remedy is necessary and that the third *Gingles* precondition could not be satisfied.

The district court did not state that crossover voting was irrelevant. It explained that such voting was inherently included in the Plaintiffs experts' analyses. *Robinson*, 605 F. Supp. 3d at 843. The 2022 motions panel of this court explained that the district court correctly relied on the experts to explain the level of crossover voting. *Robinson*, 37 F.4th at 225. Regardless, the State argues the possibility of effective white crossover districts means (1) the third *Gingles* precondition cannot be established, (2) two majority-minority districts are unnecessary for black voters to elect their preferred candidates, (3) Louisiana is barred from drawing one, and (4) it would be unlawful to require the Louisiana Legislature to enact a second majority-minority district.

[30] The Plaintiffs are correct that this argument focuses on the wrong plan. Rather than follow Supreme Court precedent that requires sufficient crossover voting in the Legislature's plan — and no such evidence existed here — the State focused on the *possibility* of creating new districts with crossover voting. The relevant consideration under the third *Gingles* precondition is the *challenged* plan, not some *hypothetical* crossover district that could have been but was not drawn by the Legislature. *Robinson II*, 37 F.4th at 226. The third *Gingles* precondition's purpose is to establish that the challenged district thwarts a distinctive minority vote. *Milligan*, 599 U.S. at 19, 143 S.Ct. 1487. While the illustrative plans do have the potential to allow for the minority-preferred candidates to be elected with less than a 50 percent BVAP, the legislative plan did not. *Robinson I*, 605 F. Supp. 3d at 841–42. The record establishes that minority-preferred candidates will usually fail in Louisiana without a different district configuration.

***597** *Bartlett* established the 50 percent BVAP threshold for the first *Gingles* precondition, but it did not change the third precondition analysis. *Bartlett*, 556 U.S. at 6, 12, 16, 129 S.Ct. 1231. Illustrative districts that could perform with a BVAP of less than 50 percent with white crossover voting are not the focus of the third *Gingles* precondition analysis. The proper question to ask is this: "If the state's districting plan takes effect, will the voting behavior of the white majority cause the relevant minority group's preferred candidate 'usually to be defeated'?" *Robinson*, 37 F.4th at 224 (citing *Covington*, 316 F.R.D. at 171). The district court's factual findings confirmed the answer under the 2022 state-enacted plan — not the hypothetical districts — would be "yes" because the experts examined the data and concluded that white voters consistently vote to defeat minority-preferred candidates. *Robinson*, 605 F. Supp. 3d at 842–43. This is the proper analysis.

The Supreme Court examined similar evidence of racially polarized voting under the third *Gingles* precondition in *Milligan*. 599 U.S. at 22, 143 S.Ct. 1487. The Court analyzed a white crossover voting percentage of 15.4, *id.*, and, here, the district court analyzed a range of 11.7 percent to 20.8 percent. *Robinson*, 605 F. Supp. 3d at 842. The Supreme Court agreed with the Alabama district court's factual determination that

the third *Gingles* precondition was met despite the crossover percentage. *Milligan*, 599 U.S. at 22–23, 143 S.Ct. 1487.

[31] The State argues the district court applied the wrong legal standard by finding the white crossover information irrelevant, but, as we have discussed, the district court did no such thing. Rather, it focused on expert testimony that included an analysis of crossover voting. Effective crossover voting can be evidence of diminished bloc voting under the third *Gingles* precondition. *Bartlett*, 556 U.S. at 16–17, 129 S.Ct. 1231. The analysis, however, of whether white crossover voting undermines the potential of electing minority-preferred candidates is properly determined under the *first Gingles* precondition, not the *third. Id.* at 16–20, 129 S.Ct. 1231. It dictates the answer to the question of whether a minority makes up a sufficient BVAP in the relevant geographic area, not solely whether white bloc voting is legally significant. *Id.*

We conclude that *Bartlett*'s discussion of crossover voting and how a Section 2 violation will generally not be found if effective crossover voting is present was limited to the first *Gingles* precondition analysis. The district court's factual determination that a white crossover voting range of 11.7 percent to 20.8 percent can satisfy the third *Gingles* precondition aligns with *Milligan*. We find no clear error in the district court's determination about crossover voting and move to the totality of the circumstances analysis.

D. Totality of the circumstances & proportionality.

[32] **[33]** The State's final argument that the district court erred in its *Gingles* analysis is its consideration of racial proportionality as a factor. Once the *Gingles* preconditions are achieved, Section 2 liability is determined based on the totality of the circumstances. *Milligan*, 599 U.S. at 26, 143 S.Ct. 1487. This requires application of the *Gingles* analysis specifically to the facts of each case and the state electoral mechanism while also considering the *Zimmer* factors as a guide. *Id.* at 19, 143 S.Ct. 1487; *Clements*, 999 F.2d at 849.

[34] While not dispositive, one relevant *Zimmer* factor is proportionality. *Johnson*, 512 U.S. at 1000, 114 S.Ct. 2647. "[W]hether the number of districts in which the minority group forms an effective majority ***598** is roughly proportional to its share of the population in the relevant area" is a "relevant consideration" for courts to make. *LULAC*, 548 U.S. at 426, 126 S.Ct. 2594. "The *Gingles* framework itself imposes meaningful constraints on proportionality," and "[f]orcing proportional representation is unlawful and inconsistent with" Section 2. *Milligan*, 599 U.S. at 26, 28, 143 S.Ct. 1487. The Supreme Court has repeatedly "rejected districting plans that would bring States closer to proportionality when those plans violate traditional districting criteria." *Id.* at 29 n.4, 143 S.Ct. 1487.

The State contends the Supreme Court in *Milligan* found no constitutional or Section 2 concerns because the proportional representation had been rejected as a factor. The State argues the opposite occurred here: the district court read a proportionality requirement into *Gingles*.

The Plaintiffs did emphasize that the black population is one-third of Louisiana's residential population, yet it has only one out of six opportunities to elect their preferred candidates. The district court, according to the State, "adopted this line of argument" and held that the black representation was not proportional to the black population. The State argues this holding will amount to unlawful, forced proportional representation, which cannot be the basis for Section 2 relief.

The Plaintiffs assert the district court was not forcing proportional representation but was weighing proportionality in the totality of the circumstances required under *Gingles*. The district court identified the disproportional representation, weighing it in favor of the Plaintiffs throughout its analysis. *Robinson*, 605 F. Supp. 3d at 851. The Plaintiffs contend there was no forced racial proportionality, and argue *Milligan* rejected the same argument that an additional majority-minority district inevitably demands proportionality. *See Milligan*, 599 U.S. at 26, 143 S.Ct. 1487. The Supreme Court determined that if a proper *Gingles* analysis results in proportional representation — like here and in *Milligan* — the plan is not automatically invalid or clearly erroneous. *See id.* at 26–30, 143 S.Ct. 1487.

The district court considered proportionality only in its *Zimmer*-factors analysis. *Robinson*, 605 F. Supp. 3d at 844–51. The court did not require proportionality but considered it along with the other factors in examining the totality of circumstances. *Id.* at 771. The court recognized there is no right to proportional representation. *Id.* at 851. Instead, proportionality is a relevant consideration and indication of equal opportunity voting, which it found relevant to this case. *Id.* The district court determined the black representation was not proportional to the black population, and this factor weighed in favor of the Plaintiffs. *Id.*

The Supreme Court has held that proportionality cannot be at the expense of "integrity in terms of traditional, neutral redistricting criteria." *Milligan*, 599 U.S. at 28, 143 S.Ct. 1487 (citations omitted). Here, the district court analyzed proportionality as a factor among other redistricting criteria. *Robinson*, 605 F. Supp. 3d at 851. The district court found "that the proportionality *consideration* weighs in favor of Plaintiffs" and that "the totality of the circumstances weighs in favor of Plaintiffs." *Id.* (emphasis added).

We agree with the 2022 motions panel that the Plaintiffs' arguments "are not without weaknesses," *Robinson*, 37 F.4th at 215, and Plaintiffs' analysis is not "entirely watertight." *Id.* at 232. There is nothing unusual about weaknesses, even in arguments of a successful party. This appeal, however, primarily disputes factual findings that are not clearly erroneous.

The district court spent 39 pages in the published opinion discussing the evidence ***599** presented and expert testimony heard during its five-day evidentiary hearing, *Robinson*, 605 F. Supp. 3d at 778–817, and 41 pages analyzing those facts and legal authority. *Id.* at 817–858. The district court came to the same conclusion as the Alabama district court that was affirmed in *Milligan*, based on "essentially the same" record and arguments.

The Supreme Court's *Milligan* opinion may require the State here to adjust its arguments as the case moves to its next phase. We conclude the emphasis so far has been on the supposed invalidity of any consideration of race and a rejection of the *Gingles* approach. The *Milligan* opinion refused to accept such arguments. Among the similar arguments in *Milligan* and here is that the plaintiffs' illustrative maps were unreasonably configured due to their division of a cognizable community population into two different districts; the district court should have judged the enacted map against a race-neutral benchmark calculated by a computer-simulated map; the possibility of drawing a majority-minority district does not require the drawing of the district; and the district court's application of Section 2 encourages racial gerrymandering since the Plaintiffs incorporate race into their illustrative plans. *Milligan*, 599 U.S. 1, 143 S.Ct. 1487. Most of the arguments the State made here were addressed and rejected by the Supreme Court in *Milligan*.

The district court's preliminary injunction, like the one issued by Alabama, was valid when it was issued. Now, almost 17 months later, we need to consider whether the preliminary injunction is still needed.

III. The balance of equities and mootness of the preliminary injunction.

[35] The State disputes the balance the district court struck in the equities of the case, arguing that a preliminary injunction was not the proper remedy because it did not simply preserve the *status quo.* Unfortunately for that argument, the Supreme Court approved a similar preliminary injunction in *Milligan*. *Id.*

The State's initial concern with the preliminary injunction was that it was issued too close to the election. *See Purcell*, 549 U.S. 1, 127 S.Ct. 5. Both this court and the Supreme Court have applied the *Purcell* principle against changing state election rules when staying injunctions that threaten voter confusion and chaos so near an election. *Robinson*, 37 F.4th at 228–29.

Purcell stayed an election 29 days prior to an election, and the Supreme Court has stayed injunctions five days, 33 days, 60 days, and less than four months before an election. *Id.* at 229 (citations omitted). Here, the injunction was implemented more than five months prior to the election and more than four months prior to early voting registration. It is not "an injunction entered days or weeks before an election — when the election is already underway," which would require a *Purcell* stay. *Id.* at 228.

The district court recognized that even the State acknowledged the injunction deadline would present no difficulties for Louisiana's election calendar, and the deadlines that impact voters were not until October. *Robinson*, 605 F. Supp. 3d at 854 (citing Petition for Injunction and Declaratory Relief, *Bullman v. Ardoin*, No. C-716690, 2022 WL 769848 (La. Dist. Ct. Mar. 10, 2022) (the pending state court petition regarding the same issue)). Further, Secretary Ardoin's counsel stated that "Louisiana does not have a hard deadline for redistricting," and the election code can be amended if necessary. *Id.* at 854–55.

***600** We agree that *Purcell* did not bar the preliminary injunction nor require it to be stayed.

[36] Where are we now, though? The reasons for urgency in the district court's 2022 preliminary injunction are gone.

The district court issued the injunction after determining the Plaintiffs were likely to suffer irreparable harm under the enacted redistricting plan. *Robinson*, 605 F. Supp. 3d at 851–52. It further concluded that, if the 2022 elections were "conducted under a map which has been shown to dilute Plaintiffs' votes, Plaintiffs' injury will persist unless the map is changed for 2024." *Id.* at 852. None of that applies now, though there are new deadlines on the somewhat distant horizon.

[37] **[38]** The State would have the preliminary injunction declared moot. To avoid mootness, "the controversy posed by the plaintiff's complaint [must] be live ... throughout the litigation process." *Rocky v. King*, 900 F.2d 864, 866 (5th Cir. 1990). "Mootness is a jurisdictional question" that must be resolved prior to a federal court having jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (citations omitted).

The Supreme Court's affirmance of the Alabama district court's almost identical preliminary injunction six months after the affected election might be useful precedent, but the Court did not address the possibility of mootness. *Milligan*, 599 U.S. 1, 143 S.Ct. 1487. The irreparable harm articulated by both the Alabama district court and this district court is that forcing black voters to vote under a map that likely violates Section 2 is a continuing and live injury, despite the loss of some of the urgency. *Merrill*, 582 F. Supp. 3d at 1026–27; *Robinson*, 605 F. Supp. 3d at 851–52. Both district courts made factual findings that the plaintiffs would have ongoing and irreparable harm that will persist unless the map is changed. *Id.* That harm is still present, but a trial can likely occur prior to harm occurring in the 2024 elections.

We conclude that a preliminary injunction is no longer needed to prevent an irreparable injury from occurring before said trial. Our conclusion comes from the balance of the equities no longer weighing in favor of the Plaintiffs. Once an "election occurs, there can be no do-overs and no redress" for voters whose votes were diluted. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Like the Alabama voters, "[t]he Plaintiffs already suffered this irreparable injury ... when they voted in 2022 under the unlawful" plan. *Singleton v. Allen*, 2:21-CV-1291-AMM, 2023 WL 6567895, at *18 (N.D. Ala. Oct. 5, 2023). The Louisiana elections are on a more lenient time schedule than Alabama's. Both general elections are more than 13 months away, but Alabama's qualifying deadline to participate in the 2024 elections is in November 2023. *Id.*; Ala. Code § 17–13–5(a).

For the 2024 Louisiana elections calendar, though, there is no imminent deadline. The qualifying deadlines are not until July 2024, so a preliminary injunction, which is an extraordinary remedy, is no longer required to prevent the alleged elections violation. We therefore vacate the preliminary injunction, even though the underlying controversy is not moot.

IV. The role of the Louisiana Legislature.

[39] There is not much time before initial deadlines for the next congressional election cycle are visible. Nonetheless, we have weighed carefully one of the arguments the State made at the Supreme Court in defending the mandamus ruling by this court. It was a complaint that the district court had not "afforded the legislature ***601** with a meaningful opportunity" to prepare a remedial plan. Resp. to Emergency Appl. for Stay of Writ of Mandamus at 15, *Galmon v. Ardoin*, No. 23A282 (U.S. *filed* Sept. 30, 2023). The State acknowledged the Louisiana Legislature would not likely act "while seeking to demonstrate that the district court was wrong to conclude that the Plaintiffs' are entitled to a remedy." *Id.* at 16. The Plaintiffs' reply to that argument was to insist the Legislature clearly stated it did not want to reconsider its map. It quoted House Speaker Clay Schexnayder as saying a new session was "unnecessary and premature until the legal process is played out in the court systems." Reply Br. in Supp. of Emergency Appl. for Stay of Writ of Mandamus at 3, *Galmon v. Ardoin*, No. 23A282 (U.S. *filed* Oct. 11, 2023).

The State's argument to the Supreme Court, though, was in the context of upholding the mandamus that prevented another hearing on the preliminary injunction. We do not interpret the State to have declared that after this court made a decision on the appeal from the preliminary injunction — that decision is made today — the Louisiana Legislature would not want to consider acting.

We cannot conclude on this record that the Legislature would not take advantage of an opportunity to consider a new map now that we have affirmed the district court's conclusion that the Plaintiffs have a likelihood of success on the merits. Federalism concerns are heightened in the present context: "even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.' " *McDaniel v. Sanchez*, 452

U.S. 130, 150 n.30, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) (opinion of White, J.)).

The Court's continuous urging of caution convinces us to allow the Louisiana Legislature until January 15, 2024, to enact a new congressional redistricting plan. The State has not formally requested that opportunity, so we direct counsel for the defendant state officials to inform the district court if they become aware that no special session of the Legislature will be called for this purpose or, if called, it becomes clear no new map will be approved. We anticipate that counsel for the defendant state officials, as officers of the court, will act in good faith and inform the district court of either as soon as possible.

CONCLUSION

The district court is to conduct no substantive proceedings until the earliest of (1) the completion of legislative action, (2) notice indicating the Legislature will not create new districts, or (3) January 15, 2024. Should the Legislature be considering adopting a new map at that deadline, the district court has discretion to provide modest additional time, though not of such length as to prevent the district court from timely completing its work. The district court is not prevented by our opinion from conducting proceedings to schedule future proceedings. This court's panel that ruled on the mandamus directed further scheduling in the case had to be "pursuant to the principles enunciated herein." *In re Landry*, 83 F.4th at 308. We wish to avoid potential confusion from directives from two panels of our court if any differences are perceived, though we see none. Future district court scheduling needs to follow only the guidance established in this opinion.

If the Legislature adopts a new districting plan and it becomes effective, then that map will be subject to any potential new ***602** challenges. If no new plan is adopted, then the district court is to conduct a trial and any other necessary proceedings to decide the validity of the H.B. 1 map, and, if necessary, to adopt a different districting plan for the 2024 elections. The parties can advise the district court as to the necessary timing for completion of such a trial, with allowance for the time for appellate review.

Preliminary injunction VACATED and cause REMANDED to district court for proceedings consistent with this opinion.

All Citations

86 F.4th 574

Footnotes

1 Joint Rule 21 was adopted by the approval of H. Con. Res. 90, 2021 Reg. Sess., eff. June 11, 2021. *See* http://legis.la.gov/legis/Law.aspx?d=1238755.

2 The United States Senate, in its 1982 Voting Rights Act amendments report, referred to the factors identified in this court's decision in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), *rev'd and remanded sub nom. Marshall v. Edwards*, 582 F.2d 927 (5th Cir. 1978). *See* Report, Voting Rights Extension, S.R. Rep. 97-417 (1982), 23, 28-29, reprinted in 13449 U.S. CONG. SERIAL SET (1982). In 1986, the *Gingles* Court adopted those factors and a few others to consider in vote-dilution cases. *Gingles*, 478 U.S. at 36 n.4, 106 S.Ct. 2752.

3 The State does not argue for reversal on the basis that it was given inadequate time to prepare its case prior to the issuance of the preliminary injunction. It did make that argument to the panel that granted a mandamus stopping the scheduling of a hearing on a remedy for the preliminary injunction. *In re Landry*, 83 F.4th at 305. The issue not having been raised with us, we do not consider it. We are ordering that the district court now conduct a trial, allowing any deficiencies in the 2022 hearing to be corrected.

4 The Equal Protection Clause of the Fourteenth Amendment can only be violated when there is state action. U.S. Const. amend. XIV, § 1. Although the Plaintiffs' illustrative maps were not state action and do not constitute an Equal Protection violation, a legislatively enacted map would be subject to Equal Protection review. *Robinson*, 605 F. Supp. 3d at 836. Thus, we discuss the Equal Protection implications.

End of Document

145 Cal.App.4th 660
Court of Appeal, Fifth District, California.

Enrique SANCHEZ et al.,
Plaintiffs and Appellants,
v.
CITY OF MODESTO et al.,
Defendants and Respondents.

No. F048277.
|
Dec. 6, 2006.
|
Review Denied March 21, 2007.
|
Certiorari Denied Oct. 15, 2007.
|
See 128 S.Ct. 438.

Synopsis

Background: Latino voters filed action against city under the California Voting Rights Act (CVRA), alleging that because of racially polarized voting in the city, they are precluded from electing any candidates in the city's at-large city council elections. The Superior Court of Stanislaus County, No. 347903, Roger M. Beauchesne, J., granted city's motion for judgment on the pleadings after ruling that the CVRA was facially invalid under the equal protection clauses of the state and federal Constitutions. Voters appealed.

Holdings: The Court of Appeal, Wiseman, J., held that:

[1] CVRA is race-neutral;

[2] city had third-party standing to maintain equal protection challenge to CVRA;

[3] city failed to show that CVRA was facially invalid;

[4] all persons have standing under CVRA to sue for race-based vote dilution; and

[5] CVRA is not subject to strict scrutiny under equal protection.

Reversed and remanded.

West Headnotes (30)

[1] Election Law Judicial Review or Intervention

California Voting Rights Act (CVRA) is race-neutral; it does not favor any race over others or allocate burdens or benefits to any groups on the basis of race, but simply gives a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system. West's Ann.Cal.Elec.Code §§ 14025–14032.

See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 233.

2 Cases that cite this headnote

[2] Evidence Population; census data

In voting rights case, the Court of Appeal would take judicial notice of the fact, which was revealed by the 2000 census, reporting non-Hispanic Whites as 46.7 percent of state population.

5 Cases that cite this headnote

[3] Appeal and Error Judgment on the pleadings

Appeal and Error Objections and exceptions; demurrer

Appeal and Error Judgment on the pleadings

The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer; Court of Appeal treats as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determines

de novo whether the complaint states a cause of action under any legal theory.

5 Cases that cite this headnote

[4] **Appeal and Error** Theory and Grounds of Decision Below and on Review

Court of Appeal may rely on any applicable legal theory in affirming or reversing a case because it reviews the trial court's disposition of the matter, not its reasons for the disposition.

3 Cases that cite this headnote

[5] **Constitutional Law** Presumptions and Construction as to Constitutionality

Where reasonably possible, courts are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional.

[6] **Statutes** Judicial authority and duty

Judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature.

1 Case that cites this headnote

[7] **Constitutional Law** Necessity of Determination

Constitutional Law Resolution of non-constitutional questions before constitutional questions

Principles of judicial self-restraint require courts to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available.

9 Cases that cite this headnote

[8] **Action** Persons entitled to sue

The issue of standing may be raised at any time.

2 Cases that cite this headnote

[9] **Constitutional Law** Equal Protection

Rule barring cities from mounting equal protection challenges to state statutes is subject to an exception for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[10] **Constitutional Law** Equal Protection

Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[11] **Constitutional Law** Elections

Constitutional Law Elections, Voting, and Political Rights

The constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that kind may reinforce racial stereotypes and threaten to undermine the system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole, and individual voters are entitled to assert this interest through litigation testing state laws. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[12] **Constitutional Law** Elections

City had third-party standing to maintain equal protection challenge on behalf of its citizens to state law giving a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system; the relationship between the city and individual citizens or

voters was of the appropriate kind, city voters had rejected district-based elections by a large margin in a recent referendum, there were genuine obstacles to citizens asserting their own rights, and a showing of impossibility was not required. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[13] **Constitutional Law** Differing levels set forth or compared

A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right; otherwise, the classification is subject only to rational-basis review. U.S.C.A. Const.Amend. 14.

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

Race is a suspect classification subject to strict scrutiny under the equal protection clause. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[15] **Constitutional Law** Voting and political rights

The right to vote is a fundamental right under the equal protection clause. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[16] **Constitutional Law** Differing levels set forth or compared

A law subject to strict scrutiny under equal protection is upheld only if it is narrowly tailored to promote a compelling governmental interest, while under rational-basis review, a law need only bear a rational relationship to a legitimate governmental interest. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law** Facial invalidity

A facial constitutional challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid.

5 Cases that cite this headnote

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

Election Law In general; power to prohibit discrimination

City failed to show that the California Voting Rights Act (CVRA), permitting voters to challenge racially polarized voting in the city if they were precluded from electing any candidates in the city's at-large city council elections, was facially invalid under equal protection, where they failed to show that the CVRA could be validly applied under no circumstances. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[19] **Constitutional Law** Elections, Voting, and Political Rights

Election Law Dilution of voting power in general

California Voting Rights Act (CVRA) vote-dilution cause of action differs from the Federal Voting Rights Act (FVRA) version in that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated; differences do not introduce a racial classification or a burden on the right to vote, however, and the facial terms of the statute thus are not subject to strict scrutiny under equal protection, only rational-basis review applies, and the CVRA readily passes it. West's Ann.Cal.Elec.Code §§ 14025–14032; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

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

A law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny under equal protection even if persons of all races bear the burden or receive the benefit equally. U.S.C.A. Const.Amend. 14.

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

A statute is not automatically subject to strict scrutiny because it involves race consciousness if it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. U.S.C.A. Const.Amend. 14.

[22] **Election Law** Racial and language minorities in general

The classification "language minority group" in the Federal Voting Rights Act (FVRA) does not define any group in terms of language, but simply identifies four specific racial or ethnic groups, American Indians, Asian Americans, Alaskan Natives, and Hispanics, as belonging to a protected class; definition refers to these as racial or ethnic groups, not in terms of their language, and the category "language minority group" was added to the FVRA for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

[23] **Election Law** Parties; standing

All persons have standing under the California Voting Rights Act CVRA to sue for race-based vote dilution because all persons are members of a race. West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[24] **Election Law** In general; power to prohibit discrimination

California Voting Rights Act (CVRA) is not an affirmative action statute because, unlike affirmative action laws, it does not identify any races for conferral of preferences. West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[25] **Constitutional Law** Equality of Voting Power (One Person, One Vote)

The California Voting Rights Act (CVRA) is not subject to strict scrutiny under equal protection because it imposes liability on the basis of voting; while the CVRA requires a showing of racially polarized voting as an element of liability, that does not mean any person or group of people is held liable for voting or for how they voted, as the liability is that of the government entity that maintains the at-large voting system, and it is imposed because of dilution of a groups' votes. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Elec.Code §§ 14025–14032.

2 Cases that cite this headnote

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

California Voting Rights Act (CVRA) does not burden anyone's right to engage in racially polarized voting, but only makes racially polarized voting part of the predicate for a government entity's liability for racial vote dilution; effect of racially polarized voting, the election of monoracial city councils and the like, may be and is intended to be reduced by the application of the CVRA, but no voter has a right to a voting system that chronically and systematically brings about that effect. West's Ann.Cal.Elec.Code §§ 14025–14032.

4 Cases that cite this headnote

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

A facially neutral law is subject to strict scrutiny under equal protection if it was adopted for a racially discriminatory purpose. U.S.C.A. Const.Amend. 14.

[28] **Constitutional Law** Affirmative action in general

A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose under equal protection no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory, although an intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. U.S.C.A. Const.Amend. 14.

[29] **Constitutional Law** Necessity of Determination

A court should not decide constitutional questions unless required to do so.

[30] **Constitutional Law** Facial invalidity

A court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation, which is justified only where the statute could be validly applied under no circumstances.

5 Cases that cite this headnote

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***665 OPINION**

WISEMAN, J.

The trial court granted the defense's motion for judgment on the pleadings after ruling that the California Voting Rights Act of 2001 was facially invalid under the equal protection clauses of the state and federal Constitutions. It entered judgment against plaintiff Latino voters, who allege that, because of racially polarized voting in Modesto, they are precluded from electing any candidates in the city's at-large city council elections. No evidence has been presented in support of or in opposition to this claim. Rather, at a preliminary stage of the litigation, the trial court struck down the CVRA, ruling that any possible application would necessarily involve unconstitutional racial discrimination. As we will explain, Modesto's arguments do not support disposing of the Legislature's act in this summary manner.

Courts make two kinds of decisions about the constitutionality of laws: decisions about whether a law is

invalid on its face and in all of its conceivable applications (called "facial" invalidity), and about whether a particular application of a law is invalid (called "as-applied" invalidity). In this case, the City of Modesto attempted to show that the CVRA is unconstitutional because it is facially invalid. Modesto's arguments cannot establish facial invalidity. The city may, however, use similar arguments to attempt to show *as-applied* ****826** invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory.

[1] ***666** Why do Modesto's arguments fail to show that the CVRA is facially unconstitutional? Modesto takes the position that the CVRA is unconstitutional because it uses "race" to identify the polarized voting that causes vote dilution and prevents groups from electing candidates. Modesto claims that this use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups. However, this is not an accurate characterization of what the CVRA requires. The CVRA is raceneutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system—like the election system used in Modesto. In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act.

[2] The reality in California is that no racial group forms a majority.[1] As a result, *any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities. Both demographic situations exist in California, even within our own San Joaquin Valley, and the CVRA applies to each in exactly the same way.

The trial court also found facially unconstitutional the portion of the CVRA that allows attorney fees to be awarded to prevailing plaintiffs. The trial court reached this issue even though it was moot—plaintiffs never had an opportunity to seek attorney fees, since they lost—and the city only briefed the issue after the trial court asked it to do so. Further, in reaching its decision, the court focused on an improbable set of hypothetical facts. The asserted invalidity of a single hypothetical application is not a proper basis for finding the fee clause invalid on its face.

The judgment is reversed and the case is remanded to the trial court.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs are Latino voters who reside in Modesto. They filed a complaint in Superior Court on June 3, 2004, alleging that, because of racially polarized voting, the city's at-large method of electing city council members diluted ***667** their votes. The complaint named as defendants the City of Modesto, the city clerk, the mayor, and each member of the city council.

According to the complaint, in Modesto's at-large election system, candidates for city council run for individual seats to ****827** which numbers are arbitrarily assigned and for each of which all the city's voters may vote. To win, a candidate must receive a majority of the votes cast for the seat for which he or she has chosen to run. A runoff between the top two vote-getters for a seat occurs if no candidate receives a majority. The complaint alleges that this system, combined with a pattern of racially polarized voting, regularly prevented Latino voters from electing any candidates of their choice or influencing city government. Although Latinos were 25.6 percent of the city's population of 200,000, only one Latino had been elected to the city council since 1911.

The complaint alleged one cause of action, a violation of the CVRA (Elec.Code, §§ 14025–14032),[2] and prayed for the imposition of a district-based system as a remedy. The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election...." (§§ 14027, 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Some background on federal voting rights law is helpful to provide context for the CVRA. Like the CVRA, section 2 of the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973) creates liability for vote dilution. A violation of the FVRA is established if "the political processes leading to nomination or election in [a] State or political subdivision [of a state] are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (42 U.S.C. § 1973(b).) Amendments to the FVRA passed by Congress in 1982 made it clear that intentional discrimination by officials is not required to show a violation. (*Shaw v. Reno* (1993) 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511(*Shaw*);*Thornburg v. Gingles* (1986) 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25(*Gingles*).) Later, after noting that it has "long recognized" that at-large elections and multi-member districts can " ' "minimize or cancel out the voting strength" ' " of minorities (*Gingles, supra,* at p. 47, 106 S.Ct. 2752), the Supreme Court delineated the elements of a vote-dilution ***668** violation under the FVRA:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at pp. 50–51, 106 S.Ct. 2752 (fn. omitted).)

Section 2 of the FVRA does not allow states to use race however they want to in remedying vote dilution. In fact, the Supreme Court has recognized constitutional limitations on race-based districting plans adopted by state and local governments attempting to avoid section 2 liability. For example, in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the court considered a new district map for the State of North Carolina, created by the ****828** state legislature after the results of the 1990 census gave the state a right to an additional member of the House of Representatives. The new districting plan included two majority-Black districts. The plaintiffs claimed the plan constituted an unconstitutional racial gerrymander. (*Id.* at pp. 633–634, 641, 113 S.Ct. 2816.) Among the justifications the state offered for the plan was that the two majority-Black districts were needed to avoid liability for vote dilution under section 2 of the FVRA. (*Shaw, supra,* at p. 655, 113 S.Ct. 2816.) Reversing the trial court's order dismissing the case, the Supreme Court held that the plaintiffs had stated a valid claim for relief under the equal protection clause of the Fourteenth Amendment. (*Shaw, supra,* at pp. 637–639, 642, 113 S.Ct. 2816.) It stated that, because the majority-Black districts' shapes were so bizarre, they could not "rationally ... be understood as anything other than an effort to separate voters into different districts on the basis of race," and the redistricting plan should be subjected by the trial court to strict scrutiny, just like "other state laws that classify citizens by race." (*Id.* at pp. 644, 649, 113 S.Ct. 2816.)

Later cases explained that a finding that race was the "predominant" factor in creating a district—to which other factors were "subordinated"—is what triggers strict scrutiny. (*Bush v. Vera* (1996) 517 U.S. 952, 958–959, 116 S.Ct. 1941, 135 L.Ed.2d 248 (plur. opn. of O'Connor, J.) (*Vera*).) *Shaw* and its progeny therefore stand for the following proposition: While state and local governments are commanded not to permit racial vote dilution that violates section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation unless that use of race passes strict scrutiny. The court has assumed without deciding that race-conscious measures undertaken to avoid section 2 liability pass strict scrutiny if those measures use race no more than is reasonably necessary to achieve section 2 compliance. (*Vera, supra,* 517 U.S. at pp. 976–979, 116 S.Ct. 1941.)

***669** The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the *Gingles* requirement that, to establish *liability* for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible. That said, the bill that ultimately became the CVRA did intend to allow geographical compactness to be a consideration at the *remedy* stage. A bill analysis prepared by staff for the Assembly Committee on Judiciary reflects this fact:

> "This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* [*v. Gingles, supra,* 478 U.S. 30, 106 S.Ct. 2752] requirements without an additional showing of geographical compactness.... This bill recognizes that geographical concentration is an appropriate question at the *remedy* stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill

puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (italics added).)

****829** Another point emphasized in the legislative history is California's lack of a racial majority group. The Assembly Judiciary Committee analysis says “[t]he author states that [the bill] ‘addresses the problem of racial block voting,’ which is particularly harmful to a state like California due to its diversity.... In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction....” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

The bill ultimately became sections 14025 to 14032 of the Elections Code. Here is a synopsis of those provisions:

- Section 14027 sets forth the prohibited government conduct:

  “An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.”

- A protected class is a class of voters “who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.).” (§ 14026, subd. (d).)

***670** - Section 14032 gives a right of action to voters in protected classes.

- Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)

- The court shall “implement appropriate remedies, including the imposition of district-based elections,” if it finds liability. (§ 14029.)

- Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

According to plaintiffs, the CVRA enlarges the potential for relief beyond that available under the FVRA in a number of ways, of which the elimination of the geographically compact majority-minority district requirement as an element of liability is only the beginning. First, freed of that requirement, a court could craft a remedy involving a crossover or coalition district. A crossover district is one in which, although members of the plaintiffs' group do not constitute a majority, that group can elect candidates of its choice by joining forces with dissident members of the racial majority who also live in the district. A coalition district is similar, except that members of the plaintiffs' group join forces with members of another racial minority group.

Second, a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems. In one of these, called cumulative voting, each voter has as many votes as there are open seats and may distribute them among several candidates or give them all to one candidate. In a cumulative voting system, a politically cohesive but geographically dispersed minority ****830** group can elect a single candidate by giving all its votes to that candidate, although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.

Defendants in this case filed a motion for judgment on the pleadings, arguing that the CVRA was facially invalid under the equal protection clause of the Fourteenth Amendment and article I, section 7 (i.e., the equal protection provision) of the California Constitution. In response to a request by the trial court, defendants filed a supplemental brief arguing that the ***671** CVRA's attorney-fee provision also violated article XVI, section 6, of the California Constitution, which prohibits gifts of public funds. The trial court agreed with defendants on both points. It granted the motion and entered a judgment of dismissal.

DISCUSSION

[3] **[4]** The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972, 14 Cal.Rptr.3d 787.) We may rely on any applicable legal theory in affirming or reversing because we " 'review the trial court's disposition of the matter, not its reasons for the disposition.' " (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065, 20 Cal.Rptr.3d 562.)

[5] **[6]** **[7]** Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60, 195 P.2d 1;*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254, 125 Cal.Rptr.2d 337.) Even judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature.(*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660–661, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, 18 Cal.Rptr.3d 492.)

I. City's standing to challenge statute

As a threshold issue, plaintiffs contend that defendants are not entitled to bring their constitutional challenge to the CVRA. We disagree. Plaintiffs rely on a settled line of cases barring cities from mounting equal protection challenges to state statutes, but a second line of cases establishes an exception, into which this case falls. In light of our conclusion that defendants' equal protection challenge fails on its merits, we could decide this appeal without reaching the standing issue. We choose to address it, however, because the equal protection issue will likely arise on remand if the case reaches the remedy stage, and the standing question will surface again.

[8] Defendants moved to strike the footnote in plaintiffs' reply brief in which standing was first raised and argued that we should not address it. We ***672** disagree because standing can be raised at any time. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745, 30 Cal.Rptr.3d 230; ****831** *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1251, 15 Cal.Rptr.3d 344;*People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2, 7 Cal.Rptr.2d 290.) The issue of standing here does not come up in the traditional context, as we shall explain; however, it is sufficiently similar to warrant application of the rule that it may be raised at any time.

Further, defendants have had two opportunities to brief the issue. They did so first in their motion to strike the footnote, where they requested leave to submit additional briefing, and included a supplemental brief as a section of their motion. This request is granted and the supplemental discussion in the motion is deemed filed. Defendants also submitted a supplemental brief on the issue in response to our briefing letter dated June 30, 2006. For these reasons, defendants cannot legitimately claim to be prejudiced by any lack of opportunity to inform the court of their position. We hold that addressing the issue is appropriate and deny the motion to strike.[3] We now turn to the merits.

Plaintiffs invoke the "well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star–Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6, 227 Cal.Rptr. 391, 719 P.2d 987(*Star–Kist*).) The concept of standing at issue here is not the usual one limiting the rights of plaintiffs, but a special one pertaining to cities and counties attempting, as plaintiffs or defendants, to challenge state laws:

> "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." (*Star–Kist, supra,* 42 Cal.3d at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987, fn. omitted.)

The rule against city and county standing in cases of this kind derives from the United States Supreme Court's holdings in *Williams v. Mayor* (1933) 289 U.S. 36, 40, 53 S.Ct. 431,

77 L.Ed. 1015(*Williams*) and a number of earlier cases. In *Williams,* the Maryland Legislature exempted a railroad from local taxes. (*Id.* at pp. 37–38, 53 S.Ct. 431.) The railroad was in the hands of a receiver ***673** appointed by a federal district court. Two cities filed claims in the receivership proceedings in the district court seeking taxes due. They challenged the tax-exemption statute under the equal protection clause of the Fourteenth Amendment. (*Williams, supra,* 289 U.S. at pp. 39–40, 53 S.Ct. 431.) The Supreme Court reversed a lower court decision invalidating the statute. Its explanation of this holding is simply: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Id.* at p. 40, 53 S.Ct. 431.) The court cited several of its own earlier cases, none of which explained the rule in any greater detail. (See, e.g., *Newark v. New Jersey* (1923) 262 U.S. 192, 196, 43 S.Ct. 539, 67 L.Ed. 943 [city not entitled to raise 14th Amend. equal protection challenge to ****832** state's imposition of water use fee]; *Trenton v. New Jersey* (1923) 262 U.S. 182, 185–188, 192, 43 S.Ct. 534, 67 L.Ed. 937 [city not entitled to challenge same fee under due process clause of 14th Amend. or under contract clause of art. I, § 10, of the U.S. Const.].)

California courts have applied the rule in a variety of contexts. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209, 282 P.2d 481 [city cannot rely on contract clause to obtain invalidation of state statute allegedly impairing preexisting contract between city and state]; *City of Burbank v. Burbank–Glendale–Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380, 85 Cal.Rptr.2d 28 [airport authority, as political subdivision of state, had no standing to challenge under due process clause of 14th Amend. state statute allowing city to review authority's development plans]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296–297, 268 Cal.Rptr. 219(*McMahon*) [county had no power to challenge under due process clause of 14th Amend. a state law requiring it to contribute county funds for welfare payments]; *City of Los Angeles v. City of Artesia* (1977) 73 Cal.App.3d 450, 457, 140 Cal.Rptr. 684 [City and County of Los Angeles could not seek invalidation under due process clause of 14th Amend. or contract clause of retroactive application of state law limiting amount counties could charge Lakewood Plan cities for police protection].) The Ninth Circuit in California has applied the rule as well. (*City of South Lake Tahoe v. California Tahoe* (9th Cir.1980) 625 F.2d 231, 233–234 [city lacked standing to challenge under 14th Amend. a planning agency's land use rules promulgated pursuant to state statute].)

The California Supreme Court has held that the no-standing rule does not apply to a political subdivision's claim that a state statute encroaches on the power of Congress to regulate interstate commerce under the commerce clause of the United States Constitution. (*Star–Kist, supra,* 42 Cal.3d at pp. 4, 8–9, 227 Cal.Rptr. 391, 719 P.2d 987.) It relied in part on federal cases holding that the no-standing rule also does not apply to challenges based on the supremacy clause of the United States Constitution.(*Id.* at p. 8, 227 Cal.Rptr. 391, 719 P.2d 987.) The court did not, however, disturb the ***674** doctrine with respect to the equal protection and due process clauses of the Fourteenth Amendment and the contract clause, the areas in which it traditionally has been applied. (*Id.* at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987.)

[9] A second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. The first of these cases, *Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777, 192 Cal.Rptr. 782(*Drum*), involved a county's due-process challenge to its own inadequate notice to a building project's neighbors of a zoning-variance hearing. The county approved a request for a variance to enable a homeowner to build a garage. The notices of the variance hearing received by the neighbors described the garage. Later, the owner decided to add a second story with living quarters to the garage and requested a permit for the new design. The county issued the permit. When construction began, neighbors complained that they had not been informed about the second story. The county reversed its decision to issue the permit and issued a stop-work order. In the ensuing litigation between the owner and county, the county argued that the permit it issued for a two-story garage was invalid because it was not within the scope of the variance ****833** of which the neighbors had received notice; the neighbors' due process rights had therefore been violated. (*Id.* at pp. 779–781, 782, 192 Cal.Rptr. 782.) We agreed with this position, rejecting the owner's argument that the county was not entitled to assert individual citizens' due process rights:

> "It would serve no legitimate interest to hold that appellant may not invoke lack of notice to its citizens in order to enjoin construction of respondents' building. Surely it should be able to invoke its own requirements of notice in order to preserve the public interest in preserving community patterns established by zoning laws." (*Drum, supra,* 144 Cal.App.3d at pp. 784–785, 192 Cal.Rptr. 782.)

Admittedly, *Drum* did not involve a local government's challenge to a state law and dealt with statutory rather than constitutional due process rights. (*Drum, supra,* 144 Cal.App.3d at p. 783, 192 Cal.Rptr. 782.) It did not discuss or cite any of the no-standing cases we mention above. But the next case in the line, *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 264 Cal.Rptr. 499(*Selinger*), relied on *Drum,* among other authorities, in expressly asserting an exception to the no-standing rule.

In *Selinger,* a subdivision developer obtained a writ of mandate from the superior court requiring a city to acknowledge that his subdivision map was deemed approved by operation of law—because one year had elapsed without city action on his application—under the Permit Streamlining Act, a state statute. (*Selinger, supra,* 216 Cal.App.3d at p. 263, 264 Cal.Rptr. 499.) Among other things, the city argued that the Permit Streamlining Act violated ***675** adjacent landowners' right to due process of law by allowing a development plan to be automatically approved without notice and a hearing. (*Id.* at p. 270, 264 Cal.Rptr. 499.) The Court of Appeal agreed, rejecting the developer's argument that the city lacked standing to contest the validity of the statute. The court noted the no-standing rule as stated in *Star–Kist, supra,* 42 Cal.3d at page 6, 227 Cal.Rptr. 391, 719 P.2d 987, but it cited *Drum, supra,* 144 Cal.App.3d 777, 192 Cal.Rptr. 782 in support of making an exception. (*Selinger, supra,* 216 Cal.App.3d at pp. 270, 271, 264 Cal.Rptr. 499.)

More powerfully, the court relied on the Supreme Court's doctrine of third-party standing as set forth in *Singleton v. Wulff* (1976) 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. In that case, the Supreme Court explained that constitutional rights usually must be asserted by the person to whom they belong, but that a litigant may assert them on behalf of a third party under exceptional circumstances. (*Id.* at p. 114, 96 S.Ct. 2868.) In addition to the requirement that the litigant must sustain an injury of its own, two factual elements are relevant in determining whether the litigant should be allowed to assert a third party's rights. One tests whether the litigant and third party are related closely enough to ensure that the litigant's interest in asserting the right is genuine and its advocacy will be effective:

> "The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (*Singleton v.* ****834** *Wulff, supra,* 428 U.S. at pp. 114–115, 96 S.Ct. 2868.)

The second element concerns the reasons why the third party is not asserting or cannot assert the right in question for itself:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." (*Singleton v. Wulff, supra,* 428 U.S. at pp. 115–116, 96 S.Ct. 2868.)

In *Selinger,* the Court of Appeal thought the two elements supported the city's standing. Local citizens' right to notice and a hearing was "inextricably bound up" with the city's interest in reviewing and conditioning subdivision applications on its own timetable based on local needs. (*Selinger, supra,* 216 Cal.App.3d at p. 271, 264 Cal.Rptr. 499.) Also, there was a high obstacle to local citizens' ***676** ability to litigate their rights: Without notice, adjacent landowners would be likely to miss the 90–day statutory deadline for legal challenges to the approval of subdivision maps. (*Ibid.*)

The Court of Appeal applied the exception to the no-standing rule again in *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 21 Cal.Rptr.2d 453(*Central Delta Water*). Two local water agencies sued the State Water Resources Control Board, mounting an equal-protection challenge to discharge fees imposed on them under a state statute and regulations. (*Id.* at pp. 627–629, 630, 21 Cal.Rptr.2d 453.) The Court of Appeal rejected the defendant's claim that, as political subdivisions, the agencies lacked standing to challenge the statute and regulations. It stated that the equal protection rights of the agencies' constituent water users were inextricably bound up with the agencies' duty to supply water. (*Id.* at pp. 630–631, 21 Cal.Rptr.2d 453.) The court did not explain what obstacles prevented the constituents from suing on their own behalf.

[10] We believe these courts have reasoned correctly in establishing an exception to the no-standing rule for

those situations in which the usual standards for third-party standing are satisfied. As previously mentioned, we acknowledge that there was no challenge to a state statute in *Drum,* and therefore the principle that a political subdivision cannot challenge the will of its creator was not implicated. Consequently, the citation of *Drum* by the *Selinger* court was a stretch. But the reasoning stated in *Selinger* and applied in *Central Delta Water* is sound. Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it.

We recognize that the third-party-standing doctrine is the key to the exception; that the doctrine is addressed to the standing of plaintiffs to sue in federal court; and that we deal here neither with the standing of plaintiffs nor with federal court. The doctrine is a sound basis for the exception in spite of these omissions. The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their ****835** creator, the state. This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf.

[11] This case falls into the exception to the no-standing rule established in these cases. As the Supreme Court explained in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that ***677** kind may "reinforce ... racial stereotypes and threaten ... to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Id.* at p. 650, 113 S.Ct. 2816.) Individual voters are entitled to assert this interest through litigation testing state laws, as they did in *Shaw.* The city's assertion of equal protection rights in this case is best understood as a means of asserting those rights on behalf of its citizens.

[12] The requirements of third-party standing are satisfied here. First, the relationship between the city and individual citizens or voters is of the appropriate kind. The city's vigorous litigation up to this point has shown its zealousness in asserting the claimed right. Plaintiffs' complaint has informed us that city voters rejected district-based elections by a large margin in a referendum in 2001, so the city likely is acting with substantial constituent support for its position. A cross-complaint filed by the individual defendants, seeking a judgment declaring the CVRA unconstitutional, shows that at least those individuals want to have the city pursue the matter on their behalf. Finally, the claimed equal-protection interest of individual citizens is "inextricably bound up" (*Singleton v. Wulff, supra,* 428 U.S. at p. 114, 96 S.Ct. 2868) with the city's interest in continuing its present election system.

Second, there are genuine obstacles to citizens asserting their own rights. It is not clear how a lawsuit could be structured to enable citizens to mount the facial challenge made by the city. Prior to any change in the city's voting system, whom would these citizens sue, and for what? Making citizens wait until after some remedy is ordered or adopted would involve other obstacles, including the possibility that elections could be held under the remedy before the litigation is concluded. Even after adoption of a change in the system, an individual voter's stake in the matter would be small in relation to the economic burdens of litigation, and this could be a substantial deterrent. (See *Powers v. Ohio* (1991) 499 U.S. 400, 415, 111 S.Ct. 1364, 113 L.Ed.2d 411 [venire person dismissed in criminal case for racially discriminatory reason has little incentive to pursue costly litigation to vindicate his or her equal protection rights, so criminal defendant must be permitted to assert those rights].) While these obstacles would not make it impossible for individual voters to sue the city if some alteration in its voting system is adopted, a showing of impossibility is not required. (See *Singleton v. Wulff, supra,* 428 U.S. at p. 116, fn. 6, 96 S.Ct. 2868 [dis. opn. argued that third parties must face insuperable obstacles; maj. replied that "our cases do not go that far"].)

For these reasons, we reject plaintiffs' contention that defendants are not entitled to assert an equal protection challenge to the CVRA. The city is entitled to do so on behalf of its citizens.

***678** *II. Equal protection*

A. Principles

We begin our examination of defendants' equal-protection claim with a brief review ****836** of the basic constitutional principles at issue. Federal and California equal-protection standards are not the same for all purposes. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 652–653, 88 Cal.Rptr.2d 283, 982 P.2d 154 (dis. opn. of Kennard, J.); *Butt v. State of California* (1992) 4 Cal.4th 668, 683, 685, 15 Cal.Rptr.2d

480, 842 P.2d 1240.) Here, however, the parties' briefs rely on federal case law and do not claim that any different standards apply to these facts under the state Constitution. We will, therefore, focus on principles developed in federal cases.

1. Suspect classifications, fundamental rights, strict scrutiny, and rational-basis review

[13] [14] [15] A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right. (*Plyler v. Doe* (1982) 457 U.S. 202, 216–218 & fns. 14 & 15, 102 S.Ct. 2382, 72 L.Ed.2d 786.) Otherwise, the classification is subject only to rational-basis review. (*Vacco v. Quill* (1997) 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834.) Race is a suspect classification (*Johnson v. California* (2005) 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949(*Johnson*)), and the right to vote is a fundamental right (*Kramer v. Union School District* (1969) 395 U.S. 621, 626–628, 89 S.Ct. 1886, 23 L.Ed.2d 583) for equal protection purposes.

[16] A law subject to strict scrutiny is upheld only if it is *narrowly tailored* to promote a *compelling* governmental interest. (*Johnson, supra,* 543 U.S. at p. 505, 125 S.Ct. 1141.) Under rational-basis review, by contrast, a law need only bear a *rational relationship* to a *legitimate* governmental interest. (*Vacco v. Quill, supra,* 521 U.S. at p. 799, 117 S.Ct. 2293.) (The third level of review—intermediate scrutiny, which applies to sex discrimination—is not at issue in this case.)

2. Facial invalidity standard

[17] Defendants' challenge claims that the statute is facially invalid. In *United States v. Salerno* (1987) 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697(*Salerno*), the Supreme Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The court explained that the fact the federal Bail Reform Act, subject in that case to a substantive due-process ***679** challenge, "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Ibid.*)

Defendants assert that the *Salerno* standard does not apply here because *Salerno* was not cited in certain cases involving affirmative action laws (see, e.g., *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 [municipal ordinance establishing affirmative action program for city contracting]); laws creating specific election districts (see, e.g., *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 [bizarrely shaped congressional district boundaries designed to create majority-Black districts]); and laws involving explicit use of racial segregation (see, e.g., *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 [racial segregation of prisoners during initial evaluation]). Various justices of the Supreme Court, not amounting in any instance to a majority, have taken differing positions on the scope and applicability of the *Salerno* doctrine. ****837** (*Chicago v. Morales* (1999) 527 U.S. 41, 55, fn. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (conc. opn. of Stevens, J., joined by Souter, J. and Ginsburg, J.) [*Salerno* formulation is dictum and need not be followed, especially by state courts]; *id.* at pp. 77–80 & fns. 1–3, 119 S.Ct. 1849 (dis. opn. of Scalia, J.) [*Salerno* states the correct standard for all cases but First Amendment overbreadth challenges].)

[18] The only cases of which we are aware where it has been definitively stated that a facial challenge could succeed on a showing falling short of the *Salerno* standard, however, are those where the overbreadth of a law violated the First Amendment by chilling protected speech (*Salerno, supra,* 481 U.S. at p. 745, 107 S.Ct. 2095) and where a law imposed an undue burden on the right to have an abortion (*Planned Parenthood of Southern Arizona v. Lawall* (9th Cir.1999) 180 F.3d 1022, 1026 [asserting that in *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, U.S. Supreme Court overruled *Salerno* in context of facial challenges to abortion restrictions]). Outside these areas, California courts apply a *Salerno*-type approach to facial constitutional challenges in general. (See, e.g., *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122;*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338, 84 Cal.Rptr.2d 425, 975 P.2d 622;*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) We agree there is no warrant for refusing to apply *Salerno* outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so. (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir.2003) 344 F.3d 959, 972.) Consequently, we hold that the *Salerno* standard for facial invalidation applies here, and defendants can succeed in their facial challenge only

by showing that the CVRA can be validly applied under no circumstances.

*680 ***B. Analysis***

With this background, the two basic reasons for rejecting defendants' challenge to the CVRA are easy to state. First, because the statute is nondiscriminatory, it is subject only to rational-basis review, not strict scrutiny; and it passes rational-basis review. Second, although the *Shaw–Vera* line of cases reveals the potential for unconstitutional applications of the statute, that potential does not show there can be no valid applications and therefore cannot establish that the statute is facially invalid. We consider these two reasons in turn.

1. The CVRA is nondiscriminatory, not subject to strict scrutiny, and passes rational basis review

Like the FVRA, the CVRA involves race and voting, but, also like the FVRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification and does not burden anyone's right to vote. Like the FVRA, the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists.

[19] The CVRA vote-dilution cause of action differs from the FVRA version in important ways, specifically, that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated. The differences do not introduce a racial classification or a burden on the right to vote, however. Therefore, the facial terms of the statute are not subject to strict scrutiny. Only rational-basis review applies, and the CVRA readily passes it. Curing vote dilution is a legitimate government interest and creation ****838** of a private right of action like that in the CVRA is rationally related to it. Major portions of defendants' briefs are devoted to showing that the CVRA fails strict scrutiny. We need not address these points because strict scrutiny does not apply.

a. The CVRA is not a law that imposes a racial classification on individuals and then uses it to confer a burden or benefit on all

Defendants argue that strict scrutiny applies here because it applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways. They rely on cases like *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010(*Loving*) and *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949, which applied strict scrutiny to state laws that employed racial classifications but burdened persons of different races equally. In *Loving,* the Supreme Court invalidated a state law forbidding persons of different races to marry one another. The law ***681** was subject to strict scrutiny even though its burden was generally distributed. (*Loving, supra,* 388 U.S. at p. 8, 87 S.Ct. 1817.) In *Johnson,* a policy of segregating state prison inmates by race during an initial evaluation period was held to be subject to strict scrutiny even though all prisoners were equally affected by it. (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.)

[20] What those cases hold is that a law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny even if persons of all races bear the burden or receive the benefit equally. In *Johnson,* for instance, the court rejected the state's argument that "strict scrutiny should not apply because all prisoners are 'equally' segregated." (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.) It stated that this argument "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.' " (*Ibid.*)

[21] What the cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. The CVRA confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution. The creation of that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification. If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

Defendants argue that these antidiscrimination laws are, in fact, subject to strict scrutiny, but cite no cases subjecting them to it. Lacking that authority, they instead cite lower court cases subjecting federal antidiscrimination laws to analysis under the congruence and proportionality test of *City of Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624(*Boerne*), which they describe as "obviously very similar to strict scrutiny." For example, the court of appeals subjected a provision of Title VII of the federal

Civil Rights Act to a *Boerne* analysis in *In re Employment Discrimination Litigation* (11th Cir.1999) 198 F.3d 1305, 1319–1324.

This argument does not work. The *Boerne* test has nothing to do with strict ****839** scrutiny. It has nothing in particular to do with the equal protection clause. It is about the source of constitutional power for Congress' enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination.

***682** Briefly, the question presented in *Boerne* was whether Congress had authority under section 5 of the Fourteenth Amendment (the amendment's enforcement clause) to enact by statute a standard for protecting the free exercise of religion that was far more stringent than the standard the Supreme Court established under the free exercise clause of the First Amendment in an earlier case. Congress claimed the action was within its power under section 5 of the Fourteenth Amendment to enforce the due process clause of the Fourteenth Amendment, which in turn incorporated the First Amendment and its free exercise clause. (*Boerne, supra,* 521 U.S. at pp. 512–517, 117 S.Ct. 2157.) The court held that Congress lacked this authority because the standard Congress adopted was not congruent and proportional to the scope of the First Amendment right as the court itself had earlier defined it. (*Id.* at pp. 519–520, 532, 117 S.Ct. 2157.)

From this summary, it can be seen that the fact that an antidiscrimination law like Title VII has been subjected by some courts to a *Boerne* analysis does not even remotely imply that laws of that kind violate individuals' rights against discrimination unless they pass strict scrutiny. Defendants go so far as to imply that the only reason strict scrutiny has never been applied to federal antidiscrimination laws is that the *Boerne* test applies to those laws instead; strict scrutiny is the test appropriate for state legislation while *Boerne* applies in federal law. This cannot be true. Strict scrutiny applies to all racially discriminatory laws. It does not apply to antidiscrimination laws because, like CVRA, they are not racially discriminatory.

Defendants argue that the "sky will not fall" if strict scrutiny is applied to antidiscrimination laws. It will not fall because those laws, unlike the CVRA, generally impose liability only upon a showing of intentional discrimination, and for that reason the laws would likely be upheld under strict scrutiny. This argument collapses as soon as it is applied to the FVRA. As noted above, section 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason.

Also unhelpful to defendants is the argument that *Shaw* and *Vera* stand for the proposition that strict scrutiny can be triggered by an anti-vote-dilution law even though it does not burden the rights of the White plaintiffs. Responding to Justice Souter's dissenting view in *Shaw* that race-based districting should not trigger strict scrutiny unless another race's voting strength is harmed, the *Shaw* majority explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular ***683** racial group rather than their constituency as a whole." (*Shaw, supra,* 509 U.S. at p. 650, 113 S.Ct. 2816.) Similarly, in *Vera,* the plurality responded to a dissenting comment by Justice Souter—that race-based, dilution-combating districts do not harm any class of voters—by referring to "harmful and divisive stereotypes" that the use of race may foster even if it does not involve any voting-related ****840** harm to the plaintiffs. (*Vera, supra,* 517 U.S. at pp. 983–984, 116 S.Ct. 1941.)

Contrary to defendants' view, these statements do not mean the CVRA is subject to strict scrutiny even though it does not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote. They only mean that districting plans that use race as the predominant line-drawing factor—and therefore amount to segregation of voters by race—are subject to strict scrutiny. A court might wish to impose that kind of districting plan as a CVRA remedy. Even so, as we will explain, applications of the statute not involving that type of remedy are readily conceivable, so this potential problem is not a basis for a *facial* challenge.

b. The CVRA does not deny anyone standing on the basis of membership in any group

So far we have only addressed the main thrust of defendants' argument in support of applying strict scrutiny: that the statute's reference to race is itself a racial classification. We turn next to a series of related minor arguments. The first of these is based on the trial court's view that the statute is racially discriminatory on its face because its definition of "protected class" excludes some racial or ethnic groups. The CVRA defines a protected class as persons "who are members of a race, color or language minority group, as this class is

referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

The trial court took issue with the inclusion of "language minority group" in this definition. Its objection is based on an error made in reviewing the federal standard that the CVRA incorporates. Its order quoted Title 42 United States Code section 1973b(f)(1), a provision stating congressional findings on the deleterious effects of English-only elections. The provision states that "voting discrimination against citizens of language minorities is pervasive" and that "[s]uch minority citizens are from environments in which the dominant language is other than English." The trial court believed this was the federal statutory definition of "language minority group" to which the CVRA refers. On that basis, it concluded that the CVRA denies standing to English speakers. Then the trial court quoted 28 Code of Federal Regulations part 51.2 (2003), which states that "language minority group" means "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." The court believed this further restricted the meaning of the term, ***684** so as to exclude, for example, speakers of Polish or Portuguese. These restrictions, the court ruled, denied standing to ethnic groups that speak the purportedly excluded languages. That, in turn, triggered strict scrutiny, which the statute failed.

In reality, the regulation the court referred to merely restated the *actual* federal statutory definition of "language minority group," which is found at Title 42 United States Code section 1973***l***(c)(3): "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." This provision uses and defines the precise phrase ("language minority group") contained in the CVRA. The only logical conclusion is that this is the definition the Legislature intended to incorporate. There is no reason to think it also meant to include the language from Title 42 United States Code section 1973b(f)(1) about "environments in which the dominant language is other than English," which does not use the phrase "language ****841** minority group" and which states a congressional finding, not a definition.

[22] Consequently, despite its name, the classification "language minority group" does not define any group in terms of language, and the trial court relied on a mistaken understanding of the statute. The term simply identifies four specific racial or ethnic groups as belonging to a protected class. The definition refers to these as racial or ethnic groups ("persons who are American Indian," etc.), not in terms of their language. As plaintiffs explain, the category "language minority group" was added to the FVRA in 1975 for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." (See Sen.Rep. No. 94–925, 1st Sess. (1975), reprinted in 1975 U.S.Code Cong. & Admin. News, pp. 774, 814 ["The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group...."].)

The four language minority groups are, therefore, on the same footing as Whites, persons of Polish or Portuguese ancestry, or any other racial or ethnic group. In a variety of contexts, the Supreme Court has held that the term "race" is expansive and covers all ethnic and racial groups.(*Rice v. Cayetano* (2000) 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 [15th Amendment's prohibition on abridgment of right to vote on account of race "grants protection to all persons, not just members of a particular race"]; *Saint Francis College v. Al–Khazraji* (1987) 481 U.S. 604, 610, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 [prohibition of racial discrimination in 42 U.S.C. § 1981 protects all persons from discrimination based on their ***685** "ancestry or ethnic characteristics"; court is "quite sure" White people are protected]; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280, 96 S.Ct. 2574, 49 L.Ed.2d 493 [prohibition on discrimination because of race in Title VII applies to Whites and non-Whites alike].) The inclusion of "language minority groups," as defined by the statute, only reinforces the proposition that American Indians, Asian Americans, Alaskan Natives, and Hispanics are among the racial or ethnic groups that can constitute a protected class. It does not deny standing to anyone.

The trial court cited *Polish American Congress v. City of Chicago* (N.D.Ill.2002) 211 F.Supp.2d 1098 for the proposition that "the federal courts have interpreted the definition of protected class under 42 U.S.C. [section] 1973 so as to exclude Polish speakers from those having standing to sue," but that is not what that case held. The court simply stated that Polish–Americans were not one of the four groups included in the statutory definition of "language minority group." (*Polish American Congress v. City of Chicago, supra,* at p. 1107.) The court did not consider whether Polish–Americans had standing under the FVRA as a "race" and the plaintiffs apparently did not argue that they did. A case is

not authority for a proposition it did not consider. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1318, 92 Cal.Rptr.2d 418.)

[23] The trial court's view would likely justify strict scrutiny and facial invalidation if it represented a correct reading of the statute, but it does not. Even if it were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have: All persons have standing under the CVRA to sue for race- ****842** based vote dilution because all persons are members of a race.

c. The CVRA is not an affirmative action law

[24] Defendants characterize the CVRA as an affirmative action statute and rely on affirmative action cases to argue that it is subject to strict scrutiny. The CVRA is not an affirmative action statute because, unlike affirmative action laws the Supreme Court has struck down, it does not identify any races for conferral of preferences. In *Gratz v. Bollinger* (2003) 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, for instance, the Supreme Court applied strict scrutiny and struck down a university's affirmative action admission program. The program conferred 20 points, on a scale of 1 to 150, on applicants belonging to a specified set of racial groups. This advantage could increase a low waitlist score to an automatic admit score. (*Id.* at pp. 251, 255, 123 S.Ct. 2411). In *Richmond v. J.A. Croson Co., supra,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, the court applied strict scrutiny and struck down a city's program of affirmative action in government contracting. The program commanded that 30 percent of the ***686** money spent on city building contracts be paid to subcontracting firms owned by members of a specified set of racial groups.(*Id.* at pp. 477–478, 511, 109 S.Ct. 706.) The CVRA does nothing similar. We cannot subject the CVRA to strict scrutiny on the ground that affirmative action programs are subject to strict scrutiny.

d. The CVRA does not burden the fundamental right to vote

[25] As we have said, strict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right, and voting is treated as a fundamental right in this context. Separately from their racial discrimination argument, defendants contend that the CVRA is subject to strict scrutiny because it "impos[es] liability on the basis of voting...." This is not correct. It is true that the CVRA requires a showing of racially polarized voting as an element of liability, but that does not mean any person or group of people is held liable for voting or for how they voted. The liability is that of the government entity that maintains the voting system, and it is imposed because of dilution of the plaintiffs' votes.

A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, i.e., those that violate the one-person, one-vote rule by having unequal populations. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506.) The CVRA involves nothing similar. Cases reviewing districts created predominantly on the basis of race presumably are another example, even though the opinions in those cases focus on the suspect racial classification rather than on the fundamental right to vote. However, the possibility of some court imposing an unconstitutional remedy under the CVRA in some cases is not, as we have said, a basis for *facial* invalidation.

e. The CVRA does not burden any First Amendment right

Defendants also argue that the CVRA is subject to strict scrutiny because it burdens fundamental rights protected by the First Amendment:

> "Voter preferences that underlie racially polarized voting, moreover, are political views protected against infringement by the First Amendment. The votes themselves are expressions of political preferences about candidates and ballot measures. Bloc voting, then, represents a coalition of political interests ****843** that lie close to the core of the freedom of political association."

[26] Defendants may be correct in arguing that racially polarized voting constitutes political expression protected by the First Amendment. But the CVRA does not burden anyone's right to engage in racially polarized voting. It only makes racially polarized voting part of the predicate for a government ***687** entity's liability for racial vote dilution. In doing so, it is comparable to the FVRA. The *effect* of racially polarized voting—election of monoracial city councils and the like—may be and is intended to be reduced by the application of the CVRA. But no voter has a right to a voting system that chronically and systematically brings about that effect. We do not understand defendants to argue the contrary.

f. The fact that the CVRA addresses a racial issue does not show that the Legislature acted with an invidious purpose

[27] A facially neutral law is subject to strict scrutiny if it was adopted for a racially discriminatory purpose. (*Miller v. Johnson* (1995) 515 U.S. 900, 913, 115 S.Ct. 2475, 132 L.Ed.2d 762.) Defendants argue that, even if the CVRA is facially neutral, it is subject to strict scrutiny because it was "enacted *solely* for racial purposes, i.e., to remedy racial bloc voting in at-large" voting systems. Defendants contend that plaintiffs admit this by "assert[ing] that the [CVRA] is an antidiscrimination statute intended to remedy" racially polarized voting.

[28] This is incorrect for essentially the same reason that defendants are mistaken in claiming that the statute is subject to strict scrutiny because it contains a facial reference to race. A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory. An intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. The CVRA does not, however, have the latter component. Upon a finding of liability, it calls only for "appropriate remedies" (§ 14029), not for any particular, let alone any improper, use of race.

g. Differences between the CVRA and the FVRA do not automatically render the CVRA unconstitutional

Defendants devote almost half of the argument portion of their brief to attempting to show that the CVRA contains "dramatic departures from the FVRA" which amount to an "extraordinary expansion of federal law." To the extent that this may be intended as an independent argument that the CVRA is unconstitutional, it is without merit. There is no rule that a state legislature can never extend civil rights beyond what Congress has provided. State law may, of course, be preempted by federal law if inconsistent with it, but defendants have not made a preemption argument. To the extent that this discussion may be intended to make the narrower point that the CVRA is not ***688** narrowly tailored to effectuate a compelling government interest—i.e., that it fails strict scrutiny—we will disregard it, since we hold that strict scrutiny does not apply.

2. Potential unconstitutional applications cannot show facial invalidity

Defendants' arguments are partially based on Supreme Court cases that struck down specific redistricting plans drawn up partly to avoid racial vote dilution that ****844** might violate section 2 of the FVRA. Because those cases only address specific actions taken by states to cure racial vote dilution (i.e., the creation of particular districts), their impact here relates only to the validity of specific applications of the CVRA—applications that at this point are hypothetical. Under the facial-invalidity standard set forth in *Salerno, supra,* 481 U.S. at page 745, 107 S.Ct. 2095, therefore, the cases cannot establish that the CVRA is facially invalid. (To be sure, defendants contend that none of their arguments are addressed to mere remedies issues and that all are instead addressed to the criteria for liability under the CVRA and prove that those criteria are subject to strict scrutiny. As explained earlier, they are not subject to strict scrutiny.)

Shaw, supra, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, was the first in this line of cases. It held, as mentioned earlier, that a redistricting plan was subject to strict scrutiny because it could not rationally be understood as anything but an effort to separate voters on the basis of race. The plurality opinion in *Vera* made a similar point. There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw–Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.

It is equally apparent that this does not mean the CVRA must pass strict scrutiny in order to withstand a facial challenge. Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute. Defendants' argument, to be successful, would have to be not only that unconstitutional remedies are consistent with the CVRA, but that they are mandated by it. They are not.

III. Gift of public funds

Although no fee motion was ever made, the trial court found the CVRA's attorney-fee provision to be invalid. That provision states as follows:

> "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, ***689** a reasonable attorney's fee consistent with the standards established in *Serrano v. Priest* (1977) 20 Cal.3d 25, 48–49[, 141 Cal.Rptr. 315, 569 P.2d 1303], and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant

> parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." (§ 14030.)

Relying on *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450–451, 123 Cal.Rptr.2d 122(*Jordan*), the trial court ruled that this section violated article XVI, section 6, of the California Constitution, which forbids the Legislature to "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation...." The court interpreted *Jordan* to mean that "[a] lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes."

The court then applied this purported rule to a hypothetical:

> "If a California city has at large city council election plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just ****845** one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). [Citations.] While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid."

[29] The court violated two rules of constitutional decisionmaking in invalidating the section. First, a court should not decide constitutional questions unless required to do so. (*People v. Pantoja, supra,* 122 Cal.App.4th at p. 10, 18 Cal.Rptr.3d 492.) Here, no party moved for attorney fees, so the validity of the fee statute was not at issue. The court should not have addressed or answered the question.

[30] Second, the court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation. Facial invalidation is justified only where the statute could be validly applied under *no* circumstances.(*East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal.4th at p. 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122.) Circumstances in which the objection the court raises would not be present are easy to imagine. If, on remand, the court finds liability *in this case* but is unable to formulate a permissible remedy *in this case,* then the court will ***690** have an opportunity to decide whether the application of section 14030 would be unconstitutional *in this case.* It has not had that opportunity yet. We express no opinion here on whether a fee award would be barred under those circumstances since doing so is premature.

IV. Issues on remand

The parties have raised several issues in this appeal that the trial court never decided and that we need not decide now. We repeat them here for convenience:

- What elements must be proved to establish liability under the CVRA?
- Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?
- Is the court precluded from employing any alternative at-large voting system as a remedy?
- Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote-dilution-remedy cases?

The court's answers to these questions will determine the scope of relief, if any, available to plaintiffs. The logical limit in one direction would be a conclusion that plaintiffs can obtain under the CVRA only the same relief that they could have obtained under the FVRA. The logical limit in the other direction would be the conclusion that, upon proof of racially polarized voting, plaintiffs will be entitled to the most appropriate remedy, among the remedies we have discussed, that does not result in unconstitutionally drawn districts under the Supreme Court's rulings.

DISPOSITION

The judgment is reversed and the case remanded to the trial court for further proceedings. Plaintiffs shall recover their costs on appeal.

****846** Defendants' motion to strike, filed February 10, 2006, is denied. The request for leave to submit supplemental

briefing included in the motion to strike is granted and the supplemental brief incorporated in the motion is deemed filed.

***691** The following requests are granted: Motion of Appellants Requesting Judicial Notice (filed September 15, 2005); Supplemental Motion of Appellants Requesting Judicial Notice (filed January 31, 2006); Second Motion of Respondents Requesting Judicial Notice (filed February 6, 2006); Request for Judicial Notice contained in defendants' Answer to Brief of Amici Curiae Common Cause and FairVote (filed March 22, 2006); Third Motion of Respondents Requesting Judicial Notice (filed July 20, 2006).

HARRIS, Acting P.J., and CORNELL, J., concur.

All Citations

145 Cal.App.4th 660, 51 Cal.Rptr.3d 821, 06 Cal. Daily Op. Serv. 11,187

Footnotes

1 We take judicial notice of this fact, which was revealed by the 2000 census. (See < http://factfinder.census.gov/servlet/QTTable?_bm =y&-qr_ name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&-_ lang =en&-_sse=on> [census table reporting non-Hispanic Whites as 46.7 percent of state population].)

2 Subsequent statutory references are to the Elections Code unless otherwise noted.

3 In addition to the motion to strike and request for leave to submit supplemental briefing, a number of requests for judicial notice are pending. These requests, which we list in the Disposition, are granted.

73 N.Y.2d 629, 541 N.E.2d 18, 543 N.Y.S.2d 18

Margaret A. Sheehy et al., Appellants,

v.

Big Flats Community Day, Inc., et al., Defendants, and American Legion Ernest Skinner Memorial Post 1612, Respondent.

Court of Appeals of New York
100
Argued April 25, 1989;

decided June 6, 1989

CITE TITLE AS: Sheehy v Big Flats Community Day

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court, entered May 25, 1988, which affirmed an order of the Supreme Court (Charles B. Swartwood, J.), entered in Chemung County, partially granting a motion by defendant American Legion Ernest Skinner Memorial Post 1612 for summary judgment and dismissing plaintiff Margaret A. Sheehy's causes of action against that defendant. The following question was certified by the Appellate Division: "Did this court err as a matter of law in affirming the order of the Supreme Court partially granting a motion by defendant American Legion Ernest Skinner Memorial Post 1612 for summary judgment dismissing the complaint against it?"

Sheehy v Big Flats Community Day, 137 AD2d 160, affirmed.

HEADNOTES

Intoxicating Liquors
Sale to Minors
Private Right of Action under Penal Law Section Proscribing Furnishing of Alcoholic Beverages to Minors

(1) Penal Law § 260.20 (4), which makes it a crime for anyone but a parent or guardian to furnish alcoholic beverages to a person who is under the legal purchase age, does not give rise to an implied private right of action in favor of such a person who has been injured as a result of his or her own consumption of alcohol. Accordingly, in an action to recover damages for personal injuries sustained by the minor plaintiff when she was struck by an automobile while crossing a highway after she allegedly was served several beers by defendant in violation of the applicable age limit for purchasing alcoholic beverages, the minor plaintiff's cause of action based upon a violation of section 260.20 (4) was properly dismissed. In determining whether a private right of action may fairly be implied from section 260.20 (4), the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme. Although plaintiff, being under the legal purchase age at the time of the accident, was within the statute's intended protected class, and permitting her civil claim would advance the legislative purpose of deterring the proscribed conduct, recognizing a private right of action in favor of the intoxicated youth under Penal Law § 260.20 (4), would be inconsistent with the evident legislative purpose underlying the scheme embodied in General Obligations Law §§ 11-100 and 11-101: to utilize civil ***630** penalties as a deterrent while, at the same time, withholding reward from the individual who voluntarily became intoxicated for his or her own irresponsible conduct. Section 260.20 (4) cannot, and will not, be used as a predicate for overriding this legislative policy judgment.

Intoxicating Liquors
Right of Action by Person Injured as Result of Voluntary Intoxication

(2) There is no common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication. Accordingly, plaintiff's common-law claim to recover damages for personal injuries sustained as the result of her voluntary intoxication was properly dismissed as against defendant, who allegedly

served her intoxicating beverages prior to the accident in which plaintiff was injured.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Intoxicating Liquors, § 267 *et seq.*

CLS, General Obligations Law § $11-100, 11-101; Penal Law § 260.20 (4).

NY Jur 2d, Alcoholic Beverages, § $95, 96.

ANNOTATION REFERENCES

Liability of persons furnishing intoxicating liquor for injury to or death of consumer, outside coverage of civil damages act. 98 ALR3d 1230.

POINTS OF COUNSEL

James B. Reed for appellants.
I. American Legion's unlawful conduct violated the statutory duty of care owed to plaintiffs pursuant to Penal Law § 260.20 (4), and as such, was negligent as a matter of law. *(Stambach v Pierce,* 136 AD2d 329; *Dashinsky v Santjer,* 32 AD2d 382; *CPC Intl. v McKesson Corp.,* 70 NY2d 268; *Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314; *Dynarski v U-Crest Fire Dist.,* 112 Misc 2d 344; *Montgomery v Orr,* 130 Misc 2d 807.) II. The Trial Judge abused his discretion when he invaded the province of the jury to determine the factual question of whether plaintiff's injuries occurred in "an area over which the defendant Legion *could have* reasonably exercised supervision and control". *(Wanger v Zeh,* 45 Misc 2d 93, 26 AD2d 729; *Moskowitz v Garlock,* 23 AD2d 943; *Phillips v Kantor & Co.,* 31 NY2d 307; *Powers v Niagara Mohawk Power Corp.,* 129 AD2d 37; *Allen v County of Westchester,* 109 AD2d 475, 66 NY2d 915; *Schirmer v Yost,* 60 AD2d 789; ***631** *Wright v Sunset Recreation,* 91 AD2d 701.) III. New York should reject the "zone of control" rule in cases involving minors who are negligently and unlawfully provided with alcohol by an adult. *(D'Amico v Christie,* 71 NY2d 76.) IV. New York should recognize a common-law negligence cause of action in favor of minor injured as a consequence of being negligently provided with alcohol by an adult host.
William S. Yaus and *Patricia M. Curtin* for respondent.
I. Penal Law § 260.20 (4) does not allow a minor plaintiff to recover for injuries resulting from her own intoxication. *(Powers v Niagara Mohawk Power Corp.,* 129 AD2d 37; *Reuter v Elobo Enters.,* 120 AD2d 722; *Vadasy v Feigel's Tavern,* 88 Misc 2d 614, 55 AD2d 1011, 42 NY2d 805; *Santoro v Di Marco,* 65 Misc 2d 817, 80 Misc 2d 296; *CPC Intl. v McKesson Corp.,* 70 NY2d 268; *Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314; *Stoganovic v Dinolfo,* 92 AD2d 729; *Touche Ross & Co. v Redington,* 442 US 560; *Montauk-Caribbean Airways v Hope,* 784 F2d 91; *County of Monroe v State of New York,* 123 AD2d 141.) II. Appellant has no common-law negligence cause of action since the accident occurred beyond the area where respondent American Legion could have reasonably exercised supervision and control. *(Allen v County of Westchester,* 109 AD2d 475, 66 NY2d 915; *D'Amico v Christie,* 71 NY2d 76; *Delamater v Kimmerle,* 104 AD2d 242; *Wright v Sunset Recreation,* 91 AD2d 701; *Schirmer v Yost,* 60 AD2d 789; *Paul v Hogan,* 56 AD2d 723.) III. Appellant cannot now raise issues not presented to the courts below; moreover, there is no merit to appellant's theory that foreseeability alone affords a basis for recovery. *(Mastronardi v Mitchell,* 109 AD2d 825; *Abacus Real Estate Fin. Co. v P.A.R. Constr. & Maintenance Corp.,* 115 AD2d 576; *D'Amico v Christie,* 71 NY2d 76; *Powers v Niagara Mohawk Power Corp.,* 129 AD2d 37; *Delamater v Kimmerle,* 104 AD2d 242.)

OPINION OF THE COURT

Titone, J.

(1, 2) Penal Law § 260.20 (4), which makes it a crime for anyone but a parent or guardian to furnish alcoholic beverages to a person who is under the legal purchase age, does not give rise to an implied private right of action in favor of such a person who has been injured as a result of his or her own consumption of alcohol. Accordingly, since recovery under traditional common-law tort principles is also precluded on this ***632** record, this minor plaintiff's complaint against the party that furnished her with alcohol was properly dismissed.

On the evening of June 24, 1983, plaintiff Margaret Sheehy, who was then 17 years old, attended the "Big Flats Community Days" celebration, an outdoor event that was sponsored by defendant Big Flats Community Days, Inc. (Big Flats). According to the allegations in her complaint, Sheehy was served several beers in a beer tent operated by defendant American Legion Ernest Skinner Memorial Post 1612 (American Legion). Sheehy claimed that she had not been asked for proof of her age before she was admitted to the tent or served. At the time of the incident the legal age for purchasing alcoholic beverages in New York was

19 (Alcoholic Beverage Control Law § 65 [former (1)], as amended by L 1982, ch 159, § 1).

An affidavit submitted by one of Sheehy's witnesses alleged that she entered the American Legion beer tent for the second time just before midnight and was served additional beers, although she was staggering and was visibly intoxicated. She then crossed the highway and entered the bar operated by defendant Driscoll's Tavern, Inc. (Driscoll's), where she was served another alcoholic beverage. When Sheehy attempted to cross the highway and return to the grounds of the "Community Days" celebration, she was struck by an automobile and severely injured.

Sheehy commenced the present action against Big Flats, American Legion and Driscoll's, claiming that their conduct in serving her alcoholic beverages in violation of law was the proximate cause of the accident. Defendant American Legion, the only defendant involved in this appeal, denied the factual allegations in Sheehy's complaint, alleging instead that plaintiff had been asked for proof of her age before having been served and that she had displayed a false driver's license. Defendant also claimed that Sheehy had immediately been told to leave the beer tent after she was recognized by someone who knew her true age.

In response to American Legion's motion for summary judgment, Supreme Court dismissed Sheehy's asserted causes of action against that defendant.[1] Viewing the complaint's ***633** allegations and the supporting submissions in the light most favorable to Sheehy, the court nevertheless concluded that neither her common-law claim nor the claim based upon a violation of Penal Law § 260.20 (4)[2] was legally maintainable. The Appellate Division affirmed, holding that the existence of a recently enacted statute providing for civil liability in cases involving the provision of alcoholic beverages to individuals under the legal purchase age (General Obligations Law § 11-100) precluded any inference that the Legislature intended a judicially created right of recovery based upon the Penal Law provision (137 AD2d 160, 163-164). The court then granted Sheehy leave to appeal to this court, certifying the following question of law: "Did this court err as a matter of law in affirming the order of Supreme Court partially granting a motion by defendant American Legion * * * for summary judgment dismissing the complaint against it?"

The primary issue on this appeal, an issue on which there has been some disagreement among the Appellate Divisions *(compare,* 137 AD2d 160, *supra, with Stambach v Pierce,* 136 AD2d 329), is whether a private right of action for damages exists under Penal Law § 260.20 (4). At the time of Sheehy's accident, that statute imposed criminal penalties on any person, other than a parent or guardian, who "gives or sells or causes to be given or sold any alcoholic beverage * * * to a child less than nineteen years old" (Penal Law § 260.20 [4], as amended L 1982, ch 159, § 4).[3] Since the statute does not make express provision for civil damages, recovery under Penal Law § 260.20 (4) may be had only if a private right of action may fairly be implied.

Of central importance in this inquiry is the test set forth in *Burns Jackson Miller Summit & Spitzer v Lindner* (59 NY2d 314; *see also, CPC Intl. v McKesson Corp.,* 70 NY2d 268). Under that test, the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme *(CPC Intl. v McKesson Corp.,* ***634** *supra,* at 276-277; *Burns Jackson Miller Summit & Spitzer v Lindner, supra,* at 329-331). It was the third prong of this test that led to a rejection of a private right of action in *CPC Intl. v McKesson Corp. (supra),* one of the more recent applications of the *Burns Jackson* analysis. We reach the same result here.

In this case, there is no doubt that the first, and perhaps most easily satisfied, prong of the *Burns Jackson* test has been met. The statutory provision criminalizing the provision of alcoholic beverages to those under the legal purchase age (Penal Law § 260.20 [4]), which is located within the Penal Law article dealing with offenses against children and incompetents (Penal Law art 260), was unquestionably intended, at least in part, to protect such individuals from the health and safety dangers of alcohol consumption, dangers of which their limited experience provides little warning *(see, People v Arriaga,* 45 Misc 2d 399, 401; Governor's Mem of Approval, 1985 McKinney's Session Laws of NY, at 3288, quoted in Hechtman, 1985 Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 260.20, 1989 Cum Ann Pocket Part, at 87; *see also, People v Martell,* 16 NY2d 245, 247). Plaintiff, who was under the legal purchase age at the time of her accident, was clearly within this category.

Similarly, it cannot be denied that recognition of a private right of action for civil damages would, as a general matter,

advance the legislative purpose. In making the provision of alcohol to individuals under the legal purchase age a crime, the Legislature plainly intended to create a deterrent for those who might, intentionally or carelessly, engage in the proscribed conduct. Obviously, permitting civil damage suits for injuries arising from the same conduct would also further this deterrent goal.

These conclusions, however, do not end the inquiry. In addition to determining whether Sheehy was within the intended protected class and whether permitting her claim would advance the legislative goal, we must, "most importantly, [determine] the consistency of doing so with the purposes underlying the legislative *scheme" (Burns Jackson Miller Summit & Spitzer v Lindner, supra,* at 325 [emphasis supplied]). For, the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private ***635** right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme *(see, CPC Intl. v McKesson Corp., supra,* at 276, 277).

In this case, in addition to establishing criminal penalties for the provision of alcoholic beverages to individuals under the legal purchase age, the Legislature has deliberately adopted a scheme for affording civil damages to those injured by the negligent or unlawful dispensation of alcohol. General Obligations Law § 11-101 (the Dram Shop Act), which applies only to commercial alcoholic beverage sales *(D'Amico v Christie,* 71 NY2d 76), expressly provides for a right of action by any person "injured in person, property, means of support, or otherwise by any intoxicated person" against the person who unlawfully sold or assisted in the procuring of the intoxicated person's alcohol. However, this statute has been held not to authorize recovery in favor of the individual whose intoxication resulted from the unlawful sale *(see, e.g., Mitchell v The Shoals, Inc.,* 19 NY2d 338, 340-341; *Reuter v Flobo Enters.,* 120 AD2d 722; *Allen v County of Westchester,* 109 AD2d 475, *appeal dismissed* 66 NY2d 915; *Matalavage v Sadler,* 77 AD2d 39; *Moyer v Lo Jim Cafe,* 19 AD2d 523, *affd* 14 NY2d 792).

Even more to the point, General Obligations Law § 11-100, which was enacted in 1983, provides for recovery against a person who knowingly caused a young person's intoxication by furnishing alcoholic beverages, with or without charge, "with knowledge or reasonable cause to believe that such person was [a person under the legal purchase age]." Significantly, in enacting this statute, which specifically addresses the problem of civil damages resulting from youthful alcoholic excesses, the Legislature authorized suit only by persons "injured in person, property, means of support, or otherwise, by [the intoxicated person]", the same language as that used in General Obligations Law § 11-101. Since the Legislature must be presumed to have been aware of the long-standing judicial construction of that language as precluding recovery by the intoxicated person, it is reasonable to infer that the Legislature intended the same result in cases arising under section 11-100.

When this background is considered, it becomes apparent that a private right of action in favor of the intoxicated minor cannot fairly be implied from the prohibition contained in ***636** Penal Law § 260.20 (4). Where the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage, on the basis of a different statute, at least where, as here, the two statutes address the same wrong *(see, CPC Intl. v McKesson Corp., supra,* at 282-283 [applying Federal law]; *Carpenter v City of Plattsburgh,* 105 AD2d 295, 298-299, *affd* 66 NY2d 791; *Drinkhouse v Parka Corp.,* 3 NY2d 82). Indeed, it would be anomalous to infer from its silence that the Legislature intended to permit a private right of recovery based upon the duty created by Penal Law § 260.20 (4) when that body has so recently adopted a specific statute on the same subject, which was clearly intended to exclude the class of injureds in which this plaintiff falls.

(1) Manifestly, the Legislature has already considered the use of civil remedies to deter the sale of alcoholic beverages to those under the legal purchase age and has determined that the approach embodied in General Obligations Law § 11-100 is the most suitable. Recognizing a private right of action in favor of the intoxicated youth under Penal Law § 260.20 (4) would be inconsistent with the evident legislative purpose underlying the scheme embodied in General Obligations Law §§ 11-100 and 11-101: to utilize civil penalties as a deterrent while, at the same time, withholding reward from the individual who voluntarily became intoxicated for his or her own irresponsible conduct. We cannot, and will not, use Penal Law § 260.20 (4) as a predicate for overriding this legislative policy judgment *(cf., D'Amico v Christie, supra,* at 84).

(2) Turning to Sheehy's purported common-law claim, we conclude that it too is fatally flawed and was therefore properly dismissed. Rejecting any argument that a duty exists to protect a consumer of alcohol from the results of his or her own voluntary conduct, the courts of this State have consistently refused to recognize a common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication *(e.g., Wellcome v Student Coop.,* 125 AD2d 393; *Allen v County of Westchester,supra; Gabrielle v Craft,* 75 AD2d 939; *Paul v Hogan,* 56 AD2d 723; *Bizzell v N.E.F.S. Rest.,* 27 AD2d 554; *Moyer v Lo Jim Cafe, supra; Scatorchia v Caputo,* 263 App Div 304; *Vadasy v Feigel's Tavern,* 88 Misc 2d 614, *affd* 55 AD2d 1011; *see also, Reuter v Flobo Enters.,* 120 AD2d 722, *supra).* ***637** An exception to the general common-law rule that providers of alcoholic beverages have no duty to protect against the consequences of voluntary intoxication has been recognized in cases where a property owner has failed to protect others on the premises, or in other areas within the property owner's control, from the misconduct of an intoxicated person, at least when the opportunity to supervise was present *(see, D'Amico v Christie, supra,* at 85 [and cases cited therein]). However, that exception has no application in a case such as this, which involves an attempt to recover by the person who voluntarily became intoxicated. Finally, while Sheehy now contends that a new exception to the common-law rule should be recognized when the person who became intoxicated was under the legal purchase age *(see, Dynarski v U-Crest Fire Dist.,* 112 Misc 2d 344; *see also, Allen v County of Westchester, supra,* at 478), she did not make a similar argument in the court of first instance, and we therefore have no occasion to consider it now.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock, Jr., and Bellacosa concur.

Order affirmed, etc. ***638**

Footnotes

1 Plaintiff Margaret Sheehy's claims against Driscoll's and Big Flats remain pending. Additionally, Sheehy's mother's Dram Shop Act claim *(see,* General Obligations Law § 11-101) against all three defendants remains pending, as do the potential cross claims arising from that cause of action.

2 Although the complaint did not directly refer to Penal Law § 260.20 (4), we agree with the courts below that Sheehy's pleadings may fairly be read to encompass a claim for a private right of action resulting from a violation of that provision.

3 The statute has since been amended to reflect the change in the legal purchase age from 19 to 21 (L 1985, ch 274, § 5).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Harris v. Arizona Independent Redistricting Com'n, U.S.Ariz., April 20, 2016

133 S.Ct. 2612
Supreme Court of the United States

SHELBY COUNTY, ALABAMA, Petitioner
v.
Eric H. HOLDER, Jr., Attorney General, et al.

No. 12–96
|
Argued Feb. 27, 2013.
|
Decided June 25, 2013.

Synopsis
Background: County brought declaratory judgment action against United States Attorney General, seeking determination that Voting Rights Act's coverage formula and preclearance requirement, under which covered jurisdictions were required to demonstrate that proposed voting law changes were not discriminatory, was unconstitutional. United States and civil rights organization intervened. After intervenors' motion for additional discovery was denied, 270 F.R.D. 16, parties cross-moved for summary judgment. The United States District Court for the District of Columbia, John D. Bates, J., 811 F.Supp.2d 424, entered summary judgment for Attorney General. County appealed. The United States Court of Appeals for the District of Columbia Circuit, Tatel, Circuit Judge, 679 F.3d 848, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Chief Justice Roberts, held that Voting Rights Act provision setting forth coverage formula was unconstitutional.

Reversed.

Justice Thomas filed concurring opinion.

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

West Headnotes (19)

[1] **Statutes** Validity

Exceptional conditions can justify legislative measures not otherwise appropriate.

4 Cases that cite this headnote

[2] **Election Law** Discrimination; Voting Rights Act

The Voting Rights Act imposes current burdens and must be justified by current needs. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

77 Cases that cite this headnote

[3] **States** Exercise of Powers by States or the United States

A departure from the fundamental principle of states' equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

22 Cases that cite this headnote

[4] **Constitutional Law** Constitution as supreme, paramount, or highest law

States Exercise of Federal Power; Infringement on State Powers

Although the Constitution and laws of the United States are the supreme law of the land, and state legislation may not contravene federal law, the Federal Government does not have a general right to review and veto state enactments before they go into effect. U.S.C.A. Const. Art. 6, cl. 2.

14 Cases that cite this headnote

[5] **States** Federalism; Relationship Between Federal and State Governments

States Supremacy of Federal Law Over State Law

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their

governments and pursuing legislative objectives. U.S.C.A. Const. Art. 6, cl. 2.

5 Cases that cite this headnote

[6] **States** Federalism; Relationship Between Federal and State Governments

The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.

1 Case that cites this headnote

[7] **States** Federalism; Relationship Between Federal and State Governments

The federal balance is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

4 Cases that cite this headnote

[8] **Election Law** Power to Confer and Regulate

States Other particular powers

Although the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, the Federal Government retains significant control over federal elections. U.S.C.A. Const.Amend. 10.

15 Cases that cite this headnote

[9] **Election Law** State legislatures

States have broad powers to determine the conditions under which the right of suffrage may be exercised.

6 Cases that cite this headnote

[10] **Election Law** State legislatures

Public Employment Grounds for and Propriety of Selection; Eligibility and Qualification

States Qualification

Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.

4 Cases that cite this headnote

[11] **United States** Power and duty to apportion

Drawing lines for congressional districts is primarily the duty and responsibility of the State.

8 Cases that cite this headnote

[12] **States** Relations Among States Under Constitution of United States

Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States.

29 Cases that cite this headnote

[13] **States** Relations Among States Under Constitution of United States

Our Nation was and is a union of States, equal in power, dignity, and authority, and, indeed, the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.

7 Cases that cite this headnote

[14] **States** Relations Among States Under Constitution of United States

The fundamental principle of equal sovereignty among the States remains highly pertinent in assessing disparate treatment of States subsequent to their admission.

18 Cases that cite this headnote

[15] **Constitutional Law** Fifteenth Amendment

The Fifteenth Amendment, which commands that the right to vote shall not be denied or abridged on account of race or color, and gives Congress the power to enforce that command, is not designed to punish for the past; its purpose is to ensure a better future. U.S.C.A. Const.Amend. 15.

27 Cases that cite this headnote

[16] **Constitutional Law** Fifteenth Amendment

To serve the Fifteenth Amendment's purpose to ensure a better future, Congress, if it is to divide the States, must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions; it cannot rely simply on the past. U.S.C.A. Const.Amend. 15.

9 Cases that cite this headnote

[17] **Constitutional Law** Invalidation, annulment, or repeal of statutes

Statutes Judicial authority and duty

Striking down an Act of Congress is the gravest and most delicate duty that the Supreme Court is called on to perform, and it does not do so lightly.

3 Cases that cite this headnote

[18] **Election Law** In general; covered jurisdictions

Voting Rights Act provision setting forth coverage formula used to determine which states and political subdivisions were subject to preclearance was unconstitutional, and thus could no longer be used as basis for subjecting jurisdictions to preclearance; although formula at time of Act's passage had met test that current burdens were required to be justified by current needs and that disparate geographic coverage was required to be sufficiently related to the problem that it targeted, formula no longer met that test. U.S.C.A. Const. Art. 6, cl. 2; U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b(b).

75 Cases that cite this headnote

[19] **Election Law** In general; power to prohibit discrimination

While any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

28 Cases that cite this headnote

West Codenotes

Held Unconstitutional

42 U.S.C.A. § 1973b(b), transferred to 52 U.S.C.A. § 10303

****2615** *Syllabus*[*]

***529** The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769. Section 2 of the Act, which bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color," 42 U.S.C. § 1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the "coverage formula," defining the " covered jurisdictions" as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. § 1973b(b). In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D.C. § 1973c(a). Such approval is known as "preclearance."

The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act's coverage and, in the alternative, challenged the Act's constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act's continued constitutionality. See *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140.

Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court

in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing ***530** § 4(b)'s coverage formula. The D.C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, that § 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.

Held : Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance. Pp. 2622 – 2628.

(a) In *Northwest Austin*, this Court noted that the Voting Rights Act "imposes current burdens and must be justified by current needs" and concluded that "a departure ****2616** from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S., at 203, 129 S.Ct. 2504. These basic principles guide review of the question presented here. Pp. 2622 – 2627.

(1) State legislation may not contravene federal law. States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives. Indeed, the Tenth Amendment reserves to the States all powers not specifically granted to the Federal Government, including "the power to regulate elections." *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410. There is also a "fundamental principle of equal sovereignty" among the States, which is highly pertinent in assessing disparate treatment of States. *Northwest Austin, supra,* at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the Act applies to only nine States (and additional counties). That is why, in 1966, this Court described the Act as "stringent" and "potent," *Katzenbach,* 383 U.S., at 308, 315, 337, 86 S.Ct. 803. The Court nonetheless upheld the Act, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions." *Id.,* at 334, 86 S.Ct. 803. Pp. 2622 – 2625.

(2) In 1966, these departures were justified by the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," *Katzenbach,* 383 U.S., at 308, 86 S.Ct. 803. At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it —made sense. The Act was limited to areas where Congress found "evidence of actual voting discrimination," and the covered jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points ***531** below the national average." *Id.,* at 330, 86 S.Ct. 803. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* The Court therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* Pp. 2624 – 2625.

(3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin, supra,* at 202, 129 S.Ct. 2504. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years**.** Yet the Act has not eased § 5's restrictions or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because § 5 applies only to those jurisdictions singled out by § 4, the Court turns to consider that provision. Pp. 2625 – 2627.

(b) Section 4's formula is unconstitutional in light of current conditions. Pp. 2627 – 2631.

****2617** (1) In 1966, the coverage formula was "rational in both practice and theory." *Katzenbach, supra,* at 330, 86 S.Ct. 803. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the "coverage formula raise[d] serious constitutional questions." *Northwest Austin, supra,* at 204, 129 S.Ct. 2504. Coverage today is based on decades-old

data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 2627 – 2628.

(2) The Government attempts to defend the formula on grounds that it is "reverse-engineered"—Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. *Katzenbach* did not sanction such an approach, reasoning instead that the coverage formula was rational because the "formula ... was relevant to the problem." 383 U.S., at 329, 330, 86 S.Ct. 803. The Government has a fallback ***532** argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need[ ]" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. Pp. 2627 – 2629.

(3) Respondents also rely heavily on data from the record compiled by Congress before reauthorizing the Act. Regardless of how one looks at that record, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803. But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40–year–old facts having no logical relation to the present day. Pp. 2629 – 2630.

679 F.3d 848, reversed.

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

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

[1] ***534** The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 ***535** of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.,* at 334, 86 S.Ct. 803. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally ****2619** covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 203–204, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). Since that time, Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

[2] ***536** At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

I

A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Id.,* at 197, 129 S.Ct. 2504. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African–Americans from voting. *Katzenbach,* 383 U.S., at 310, 86 S.Ct. 803. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African–Americans barely improved. *Id.,* at 313–314, 86 S.Ct. 803.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. The current ***537** version forbids any " standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November

1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. § 4(c), *id*., at 438–439. A ****2620** covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4(a), *id.,* at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 C.F.R. pt. 51, App. (2012).

In those jurisdictions, § 4 of the Act banned all such tests or devices. § 4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges. *Id.,* at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." *Ibid*.

***538** Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See § 4(a), *id.,* at 438; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504. In *South Carolina v. Katzenbach,* we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U.S., at 308, 86 S.Ct. 803.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in § 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§ 3–4, 84 Stat. 315. That swept in several counties in California, New Hampshire, and New York. See 28 C.F.R. pt. 51, App. Congress also extended the ban in § 4(a) on tests and devices nationwide. § 6, 84 Stat. 315.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Voting Rights Act Amendments of 1975, §§ 101, 202, 89 Stat. 400, 401. Congress also amended the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. § 203, *id.,* at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 C.F.R. pt. 51, App. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§ 203, 206, 89 Stat. 401, 402. Finally, Congress made the nationwide ban on tests and devices permanent. § 102, *id*., at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act ***539** Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a § 2 suit, in the ten years prior to seeking bailout. § 2, *id.,* at 131–133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); ****2621** *City of Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Lopez v. Monterey County,* 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended § 5 to prohibit more conduct than before. § 5, *id.,* at 580–581; see *Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 341, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (*Bossier II*); *Georgia v. Ashcroft,* 539 U.S. 461, 479, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b)-(d).

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act's coverage and, in the alternative, challenging the Act's constitutionality. See *Northwest Austin,* 557 U.S., at 200–201, 129 S.Ct. 2504.

A three-judge District Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only "counties, parishes, and voter-registering subunits." *Northwest Austin Municipal Util. Dist. No. One v. Mukasey,* 573 F.Supp.2d 221, 232 (D.D.C.2008). The District Court also rejected the constitutional challenge. *Id.,* at 283.

***540** We reversed. We explained that " 'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.' " *Northwest Austin, supra,* at 205, 129 S.Ct. 2504 (quoting *Escambia County v. McMillan,* 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*)). Concluding that "underlying constitutional concerns," among other things, "compel[led] a broader reading of the bailout provision," we construed the statute to allow the utility district to seek bailout. *Northwest Austin,* 557 U.S., at 207, 129 S.Ct. 2504. In doing so we expressed serious doubts about the Act's continued constitutionality.

We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.,* at 202, 203, 129 S.Ct. 2504 (internal quotation marks omitted). We also noted that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.,* at 202, 129 S.Ct. 2504. Finally, we questioned whether the problems that § 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance." *Id.,* at 203, 129 S.Ct. 2504.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day.

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 ****2622** of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their ***541** enforcement. The District Court ruled against the county and upheld the Act. 811 F.Supp.2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula.

The Court of Appeals for the D.C. Circuit affirmed. In assessing § 5, the D.C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful § 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, § 5 preclearance suits involving covered jurisdictions, and the deterrent effect of § 5. See 679 F.3d 848, 862–863 (2012). After extensive analysis of the record, the court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that § 5 was therefore still necessary. *Id.,* at 873.

Turning to § 4, the D.C. Circuit noted that the evidence for singling out the covered jurisdictions was "less robust" and that the issue presented "a close question." *Id.,* at 879. But the court looked to data comparing the number of successful § 2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of § 5, the court concluded that the statute continued "to single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster. *Id.,* at 883.

Judge Williams dissented. He found "no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout." *Id.,* at 891. Rather, to the extent there was any correlation, it actually went the other way: "condemnation under § 4(b) is a marker of *higher* black registration and turnout." *Ibid.* (emphasis added). Judge Williams also found that "[c]overed jurisdictions have *far more* black officeholders as a proportion of the black ***542** population than do uncovered ones." *Id.,* at 892. As to the evidence of successful § 2 suits, Judge Williams disaggregated the reported cases by State, and concluded that "[t]he five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions." *Id.,* at 897. He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported § 2 suit brought against them during the entire 24 years covered by the data.

Ibid. Judge Williams would have held the coverage formula of § 4(b) "irrational" and unconstitutional. *Id.,* at 885.

We granted certiorari. 568 U.S. ——, 133 S.Ct. 594, 184 L.Ed.2d 389 (2012).

II

[3] In *Northwest Austin,* we stated that "the Act imposes current burdens and must be justified by current needs." 557 U.S., at 203, 129 S.Ct. 2504. And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us.[1]

****2623** A

[4] The Constitution and laws of the United States are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 ***543** Records of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911); 2 *id.,* at 27–29, 390–392.

[5] **[6]** **[7]** Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (internal quotation marks omitted).

[8] **[9]** **[10]** **[11]** More specifically, " 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.' " *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Sugarman v. Dougall,* 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1; see also *Arizona v. Inter Tribal Council of Ariz., Inc.,* —— U.S., at ——– ——, 133 S.Ct., at 2253 – 2254. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash,* 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (internal quotation marks omitted); see also *Arizona, ante,* at —— U.S., at ——– ——, 133 S.Ct., at 2257 – 2259. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, 161, 12 S.Ct. 375, 36 L.Ed. 103 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." *Perry v. Perez,* 565 U.S. ——, ——, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012) (*per curiam*) (internal quotation marks omitted).

[12] **[13]** **[14]** ***544** Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin, supra,* at 203, 129 S.Ct. 2504 (citing *United States v. Louisiana,* 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960); *Lessee of Pollard v. Hagan,* 3 How. 212, 223, 11 L.Ed. 565 (1845); and *Texas v. White,* 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.,* at 580, 31 S.Ct. 688. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle ****2624** operated as a *bar* on differential treatment outside that context. 383 U.S., at 328–329, 86 S.Ct. 803. At the same time, as we made clear in *Northwest Austin,* the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U.S., at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law

—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Id.,* at 202, 129 S.Ct. 2504. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 C.F.R. §§ 51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal ***545** legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F.3d, at 884 (Williams, J., dissenting) (case below).

All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." *Katzenbach,* 383 U.S., at 308, 315, 337, 86 S.Ct. 803. We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." *Id.,* at 334, 86 S.Ct. 803. We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez,* 525 U.S., at 282, 119 S.Ct. 693, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County Comm'n,* 502 U.S. 491, 500–501, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). As we reiterated in *Northwest Austin,* the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system." 557 U.S., at 211, 129 S.Ct. 2504.

B

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach,* 383 U.S., at 308, 86 S.Ct. 803. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African–Americans from voting. *Id.,* at 310, 86 S.Ct. 803. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." *Id.,* at 314, 86 S.Ct. 803. Shortly before ***546** enactment of the Voting Rights Act, only 19.4 percent of African–Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.,* at 313, 86 S.Ct. 803. Those figures were roughly ****2625** 50 percentage points or more below the figures for whites. *Ibid.*

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Id.,* at 334, 335, 86 S.Ct. 803. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. *Id.,* at 333, 86 S.Ct. 803; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.,* at 330, 86 S.Ct. 803. We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* We therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. *Id.,* at 308, 86 S.Ct. 803. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant." *Id.,* at 315, 86 S.Ct. 803.

***547** C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin,* 557 U.S., at 202, 129 S.Ct. 2504. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H.R.Rep. 109–478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627. That Report also explained that there have been "significant increases in the number of African–Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act. *Id.,* at 18.

****2626** The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These ***548** are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S.Rep. No. 109–295, p. 11 (2006); H.R.Rep. No. 109–478, at 12. The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African–American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed voting changes. H. R Rep. No. 109–478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S.Rep. No. 109–295, at 13.

There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See § 2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African–American voters. See ***549** *United States v. Price,* 383 U.S. 787, 790, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African–American enfranchisement. See *Northwest Austin, supra,* at 220, n. 3, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African–American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. See 42 U.S.C. § 1973b(a)(8). Congress also expanded the prohibitions in § 5. We had previously interpreted § 5

to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See *Bossier II,* 528 U.S., at 324, 335–336, 120 S.Ct. 866. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups ****2627** but did not do so because of a discriminatory purpose, see 42 U.S.C. § 1973c(c), even though we had stated that such broadening of § 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality," *Bossier II, supra,* at 336, 120 S.Ct. 866 (citation and internal quotation marks omitted). In addition, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." § 1973c(b). In light of those two amendments, the bar that covered jurisdictions ***550** must clear has been raised even as the conditions justifying that requirement have dramatically improved.

We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504; see *Georgia v. Ashcroft,* 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5"). Nothing has happened since to alleviate this troubling concern about the current application of § 5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." *Katzenbach,* 383 U.S., at 330, 86 S.Ct. 803. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin,* 557 U.S., at 204, 129 S.Ct. 2504. As we explained, a statute's "current burdens" must be justified by "current needs," and ***551** any "disparate geographic coverage" must be " sufficiently related to the problem that it targets." *Id.,* at 203, 129 S.Ct. 2504. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H.R.Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, *e.g.,* ****2628** *Katzenbach, supra,* at 313, 329–330, 86 S.Ct. 803. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48–49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is

that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that *Katzenbach* sanctioned such an approach, but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the coverage formula was rational because the "formula ... was relevant to the ***552** problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S., at 329, 330, 86 S.Ct. 803.

Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin, supra,* at 211, 129 S.Ct. 2504—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49–50. This argument does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history —rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach, supra,* at 308, 86 S.Ct. 803 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.").

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need [ ]" for a preclearance system ***553** that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Congress ****2629** reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

[15] **[16]** The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See *Rice v. Cayetano,* 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) ("Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment."). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin,* and we make it clear again today.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh § 2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e.g.,* ***554** 679 F.3d, at 873–883 (case below), with *id.,* at 889–902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803; *Northwest Austin,* 557 U.S., at 201, 129 S.Ct. 2504.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see *post,* at 2644, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. *Post,* at 2644 – 2648. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby ****2630** County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The ***555** county was selected based on that formula, and may challenge it in court.

D

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Post,* at 2637 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution." The dissent states that "[i]t cannot tenably be maintained" that this is an issue with regard to the Voting Rights Act, *post,* at 2637, but four years ago, in an opinion joined by two of today's dissenters, the Court expressly stated that "[t]he Act's preclearance requirement and its coverage formula raise serious constitutional questions." *Northwest Austin, supra,* at 204, 129 S.Ct. 2504. The dissent does not explain how those "serious constitutional questions" became untenable in four short years.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U.S., at 334, 335, 86 S.Ct. 803. Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e.g., Northwest Austin, supra,* at 211, 129 S.Ct. 2504. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future "unless there [is] no or almost no evidence of unconstitutional action by States." *Post,* at 2650.

***556** In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin* 's emphasis on its significance. *Northwest Austin* also emphasized the "dramatic" progress since 1965, 557 U.S., at 201, 129 S.Ct. 2504, but the dissent describes current levels of discrimination as " flagrant," "widespread," and "pervasive," *post,* at 2636, 2641 (internal quotation marks omitted). Despite the fact that *Northwest Austin* requires an Act's "disparate geographic coverage" to be "sufficiently related" to its targeted problems, 557 U.S., at 203, 129 S.Ct. 2504, the dissent maintains that an Act's limited coverage actually eases Congress's burdens, and suggests that a fortuitous relationship should suffice. Although *Northwest Austin* stated definitively that "current burdens" must be justified by "current needs," *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish ****2631** between States in such a fundamental way based on 40–year–old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use

of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

* * *

[17] **[18]** Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the ***557** Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

[19] Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley,* 502 U.S., at 500–501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice THOMAS, concurring.
I join the Court's opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well. The Court's opinion sets forth the reasons.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Ante,* at 2618. In the face of "unremitting and ingenious defiance" of citizens' constitutionally protected right to vote, § 5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Though § 5's preclearance ***558** requirement represented a "shar[p] depart[ure]" from "basic principles" of federalism and the equal sovereignty of the States, *ante,* at 2622, 2623, the Court upheld the measure against early constitutional challenges because it was necessary at the time to address "voting discrimination where it persist[ed] on a pervasive scale." *Katzenbach, supra,* at 308, 86 S.Ct. 803.

Today, our Nation has changed. "[T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions." *Ante,* at 2618. As the Court explains: " '[V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' " *Ante,* at 2625 (quoting ****2632** *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 202, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009)).

In spite of these improvements, however, Congress *increased* the already significant burdens of § 5. Following its reenactment in 2006, the Voting Rights Act was amended to "prohibit more conduct than before." *Ante,* at 2621. "Section 5 now forbids voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.' " *Ante,* at 2621. While the pre–2006 version of the Act went well beyond protection guaranteed under the Constitution, see *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 480–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997), it now goes even further.

It is, thus, quite fitting that the Court repeatedly points out that this legislation is "extraordinary" and "unprecedented" and recognizes the significant constitutional problems created by Congress' decision to raise "the bar that covered jurisdictions must clear," even as "the conditions justifying that requirement have dramatically improved." *Ante,* at 2627. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5. As the Court aptly notes: "[N]o one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination ***559** that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." *Ante,* at 2629. Indeed, circumstances in the covered jurisdictions can no longer be characterized as "exceptional" or "unique." "The extensive pattern of discrimination that

led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Northwest Austin, supra,* at 226, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Section 5 is, thus, unconstitutional.

While the Court claims to "issue no holding on § 5 itself," *ante,* at 2631, its own opinion compellingly demonstrates that Congress has failed to justify " 'current burdens' " with a record demonstrating " 'current needs.' " See *ante,* at 2622 (quoting *Northwest Austin, supra,* at 203, 129 S.Ct. 2504). By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find § 5 unconstitutional.

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

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would ***560** guard against backsliding. Those assessments were well within Congress' province to make and ****2633** should elicit this Court's unstinting approbation.

I

"[V]oting discrimination still exists; no one doubts that." *Ante,* at 2619. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens. *Id.,* at 311, 86 S.Ct. 803. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon v. Herndon,* 273 U.S. 536, 541, 47 S.Ct. 446, 71 L.Ed. 759; in 1944, the Court struck down a "reenacted" and slightly altered version of the same law, *Smith v. Allwright,* 321 U.S. 649, 658, 64 S.Ct. 757, 88 L.Ed. 987; and in 1953, the Court once again confronted an attempt by Texas to "circumven[t]" the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry v. Adams,* 345 U.S. 461, 469, 73 S.Ct. 809, 97 L.Ed. 1152.

***561** During this era, the Court recognized that discrimination against minority voters was a quintessentially political problem requiring a political solution. As Justice Holmes explained: If "the great mass of the white population intends to keep the blacks from voting," "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Giles v. Harris,* 189 U.S. 475, 488, 23 S.Ct. 639, 47 L.Ed. 909 (1903).

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of "the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *Katzenbach,* 383 U.S., at 313, 86 S.Ct. 803. But circumstances reduced the ameliorative potential of these legislative Acts:

> "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting

> officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied ****2634** and evaded court orders or have simply closed their registration offices to freeze the voting rolls." *Id.,* at 314, 86 S.Ct. 803 (footnote omitted).

Patently, a new approach was needed.

***562** Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by § 5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U.S.C. § 1973c(a). A change will be approved unless DOJ finds it has "the purpose [or] ... the effect of denying or abridging the right to vote on account of race or color." *Ibid.* In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.

After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and ***563** Amendments Act of 2006 (hereinafter 2006 Reauthorization), § 2(b) (1), 120 Stat. 577. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States,* 446 U.S. 156, 181, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." *Ibid.* (quoting H.R.Rep. No. 94–196, p. 10 (1975)). See also *Shaw v. Reno,* 509 U.S. 630, 640, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

****2635** Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." *Id.,* at 642, 113 S.Ct. 2816. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the ***564** South 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter Quiet Revolution). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Shaw,* 509 U.S., at 640–641, 113 S.Ct. 2816; *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362,

12 L.Ed.2d 506 (1964). See also H.R.Rep. No. 109–478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. *Ante,* at 2620 – 2621. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. *Ante,* at 2620. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S.Rep. No. 109–295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did the Senate, which continued to hold hearings into June and July. H.R. Rep. 109–478, at 5; ***565** S. Rep. 109–295, at 3–4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 182–183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work ... in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006).

In the long course of the legislative process, Congress "amassed a sizable record." ****2636** *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 205, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). See also 679 F.3d 848, 865–873 (C.A.D.C.2012) (describing the "extensive record" supporting Congress' determination that "serious and widespread intentional discrimination persisted in covered jurisdictions"). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H.R. Rep. 109–478, at 5, 11–12; S. Rep. 109–295, at 2–4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F.3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority ***566** voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)-(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§ 2(b)(4)-(5), *id.,* at 577–578. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), *id.,* at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still necessary and effective. 42 U.S.C. § 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

***567** The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation."[2] In choosing this language, the ****2637** Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin,*[3] is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, "the Founders' first successful amendment told Congress that it could 'make no law' over a ***568** certain domain"; in contrast, the Civil War Amendments used " language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers ... to enact 'appropriate' legislation targeting state abuses." A. Amar, America's Constitution: A Biography 361, 363, 399 (2005). See also McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores,* 111 Harv. L.Rev. 153, 182 (1997) (quoting Civil War-era framer that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.").

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch,* 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its ****2638** judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S., at 324, 86 S.Ct. 803. Faced with subsequent reauthorizations of the VRA, the ***569** Court has reaffirmed this standard. *E.g., City of Rome,* 446 U.S., at 178, 100 S.Ct. 1548. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."

For three reasons, legislation *re*authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld. See *id.,* at 174, 100 S.Ct. 1548 ("The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach* ..., in which we upheld the constitutionality of the Act."); *Lopez v. Monterey County,* 525 U.S. 266, 283, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999) (similar).

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act.

It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (anticipating, but not guaranteeing, that, in 25 years, "the use of racial preferences [in higher education] will no longer be necessary").

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch–22. If the statute was working, there would be less evidence of discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193–194.

***570** This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." *Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1880). The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods." *City of Rome,* 446 U.S., at 176–177, 100 S.Ct. 1548.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, ****2639** to be working to advance the legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch,* 4 Wheat., at 421: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

A

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See *City of Rome,* 446 U.S., at 181, 100 S.Ct. 1548 (identifying "information on the number and types of ***571** submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General" as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H.R.Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F.3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. 109–478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H.R.Rep. No. 109–478, at 40–41.[4] Congress also received empirical studies ***572** finding that DOJ's requests for more information had a significant effect on the degree to which covered ****2640**

jurisdictions "compl[ied] with their obligatio[n]" to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.,* at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a § 2 claim, and clearance by DOJ substantially reduces the likelihood that a § 2 claim will be mounted. Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., ***573** pp. 13, 120–121 (2006). See also Brief for States of New York, California, Mississippi, and North Carolina as *Amici Curiae* 8–9 (Section 5 "reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2 litigation").

The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which § 5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987. H.R.Rep. No. 109–478, at 39.

- Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be "designed with the purpose to limit and retrogress the increased black voting strength ... in the city as a whole." *Id.,* at 37 (internal quotation marks omitted).

- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after "an unprecedented number" of African–American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen. *Id.,* at 36–37.

- In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA. ***574** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 440 [126 S.Ct. 2594, 165 L.Ed.2d 609] (2006). In response, ****2641** Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement. See Order in *League of United Latin American Citizens v. Texas,* No. 06–cv–1046 (WD Tex.), Doc. 8.

- In 2003, after African–Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African–American members of the school board, was found to be an " 'exact replica' " of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F.Supp.2d 424, 483 (D.D.C.2011). See also S.Rep. No. 109–295, at 309. DOJ invoked § 5 to block the proposal.

- In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. *Id.,* at 816.

- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce

the availability of early voting in that election at polling places near a historically black university. 679 F.3d, at 865–866.

- In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, ***575** noting that it would have disqualified many citizens from voting "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." 1 Section 5 Hearing 356.

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." 679 F.3d, at 865.[5]

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." Persily 202 ****2642** (footnote omitted). This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into ***576** subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§ 2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. *City of Rome,* 446 U.S., at 180–182, 100 S.Ct. 1548 (congressional reauthorization of the preclearance requirement was justified based on "the number and nature of objections interposed by the Attorney General" since the prior reauthorization; extension was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination") (internal quotation marks omitted). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA. *Ibid.*

B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in § 4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. *Ante,* at 2624 – 2625. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." *Ante,* at 2628. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was ***577** especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Congress learned of these conditions through a report, known as the Katz study, that looked at § 2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964–1124 (2005) (hereinafter Impact and Effectiveness). Because the private right of action authorized by § 2 of the VRA applies nationwide, a comparison of § 2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would ****2643** expect that the rate of successful § 2 lawsuits would be roughly the same in both areas.[6] The study's findings, however, indicated that racial discrimination in

voting remains "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly *four* times as many successful § 2 cases in covered jurisdictions as there were in noncovered ***578** jurisdictions. 679 F.3d, at 874. The Katz study further found that § 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. Impact and Effectiveness 974. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H.R.Rep. No. 109–478, at 34–35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L.Rev. Forum 205, 209 (2013).

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." *Ibid.* Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic ***579** literature. See 2006 Reauthorization § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable"); H.R.Rep. No. 109–478, at 35 (2006), 2006 U.S.C.C.A.N. 618; Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution 21, 22.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered ****2644** jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See *Northwest Austin,* 557 U.S., at 199, 129 S.Ct. 2504. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U.S.C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.).

Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H.R.Rep. No. 109–478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also ***580** worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a–3a.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces

the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See *supra,* at 2641 – 2642. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat [e about] what [the] record shows." *Ante,* at 2629. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

***581** A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. ****2645** "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610–611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Instead, the "judicial Power" is limited to deciding particular "Cases" and "Controversies." U.S. Const., Art. III, § 2. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick,* 413 U.S., at 610, 93 S.Ct. 2908. Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice." G. May, Bending Toward Justice: ***582** The Voting Rights Act and the Transformation of American Democracy 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. 679 F.3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of § 5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. 42 U.S.C. § 1973(a). This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." 679 F.3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement.[7]

****2646** A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by § 5's preclearance requirement are "justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504. In the interim between the VRA's 1982 and 2006 reauthorizations,

this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove v. United States,* 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987), the Court held that Pleasant Grove—a city in Jefferson County, Shelby County's neighbor—engaged in purposeful ***583** discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." *Id.,* at 465, 471–472, 107 S.Ct. 794.

Two years before *Pleasant Grove,* the Court in *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. *Id.,* at 223, 105 S.Ct. 1916 (internal quotation marks omitted). The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously concluded, because "its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." *Id.,* at 233, 105 S.Ct. 1916.

Pleasant Grove and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated § 2. *Dillard v. Crenshaw Cty.,* 640 F.Supp. 1347, 1354–1363 (M.D.Ala.1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." *Id.,* at 1360.

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard v. Baldwin Cty. Bd. of Ed.,* 686 F.Supp. 1459, 1461 (M.D.Ala.1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard v. Crenshaw Cty.,* 748 F.Supp. 819 (M.D.Ala.1990).

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimination, concerns about backsliding persist. In 2008, for example, ***584** the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that "would have eliminated the city's sole majority-black district, which had been created pursuant to the consent decree in *Dillard*." 811 F.Supp.2d 424, 443 (D.D.C.2011). Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African–American councilman who represented the former majority-black district. *Ibid.* The city's defiance required DOJ to bring a § 5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district. *Ibid.*; Brief for Respondent–Intervenors Earl Cunningham et al. 20.

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See ****2647** *United States v. McGregor,* 824 F.Supp.2d 1339, 1344–1348 (M.D.Ala.2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African–Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African–American voter turnout. *Id.,* at 1345–1346 (internal quotation marks omitted). See also *id.,* at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, " '[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses' "). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. *Id.,* at 1344–1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the "recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem" in Alabama. ***585** *Id.,* at 1347. Racist sentiments, the judge observed, "remain regrettably entrenched in the high echelons of state government." *Ibid.*

These recent episodes forcefully demonstrate that § 5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions.[8] And under our case law, that conclusion should suffice to resolve this case. See *United States v. Raines,* 362 U.S. 17, 24–25, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."). See also *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 743,

123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress' enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute "could constitutionally be applied to *some* jurisdictions").

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. See *United States v. Georgia,* 546 U.S. 151, 159, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (Title II of the Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity "insofar as [it] creates a private cause of action ... for conduct that *actually* violates the Fourteenth Amendment"); *Tennessee v. Lane,* 541 U.S. 509, 530–534, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (Title II of the ADA is constitutional "as it applies to the class of cases implicating the fundamental right of access to the courts"); ***586** *Raines,* 362 U.S., at 24–26, 80 S.Ct. 519 (federal statute proscribing deprivations of the right to vote based on race was constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties). A similar approach is warranted here.[9]

****2648** The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress' legislative authority. The severability provision states:

> "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 42 U.S.C. § 1973p.

In other words, even if the VRA could not constitutionally be applied to certain States—*e.g.,* Arizona and Alaska, see *ante,* at 2622 —§ 1973p calls for those unconstitutional applications to be severed, leaving the Act in place for juris-dictions as to which its application does not transgress constitutional limits.

Nevertheless, the Court suggests that limiting the jurisdictional scope of the VRA in an appropriate case would be "to try our hand at updating the statute." *Ante,* at 2629. ***587** Just last Term, however, the Court rejected this very argument when addressing a materially identical severability provision, explaining that such a provision is "Congress' explicit textual instruction to leave unaffected the remainder of [the Act]" if any particular " application is unconstitutional." *National Federation of Independent Business v. Sebelius,* 567 U.S. ——, ——, 132 S.Ct. 2566, 2639, 183 L.Ed.2d 450 (2012) (plurality opinion) (internal quotation marks omitted); *id.,* at ——, 132 S.Ct., at 2641–2642 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part) (slip op., at 60) (agreeing with the plurality's severability analysis). See also *Raines,* 362 U.S., at 23, 80 S.Ct. 519 (a statute capable of some constitutional applications may nonetheless be susceptible to a facial challenge only in "that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application"). Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

B

The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." *Ante,* at 2623 – 2624, 2630. In *Katzenbach,* however, the Court held, in no uncertain terms, that the principle "*applies only to the terms upon which States are admitted to the Union,* and not to the remedies for local evils which have subsequently appeared." 383 U.S., at 328–329, 86 S.Ct. 803 (emphasis added).

****2649** *Katzenbach,* the Court acknowledges, "rejected the notion that the [equal sovereignty] principle operate[s] as a bar on ***588** differential treatment outside [the] context [of the admission of new States]." *Ante,* at 2623 – 2624 (citing 383 U.S., at 328–329, 86 S.Ct. 803) (emphasis omitted). But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Ante,* at

2624 (citing 557 U.S., at 203, 129 S.Ct. 2504). See also *ante,* at 2630 (relying on *Northwest Austin* 's "emphasis on [the] significance" of the equal-sovereignty principle). If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach* 's limitation of the equal sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach* 's holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. 557 U.S., at 203–204, 129 S.Ct. 2504. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin,* attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach* 's ruling on the limited "significance" of the equal sovereignty principle.

Today's unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e.g.,* 28 U.S.C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); 26 U.S.C. § 142(*l*) (EPA required to locate green building project in a State meeting specified population criteria); 42 U.S.C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with "a population density of fifty-two or fewer persons per ***589** square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that " [n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987"). Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. See, *e.g., United States v. Morrison,* 529 U.S. 598, 626–627, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA's constitutionality). Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect. See Persily 195 ("[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.").

In the Court's conception, it appears, defenders of the VRA could not prevail ****2650** upon showing what the record overwhelmingly bears out, *i.e.,* that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

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The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, *e.g., City of Boerne v. Flores,* 521 U.S. 507, 530, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick.

Instead, the Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." *Ante,* at 2627. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization § 2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on "decades-old data and eradicated practices." *Ante,* at 2627. Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must "star[t] from scratch." *Ante,* at 2630. I do not see why that should be so.

Congress' chore was different in 1965 than it was in 2006. In 1965, there were a "small number of States ... which in most instances were familiar to Congress by name," on which Congress fixed its attention. ***591** *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. In drafting the coverage formula, " Congress began work with reliable evidence of actual voting discrimination in a great majority of the States" it sought to target. *Id.,* at 329, 86 S.Ct. 803. "The formula [Congress] eventually evolved to describe these areas" also captured a few States that had not been the subject of congressional factfinding. *Ibid.* Nevertheless, the Court upheld the formula in its entirety, finding it fair "to infer a significant danger of the evil" in all places the formula covered. *Ibid.*

The situation Congress faced in 2006, when it took up *re* authorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and *all* of the jurisdictions covered by it were "familiar to Congress by name." *Id.,* at 328, 86 S.Ct. 803. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the ****2651** formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing "relevance" of the formula.

Consider once again the components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of ***592** discriminatory voting changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See *supra,* at 2643 – 2645, 2646 – 2647.

The Court holds § 4(b) invalid on the ground that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." *Ante,* at 2631. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions. See *supra,* at 2634 – 2635, 2636, 2640 – 2641.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. *Ante,* at 2629 – 2630, 2630 – 2631. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are ***593** identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. *Katzenbach,* 383 U.S., at 311, 86 S.Ct. 803; *supra,* at 2633. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence

that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because ****2652** Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 & half; years" he had served in the House. 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner). After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Reauthorization § 2(b)(7), 120 Stat. 577. That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's ***594** utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

All Citations

570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651, 81 USLW 4572, 13 Cal. Daily Op. Serv. 6569, 2013 Daily Journal D.A.R. 8199, 24 Fla. L. Weekly Fed. S 407

Footnotes

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

1 Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin,* see Juris. Statement i, and Brief for Federal Appellee 29–30, in *Northwest Austin Municipal Util. Dist. No. One v. Holder,* O.T. 2008, No. 08–322, and accordingly *Northwest Austin* guides our review under both Amendments in this case.

1 The Court purports to declare unconstitutional only the coverage formula set out in § 4(b). See *ante,* at 2631. But without that formula, § 5 is immobilized.

2 The Constitution uses the words "right to vote" in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact "appropriate legislation" to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U.S. Const., Art. I, § 4 ("[T]he Congress may at any time by Law make or alter" regulations concerning the "Times, Places and Manner of holding Elections for Senators and Representatives."); *Arizona v. Inter Tribal Council of Ariz., Inc.,* —— U.S., ——, —— – ——, 133 S.Ct. 2247, —— – ——, 186L.Ed.2d 239 (2013).

3 Acknowledging the existence of "serious constitutional questions," see *ante,* at 2630 (internal quotation marks omitted), does not suggest how those questions should be answered.

4 This number includes only changes actually proposed. Congress also received evidence that many covered jurisdictions engaged in an "informal consultation process" with DOJ before formally submitting a proposal, so that the deterrent effect of preclearance was far broader than the formal submissions alone suggest. The Continuing Need for Section 5 Pre–Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006). All agree

that an unsupported assertion about "deterrence" would not be sufficient to justify keeping a remedy in place in perpetuity. See *ante,* at 2627. But it was certainly reasonable for Congress to consider the testimony of witnesses who had worked with officials in covered jurisdictions and observed a real-world deterrent effect.

5 For an illustration postdating the 2006 reauthorization, see *South Carolina v. United States,* 898 F.Supp.2d 30 (D.D.C.2012), which involved a South Carolina voter-identification law enacted in 2011. Concerned that the law would burden minority voters, DOJ brought a § 5 enforcement action to block the law's implementation. In the course of the litigation, South Carolina officials agreed to binding interpretations that made it "far easier than some might have expected or feared" for South Carolina citizens to vote. *Id.,* at 37. A three-judge panel precleared the law after adopting both interpretations as an express "condition of preclearance." *Id.,* at 37–38. Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.,* at 54 (opinion of Bates, J.).

6 Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful § 2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country.

7 This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County's constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to § 5's preclearance requirement by virtue of *Alabama's* designation as a covered jurisdiction under § 4(b) of the VRA. See *ante,* at 2621 – 2622. In any event, Shelby County's recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to § 5's preclearance mandate. See *infra,* at 2646.

8 Congress continued preclearance over Alabama, including Shelby County, *after* considering evidence of current barriers there to minority voting clout. Shelby County, thus, is no "redhead" caught up in an arbitrary scheme. See *ante,* at 2629.

9 The Court does not contest that Alabama's history of racial discrimination provides a sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to § 4's coverage formula because it is subject to § 5's preclearance requirement by virtue of that formula. See *ante,* at 2630 ("The county was selected [for preclearance] based on th[e] [coverage] formula."). This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State. See *supra,* at 2647, n. 8.

690 F.Supp.3d 1226
United States District Court, N.D. Alabama, Southern Division.

Bobby SINGLETON, et al., Plaintiffs,

v.

Wes ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.

Evan Milligan, et al., Plaintiffs,

v.

Wes Allen, in his official capacity as Alabama Secretary of State, et al., Defendants.

Case No.: 2:21-cv-1291-AMM,
Case No.: 2:21-cv-1530-AMM
|
Signed September 5, 2023

Synopsis

Background: Black registered voters and civil rights organizations brought actions against Alabama Secretary of State and numerous state legislators, challenging Alabama's congressional redistricting plan, for which only one of seven districts had a Black majority, as violating equal protection and diluting votes in violation of § 2 of Voting Rights Act (VRA). Two actions were consolidated for preliminary injunction proceedings, and a three-judge panel of the United States District Court for the Northern District of Alabama, 582 F.Supp.3d 924, granted preliminary injunctions, with clarification, 2022 WL 272637, and denied a stay pending appeal, 2022 WL 272636. In third action, which involved vote dilution claim under VRA, the United States District Court for the Northern District of Alabama, Anna M. Manasco, J., 2022 WL 264819, granted preliminary injunction. The Supreme Court, 142 S.Ct. 879, noted its probable jurisdiction in first two actions, granted certiorari before judgment in third action, stayed the preliminary injunctions and then, 143 S.Ct. 1487, affirmed. Case was then returned to District Court for remedial proceedings, and Court allowed Legislature approximately five weeks to enact new plan. After plan was enacted, plaintiffs filed objections and sought another preliminary injunction.

Holdings: The District Court held that:

[1] plaintiffs were not required in remedial proceedings to reprove, under *Gingles*, Alabama's liability under VRA for voter dilution in connection with Alabama's 2023 approval of congressional redistricting plan;

[2] Alabama's 2023 redistricting plan failed to completely remedy voter dilution violation of VRA through its failure to include a second Black-opportunity district, as required to enjoin plan and to direct special master and his team to draw remedial maps as part of new redistricting plan;

[3] Black Alabamian registered voters were sufficiently large as a group to constitute majority in a reasonably configured, second majority-Black legislative district in Alabama, as required for likelihood of success on merits of claim that 2023 plan improperly diluted votes of Black Alabamians in violation of VRA, and for entry of preliminary injunction;

[4] report provided by State of Alabama's "race predominance" expert witness was inadmissible;

[5] Black Alabamian registered voters were "reasonably compact" as a group to constitute majority in a reasonably configured, second majority-Black legislative district in Alabama, as required for likelihood of success on merits of claim that 2023 plan improperly diluted votes of Black Alabamians in violation of VRA, and for entry of preliminary injunction;

[6] significant lack of responsiveness of elected officials in Alabama to particularized needs of Black Alabamian registered voters weighed in favor of determination that 2023 plan improperly diluted votes of Black Alabamians in violation of VRA, as required for entry of preliminary injunction;

[7] voters and organizations would suffer irreparable harm absent entry of preliminary injunction;

[8] public interest weighed in favor of entry of immediate preliminary injunction; and

[9] it was appropriate to direct special master and his team to draw remedial map or maps for court to order Alabama Secretary of State to use in Alabama's 2024 congressional elections.

Ordered accordingly.

West Headnotes (50)

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

While redistricting is primarily the duty and responsibility of the state, a District Court has its own duty to cure districts drawn in violation of federal law.

[2] **Constitutional Law** Necessity of Determination

Fundamental and longstanding principle of judicial restraint requires that court avoid reaching constitutional questions in advance of necessity of deciding them.

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

Redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.

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

A state's redistricting must comply with federal law.

[5] **Election Law** Vote Dilution

State engages in impermissible vote dilution, in violation of Voting Rights Act (VRA), if its districting plan provides less opportunity for racial minorities than for other members of electorate to elect representatives of their choice. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[6] **Election Law** Vote Dilution

Essence of vote dilution claim under Voting Rights Act provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause inequality in opportunities enjoyed by voters of different races to elect their preferred representatives; such risk is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in majority voting population that regularly defeats their choices. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[7] **Election Law** Dispersal or concentration of minority voters

Plaintiff may allege vote dilution in violation of Voting Rights Act provision, prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, in single-member district if manipulation of districting lines fragments or cracks politically cohesive minority voters among several districts or packs them into one district or small number of districts, and thereby dilutes voting strength of members of minority population. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Racially polarized or bloc voting

To prove vote dilution in violation of Voting Rights Act provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, plaintiffs must satisfy three *Gingles* preconditions: (1) minority group must be sufficiently large and geographically compact to constitute majority in "reasonably configured district," which is so configured it if comports with traditional districting criteria such as being contiguous and reasonably compact; (2) minority group must be able to show it is politically cohesive; and (3) minority group must be able to demonstrate that white majority votes sufficiently as bloc to enable it to defeat minority's preferred candidate.

Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[9] **Election Law** Vote Dilution

A plaintiff who demonstrates the preconditions, in accordance with *Gingles*, for a vote dilution claim under Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice must also show political process is not equally open to minority voters through analysis of totality of circumstances and the following non-exclusive factors drawn from report from Senate Judiciary Committee accompanying 1982 amendments to VRA: (1) history of voting-related discrimination in state or political subdivision; (2) extent to which voting in elections of state or political subdivision is racially polarized; (3) extent to which state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; (4) exclusion of minority group's members from candidate slating processes; (5) extent to which minority group members bear effects of past discrimination in areas such as education, employment, and health, which hinder ability to participate effectively in political process; (6) use of overt or subtle racial appeals in political campaigns; (7) extent to which minority group's members have been elected to public office in jurisdiction; (8) evidence demonstrating elected officials are unresponsive to particularized needs of minority group's members; and (9) that policy underlying state's or political subdivision's use of contested practice or structure is tenuous may have probative value. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[10] **Election Law** Vote Dilution

When plaintiff alleges vote dilution based on statewide plan, in violation of Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, proportionality analysis ordinarily is statewide. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Election Law Apportionment and Reapportionment

Because the Equal Protection Clause restricts consideration of race, and the Voting Rights Act (VRA) demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability; in effort to harmonize these conflicting demands, compliance with VRA may justify consideration of race in way that would otherwise not be allowed. U.S. Const. Amend. 14; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[12] **Injunction** Extraordinary or unusual nature of remedy

Preliminary injunction is extraordinary remedy never awarded as of right.

[13] **Injunction** Grounds in general; multiple factors

Party seeking preliminary injunction must establish: (1) it has substantial likelihood of success on merits; (2) irreparable injury will be suffered unless injunction issues; (3) threatened injury to movant outweighs whatever damage proposed injunction may cause opposing party; and (4) if issued, injunction would not be adverse to public interest.

[14] **Equity** Grounds of jurisdiction in general

Federal Courts Equity jurisdiction in general

When district court finds itself in remedial posture, tasked with designing and implementing equitable relief, scope of district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.

[15] **Injunction** Specificity, vagueness, overbreadth, and narrowly-tailored relief

District court must tailor scope of injunctive relief to fit nature and extent of violation established.

[16] **Federal Courts** Power to Grant Relief

The nature and scope of the review at the remedial phase is bound up with the nature of the violation the district court sets out to remedy.

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

Following a finding of impermissible vote dilution under Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, courts must ensure that proposed remedial districting plan completely corrects, rather than perpetuates, defects that rendered original districts unconstitutional or unlawful. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

When a jurisdiction enacts remedial plan after finding of vote dilution under Voting Rights Act (VRA) provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, it is correct for court to ask whether replacement system would remedy violation. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

United States Judicial review and enforcement

In a case alleging vote dilution in violation of Voting Rights Act provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice, and which challenges a state's drawing of single-member district lines in congressional reapportionment, the injury that gives rise to the violation is vote dilution; at the remedy phase of litigation, the district court therefore properly asks whether the remedial plan completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Evidence drawn from liability phase of voter dilution litigation under Voting Rights Act, and court's prior findings, form backdrop for court's determination of whether remedial districting plan so far as possible eliminated discriminatory effects of original plan; there is no need for court to view remedial plan as if it had emerged from thin air. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Federal court cannot accept unlawful legislative districting map on ground that it corrects violation, in earlier plan, of Voting Rights Act provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice; any proposal to remedy a Voting Rights Act violation must itself conform with Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Black registered voters and civil rights organizations were not required in remedial proceedings to reprove, under *Gingles*,

Alabama's liability under Voting Rights Act (VRA) for voter dilution in connection with Alabama's 2023 approval of congressional redistricting plan, in response to prior determination, and affirmance by Supreme Court, that voters and organizations were entitled to injunctive relief due to likelihood that Alabama's 2021 plan improperly diluted Black voters' votes in violation of VRA; proper analysis of 2023 plan was to evaluate it in part measured by historical record, in part measured by difference from old system, and in part measured by prediction, and required court to determine whether congressional district, as provided in 2023 plan, performed as an additional opportunity district for Black voters to elect candidate of their choice, not requiring new liability determination under *Gingles*. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[23] **Federal Courts** Necessity of Objection; Power and Duty of Court

Federal courts have independent obligation to ensure that jurisdiction exists before federal judicial power is exercised over merits of case.

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

A court must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus, and it generally presumes the good faith of the legislature in enacting a redistricting plan.

[25] **Injunction** Scope of Relief in General

A court's liability determination shapes the evaluation of potential remedies by the court upon entry of injunctive relief, and the determination of appropriate remedy necessarily is informed by nature of conduct enjoined.

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

District court cannot authorize element of election proposal that will not with certitude completely remedy violation of Voting Rights Act section prohibiting denial or abridgment of right to vote on account of race or color. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Requirement of complete remedy for vote dilution in violation of Voting Rights Act section prohibiting denial or abridgment of right to vote on account of race or color means that district court cannot accept remedial plan that perpetuates vote dilution it found or only partially remedies it. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Law does not require that remedial district guarantee minority voters' electoral success, as the circumstance that a group does not win elections does not resolve issue of improper vote dilution in violation of Voting Rights Act (VRA); the VRA instead requires, after finding of voter dilution, that remedial district guarantee minority voters equal opportunity to achieve electoral success. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[29] **Election Law** Method of apportionment

The ultimate right of Voting Rights Act provision prohibiting districting plans that provide less opportunity for racial minorities to elect representatives of their choice is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[30] **Election Law** Vote Dilution

Election Law Majority-minority districts

When performance analysis shows that cohesive majority will often, if not always, prevent minority voters from electing candidate of their choice in purportedly remedial district, there is denial of opportunity in real sense of that term,

thereby constituting voter dilution in violation of Voting Rights Act (VRA); further, when voting is racially polarized to such high degree that electoral success in alleged opportunity district is completely out of reach of minority community, district is not an "opportunity district." Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

Alabama's 2023 congressional redistricting plan, which was approved on basis of prior determination, affirmed by Supreme Court, that Black Alabamian registered voters and civil rights organizations were entitled to injunctive relief due to likelihood that Alabama's 2021 plan improperly diluted Black Alabamian voters' votes in violation of VRA, failed to completely remedy voter dilution violation of VRA through its failure to include a second Black-opportunity district, as required to enjoin 2023 plan and to direct special master and his team to draw remedial maps as part of new redistricting plan; plan provided no greater opportunity for Black Alabamians to elect candidate of their choice than that provided by 2021 plan, analysis showed that Black-preferred candidates would not have been elected in any of analyzed election contests, and losses were by substantial margin. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[32] **Injunction** Redistricting and reapportionment

United States Equality of representation and discrimination; Voting Rights Act

Black Alabamian registered voters were sufficiently large as a group to constitute majority in a reasonably configured, second majority-Black legislative district in Alabama, as required for voters and civil rights organizations, under *Gingles*, to show likelihood of success on merits of claim that Alabama's congressional redistricting plan approved in 2023 improperly diluted votes of Black Alabamians in violation of Voting Rights Act (VRA), and for entry of preliminary injunction barring Alabama Secretary of State from conducting 2024 congressional elections according to Alabama's redistricting plan. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[33] **Witnesses** Cross-Examination

Cross-examination is the greatest legal engine ever invented for the discovery of truth.

[34] **Evidence** Factors, Tests, and Standards in General

Under Federal Rules of Evidence, a district court must perform critical gatekeeping function concerning admissibility of expert evidence, which involves rigorous three-part inquiry into whether: (1) expert is qualified to testify competently regarding matters he or she intends to address; (2) methodology by which expert reaches conclusions is sufficiently reliable; and (3) testimony assists trier of fact, through application of scientific, technical, or specialized expertise, to understand evidence or to determine fact in issue. Fed. R. Evid. 702.

[35] **Evidence** Presumptions, Burden, and Degree of Proof

Burden of establishing qualification, reliability, and helpfulness of expert testimony under *Daubert* and Federal Rules of Evidence rests on proponent of expert opinion. Fed. R. Evid. 702.

[36] **Evidence** Relevance and materiality

Under "relevance" part of methodology question for determining admissibility of expert testimony under *Daubert* and Federal Rules of Evidence, court must ensure that proposed expert testimony is relevant to task at hand, that is, that it logically advances material aspect of proposing party's case, and has valid scientific connection to disputed facts in case. Fed. R. Evid. 702.

[37] **Evidence** As to Particular Subjects

Report provided by State of Alabama's "race predominance" expert witness was "unreliable," and thus was inadmissible in remedial proceedings arising from Voting Rights Act (VRA) vote dilution challenge by Black Alabamian registered voters and civil rights organizations to Alabama's 2023 enactment of congressional redistricting plans in response to the enjoining of Alabama's 2021 plan due to VRA violations; report did not explain how his opinion about race predominance was connected to geographic splits methodology he used, or even why evaluation of race predominance ordinarily might be based on geographic splits analysis. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 702.

[38] **Evidence** Methodology and reasoning; scientific validity

Evidence General acceptance

Under "reliability" test for admissibility of scientific evidence under *Daubert* and Federal Rules of Evidence, courts consider: (1) whether theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether technique has high known or potential rate of error; and (4) whether theory has attained general acceptance within scientific community. Fed. R. Evid. 702.

[39] **Evidence** Methodology and reasoning; scientific validity

Evidence Correctness or soundness

Evidence Reliability

Under "reliability" test for admissibility of scientific evidence under *Daubert* and Federal Rules of Evidence, primary focus should be solely on principles and methodology, not on conclusions that they generate, so proponent of testimony does not have burden of proving it is scientifically correct, but that by preponderance of evidence, it is reliable. Fed. R. Evid. 702.

[40] **Evidence** Sources of Information Relied Upon by Expert

Evidence Ipse dixit

Nothing in either *Daubert* or Federal Rules of Evidence requires district court to admit opinion evidence that is connected to existing data only by ipse dixit of expert; court may conclude that there is simply too great analytical gap between data and opinion proffered. Fed. R. Evid. 702.

[41] **Evidence** Particular Subjects of Expert Evidence

Report provided by State of Alabama's "race predominance" expert witness was "unhelpful," and thus was inadmissible in remedial proceedings arising from Voting Rights Act (VRA) vote dilution challenge by Black Alabamian registered voters and civil rights organizations to Alabama's 2023 enactment of congressional redistricting plans in response to the enjoining of Alabama's 2021 plan due to VRA violations; Alabama established no part of its defense of 2023 plan on arguments about report and, as a result, nothing in report was helpful in determining whether the 2023 plan likely violated VRA, and warranted injunctive relief. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301; Fed. R. Evid. 702.

[42] **Injunction** Redistricting and reapportionment

United States Equality of representation and discrimination; Voting Rights Act

Black Alabamian registered voters were "reasonably compact" as a group to constitute majority in a reasonably configured, second majority-Black legislative district in Alabama, as required for voters and civil rights organizations, under *Gingles*, to show likelihood of success on merits of claim that Alabama's congressional redistricting plan approved in 2023 improperly diluted votes of Black Alabamians in violation of Voting Rights Act (VRA), and for entry of preliminary injunction barring Alabama Secretary of State from conducting 2024

congressional elections according to Alabama's redistricting plan; plans drawn by voters' and organizations' experts comported with traditional districting criteria and did not contain tentacles, appendages, bizarre shapes or other obvious irregularities to maintain communities of interest or engage in splitting of counties on par with Alabama's 2023 plan. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[43] **Injunction** Redistricting and reapportionment

United States Equality of representation and discrimination; Voting Rights Act

Significant lack of responsiveness of elected officials in Alabama to particularized needs of Black Alabamian registered voters weighed in favor of determination that Alabama's congressional redistricting plan approved in 2023 improperly diluted votes of Black Alabamians in violation of Voting Rights Act (VRA), as required for entry of preliminary injunction barring Alabama Secretary of State from conducting 2024 congressional elections according to Alabama's 2023 redistricting plan; although Legislature was entitled to presumption of good faith, 2023 plan was neither proposed nor available for comment during two public hearings held by Legislature's Committee on Reapportionment, it was made public and passed by conference committee on same day, the last day of special session, its original source and cartographer was unknown to one of Committee chairs when he voted on it, and legislative findings did not try to respond to need for Black Alabamians to not have their voting strength diluted. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[44] **Injunction** Voters, registration, and eligibility

Courts routinely deem restrictions on fundamental voting rights "irreparable injury" for purposes of preliminary injunctive relief.

[45] **Injunction** Redistricting and reapportionment

Black Alabamian registered voters and civil rights organizations challenging Alabama's 2023 congressional redistricting plan would suffer irreparable harm absent entry of preliminary injunction barring Alabama Secretary of State from conducting 2024 congressional elections according to 2023 plan, which was enacted by Alabama to remedy enjoined 2021 plan; voters and organizations had already sustained irreparable injury once in census cycle by voting under unlawful 2021 plan, and once election occurred, there could be no do-over or redress for voters whose fundamental political right to vote had been violated and whose votes had been diluted. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[46] **Election Law** Nature and source of right

Voting is beating heart of democracy, and fundamental political right, because it is preservative of all rights.

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

Once election occurs, there can be no do-over and no redress for voters whose rights were violated and votes were improperly diluted in violation of Voting Rights Act (VRA). Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[48] **Injunction** Redistricting and reapportionment

Public interest weighed in favor of entry of immediate preliminary injunction barring Alabama Secretary of State from conducting 2024 congressional elections according to 2023 redistricting plan enacted by Alabama to remedy 2021 plan enjoined on basis of improper voter dilution in violation of Voting Rights Act (VRA); Alabama's 2024 elections were more than 14 months away at time of decision, qualifying deadline to participate in primary elections for major political parties was more than two months

away, and order was issued well ahead of deadline by which Secretary needed a final congressional electoral map. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

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

It was appropriate to direct special master and his team, including cartographer and law firm, to draw remedial map or maps for court to order Alabama Secretary of State to use in Alabama's 2024 congressional elections, where 2023 redistricting plan approved by Alabama Legislature and signed by Governor during special session did not cure the Voting Rights Act (VRA) vote dilution violations contained in enjoined 2021 plan, and there was no need to provide Legislature with another chance to draw map, or other good cause to further delay remedial proceedings. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[50] **Constitutional Law** Resolution of non-constitutional questions before constitutional questions

Where decision on constitutional issue would not entitle plaintiff to relief beyond that to which they are entitled on their statutory claims, constitutional decision would be unnecessary and, therefore, inappropriate.

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Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

INJUNCTION, OPINION, AND ORDER

PER CURIAM:

***1236** These congressional redistricting cases have returned to this Court after the Supreme Court of the United States affirmed in all respects a preliminary injunction this Court entered on January 24, 2022. *See Allen v. Milligan*, 599 U.S. 1, 143 S. Ct. 1487, 1498, 1502, 216 L.Ed.2d 60 (2023).

These cases allege that Alabama's congressional electoral map is racially gerrymandered in violation of the United States Constitution and/or dilutes the votes of Black Alabamians in violation of Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section Two"). *See Singleton v. Allen*, No. 2:21-cv-1291-AMM (asserting only constitutional challenges); *Milligan v. Allen*, No. 2:21-cv-1530-AMM (asserting both constitutional and statutory challenges); *Caster v. Allen*, No. 2:21-cv-1536-AMM (asserting only statutory challenges).

Milligan is now before this three-judge Court, and *Caster* is before Judge Manasco alone, for remedial proceedings.[1] The ***1237** map this Court enjoined ("the 2021 Plan") included one majority-Black district: District 7. District 7 became a majority-Black district in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992) (three-judge court), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902, 112 S.Ct. 1926, 118 L.Ed.2d 535 (1992), *and aff'd sub nom. Figures v. Hunt*, 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993).

After an extensive seven-day hearing, this Court concluded that the 2021 Plan likely violated Section Two and thus enjoined the State from using that plan in the 2022 election. *See Milligan* Doc. 107; *Allen*, 143 S. Ct. at 1502.[2]

Based on controlling precedent, we held that "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Milligan* Doc. 107 at 5.[3] We observed that "[a]s the Legislature

consider[ed remedial] plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it." *Id.* at 6.

Because federal law dictates that the Alabama Legislature should have the first opportunity to draw a remedial plan, we gave the Legislature that opportunity. *See id.* The Secretary of State and legislative defendants ("the Legislators" and collectively, "the State") appealed. *Allen*, 143 S. Ct. at 1502.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction. *See id.* The Supreme Court "s[aw] no reason to disturb th[is] Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event." *Id.* at 1506. Likewise, the Supreme Court concluded there was no "basis to upset th[is] Court's legal conclusions" because we "faithfully applied [Supreme Court] precedents and correctly determined that, under existing law, [the 2021 Plan] violated" Section Two. *Id.*

The State then requested that this Court allow the Legislature approximately five weeks — until July 21, 2023 — to enact a new plan. *Milligan* Doc. 166. All parties understood the urgency of remedial proceedings: the State previously advised this Court that because of pressing state-law deadlines, Secretary Allen needs a final congressional districting map by "early October" for the 2024 election. *Milligan* Doc. 147 at 3.[4] In the light of that urgency, and to balance the deference given to the Legislature to reapportion the state with the limitations set by *Purcell v. Gonzalez*, 549 U.S. 1, 4–8, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006), we delayed remedial proceedings to accommodate the Legislature's efforts, entered a scheduling order, and alerted the parties that any remedial hearing would commence on the date they proposed: August 14, 2023. *Milligan* Doc. 168.

***1238** On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map ("the 2023 Plan"). Just like the 2021 Plan enjoined by this Court, the 2023 Plan includes only one majority-Black district: District 7. *Milligan* Doc. 186-1 at 2.

All Plaintiffs timely objected to the 2023 Plan and requested another injunction. *See Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* and *Caster* Plaintiffs argue that the 2023 Plan did not cure the unlawful vote dilution we found because it did not create a second district in which Black voters have an opportunity to elect a candidate of their choice (an "opportunity district"). *Milligan* Doc. 200 at 16–23; *Caster* Doc. 179 at 8–11. Separately, the *Milligan* and *Singleton* Plaintiffs argue that the 2023 Plan runs afoul of the U.S. Constitution. The *Milligan* Plaintiffs contend that the State intentionally discriminated against Black Alabamians in drawing the 2023 Plan, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Milligan* Doc. 200 at 23–26. And the *Singleton* Plaintiffs argue that the 2023 Plan is an impermissible racial gerrymander — indeed, just the latest in a string of racially gerrymandered plans the State has enacted, dating back to 1992. *Singleton* Doc. 147 at 13–27.

The record before us thus includes not only the evidentiary materials submitted during the preliminary injunction proceedings, but also expert reports, deposition transcripts, and other evidence submitted during this remedial phase. *See Singleton* Docs. 147, 162, 165; *Milligan* Docs. 200, 220, 225; *Caster* Docs. 179, 191, 195; Aug. 14 Tr. 92–93; Aug. 15 Tr. 24–25. We also have the benefit of the parties' briefs, a hearing, three *amicus* briefs, and a statement of interest filed by the Attorney General of the United States. *Milligan* Docs. 199, 234, 236, 260.

The State concedes that the 2023 Plan does not include an additional opportunity district. Indeed, the State has explained that its position is that notwithstanding our order and the Supreme Court's affirmance, the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 159–64.

That concession controls this case. Because the 2023 Plan does not include an additional opportunity district, we conclude that the 2023 Plan does not remedy the likely Section Two violation that we found and the Supreme Court affirmed. We also conclude that under the controlling Supreme Court test, the *Milligan* Plaintiffs are substantially likely to establish that the 2023 Plan violates Section Two. As we explain below, our conclusions rest on facts the State does not dispute.

Because the record establishes the other requirements for relief — that the Plaintiffs will suffer irreparable injury if an injunction does not issue, the threatened injury to the Plaintiffs outweighs the damage an injunction may cause the State, and an injunction is not adverse to the public interest — under Federal Rule of Civil Procedure

65(d) we **PRELIMINARILY ENJOIN** Secretary Allen from conducting any elections with the 2023 Plan.

Under the Voting Rights Act, the statutory framework, and binding precedent, the appropriate remedy is, as we already said, a congressional districting plan that includes either an additional majority-Black district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 24, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (plurality opinion); *Cooper v. Harris*, 581 U.S. 285, 306, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017). We discern no basis in federal law to accept a map the State admits falls short of this required remedy.

***1239** **[1]** "Redistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 585 U.S. 579, 138 S. Ct. 2305, 2324, 201 L.Ed.2d 714 (2018) (internal quotation marks omitted), but this Court "ha[s] its own duty to cure" districts drawn in violation of federal law, *North Carolina v. Covington*, 585 U.S. 969, 138 S. Ct. 2548, 2553, 201 L.Ed.2d 993 (2018). We are three years into a ten-year redistricting cycle, and the Legislature has had ample opportunity to draw a lawful map.

Based on the evidence before us, including testimony from the Legislators, we have no reason to believe that allowing the Legislature still another opportunity to draw yet another map will yield a map that includes an additional opportunity district. Moreover, counsel for the State has informed the Court that, even if the Court were to grant the Legislature yet another opportunity to draw a map, it would be practically impossible for the Legislature to reconvene and do so in advance of the 2024 election cycle. Accordingly, the Special Master and cartographer are **DIRECTED** to commence work forthwith on a remedial map. Instructions shall follow by separate order.

[2] Because we grant relief on statutory grounds, and "[a] fundamental and longstanding principle of judicial restraint requires that [we] avoid reaching constitutional questions in advance of the necessity of deciding them," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) ("*LULAC*"); *Thornburg v. Gingles*, 478 U.S. 30, 38, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), we again **RESERVE RULING** on the constitutional issues raised by the *Singleton* and the *Milligan* Plaintiffs, including the *Singleton* Plaintiffs' motion for a preliminary injunction.

***

We have reached these conclusions only after conducting an exhaustive analysis of an extensive record under well-developed legal standards, as Supreme Court precedent instructs. We do not take lightly federal intrusion into a process ordinarily reserved for the State Legislature. But we have now said twice that this Voting Rights Act case is not close. And we are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires.

We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy. And we are struck by the extraordinary circumstance we face. We are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district. The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice. The 2023 Plan plainly fails to do so.

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I. BACKGROUND

A. Procedural Posture

1. Liability Proceedings

On September 27, 2021, after the results of the 2020 census were released, the *Singleton* Plaintiffs filed a complaint against John Merrill, the former Secretary of State of Alabama.[5] *Singleton* Doc. 1. The *Singleton* Plaintiffs asserted that holding the 2022 election under Alabama's old congressional map ("the 2011 Plan") would violate the Equal Protection Clause of the Fourteenth Amendment because the districts were malapportioned and racially gerrymandered. *Id.* The Chief Judge of the Eleventh Circuit convened a three-judge court to adjudicate *Singleton*. *Singleton* Doc. 13.

On November 3, 2021, the Legislature passed the 2021 Plan. The next day, Governor Ivey signed the 2021 Plan into law, and the *Singleton* Plaintiffs amended their complaint to stake their claims on the 2021 Plan, asserting a racial gerrymandering claim under the Equal Protection Clause of the Fourteenth Amendment and an intentional discrimination claim under the Fourteenth and Fifteenth Amendments. *Singleton* Doc. 15 at 38–48. "The *Singleton* plaintiffs are registered voters in Alabama's Second, Sixth, and Seventh Congressional Districts under the [2021] Plan; the lead plaintiff, Bobby Singleton, is a Black Senator in the Legislature." *Singleton* Doc. 88 at 10.

On the same day the *Singleton* Plaintiffs filed their amended complaint, the *Caster* Plaintiffs filed a lawsuit against Secretary Merrill. *Caster* Doc. 3. *Caster* is pending before Judge Manasco sitting alone. The *Caster* Plaintiffs challenged the 2021 Plan only under Section Two and asserted a single claim of vote dilution. *Id.* at 29–31. "The *Caster* plaintiffs are citizens of Alabama's First, Second, and Seventh Congressional Districts under the [2021] Plan." *Caster* Doc. 101 at 20.

On November 16, 2021, the *Milligan* Plaintiffs filed suit against Secretary Merrill and the Legislators, who serve as co-chairs of the Legislature's Committee on Reapportionment ("the Committee").[6] *Milligan* Doc. 1. The *Milligan* Plaintiffs asserted a vote dilution claim under Section Two, a racial gerrymandering claim under the Fourteenth Amendment, and an intentional discrimination claim under the Fourteenth Amendment. *Id.* at 48–52. "The *Milligan* plaintiffs are Black registered voters in Alabama's First, Second, and Seventh Congressional Districts and two organizational plaintiffs — Greater Birmingham Ministries and the Alabama State Conference of the National Association for the Advancement of Colored People, Inc. ('NAACP') — with members who are registered voters in those Congressional districts and the Third Congressional District." *Milligan* Doc. 107 at 12–13. The Chief Judge of the Eleventh Circuit convened a three-judge court to hear *Milligan* that includes the same three judges who comprise the *Singleton* Court. *Milligan* Doc. 23.

***1242** The Legislators intervened as defendants in *Singleton* and *Caster*. *See Singleton* Doc. 32; *Caster* Doc. 69.

Each set of Plaintiffs requested that this Court enjoin Alabama from using the 2021 Plan for the 2022 election. *Singleton* Doc. 15 at 47; *Milligan* Doc. 1 at 52; *Caster* Doc. 3 at 30–31; *see also Singleton* Doc. 57; *Milligan* Doc. 69; *Caster* Doc. 56. The *Singleton* Court consolidated *Singleton* and *Milligan* "for the limited purposes" of preliminary injunction proceedings; set a hearing for January 4, 2022; and set prehearing deadlines. *Milligan* Doc. 40. The *Caster* Court then set a preliminary injunction hearing for January 4, 2022 and set the same prehearing deadlines that were set in *Singleton* and *Milligan*. *Caster* Doc. 40. All parties agreed to a consolidated preliminary injunction proceeding which permitted consideration of evidence in a combined fashion.

A preliminary injunction hearing commenced on January 4 and concluded on January 12, 2022. *Allen*, 143 S. Ct. at 1502. During the hearing, this Court "received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation." *Id.*

We evaluated the *Milligan* and *Caster* Plaintiffs' statutory claims using the three-part test developed by the Supreme Court in *Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25. And we preliminarily enjoined Alabama from using the 2021 Plan. *Milligan* Doc. 107. We held that under controlling precedent, "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in

which Black voters otherwise have an opportunity to elect a representative of their choice." *Id.* at 5. Because we issued an injunction on statutory grounds, we declined to decide the constitutional claims of the *Singleton* and *Milligan* Plaintiffs. *Id.* at 214–17.

[3] Because "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt," we gave the Legislature the first opportunity to draw a new map. *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) (White, J.); *Milligan* Doc. 107 at 6. The State appealed, and the Supreme Court stayed the injunction. *Allen*, 143 S. Ct. at 1502; *Merrill v. Milligan*, —— U.S. ——, 142 S. Ct. 879, —— L.Ed.2d —— (2022).

On February 8, 2022, the *Singleton* Plaintiffs moved this Court for an expedited ruling on their constitutional claims. *Singleton* Doc. 104. All other parties opposed that motion, *see Singleton* Doc. 109; *Milligan* Doc. 135; *Caster* Doc. 127, and we denied it on the ground that we should not decide any constitutional claims prematurely, *Singleton* Doc. 114.

On April 14, 2022, we held a status conference. *See Milligan* Doc. 143. Mindful that under Alabama law, the last date candidates may qualify with major political parties to participate in the 2024 primary election is November 10, 2023, *see* Ala. Code § 17-13-5(a), we directed the State to identify the latest date by which the Secretary of State must have a final congressional districting map to hold the 2024 election, *Milligan* Doc. 145. The State advised us that the Secretary needs the map "by early October." *Milligan* Doc. 147 at 3.

On November 21, 2022, this Court ordered the parties to meet and confer and file a joint report of their positions on discovery, scheduling, and next steps. *Milligan* Doc. 153. The parties timely filed a joint report and proposed a scheduling order, which we entered. *Milligan* Docs. 156, 157.

On February 8, 2023, we held another status conference. *See Milligan* Doc. 153. ***1243** We again directed the State to identify the latest date by which the Secretary required a map to hold the 2024 election. *Milligan* Doc. 161. The State responded that a new plan would need to be approved by October 1, 2023, to provide time for the Secretary to reassign voters, print and distribute ballots, and otherwise conduct the election. *Milligan* Doc. 162 at 7.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction in all respects. *See generally Allen*, 143 S. Ct. 1487. The Supreme Court then vacated its stay. *Allen v. Milligan*, —— U.S. ——, 143 S. Ct. 2607, 216 L.Ed.2d 1207 (2023).

2. Remedial Proceedings

After the Supreme Court's ruling, this Court immediately set a status conference. *Milligan* Doc. 165. Before the conference, the State advised us that "the ... Legislature intend[ed] to enact a new congressional redistricting plan that will repeal and replace the 2021 Plan" and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2.

During the conference, the parties indicated substantial agreement on the appropriate next steps. *Milligan* Doc. 168 at 4. We delayed remedial proceedings until July 21, 2023 to accommodate the Legislature's efforts; entered a briefing schedule for any objections if the Legislature enacted a new map; and alerted the parties that if a remedial hearing became necessary, it would commence on the date they suggested: August 14, 2023. *Id.* at 4–7.

On June 27, 2023, Governor Ivey issued a proclamation that a special session of the Legislature would convene to consider the congressional districting map. *Milligan* Doc. 173-1. That same day, the Committee met, elected its co-chairs, and held its first public hearing to receive comments on potential plans. *Milligan* Doc. 173 ¶ 2.

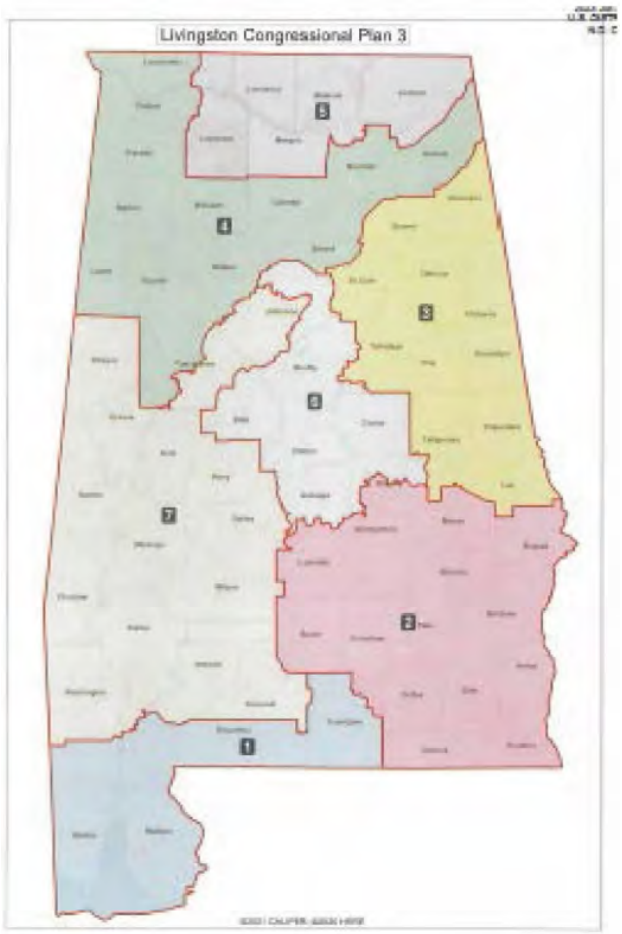
On July 13, 2023, the Committee met and re-adopted its previous redistricting guidelines ("the guidelines"). *Milligan* Doc. 180 ¶ 1; *Milligan* Doc. 107 app. A; *Milligan* Doc. 88-23. That day, the Committee held a second public hearing to receive comments on proposed remedial plans. *Milligan* Doc. 180 ¶ 1.

The special session of the Legislature commenced on July 17, 2023. *See Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the "Community of Interest Plan." *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, titled the "Opportunity Plan." *Id.* ¶¶ 19, 22. The next day, a six-person bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan. *Milligan* Doc. 186.

Although neither the 2021 Plan, nor the Community of Interest Plan, nor the Opportunity Plan was accompanied by any legislative findings, when the Legislature enacted the 2023 Plan, it was accompanied by eight pages of legislative findings. We append the legislative findings to this order as Appendix A.

Governor Ivey signed the 2023 Plan into law the same day. *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70. It appears below. The 2023 Plan keeps Mobile and Baldwin counties together in District 1 and combines much of the Black Belt in Districts 2 and 7.[7]

***1244**



Milligan Doc. 186-1 at 1.

The 2023 Plan, like the 2021 Plan enjoined by this Court, has only one majority-Black district. *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 107 at 2–3. In the 2023 Plan, the Black share of the voting-age population ("BVAP") in District ***1245** 7 is 50.65% (it was 55.3% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 57. The district with the next largest BVAP is District 2. *Milligan* Doc. 251 ¶ 3. In District 2, Black Alabamians account for 39.93% of the voting age population (it was 30.6% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 128.

On July 26, 2023, the parties jointly proposed a scheduling order for remedial proceedings. *Milligan* Doc. 193. We adopted it. *Milligan* Doc. 194.

On July 27, 2023, the *Singleton* Plaintiffs objected to the 2023 Plan. *Singleton* Doc. 147. The *Singleton* Plaintiffs assert that the 2023 Plan violates the Fourteenth Amendment because the districts are racially gerrymandered. *Id.* at 16–22. The *Singleton* Plaintiffs request that the Court enjoin Secretary Allen from using the 2023 Plan and order a remedy, such as their own plan, which plan they say is race-neutral, honors traditional districting principles, and gives Black voters an opportunity to elect candidates of their choice in two districts. *Id.* at 27–28.

Also on July 27, 2023, the United States filed a Statement of Interest "to assist th[is] Court in evaluating whether the 2023 Plan fully cures the likely Section 2 violation in the 2021 Plan." *Milligan* Doc. 199 at 20. "The United States expresses no view on any factual disputes," "nor on any legal questions other than those related to applying Section 2 to the proposed remedy in this case." *Id.* at 5. The United States asserts that if this Court "conclude[s] that the 2023 Plan fails to completely remedy the likely Section 2 violation in the 2021 Plan, it must assume the responsibility of devising and implementing a legally acceptable plan." *Id.* at 19.

The *Milligan* and *Caster* Plaintiffs also timely objected to the 2023 Plan. *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* Plaintiffs assert that the 2023 Plan offers no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan offered. *Milligan* Doc. 200 at 16–23. The *Milligan* Plaintiffs further say that the events giving rise to the 2023 Plan raise constitutional concerns because evidence suggests that the 2023 Plan was drawn to discriminate against Black Alabamians. *Id.* at 23–26. The *Milligan* Plaintiffs also ask us to enjoin Secretary Allen from conducting the 2024 election based on the 2023 Plan and order the Court-appointed Special Master to devise a new plan. *Id.* at 26.

The *Caster* Plaintiffs likewise assert that the 2023 Plan does not remedy the Section Two violation because it fails to

create an additional district in which Black voters have an opportunity to elect a candidate of their choice. *Caster* Doc. 179 at 7–11. The *Caster* Plaintiffs also request that the Court enjoin the 2023 Plan and proceed to a court-driven remedial process to ensure relief for the 2024 election. *Id.* at 3, 11.

The Court held a status conference on July 31, 2023. *See Milligan* Doc. 194 at 3. Before that conference, the parties indicated substantial disagreement about the nature of remedial proceedings. *See Milligan* Docs. 188, 195, 196, 201. During the conference, the Court and the parties discussed (1) a motion filed by the *Milligan* and *Caster* Plaintiffs to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188; *see also Milligan* Docs. 195, 196, 201; (2) the *Singleton* Plaintiffs' motion for a preliminary injunction, *Singleton* Doc. 147; and (3) next steps.

After that conference, the Court clarified that remedial proceedings would be limited to whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and Section Two. *Milligan* Doc. 203 at 4. The Court further clarified that because the scope of the remedial hearing would be limited, the constitutional ***1246** claims of the *Singleton* Plaintiffs would not be at issue. *Id.* at 5. The Court then set a remedial hearing in *Milligan* and *Caster* for August 14, 2023, *id.* at 3, and a preliminary injunction hearing in *Singleton* to commence immediately after the remedial hearing, *id.* at 6.

On August 3, 2023, the State moved for clarification of the scope of remedial proceedings. *Milligan* Doc. 205. All Plaintiffs responded. *Milligan* Doc. 210; *Caster* Doc. 190; *Singleton* Doc. 160. Also on August 3, 2023, Congresswoman Terri Sewell (who represents District 7) and members of the Congressional Black Caucus of the United States Congress sought leave to file an *amici curiae* brief in support of the Plaintiffs, which we granted, *Milligan* Docs. 208, 232, 236. Congresswoman Sewell and members of the Congressional Black Caucus assert that the 2023 Plan is an insufficient remedy for the likely Section Two violation found by this Court. *Milligan* Doc. 236 at 5. They too assert that this Court "should enjoin [the 2023 Plan] and direct the Special Master to redraw a map that complies with the Voting Rights Act." *Id.* at 10.

On August 4, 2023, the State responded to the Plaintiffs' objections to the 2023 Plan. *See Milligan* Doc. 220. The State defends the 2023 Plan as prioritizing "to the fullest extent possible" three communities of interest: the Black Belt, the Gulf Coast, and the Wiregrass.[8] *Id.* at 9. The State further asserts that the 2023 Plan fairly applies traditional districting "principles of compactness, county lines, and communities of interest," and because the *Caster* and *Milligan* Plaintiffs' "alternative plans would violate the traditional redistricting principles given effect in the 2023 Plan, [their] § 2 claims fail." *Id.* at 9–10.

On August 6, 2023, we again clarified the scope of the remedial proceedings in *Milligan* and *Caster*. *Milligan* Doc. 222. We explained that the purpose of those remedial proceedings would be to determine whether the 2023 Plan remedies the likely Section Two violation found by this Court and affirmed by the Supreme Court. *Id.* at 8–9. We reiterated that the remedial proceedings would not relitigate the findings made in connection with the previous liability determination. *Id.* at 11.

On August 7, 2023, all Plaintiffs replied in support of their objections to the 2023 Plan. *See Milligan* Doc. 225; *Caster* Doc. 195. The replies share a common premise: that any alleged reliance by the Legislature on traditional districting principles does not absolve the Legislature of its obligation to cure the Section Two violation found by this Court and affirmed by the Supreme Court. *See Milligan* Doc. 225 at 12; *Caster* Doc. 195 at 7–8.

On August 9, 2023, the National Republican Redistricting Trust ("the Trust") moved for leave to file an *amicus curiae* brief in support of the 2023 Plan, which the Court granted. *See Milligan* Docs. 230, 232, 234. The Trust asserts that the "2023 Plan adheres to traditional districting principles better than any of the Plaintiffs' plans, maintaining communities of interest that the 2021 Plan did not." *Milligan* Doc. 234 at 7. The Trust urges this Court to reject the Plaintiffs' remedial plans. *Id.* at 25.

Later that day, the *Milligan* and *Caster* Plaintiffs moved *in limine* to exclude testimony from certain experts and "any and ***1247** all evidence, references to evidence, testimony, or argument relating to the 2023 Plan's maintenance of communities of interest." *Milligan* Doc. 233 at 1. The State responded. *Milligan* Doc. 245.

On August 11, 2023, certain state and local elected officials in Alabama moved for leave to file an *amici curiae* brief in support of the Plaintiffs, which the Court granted. *See Milligan* Docs. 255, 258, 260. The elected officials join in full the *Milligan* Plaintiffs' objections and assert that this Court

should enjoin Secretary Allen from using the 2023 Plan on the same grounds that we enjoined the 2021 Plan. *Milligan* Doc. 260 at 5, 14–15.

We held a remedial hearing in *Milligan* and *Caster* on August 14, 2023. *See Milligan* Doc. 203. Based on the agreement of all parties, the Court considered all evidence admitted in either *Milligan* or *Caster*, including evidence admitted during the preliminary injunction hearing, in both cases unless counsel raised a specific objection. *Id.* at 4; *Caster* Doc. 182; Aug. 14 Tr. 61. After the hearing, we directed the parties to submit proposed findings of fact and conclusions of law on August 19, 2023, and they did so. *See Milligan* Docs. 267, 268; *Caster* Docs. 220, 221.

B. Factual and Legal Background

1. Constitutional and Statutory Provisions for Race In Redistricting

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States ... according to their respective Numbers" and "chosen every second Year by the People of the several States." U.S. Const. art. I, § 2. Each state's population is counted every ten years in a national census, and state legislatures rely on census data to apportion each state's congressional seats into districts.

[4] Redistricting must comply with federal law. *Bartlett*, 556 U.S. at 7, 129 S.Ct. 1231 (plurality opinion); *Reynolds v. Sims*, 377 U.S. 533, 554–60, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). At present, these cases concern a federal statutory requirement — Section Two, which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

[5] A state violates Section Two "if its districting plan provides 'less opportunity' for racial minorities [than for other members of the electorate] 'to elect representatives of their choice.' " *Abbott*, 138 S. Ct. at 2315 (internal quotation marks omitted) ***1248** (quoting *LULAC*, 548 U.S. at 425, 126 S.Ct. 2594).

[6] "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S.Ct. 2752. "Such a risk is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that regularly defeats their choices." *Allen*, 143 S. Ct. at 1503 (internal quotation marks omitted) (alterations accepted).

[7] "[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments [or cracks] politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population." *Shaw v. Hunt*, 517 U.S. 899, 914, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("*Shaw II*").

[8] "For the past forty years," federal courts "have evaluated claims brought under § 2 using the three-part framework developed in [*Gingles*]." *Allen*, 143 S. Ct. at 1502–03. To prove a Section Two violation under *Gingles*, "plaintiffs must satisfy three preconditions." *Id.* at 1503 (internal quotation marks omitted). "First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Id.* (internal quotation marks omitted). "A district will be reasonably configured ... if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Id.* "Second, the minority group must be able to show that it is

politically cohesive." *Id.* (internal quotation marks omitted). "And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.* (internal quotation marks omitted).

[9] "Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of circumstances, that the political process is not equally open to minority voters." *Id.* (internal quotation marks omitted). "Courts use factors drawn from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the [Voting Rights Act] (the Senate [F]actors) to make the totality-of-the-circumstances determination." *Georgia State Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015); *accord Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *infra* at Part IV.B.4.

The Senate Factors include:

> (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

***1249** *De Grandy*, 512 U.S. at 1010 n.9, 114 S.Ct. 2647 (quoting *Gingles*, 478 U.S. at 44–45, 106 S.Ct. 2752) (numerals added). Further, the Senate Factors include (8) "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and (9) that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *Id.* (quoting *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752) (numeral added).

[10] The Senate Factors are not exhaustive. "Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426, 126 S.Ct. 2594; *accord De Grandy*, 512 U.S. at 1000, 114 S.Ct. 2647. When a plaintiff alleges vote dilution "based on a statewide plan," the proportionality analysis ordinarily is statewide. *LULAC*, 548 U.S. at 437–38, 126 S.Ct. 2594. Although proportionality may be a "relevant consideration" under the controlling Supreme Court test, it cannot be dispositive. Section Two does not "establish[ ] a right to have members of a protected class elected in numbers equal to their proportion in the population," 52 U.S.C. § 10301, and the Supreme Court has described at length the legislative history of that proportionality disclaimer. *See Allen*, 143 S. Ct. at 1500–01.

[11] Because "the Equal Protection Clause restricts consideration of race and the [Voting Rights Act] demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability." *Abbott*, 138 S. Ct. at 2315 (internal quotation marks omitted). "In an effort to harmonize these conflicting demands, [the Supreme Court has] assumed that compliance with the [Voting Rights Act] may justify the consideration of race in a way that would not otherwise be allowed." *Id.*; *accord Cooper*, 581 U.S. at 292, 137 S.Ct. 1455.

2. Congressional Redistricting in Alabama

Since 1973, Alabama has been apportioned seven seats in the United States House of Representatives. *Milligan* Doc. 53 ¶ 28. In all House elections held after the 1970 census and the 1980 census, Alabama elected all-white delegations. *Id.* ¶ 44. After the 1990 census, the Legislature failed to enact a congressional redistricting plan. *See Wesch*, 785 F. Supp. at 1494–95. Litigation ensued, and a federal court ultimately ordered elections held according to a plan that created one majority-Black district (District 7). *Wesch v. Folsom*, 6 F.3d 1465, 1467–68 (11th Cir. 1993); *Wesch*, 785 F. Supp. at 1498, 1581 app. A. In the 1992 election held using the court-ordered map, District 7 elected Alabama's first Black Congressman in over 90 years. *Milligan* Doc. 53 ¶ 44. District 7 remains majority-Black and in every election since 1992 has elected a Black Democrat. *Id.* ¶¶ 44, 47, 49, 58. After 2020 census data was released, Mr. Randy Hinaman prepared the 2021 Plan:

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Milligan Doc. 70-2 at 40; *Milligan* Doc. 88-19.

3. These Lawsuits

Three groups of plaintiffs sued to stop the State from conducting the 2022 elections with the 2021 Plan. *Allen*, 143 S. Ct. at 1502. As relevant here, we discuss the Section Two cases:

a. *Milligan*

The *Milligan* Plaintiffs alleged that Section Two now requires two majority-Black or Black-opportunity congressional districts in Alabama.[9] The *Milligan* Plaintiffs ***1251** asserted that the 2021 Plan reflected the Legislature's "desire to use ... race to maintain power by packing one-third of Black Alabamians into [District 7] and cracking the remaining Black community." *Milligan* Doc. 1 ¶ 4.

To satisfy the first *Gingles* requirement, that Black voters as a group are "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455 (internal quotation marks omitted). The *Milligan* Plaintiffs relied on the testimony of expert witness Dr. Moon Duchin. We found Dr. Duchin highly credible. *Milligan* Doc. 107 at 148–50.

Dr. Duchin opined in her report that because 27.16% of Alabama residents identified as Black on the 2020 Decennial Census, Black Alabamians are sufficiently numerous to constitute a majority in more than one congressional district. *Milligan* Doc. 68-5 at 5. Dr. Duchin testified that the 2021 Plan "pack[ed] Black population into District 7 at an elevated level of over 55% BVAP, then crack[ed] Black population in Mobile, Montgomery, and the rural Black Belt across Districts 1, 2, and 3, so that none of them has more than about 30% BVAP." *Id.* at 6 fig.1; Tr. 564.[10]

As for compactness, Dr. Duchin included in her report a map that reflects the geographic dispersion of Black residents across Alabama. *Milligan* Doc. 68-5 at 12 fig.3. She opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and she offered four illustrative plans ("the Duchin plans"). *Id.* at 7 fig.2. Dr. Duchin offered extensive analysis in her report and testimony during the preliminary injunction hearing about how her plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. *Id.* at 8; Tr. 586–90, 599, 626; *Milligan* Doc. 92-1.

Dr. Duchin also offered exhaustive analysis and testimony about the compactness of the districts in her plans. She described how she computed compactness scores using three metrics that are commonly cited in professional redistricting analyses: the Polsby-Popper score, the Reock score, and the cut-edges score. *Milligan* Doc. 68-5 at 9; Tr. 590–94.[11] Dr. Duchin provided average compactness scores for each of her plans on each of these metrics, *Milligan* Doc. 68-5 at 9, and testified, among other things, that all four of her plans were "superior to" and "significantly more compact than" the 2021 Plan using an average Polsby-Popper metric, *id.*; Tr. 593.

Dr. Duchin also testified that her plans respected the Black Belt as a community of interest as defined in the Legislature's 2021 redistricting guidelines. *See Milligan* Doc. 68-5 at 13; *Milligan* Doc. 88-23 at 2–3. Dr. Duchin observed that in the 2021 Plan, eight of the eighteen core Black Belt counties are "partially or fully excluded from majority-Black districts," while "[e]ach of the 18 Black Belt counties is contained in majority-Black districts in at least some" of her

alternative plans. *Milligan* Doc. 68-5 at 13; *see also* Tr. 666–68. Ultimately, Dr. Duchin opined that the ***1252** districts in her plans were "reasonably" compact. Tr. 594.

To satisfy the second and third *Gingles* requirements, that Black voters are "politically cohesive," and that each challenged district's white majority votes "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate," *Cooper*, 581 U.S. at 302, 137 S.Ct. 1455 (internal quotation marks omitted), the *Milligan* Plaintiffs relied on a racial polarization analysis conducted by expert witness Dr. Baodong Liu. We found Dr. Liu credible. *See Milligan* Doc. 107 at 174–175.

The *Milligan* Plaintiffs asked Dr. Liu to opine (1) whether racially polarized voting occurs in Alabama, and (2) whether such voting has resulted in the defeat of Black-preferred candidates in Alabama congressional elections. *Milligan* Doc. 68-1 at 1. Dr. Liu studied thirteen elections and opined that he observed racially polarized voting in all of them, which resulted in the defeat of Black-preferred candidates in all of them except those in District 7. *Milligan* Doc. 68-1 at 9, 11, 18. At the preliminary injunction hearing, Dr. Liu emphasized the clarity and starkness of the pattern of racially polarized voting that he observed. *See* Tr. 1271–76. He testified that racially polarized voting in Alabama is "very clear." Tr. 1293.

The *Milligan* Plaintiffs next argued that the Senate Factors "confirm[ed]" the Section Two violation. *Milligan* Doc. 69 at 16. The *Milligan* Plaintiffs emphasized Senate Factors 2 and 7 — racially polarized voting and a lack of Black electoral success — because in *Gingles* the Supreme Court flagged them as the "most important" factors, and because the parties' stipulations of fact established that they were not in dispute. *See id.* (citing *Milligan* Doc. 53 ¶¶ 44, 121, 167–69). The *Milligan* Plaintiffs asserted that Factors 1, 3, and 5 also are present because "Alabama has an undisputed and ongoing history of discrimination against Black people in voting, education, employment, health, and other areas." *Id.* at 17–18. The *Milligan* Plaintiffs relied on numerous fact stipulations, which we laid out at length in the preliminary injunction. *See Milligan* Doc. 107 at 73–78 (quoting *Milligan* Doc. 53 ¶¶ 130–54, 157–65).

In addition to the stipulated facts, the *Milligan* Plaintiffs relied on the expert testimony of Dr. Joseph Bagley, whom we found credible. *See Milligan* Doc. 69 at 17–18; *Milligan* Doc. 107 at 185–187. Dr. Bagley opined about Senate Factors 1, 5, 6, 7, and 8, and he considered Factor 3 in connection with his discussion of Factor 1. *Milligan* Doc. 68-2 at 3–31. He opined that those Factors are present in Alabama and together mean that the 2021 Plan would "result in impairment of black voters' ability to participate fully and equitably in the political process of electing candidates of their choice." Tr. 1177.

For all these reasons, the *Milligan* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

b. *Caster*

The *Caster* Plaintiffs likewise alleged that the 2021 Plan violated Section Two because it "strategically cracks and packs Alabama's Black communities." *Caster* Doc. 3 ¶ 1. The *Caster* Plaintiffs also requested a remedy that includes two majority-Black or Black-opportunity districts. *Id.* at 31; *Caster* Doc. 97 ¶¶ 494–505.

To satisfy the first *Gingles* requirement, the *Caster* Plaintiffs relied on the expert testimony of Mr. Bill Cooper. *Caster* Docs. 48, 56, 65. We found Mr. Cooper highly credible. *See Milligan* Doc. 107 at 150–52. Mr. Cooper first opined that Black Alabamians are sufficiently numerous to constitute a majority in more than one congressional district; Mr. Cooper explained that according to 2020 census data, Alabama's ***1253** Black population increased by 83,618 residents, which constitutes a 6.53% increase in Alabama's Black population since 2010, which is 34% of the state's entire population increase since then. *Caster* Doc. 48 at 6–7. Mr. Cooper explained that there was a loss of 33,051 white persons during this time frame, a 1.03% decrease. *Id.* at 6 fig.1.

Mr. Cooper also opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and he offered seven illustrative plans ("the Cooper plans"). *Caster* Doc. 48 at 20–36; *Caster* Doc. 65 at 2–6. Mr. Cooper testified that when he began his work, he expected to be able to draw illustrative plans with two reasonably compact majority-Black congressional districts because, at the same time the Legislature enacted the 2021 Plan, the Legislature also enacted a redistricting plan for the State Board of Education, which plan included two majority-Black districts. *Caster* Doc. 48 at 15–20; Tr. 433–37. Mr. Cooper testified that the Board of Education plan has included two Black-opportunity districts since 1996, and that continuously for those twenty-five years, more than half

of Black voters in Alabama have lived in one of those two districts. *Caster* Doc. 48 at 16; Tr. 435. Mr. Cooper explained that the Board of Education plan splits Mobile County into two districts (with one district connecting Mobile County to Montgomery County, and another connecting Mobile County to Baldwin County). Tr. 435–36; *Caster* Doc. 48 at 17 fig.8.

Like Dr. Duchin, Mr. Cooper offered extensive analysis and testimony about how his plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. Tr. 441–44, 446–47; *Caster* Doc. 48 at 22; *Caster* Doc. 65 at 5–6.

Also like Dr. Duchin, Mr. Cooper offered exhaustive analysis and testimony about the compactness of the districts in his plans. Mr. Cooper testified that he considered geographic compactness by "eyeballing" as he drew his plans, obtaining readouts of the Reock and Polsby-Popper compactness scores from the software program he was using as he drew, and trying to "make sure that [his] score was sort of in the ballpark of" the score for the 2021 Plan, which he used as a "possible yardstick." Tr. 444–46. He testified that all his plans either were at least as compact as the 2021 Plan, or they scored "slightly lower" than the 2021 Plan; he opined that all of his plans are "certainly within the normal range if you look at districts around the country." Tr. 446, 458; *accord Caster* Doc. 48 at 35–37.

Mr. Cooper further testified that he considered communities of interest in two ways: first, he considered "political subdivisions like counties and towns and cities," and second, he has "some knowledge of historical boundaries" and the Black Belt, so he considered the Black Belt. Tr. 447.

To satisfy the second and third *Gingles* requirements, that Black voters are "politically cohesive," and that each challenged district's white majority votes "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate." *Cooper*, 581 U.S. at 302, 137 S.Ct. 1455 (internal quotation marks omitted), the *Caster* Plaintiffs relied on a racial polarization analysis conducted by Dr. Maxwell Palmer, whom we found credible. *See Milligan* Doc. 107 at 174–176.

Dr. Palmer analyzed the extent to which voting is racially polarized in Congressional Districts 1, 2, 3, 6, and 7 because he was told that the proposed Black-opportunity districts would include voters from those districts. *Caster* Doc. 49 ¶ 9; Tr. 704. He examined how voters in those districts voted in the 2012, 2014, 2016, 2018, and 2020 ***1254** general elections, as well as the 2017 special election for the United States Senate, and statewide elections for President, the United States Senate, Governor, Lieutenant Governor, Secretary of State, Attorney General, and several other offices. *Caster* Doc. 49 ¶¶ 6–7, 10; *see also* Tr. 707–13 (explaining how he used precinct-level data and analyzed the results on a district-by-district basis).

Dr. Palmer opined that "Black voters are extremely cohesive," *Caster* Doc. 49 ¶ 16, "[w]hite voters are highly cohesive," *id.* ¶ 17, and "[i]n every election, Black voters have a clear candidate of choice, and [w]hite voters are strongly opposed to this candidate," *id.* ¶ 18. He concluded that "[o]n average, Black voters supported their candidates of choice with 92.3% of the vote[,]" and "[o]n average, [w]hite voters supported Black-preferred candidates with 15.4% of the vote, and in no election did this estimate exceed 26%." *Id.* ¶¶ 16–17. In his testimony, he characterized this evidence of racially polarized voting as "very strong." Tr. 701.

The *Caster* Plaintiffs then analyzed the Senate Factors, and they relied on judicial authorities, stipulated facts, and the testimony of Dr. Bridgett King, whom we found credible, *Milligan* Doc. 107 at 185–87. *Caster* Doc. 56 at 19–38. Dr. King opined that racially polarized voting in Alabama is "severe and ongoing," and "significantly and adversely impact[s] the ability of Black Alabamians to participate equally in the state's political process." *Caster* Doc. 50 at 4.

For all these reasons, the *Caster* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

c. The State

The State, in turn argued that the Committee properly started with the prior map and adjusted boundaries only as necessary to comply with the one-person, one-vote rule and serve traditional districting criteria. *See Milligan* Doc. 78 at 16. The State asserted that "nothing" in the Voting Rights Act "requires Alabama to draw two majority-black districts with slim black majorities as opposed to one majority-black district with a slightly larger majority." *Id.* at 17. We first discuss the State's position in *Milligan* during the preliminary injunction proceedings, and we then discuss the State's position in *Caster.*

i. The State's Arguments in *Milligan*

The State argued in *Milligan* that "[n]othing in Section 2 supports Plaintiffs' extraordinary request that this Court impose districts with Plaintiffs' surgically targeted racial compositions while jettisoning numerous traditional districting criteria." *Id.* at 18. The State relied on the expert testimony of Mr. Thomas M. Bryan. After an exhaustive credibility determination, we assigned "very little weight" to Mr. Bryan's testimony and found it "unreliable." *Milligan* Doc. 107 at 152–156; *see also infra* at Part IV.B.2.a.

The State argued that the Duchin plans did not respect the communities of interest in Alabama's Gulf Coast and the Wiregrass region. *Milligan* Doc. 78 at 82–84. The State objected to the Duchin plans on the ground that they "break up the Gulf Coast and scramble it with the Wiregrass," "separate Mobile and Baldwin Counties for the first time in half a century," and "split Mobile County for the first time in the State's history." *Id.* at 85. The State asserted that the Duchin plans did not respect the Black Belt because they split it between two districts. *Id.* at 85–86 n.15.

Mr. Bryan opined about compactness. He first opined that in each Duchin plan "compactness [wa]s sacrificed." *Milligan* Doc. 74-1 at 3. He later acknowledged and opined, however, that "Dr. Duchin's plans perform generally better *on average* than the [2021 Plan], although some districts ***1255** are significantly less compact than Alabama's." *Id.* at 19 (emphasis in original). And Mr. Bryan testified that he has "no opinion on what is reasonable and what is not reasonable" compactness. Tr. 979.

As for communities of interest, Mr. Bryan opined that Mobile and Baldwin counties are "inseparable." Tr. 1006. And he testified that the Black Belt is a community of interest and ultimately conceded that the Duchin plans had fewer splits than the 2021 Plan in the Black Belt. Tr. 1063–65.

Mr. Bryan explained his overall opinion that Dr. Duchin was able to "achieve a black majority population in two districts" only by "sacrific[ing]" traditional districting criteria. Tr. 874. He explained further his concern about "cracking and packing of incumbents." Tr. 874.

The State also offered testimony about the Gulf Coast community of interest from former Congressman Bradley Byrne, who testified that he did not want Mobile County to be split because he worried it would "lose[ ] its influence" politically. Tr. 1744.

The State briefly asserted that the *Milligan* Plaintiffs could not establish *Gingles* II and III because their racial polarization analysis was selective. *See Milligan* Doc. 78 at 97. But at the preliminary injunction hearing, the State offered the testimony of Dr. M.V. Hood, whom we found credible, *see Milligan* Doc. 107 at 176–77, and Dr. Hood testified that he and Dr. Liu "both found evidence of" racially polarized voting in Alabama. Tr. 1421.

The State then asserted that the "balance" of the Senate Factors favors the State because things in Alabama have "changed dramatically." *Milligan* Doc. 78 at 101–02 (internal quotation marks omitted) (quoting *Shelby County v. Holder*, 570 U.S. 529, 547, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013)). As for Factor 1, the State acknowledged Alabama's "sordid history" and assert that it "should never be forgotten," but said that Alabama has "[o]vercome [i]ts [h]istory." *Id.* at 102. As for Factor 5, the State disputed that Black Alabamians still "bear the effects of discrimination," and that those effects "hinder their ability to participate effectively in the political process." *Id.* at 112 (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752). As for Factor 6, the State argued that historical evidence of racial appeals in campaigns is not probative of current conditions. *Id.* at 113–14. As for Factor 7, the State argued that minorities "have achieved a great deal of electoral success in Alabama's districted races for State offices." *Id.* at 116. As for Factor 8, the State vehemently disputed that elected officials in Alabama are not responsive to the needs of the Black community. *Id.* at 117–19. And as for Factor 9, the State urged that a procedure is tenuous only if it "markedly departs from past practices" and argued that the 2021 Plan was not tenuous because it did not meaningfully depart from the 2011 Plan. *Id.* at 119–20 (quoting S. Rep. 97-417 at 29 n.117).

The State did not offer any expert testimony about the Senate Factors.

ii. The State's Arguments in *Caster*

The State took much the same position in *Caster* that it took in *Milligan*, and Mr. Bryan attacked the Cooper plans for many of the same reasons he attacked the Duchin plans. We recite only a few relevant points.

First, with respect to *Gingles* I. On cross examination, Mr. Bryan conceded that he did not evaluate and had no opinion about whether the Cooper plans respected contiguity, or "the extent to which Mr. Cooper's plan[s] split political subdivisions." Tr. 931–32. When Mr. Bryan testified about compactness, he explained that he relied on compactness scores alone and ***1256** did not "analyze any of the specific contours of the districts." Tr. 971.

After Mr. Bryan offered that testimony, the *Caster* Plaintiffs recalled his earlier testimony about how the Cooper plans "draw lines that appear to [him] to be based on race" and asked him where he offered any analysis "of the way in which specific districts in Mr. Cooper's illustrative plans are configured outside of their objective compactness scores." Tr. 972–73. Mr. Bryan testified that it "appears [he] may not have written text about that." Tr. 973.

When Mr. Bryan was asked about his opinions about communities of interest, he acknowledged that he did not analyze the Cooper plans based on communities of interest. Tr. 979–80.

As for *Gingles* II and III, Dr. Hood testified at the hearing that he had not identified any errors in Dr. Palmer's work that would affect his analyses or conclusions. *See Caster* Doc. 66-2 at 2–34; Tr. 1407–11, 1449–50, 1456, 1459–61. Dr. Hood also testified that he did not dispute Dr. Palmer's conclusions that (1) "black voters in the areas he examined vote for the same candidates cohesively," (2) "black Alabamians and white Alabamians in the areas he examined consistently preferred different candidates," and (3) "the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by black voters." Tr. 1445. Dr. Hood testified that he and Dr. Palmer both found a "substantive pattern" of racially polarized voting. Tr. 1448.

4. Our Findings and Conclusions on Liability

"After reviewing th[e] extensive record," we "concluded in a 227-page opinion that the question whether [the 2021 Plan] likely violated § 2 was not a close one." *Allen*, 143 S. Ct. at 1502 (internal quotation marks omitted); *accord Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204. "It did." *Allen*, 143 S. Ct. at 1502; *accord Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204.

The parties developed such an extensive record and offered such fulsome legal arguments that it took us nearly ninety pages to describe their evidence and arguments. *See Milligan* Doc. 107 at 52–139. Our findings of fact and conclusions of law consumed eighty more pages. *See id.* at 139–210. They were exhaustive, and we do not repeat them here in full. We highlight those findings and conclusions that are particularly relevant to our remedial task.

In our *Gingles* I analysis, we first found that the Plaintiffs "established that Black voters as a group are sufficiently large ... to constitute a majority in a second majority-minority legislative district." *Id.* at 146 (internal quotation marks omitted). We then found that the Plaintiffs established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured district. *Id.* at 147–74.

We began our compactness analysis with credibility determinations about the parties' expert witnesses. We found the testimony of Dr. Duchin and Mr. Cooper "highly credible," *id.* at 148–51, and we "assign[ed] very little weight to Mr. Bryan's testimony," *id.* at 152–56. We did not take lightly the decision not to credit Mr. Bryan. We based that decision on two evaluations — one that examined his credibility relative to that of Dr. Duchin and Mr. Cooper, and one that was not relative. *See id.* We expressed concern about instances in which Mr. Bryan "offered an opinion without a sufficient basis (or in some instances any basis)," enumerated seven examples, reviewed other "internal inconsistencies and vacillations," and described a demeanor that "reflected a lack of concern for whether [his] opinion was well-founded." *Id.* at 153–56.

***1257** We then reviewed "compactness scores" to assess whether the majority-Black congressional districts in the Duchin plans and the Cooper plans were "reasonably" compact. *Id.* at 157–59. We determined that regardless of whether we relied strictly on the opinions of Dr. Duchin and Mr. Cooper about the reasonableness of the scores, or compared the scores for the illustrative plans to the scores for the 2021 Plan, the result was the same: the Plaintiffs' plans established that Black voters in Alabama could comprise a second reasonably configured majority-Black congressional district. *Id.* at 159.

Next, we considered the "eyeball" test for compactness. *See id.* at 159–62. Based on information in Dr. Duchin's report that the State did not dispute, we found that "there are areas

of the state where much of Alabama's Black population is concentrated, and that many of these areas are in close proximity to each other." *Id.* at 161. We then found that the majority-Black districts in the Duchin plans and the Cooper plans appeared reasonably compact because we did not see "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find that any District 2 could be considered reasonably compact." *Id.* at 162.

Next, we discussed whether the Duchin plans and the Cooper plans "reflect reasonable compactness when our inquiry takes into account, as it must, traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* (internal quotation marks omitted); *accord id.* at 162–74. We found that the Duchin plans and the Cooper plans respected existing political subdivisions "at least as well as the [2021] Plan," and in some instances better than the 2021 Plan. *See id.* at 163–64.

We then turned to communities of interest. Before making findings, we reiterated the rule "that a Section Two district that is **reasonably** compact and regular, taking into account traditional districting principles, need not also defeat a rival compact district in a beauty contest." *Id.* at 165 (emphasis in original) (internal quotation marks omitted) (alterations accepted) (quoting *Bush v. Vera*, 517 U.S. 952, 977, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion)). We were "careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win." *Id.*

We found that the Black Belt is an important community of interest, and that it was split among four congressional districts in the 2021 Plan: "Districts 1, 2, and 3, where the *Milligan* plaintiffs assert that their votes are diluted, and District 7, which the *Milligan* plaintiffs assert is packed." *Id.* at 167. In the Duchin plans and the Cooper plans, the "overwhelming majority of the Black Belt" was in "just two districts." *Id.* at 168. We noted that Mr. Bryan conceded that the Duchin plans and Cooper plans performed better than the 2021 Plan for the Black Belt. *Id.*

We then found that "[t]ogether with our finding that the Duchin plans and the Cooper plans respect existing political subdivisions, our finding that [they] respect the Black Belt supports a conclusion that [they] establish reasonable compactness." *Id.* at 169.

Although "we need not consider how ... Districts 2 and 7 might perform in a beauty contest against other plans that also respect communities of interest," we nevertheless discussed the State's argument that the Duchin plans and Cooper plans ignored the Gulf Coast community of interest. *Id.* at 169–71. We found the "record about the Gulf Coast community of interest ... less compelling," and that the State "overstate[d] the point." *Id.* at 169–70. Only two witnesses testified about the Gulf Coast. We discounted Mr. Bryan, and we ***1258** found that the other witness did not support the State's "overdrawn argument that there can be no legitimate reason to split Mobile and Baldwin Counties consistent with traditional redistricting criteria." *Id.* at 170. We noted that the Legislature split Mobile and Baldwin Counties in its districting plan for the State Board of Education. *Id.* at 171.

We found that the State "d[id] not give either the *Milligan* Plaintiffs or the *Caster* Plaintiffs enough credit for the attention Dr. Duchin and Mr. Cooper paid to traditional redistricting criteria." *Id.* at 173. We found that their illustrative plans satisfied the reasonable compactness requirement for *Gingles* I.

Our findings about *Gingles* II and III were comparatively brief because the underlying facts were not in dispute. *See id.* at 174–78. We credited the testimony of Doctors Liu (the *Milligan* Plaintiffs' expert), Palmer (the *Caster* Plaintiffs' expert), and Hood (the State's expert). *See id.* All three experts found evidence of racially polarized voting in Alabama. Based on their testimony, we found that Black voters in Alabama "are politically cohesive," that the challenged districts' "white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate," *id.* at 174 (internal quotation marks omitted) (alterations accepted), and that "voting in Alabama, and in the districts at issue in this litigation, is racially polarized" for purposes of *Gingles* II and III, *id.* at 177–78.

We then discussed the Senate Factors. We found that Senate Factors 2 (racially polarized voting) and 7 (the extent to which Black Alabamians have been elected to public office) "weigh[ ] heavily in favor of" the Plaintiffs. *Id.* at 178–81. We found that Factors 1, 3, and 5 (all of which relate to Alabama's history of official discrimination against Black Alabamians) "weigh against" the State. *Id.* at 182–88. And we found that Factor 6 (racial appeals in political campaigns) "weighs in favor of" the Plaintiffs but "to a lesser degree" than Senate Factors 2, 7, 1, 3, and 5. *Id.* at 188–92. We made no findings

about Factors 8 and 9, *id.* at 192–93, and we found that no Factor weighed in favor of the State. *Id.* at 195.

Finally, we discussed proportionality. We explained our understanding that under the Voting Rights Act and binding Supreme Court precedent, it is relevant, but not dispositive. *Id.* at 193. We rejected the State's argument that the Plaintiffs' arguments were "naked attempts to extract from Section 2 a non-existent right to proportional ... racial representation in Congress." *Id.* at 195 (internal quotation marks omitted). And we stated that we did not resolve the motion for preliminary injunctive relief "solely (or even in the main) by conducting a proportionality analysis" because, consistent with precedent, we conducted a thorough *Gingles* analysis and considered proportionality only as "part and parcel of the totality of the circumstances." *Id.*

Ultimately, we explained five reasons why we did not regard the liability question as "a close one":

> (1) We have considered a record that is extensive by any measure, and particularly extensive for a preliminary injunction proceeding, and the *Milligan* plaintiffs have adduced substantial evidence in support of their claim. (2) There is no serious dispute that the plaintiffs have established numerosity for purposes of *Gingles* I, nor that they have established sharply racially polarized voting for purposes of *Gingles* II and III, leaving only conclusions about reasonable compactness and the totality of the circumstances dependent upon our findings. (3) In our analysis of compactness, we have credited the *Milligan* plaintiffs' principal ***1259** expert witness, Dr. Duchin, after a careful review of her reports and observation of her live testimony (which included the first cross-examination of her that occurred in this case). (4) Separately, we have discounted the testimony of Defendants' principal expert witness, Mr. Bryan, after a careful review of his reports and observation of his live testimony (which included the first cross-examination of him that occurred in this case). (5) If the *Milligan* record were insufficient on any issue (and it is not), the *Caster* record, which is equally fulsome, would fill in the gaps: the *Caster* record (which by the parties' agreement also is admitted in *Milligan*), compels the same conclusion that we have reached in *Milligan*, both to this three-judge court and to Judge Manasco sitting alone.

Id. at 195–96. "Put differently," we said, "because of the posture of these consolidated cases, the record before us has not only once, but twice, established that the [2021] Plan substantially likely violates Section Two." *Id.* at 196.

5. Supreme Court Affirmance

The Supreme Court affirmed the preliminary injunction in a 5-4 decision. We discuss that decision in three parts. We first discuss the part of the opinion that is binding precedent because it was joined by a majority of the Justices ("the Opinion of the Supreme Court"); we then discuss the portion of the Chief Justice's opinion that is the opinion of four Justices; we then discuss Justice Kavanaugh's concurrence.

a. Controlling Precedent

The Supreme Court began by directly stating the ruling:

> In January 2022, a three-judge District Court sitting in Alabama preliminarily enjoined the State from using the districting plan it had recently adopted for the 2022 congressional elections, finding that the plan likely violated Section 2 of the Voting Rights Act. This Court stayed the District Court's order pending further review. After conducting that review, we now affirm.

Allen, 143 S. Ct. at 1498 (internal citations omitted). Next, the Supreme Court recited relevant portions of the history of the Voting Rights Act, redistricting in Alabama, and these cases. *Id.* at 1498–1502. The Supreme Court then reiterated its ruling: "The District Court found that plaintiffs demonstrated a reasonable likelihood of success on their claim that [the 2021 Plan] violates § 2. We affirm that determination." *Id.* at 1502.

Next, the Supreme Court restated the controlling legal standards, as set forth in *Gingles* and applied by federal courts "[f]or the past forty years." *Id.* at 1502–04. The majority opinion then again restated the ruling: "[a]s noted, the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*. Based on our review of the record, we agree." *Id.* at 1504 (internal citations omitted).

The Supreme Court then reviewed our analysis of each *Gingles* requirement. *Id.* at 1504–06. The Supreme Court agreed with our analysis as to each requirement. It did not hold, suggest, or even hint that any aspect of our *Gingles* analysis was erroneous. *See id.*

"With respect to the first *Gingles* precondition," the Supreme Court held that we "correctly found that black voters could constitute a majority in a second district that was

reasonably configured." *Id.* at 1504 (internal quotation marks omitted). The Supreme Court ruled that "[t]he plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria." *Id.*

***1260** The Supreme Court then considered the Duchin plans. It observed that we "explained that the maps submitted by [Dr. Duchin] performed generally better on average than did [the 2021 Plan]." *Id.* (internal quotation marks omitted) (alterations accepted). Likewise, the Supreme Court considered the Cooper plans. The Supreme Court observed that Mr. Cooper "produced districts roughly as compact as the existing plan." *Id.* And that "none of plaintiffs' maps contained any tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find them sufficiently compact." *Id.* (internal quotation marks omitted).

Next, the Supreme Court held that the "Plaintiffs' maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions .... Indeed, some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Id.* (emphasis in original). Accordingly, the Supreme Court "agree[d] with" us that "plaintiffs' illustrative maps strongly suggested that Black voters in Alabama could constitute a majority in a second, reasonably configured, district." *Id.* (internal quotation marks omitted) (alterations accepted).

Next, the Supreme Court turned to the State's argument "that plaintiffs' maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama." *Id.* The Supreme Court recited the State's definition of "community of interest," as well as its argument that "the Gulf Coast region ... is such a community of interest, and that plaintiffs' maps erred by separating it into two different districts." *Id.*

The Supreme Court "d[id] not find the State's argument persuasive." *Id.* at 1505. The Supreme Court reasoned that "[o]nly two witnesses testified that the Gulf Coast was a community of interest," that "testimony provided by one of those witnesses was partial, selectively informed, and poorly supported," and that "[t]he other witness, meanwhile, justified keeping the Gulf Coast together simply to preserve political advantage." *Id.* (internal quotation marks omitted) (alterations accepted). The Supreme Court concluded that we "understandably found this testimony insufficient to sustain Alabama's overdrawn argument that there can be no legitimate reason to split the Gulf Coast region." *Id.* (internal quotation marks omitted).

Next, the Supreme Court considered an alternative basis for its agreement with our *Gingles* I analysis: that "[e]ven if the Gulf Coast did constitute a community of interest ... [we] found that plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt." *Id.* The Supreme Court then described the reasons why the Black Belt is a community of interest — its "high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, ... lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period." *Id.* (internal quotation marks omitted).

The Supreme Court agreed with us again, ruling that we "concluded—correctly, under [Supreme Court] precedent—that [we] did not have to conduct a beauty contest between plaintiffs' maps and the State's. There would be a split community of interest in both." *Id.* (internal quotation marks omitted) (alterations accepted) (quoting *Vera*, 517 U.S. at 977, 116 S.Ct. 1941 (plurality opinion)).

The Supreme Court then rejected the State's argument that the 2021 Plan satisfied Section Two because it performed better than Plaintiffs' illustrative plans on a ***1261** core retention metric — "a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another." *Id.* The Supreme Court rejected that metric on the ground that the Supreme Court "has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim" because "[i]f that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Id.* "That is not the law," the Supreme Court made clear: Section Two "does not permit a State to provide some voters less opportunity ... to participate in the political process just because the State has done it before." *Id.* (internal quotation marks omitted).

The Supreme Court next discussed the second and third *Gingles* requirements. The Supreme Court accepted our determination that "there was no serious dispute that Black voters are politically cohesive, nor that the challenged

districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." *Id.* (internal quotation marks omitted). The Supreme Court recited the relevant racial polarization statistics and noted that the State's expert "conceded that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." *Id.* (internal quotation marks omitted).

In the last step of its review of our analysis, the Supreme Court concluded that the Plaintiffs "had carried their burden at the totality of circumstances stage." *Id.* at 1505–06. The Supreme Court upheld our findings that "elections in Alabama were racially polarized; that Black Alabamians enjoy virtually zero success in statewide elections; that political campaigns in Alabama had been characterized by overt or subtle racial appeals; and that Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." *Id.* at 1506 (internal quotation marks omitted).

The Supreme Court concluded its review of our analysis by again stating its ruling: "We see no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Nor is there a basis to upset the District Court's legal conclusions. The Court faithfully applied our precedents and correctly determined that, under existing law, [the 2021 Plan] violated § 2." *Id.* (internal quotation marks and citation omitted).

We have carefully reviewed the Opinion of the Supreme Court and discern no basis to conclude that any aspect of our Section Two analysis was erroneous.

Next, the Supreme Court turned to arguments by the State urging the Supreme Court to "remake [its] § 2 jurisprudence anew," which the Supreme Court described as "[t]he heart of these cases." *Id.* The Supreme Court explained that the "centerpiece of the State's effort is what it calls the 'race-neutral benchmark.' " *Id.* The Supreme Court then described the benchmark, found the argument "compelling neither in theory nor in practice," and discussed problems with the argument. *Id.* at 1507–10.

Of special importance to these remedial proceedings, the Supreme Court rejected the State's assertion that "existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to" Section Two. *Id.* at 1508. "[P]roperly applied," the Supreme Court explained, "the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Id.* The Supreme Court then discussed three cases to illustrate ***1262** how *Gingles* constrains rather than requires proportionality: *Shaw v. Reno*, 509 U.S. 630, 633–34, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Miller* v. *Johnson*, 515 U.S. 900, 906, 910–11, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); and *Vera*, 517 U.S. at 957, 116 S.Ct. 1941 (plurality opinion). *Allen*, 143 S. Ct. at 1508–09.

"Forcing proportional representation is unlawful," the Supreme Court reiterated, and Section Two "never requires adoption of districts that violate traditional redistricting principles." *Id.* at 1509–10 (internal quotation marks omitted) (alterations accepted). Rather, its "exacting requirements ... limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process ... denies minority voters equal opportunity to participate." *Id.* at 1510 (internal quotation marks omitted) (alterations accepted).

In Part III-B-1 of the opinion, the Supreme Court then discussed "how the race-neutral benchmark would operate in practice." *Id.* Justice Kavanaugh did not join Part III-B-1. *See id.* at 1497. Part III-B-1 is the only part of the Chief Justice's opinion that Justice Kavanaugh did not join. *See id.* We discuss it separately in the next segment of our analysis. *See infra* at Part I.B.5.b.

Finally, the Supreme Court rejected the State's arguments that the Supreme Court "should outright stop applying § 2 in cases like these" because it does not apply to single-member redistricting and is unconstitutional as we applied it. *Allen*, 143 S. Ct. at 1514. The Supreme Court observed that it has "applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades" and has "unanimously held that § 2 and *Gingles* certainly ... apply to claims challenging single-member districts.' " *Id.* at 1515 (internal quotation marks omitted) (alterations accepted) (quoting *Growe v. Emison*, 507 U.S. 25, 40, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993)). The Supreme Court reasoned that adopting the State's approach would require it to abandon this precedent. The Supreme Court explained its refusal to do so: "Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course." *Id.*

The Supreme Court then rejected as foreclosed by longstanding precedent the State's argument that Section Two is unconstitutional as we applied it. *Id.* at 1516–17. The Court affirmed our judgments in *Caster* and *Milligan*. *Id.* at 1517.

b. Part III-B-1 of the Chief Justice's Opinion

In Part III-B-1, the Chief Justice, in an opinion joined by three other Justices, explained why the State's race-neutral benchmark approach would "fare[ ] poorly" in practice.[12] *Id.* at 1510 (Roberts, C.J.). The four justices explained that Alabama's benchmark would "change existing law" by "prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being based on race." *Id.* (internal quotation marks omitted). The four justices then explained why they saw "no reason to impose such a new rule." *Id.* The four justices acknowledged that the "line between racial predominance and racial ***1263** consciousness can be difficult to discern," and explained their view that "it was not breached here." *Id.* at 1510–11.

We have considered Part III-B-1 carefully, and we do not discern anything about it that undermines our conclusion that the 2023 Plan does not remedy the Section Two violation that we found and the Supreme Court affirmed.

c. Justice Kavanaugh's Concurrence

Justice Kavanaugh "agree[d] with the [Supreme] Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act." *Allen*, 143 S. Ct. at 1517 (Kavanaugh, J., concurring). He "wr[o]te separately to emphasize four points." *Id.* (Kavanaugh, J., concurring). *First*, Justice Kavanaugh emphasized that "the upshot of Alabama's argument is that the Court should overrule *Gingles*," "[b]ut the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict." *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh observed that "[i]n the past 37 years ... Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act." *Id.* (Kavanaugh, J., concurring).

"*Second*," Justice Kavanaugh emphasized, "Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer" in Section Two, but "Alabama's premise is wrong." *Id.* at 1517–18 (Kavanaugh, J., concurring). "*Gingles* does not mandate a proportional number of majority-minority districts." *Id.* at 1518 (Kavanaugh, J., concurring). Rather, "*Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and 'geographically compact' minority population and (ii) a plaintiff's proposed alternative map and proposed majority-minority district are 'reasonably configured'—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines." *Id.* (Kavanaugh, J., concurring).

Justice Kavanaugh explained further that if "*Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines," but "*Gingles* and [the Supreme] Court's later decisions have flatly rejected that approach." *Id.* (Kavanaugh, J., concurring).

"*Third*," Justice Kavanaugh explained, "Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State's plan abridges the right to vote on account of race," but as the Supreme Court "has long recognized—and as all Members of [the Supreme] Court ... agree[d in *Allen*]—the text of § 2 establishes an effects test, not an intent test." *Id.* (Kavanaugh, J., concurring).

"*Fourth*," Justice Kavanaugh emphasized, "Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority," but "the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents." *Id.* at 1519 (Kavanaugh, J., concurring).

Justice Kavanaugh reiterated that he "vote[d] to affirm" and "concur[red] in all but Part III–B–1 of the Court's opinion." *Id.* (Kavanaugh, J., concurring).

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The State argues that Part III-B-1 tells us that only a plurality of Justices "concluded that at least some of the plans drawn by Bill Cooper did not breach the ***1264** line between racial consciousness and racial predominance." *Milligan* Doc.

267 ¶ 39 (internal quotation marks omitted) (alterations accepted). The State overreads Part III-B-1 as leaving open for relitigation the question whether the Plaintiffs submitted at least one illustrative remedial plan in which race did not play an improper role.

The affirmance tells us that a majority of the Supreme Court concluded that the Plaintiffs satisfied their burden under *Gingles* I. This necessarily reflects a conclusion that the Plaintiffs submitted at least one illustrative map in which race did not play an improper role. Justice Kavanaugh's concurrence is to the same effect — Justice Kavanaugh did not suggest, let alone say, that he "vote[d] to affirm" despite finding that the Plaintiffs submitted no illustrative map that properly considered race. What Part III-B-1 tells us — and no more — is that only four Justices agreed with every statement in that Part.

C. Remedial Proceedings

We first discuss the Plaintiffs' objections to the 2023 Plan and the State's defense. We then discuss the parties' stipulations of fact and the remedial hearing.

1. The *Milligan* Plaintiffs' Objections

The *Milligan* Plaintiffs object to the 2023 Plan on the ground that it "ignores this Court's preliminary injunction order and instead perpetuates the Voting Rights Act violation that was the very reason that the Legislature redrew the map." *Milligan* Doc. 200 at 6. The *Milligan* Plaintiffs assert that the 2023 Plan does not remedy the Section Two violation we found because it does not include an additional opportunity district. *Id.* They argue that District 2 is not an opportunity district because the performance analyses prepared by Dr. Liu and the State indicate that "Black-preferred candidates in the new CD2 will continue to lose 100% of biracial elections ... by 10%-points on average." *Id.* at 6–7 (citing *Milligan* Doc. 200-2 at 4 tbl.2).

The *Milligan* Plaintiffs make three arguments to support their objection. *First*, the *Milligan* Plaintiffs argue that the 2023 Plan fails to remedy the Section Two violation we found because the 2023 Plan itself violates Section Two and dilutes Black votes. *Id.* at 16–19. The *Milligan* Plaintiffs contend that the 2023 Plan "fails th[e] § 2 remedial analysis for the same reasons its 2021 Plan did," because it "permit[s] the white majority voting as a bloc in the new CD2 to easily and consistently defeat Black-preferred candidates." *Id.* at 17.

The *Milligan* Plaintiffs first rely on the State's evidence to make their point. The Alabama Performance Analysis "found that *not once* in seven elections from 2018 to 2020 would Black voters' candidates overcome white bloc voting to win in CD2." *Id.* at 18. And Dr. Liu's[13] analysis of 11 biracial elections in District 2 between 2014 and 2022 "shows zero Black electoral successes, with an average margin of defeat of over 10 percentage points," *id.*, because "voting is highly racially polarized," *Milligan* Doc. 200-2 at 1. Thus, the *Milligan* Plaintiffs say, "the new CD2 offers no more opportunity than did the old CD2." *Milligan* Doc. 200 at 19.

Second, the *Milligan* Plaintiffs argue that the legislative findings that accompany the 2023 Plan perpetuate the Section Two violation and contradict conclusions that we and the Supreme Court drew based on the evidence. *See id.* at 20–23. The *Milligan* Plaintiffs offer evidence to rebut the State's suggestion that there can be no legitimate reason to split Mobile and ***1265** Baldwin counties: (1) a declaration by Alabama Representative Sam Jones, the first Black Mayor of Mobile, who "explains the many economic, cultural, religious, and social ties between much of Mobile and the Black Belt, in contrast to Baldwin County, which shares 'little of these cultural or community ties' with Mobile," *id.* at 22 (quoting *Milligan* Doc. 200-9 ¶ 15); and (2) an expert report prepared by Dr. Bagley,[14] who contrasts the " 'intimate historical and socioeconomic ties' that the 'City of Mobile and the northern portion of Mobile County, including Prichard, have ... with the Black Belt,' " with the " 'ahistorical' effort to treat the Wiregrass or 'Mobile and Baldwin Counties as an inviolable' " community of interest, *id.* (quoting *Milligan* Doc. 200-15 at 1).

Further, the *Milligan* Plaintiffs urge that under binding precedent, we cannot defer to a redistricting policy of a state if it perpetuates vote dilution. *See id.* at 20 (citing *Allen*, 143 S. Ct. at 1505, and *LULAC*, 548 U.S. at 440–41, 126 S.Ct. 2594).

The *Milligan* Plaintiffs assail the legislative findings on the grounds that they "contradict the Committee's own recently readopted guidelines, were never the subject of debate or public scrutiny, ignored input from Black Alabamians and legislators, and simply parroted attorney arguments already rejected by this Court and the Supreme Court." *Id.* at 20. The *Milligan* Plaintiffs observe that although the legislative findings prioritize as "non-negotiable" rules that there cannot be "more than six splits of county lines" and that the Black Belt, Gulf Coast, and Wiregrass be kept together "to the fullest

extent possible," the guidelines prioritize compliance with Section Two over those rules. *Id.* at 20–21 (citing *Milligan* Doc. 200-4, Section 1, Findings 3(d), 3(e), 3(g)(4)(d), and *Milligan* Doc. 107 at 31) (internal quotation marks omitted). The *Milligan* Plaintiffs also observe that the guidelines did not set an "arbitrary ceiling" on the number of county splits and that the legislative findings "redefine[ ] 'community of interest.' " *Id.* at 21.

The *Milligan* Plaintiffs argue that the State ignores the Supreme Court's finding that the Duchin and Cooper plans "comported with traditional districting criteria" even though they split Mobile and Baldwin counties. *Id.* at 21 (internal quotation marks omitted). And the *Milligan* Plaintiffs argue that in any event, the 2023 Plan does not satisfy the legislative finding that the specified communities must be kept together "to the fullest extent possible" because only the Gulf Coast is kept together, while the Black Belt remains split in a way that dilutes Black votes in District 2. *Id.* at 22 (internal quotation marks omitted).

Third, the *Milligan* Plaintiffs argue that the 2023 Plan raises constitutional concerns because it "may be" the product of intentional discrimination. *Id.* at 23–26. The *Milligan* Plaintiffs rest this argument on the "deliberate failure to remedy the identified [Section Two] violations"; white legislators' efforts to "cut out Black members on the Reapportionment Committee" from meaningful deliberation on the Committee's maps; public statements by legislators about their efforts to draw the 2023 Plan to maintain the Republican majority in the United States House of Representatives and convince one Supreme Court Justice to "see something different"; and the established availability of "less discriminatory alternative maps." *Id.* at 24–25 (internal quotation marks omitted).

***1266** The *Milligan* Plaintiffs ask that the Court enjoin Secretary Allen from using the 2023 Plan and direct the Special Master to draw a remedial map. *Id.* at 26.

2. The *Caster* Plaintiffs' Objections

The *Caster* Plaintiffs assert that "Alabama is in open defiance of the federal courts." *Caster* Doc. 179 at 2. They argue that the 2023 Plan "does not even come close to giving Black voters an additional opportunity to elect a candidate of their choice" because, like the 2021 Plan, it contains just one majority-Black district and "fails to provide an opportunity for Black voters to elect their preferred candidates in a second congressional district." *Id.* at 2, 8–9.

The *Caster* Plaintiffs rely on a performance analysis Dr. Palmer[15] prepared to examine District 2 in the 2023 Plan. *See id.* at 9–10; *Caster* Doc. 179-2. Dr. Palmer analyzed 17 statewide elections between 2016 and 2022 to evaluate the performance of Black-preferred candidates in District 2; he found "strong evidence of racially polarized voting" and concluded that Black-preferred candidates would have been defeated in 16 out of 17 races (approximately 94% of the time) in the new District 2. *Caster* Doc. 179-2 at 3, 6.

The *Caster* Plaintiffs urge us to ignore as irrelevant the discussion in the legislative findings about communities of interest. They contend that we and the Supreme Court already have found the State's arguments about communities of interest " 'insufficient to sustain' Alabama's failure to provide an additional minority opportunity district." *Caster* Doc. 179 at 10 (quoting *Allen*, 143 S. Ct. at 1504–05).

If we consider the legislative findings, the *Caster* Plaintiffs identify a "glaringly absent" omission: "*any* discussion of the extent to which [the 2023 Plan] provides Black voters an opportunity to elect in a second congressional district." *Id.* at 11 (emphasis in original). According to the *Caster* Plaintiffs, the failure of the Legislature to explain how the 2023 Plan "*actually complies* with" Section Two is telling. *Id.* (emphasis in original).

The *Caster* Plaintiffs, like the *Milligan* Plaintiffs, ask us to enjoin Secretary Allen from using the 2023 Plan and "proceed to a judicial remedial process to ensure ... relief in time for the 2024 election." *Id.*

3. The State's Defense of the 2023 Plan

At its core, the State's position is that even though the 2023 Plan does not contain an additional opportunity district, the Plaintiffs' objections fail under *Allen* because the 2023 Plan "cures the purported discrimination identified by Plaintiffs" by "prioritiz[ing] the Black Belt to the fullest extent possible ... while still managing to preserve long-recognized communities of interest in the Gulf and Wiregrass." *Milligan* Doc. 220 at 9. The State contends that the "2023 Plan improves on the 2021 Plan and all of Plaintiffs' alternative plans by unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Id.* at 27.

According to the State, "Plaintiffs cannot produce an alternative map with a second majority-Black district without splitting at least two of those communities of interest," so their Section Two challenge fails. *Id.* at 9. The State leans heavily on the statement in *Allen* that Section Two "never require[s] adoption of districts that violate traditional redistricting principles." 143 S. Ct. at 1510 (internal quotation marks omitted).

The State argues that it is not in "defiance" of a court order because "[t]here are ***1267** many ways for a State to satisfy § 2's demand of 'equally open' districts." *Milligan* Doc. 220 at 9. The State contends that the Plaintiffs "now argue that § 2 requires this Court to adopt a plan that divides communities of interest in the Gulf and Wiregrass to advance racial quotas in districting, but *Allen* forecloses that position." *Id.* at 10.

The State makes four arguments in defense of the 2023 Plan. *First*, the State argues that the 2023 Plan remedies the Section Two violation we found because the 2023 Plan complies with Section Two. *Id.* at 29. The State begins with the premise that it "completely remedies a Section 2 violation ... by enacting *any* new redistricting legislation that complies with Section 2." *Id.* (emphasis in original). The State then reasons that the Plaintiffs must prove that the 2023 Plan is not "equally open." *Id.* at 31 (internal quotation marks omitted). The State argues that our "assessment," *id.* at 32, that "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it," *Milligan* Doc. 107 at 6, was " 'based on the [2021] Legislature's redistricting guidelines' " and " 'choices that the [2021] Plan made,' all of which came *before*" the 2023 Plan, *Milligan* Doc. 220 at 32 (emphasis in original) (quoting *Milligan* Doc. 7 at 149, 151).

The States cites *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987), to say that we cannot focus exclusively on evidence about the 2021 Plan to evaluate whether the 2023 Plan is a sufficient remedy. *Milligan* Doc. 220 at 34–35 ("The evidence showing a violation in an *existing* election scheme may not be completely coextensive with a *proposed* alternative." (emphasis in original)).

The State contends that the 2023 Plan remedied the discriminatory effects of the 2021 Plan by applying traditional redistricting principles "as fairly" to majority-Black communities in the Black Belt and Montgomery "as to the Gulf and the Wiregrass." *Id.* at 33. The State claims that the 2023 Plan is "entitled to the presumption of legality" and "the presumption of good faith," and is governing law unless it is found to violate federal law. *Id.* at 36–37.

Second, the State asserts that the 2023 Plan complies with Section Two, and Plaintiffs cannot produce a reasonably configured alternative map. *See id.* at 37–60. The State urges that neither we nor the Supreme Court "ever said that § 2 requires the State to subordinate 'nonracial communities of interest' in the Gulf and Wiregrass to Plaintiffs' racial goals." *Id.* at 38. The State contends that the Plaintiffs cannot satisfy *Gingles* I because they did not offer a plan that "meet[s] or beat[s]" the 2023 Plan "on the traditional principles of compactness, maintaining communities of interest, and maintaining political subdivisions that are adhered to in the State's plan." *Id.* at 38–39 (internal quotation marks omitted). "The focus now is on the 2023 Plan," the State says, and the Plaintiffs cannot lawfully surpass it. *Id.* at 40–41.

As for communities of interest, the State asserts that the 2023 Plan "resolves the concerns about communities of interest that Plaintiffs said was 'the heart' of their challenge to the 2021 Plan." *Id.* at 41. The State says that the Supreme Court's ruling that it was "not persuaded that the Gulf was a community of interest" would "surprise Alabamians and has been answered by the legislative record for the 2023 Plan." *Id.* at 41–42. The State claims that its argument on this issue is beyond dispute because the 2023 Plan "answers Plaintiffs' call to unify the Black Belt into two districts, without sacrificing indisputable communities of interest in the Gulf and Wiregrass regions." *Id.* at 42. The State ***1268** contends that "[t]here can be no dispute that the 2023 Plan's stated goal of keeping the Gulf Coast together and the Wiregrass region together is a legitimate one, and § 2 does not (and cannot) require the State to disregard that legitimate race-neutral purpose in redistricting." *Id.* at 43. And the State contends, quoting the principal dissent in *Allen*, that the Gulf Coast is "indisputably a community of interest." *Id.* at 44 (internal quotation marks omitted) (alterations accepted).

The State offers two bodies of evidence to support its assertions about communities of interest: (1) the legislative findings that accompanied the 2023 Plan, and (2) evidence about the Gulf Coast and the Wiregrass that the Legislature considered in 2023. *Id.* at 44–50. Based on this evidence, the State concludes that this is "no longer a case in which there would be a split community of interest in both the State's plan and Plaintiffs' alternatives," and "Plaintiffs will not be able to show that there is a plan on par with the 2023 Plan that

also creates an additional reasonably configured majority-Black district." *Id.* at 51 (internal quotation marks omitted) (alterations accepted).

As for compactness and county splits, the State asserts that "each of Plaintiffs' alternative maps fails to match the 2023 Plan on compactness, county splits, or both." *Id.* at 56. The State argues that "a Plaintiff cannot advocate for a less compact plan for exclusively racial reasons." *Id.* at 57. The State urges us to disregard our previous finding that the Plaintiffs adduced maps that respected the guidelines because "evidence about the 2021 Plan based on its 2021 principles does not shine light on whether the 2023 Plan has discriminatory effects." *Id.*

The State relies on the expert report of Mr. Sean Trende, who "assessed the 2023 Plan and each of Plaintiffs' alternative plans based on the three compactness measures Dr. Duchin used in her earlier report." *Id.* Mr. Trende concluded that "the 2023 Plan measures as more compact" on all three scores "than Duchin Plans A, C, and D" and all the Cooper plans. *Id.*; *see also Milligan* Doc. 220-12 at 6–11. Mr. Trende concedes that on two of the measures (Polsby-Popper and Cut Edges), the Duchin Plan B ties or beats the 2023 Plan, and on one of the measures (Cut Edges), a map that the *Milligan* and *Caster* Plaintiffs submitted to the Committee during the 2023 legislative process ("the VRA Plan")[16] ties the 2023 Plan. *See Milligan* Doc. 220 at 57. The State argues that Duchin Plan B and the VRA Plan "still fail under *Allen* because they have more county splits" (seven) than the 2023 Plan has (six). *Id.* at 58.

The State claims that if "Plaintiffs' underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be ... affirmative action in redistricting," which would be unconstitutional. *Id.* at 59–60.

Third, the State urges us to reject the Plaintiffs' understanding of an opportunity district on constitutional avoidance grounds. *See id.* at 60–68. The State begins with the undisputed premise that under Section Two, a remedial district need not be majority-Black. *Id.* at 60. The State then argues that nothing in *Allen* could "justify ... replacing the 2023 Plan with ***1269** Plaintiffs' preferred alternatives that elevate the Black Belt's demographics over its historical boundaries." *Id.* at 61. The State then argues that "*all* race-based government action must satisfy strict scrutiny," that "[f]orcing proportional representation is not a compelling governmental interest," and that "sacrificing neutral [redistricting] principles to race is unlawful." *Id.* at 63 (emphasis in original) (internal quotation marks omitted).

The State argues that Plaintiffs' interpretation of Section Two contravenes "two equal protection principles: the principle that race can never be used as a negative or operate as a stereotype and the principle that race-based action can't extend indefinitely into the future." *Id.* at 64–67. The State says that the Plaintiffs' position "depends on stereotypes about how minority citizens vote as groups ... and not on identified instances of past discrimination." *Id.* at 68.

In their *fourth* argument, the State contends that we should reject the *Milligan* Plaintiffs' intentional discrimination argument as cursory and because there is an "obvious alternative explanation for the 2023 Plan: respect for communities of interest." *Id.* at 68–71 (internal quotation marks omitted). And the State says the *Milligan* Plaintiffs "rely on the complaints of Democrats in the Legislature." *Id.* at 70.

The State submitted with its brief numerous exhibits, including the 2023 Plan, transcripts of the Committee's public hearings, a supplemental report prepared by Mr. Bryan, Mr. Trende's report, and materials from the legislative process about two of the three communities of interest they urge us to consider: the Gulf Coast and the Wiregrass. *See Milligan* Docs. 220-1–220-19.

The State cites Mr. Bryan's 2023 report four times, and three of those are in reference to the VRA Plan. *See Milligan* Doc. 220 at 21 (in the "Background" section of the brief, to describe how the VRA Plan treats Houston County); *id.* (also in the "Background" section of the brief, to say that in the VRA Plan, the BVAP for District 2 is 50%, and the BVAP for District 7 is 54%); *id.* at 58 (in the constitutional avoidance argument, to assert that the VRA Plan splits counties "along racial lines, in service of hitting a racial target"). The fourth citation was as evidence that District 2 in the 2023 Plan has a BVAP of 39.93%, which is a stipulated fact. *See id.* at 28; *Milligan* Doc. 251 ¶ 4.

Nowhere does the State argue (or even suggest) that District 2 in the 2023 Plan is (or could be) an opportunity district.

4. The Plaintiffs' Replies

a. The *Milligan* Plaintiffs

The *Milligan* Plaintiffs reply that it is "undisputed and dispositive" that the 2023 Plan "offers no new opportunity district." *Milligan* Doc. 225 at 2. The *Milligan* Plaintiffs accuse the State of ignoring the finding by us and the Supreme Court that they already have satisfied *Gingles* I, and of "try[ing] to justify the 2023 Plan through newly contrived [legislative] 'findings' that perpetuate the [Section Two] violation and contradict their own guidelines." *Id.*

The *Milligan* Plaintiffs assert that the State "cannot ... cite a single case in which a court has ruled that a remedial plan that fails to meaningfully increase the effective opportunity of minority voters to elect their preferred representatives is a valid [Section Two] remedy." *Id.* at 2–3.

The *Milligan* Plaintiffs distinguish their claim of vote dilution, for which they say the remedy is an additional opportunity district, from a racial gerrymandering claim, for which the remedy is "merely to undo a specific, identified racial split regardless of electoral outcomes." *Id.* at 4. The *Milligan* Plaintiffs say that the State's ***1270** arguments about unifying the Black Belt fail to appreciate this distinction. *Id.*

The *Milligan* Plaintiffs resist the State's reliance on *Dillard* to reset the *Gingles* analysis. *Id.* at 5. They say the State misreads *Dillard*, which involved a complete reconfiguration of the electoral mechanism from an at-large system to a single-member system with an at-large chair. *See id.* (citing *Dillard*, 831 F.2d at 250). In that context, the *Milligan* Plaintiffs say, it "makes sense" for a court to "compare the differences between the new and old" maps with the understanding that "evidence showing a violation in an existing [at-large] election scheme may not be completely coextensive with a proposed alternative election system." *Id.* at 6 (internal quotation marks omitted). According to the *Milligan* Plaintiffs, that understanding does not foreclose, in a vote dilution case without an entirely new electoral mechanism, focusing the question on "whether the new map continues to dilute Black votes as the old map did or whether the new map creates an 'opportunity in the real sense of that term.' " *Id.* (quoting *LULAC*, 548 U.S. at 429, 126 S.Ct. 2594).

The *Milligan* Plaintiffs urge that if we reset the *Gingles* analysis, we will necessarily allow "infinite bites at the apple[:] Alabama would be permitted to simply designate new 'significant' communities of interest and anoint them *post hoc*, point to them as evidence of newfound compliance, and relitigate the merits again and again—all while refusing to remedy persistent vote dilution." *Id.*

The *Milligan* Plaintiffs argue that the State's defense of the 2023 Plan invites the very beauty contest that we must avoid, and that federal law does not require a Section Two plaintiff to "meet or beat each and every one of [a State's] selected and curated districting principles" on remedy. *Id.* at 8. If that were the rule, the *Milligan* Plaintiffs say they would be required to "play a continuous game of whack-a-mole that would delay or prevent meaningful relief." *Id.*

The *Milligan* Plaintiffs point out that the guidelines the Legislature used in 2023 were the exact same guidelines the Legislature used in 2021. *Id.* at 9. And the *Milligan* Plaintiffs say that if we pay as much attention to the legislative findings that accompanied the 2023 Plan as the State urges us to, we will run afoul of the rule that legislative intent is not relevant in a Section Two analysis. *Id.*

Finally, the *Milligan* Plaintiffs say that the State badly misreads *Allen* as "authoriz[ing] states to reverse engineer redistricting factors that entrench vote dilution." *Id.* at 11. The *Milligan* Plaintiffs argue that *Allen* "specifically *rejected* this theory when it held that a state may not deploy purportedly neutral redistricting criteria to provide some voters less opportunity ... to participate in the political process." *Id.* (emphasis in original) (internal quotation marks omitted).

b. The *Caster* Plaintiffs

The *Caster* Plaintiffs reply that "Alabama is fighting a battle it has already lost[ ]" and that "[s]o committed is the State to maintaining a racially dilutive map that it turns a deaf ear to the express rulings of this Court and the Supreme Court." *Caster* Doc. 195 at 2. The *Caster* Plaintiffs urge us "not [to] countenance Alabama's repeated contravention" of our instructions. *Id.*

The *Caster* Plaintiffs make three arguments on reply. *First*, they argue that Section Two liability can be remedied "only by a plan that cures the established vote dilution." *Id.* at 3. They urge that the liability and remedy inquiries are inextricably intertwined, such that whether a map "is a Section 2 *remedy*

is ... a measure of whether it addresses the State's ***1271** Section 2 *liability*." *Id.* (emphasis in original).

The *Caster* Plaintiffs attack the State's attempt to "completely reset[ ] the State's liability such that Plaintiffs must run the *Gingles* gauntlet anew" as unprecedented. *Id.* at 4. The *Caster* Plaintiffs assert that *Covington*, 138 S. Ct. at 2553, forecloses the State's position, and they make the same argument about *Dillard* that the *Milligan* Plaintiffs make. *See Caster* Doc. 195 at 4–6.

The *Caster* Plaintiffs criticize the State's argument about legislative deference to the 2023 Plan as overdrawn, arguing that "deference does not mean that the Court abdicates its responsibility to determine whether the remedial plan in fact remedies the violation." *Id.* at 8.

The *Caster* Plaintiffs expressly disclaim a beauty contest: "Plaintiffs do not ask the Court to reject the 2023 Plan in favor of a plan it finds preferable. They ask the Court to strike down the 2023 Plan because they have provided unrefuted evidence that it fails to provide the appropriate remedy this Court found was necessary to cure the Section 2 violation." *Id.* at 9 (internal quotation marks omitted).

Second, the *Caster* Plaintiffs assert that the State misreads the Supreme Court's affirmance of the preliminary injunction. *Id.* at 10–12. The *Caster* Plaintiffs argue that *Allen* did not require a " 'meet or beat' standard for illustrative maps" and did not adopt a standard that "would allow the remedial process to continue ad infinitum—so long as one party could produce a new map that improved compactness scores or county splits." *Id.* at 10–11.

The *Caster* Plaintiffs reply to the State's argument about affirmative action in redistricting by directing us to the statement in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 143 S. Ct. 2141, 2162, 216 L.Ed.2d 857 (2023), that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is a "compelling interest[ ] that permit[s] resort to race-based government action"; and the holding in *Allen*, 143 S. Ct. at 1516–17, that for the last forty years, "[the Supreme] Court and the lower federal courts have repeatedly applied" Section Two "and, under certain circumstances, have authorized race-based redistricting as a remedy" for discriminatory redistricting maps. *Caster* Doc. 195 at 12.

Third, the *Caster* Plaintiffs argue that the State concedes that the 2023 Plan does not provide Black voters an additional opportunity district. *Caster* Doc. 195 at 13–14. The *Caster* Plaintiffs urge us that this fact is dispositive. *See id.*

Ultimately, the *Caster* Plaintiffs contend that "[i]f there were any doubt that Section 2 remains essential to the protection of voting rights in America, Alabama's brazen refusal to provide an equal opportunity for Black voters in opposition to multiple federal court opinions—six decades after the passage of the Voting Rights Act—silences it, resoundingly." *Id.* at 15.

5. The Parties' Motions for Clarification

While the parties were preparing their briefs, the *Milligan* and *Caster* Plaintiffs, as well as the State, each filed motions for clarification regarding the upcoming hearing. *See Milligan* Docs. 188, 205. The *Milligan* and *Caster* Plaintiffs sought to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188 at 2, while the State asked for a ruling on whether the Court would "foreclose consideration" of evidence it intended to offer in support of their *Gingles* I argument, *Milligan* Doc. 205 at 4–5. The State advised us that it would offer evidence "on whether race would now predominate in Plaintiffs' alternative approaches, as illuminated by new ***1272** arguments in Plaintiffs' objections and their plan presented to the 2023 Reapportionment Committee." *Id.* at 5. And the State alerted us that it would not offer any evidence "challenging the demographic or election numbers in the performance reports" offered by the Plaintiffs (*i.e.*, the Palmer and Liu Reports). *Id.* at 6 (internal quotation marks omitted).

In response, the *Milligan* Plaintiffs asserted that "the sole objective of this remedial hearing is answering whether Alabama's new map remedies the likely [Section Two] violation." *Milligan* Doc. 210 at 1. "As such," the *Milligan* Plaintiffs continued, the State is "bar[red] ... from relitigating factual and legal issues that this Court and the Supreme Court resolved at the preliminary injunction liability stage—including whether Mobile-Baldwin is an inviolable community of interest that may never be split, whether the legislature's prioritizing particular communities of interest immunizes the 2021 Plan from Section 2 liability, and whether Plaintiffs' illustrative maps are reasonably configured." *Id.* at 2. The *Milligan* Plaintiffs asserted that "the undisputed evidence proves that [the 2023 Plan] does not satisfy the preliminary injunction." *Id.* at 2–3.

The *Caster* Plaintiffs responded similarly. The *Caster* Plaintiffs argued that "the question of Alabama's liability is not an open one for purposes of these preliminary injunction proceedings," because "[t]hat is precisely what the Supreme Court decided when it affirmed this Court's preliminary injunction just a few months ago." *Caster* Doc. 190 at 2 & Part I. "Rather," the *Caster* Plaintiffs argued, "the question before the Court is whether the 2023 Plan actually remedies the State's likely violation." *Id.* at 2, 7–8. The *Caster* Plaintiffs asserted that to answer that question, we needed only to determine "whether the 2023 Plan remedies the vote dilution identified during the liability phase by providing Black Alabamians with an additional opportunity district." *Id.* at 8. Likewise, the *Caster* Plaintiffs asserted that we should exclude as irrelevant the State's evidence that the 2023 Plan respects communities of interest. *Id.* at 12–13. The *Caster* Plaintiffs argued that on remedy, Section Two is not "a counting exercise of how many communities of interest can be kept whole." *Id.* at 12. They urged that the Gulf Coast evidence was merely an attempt to relitigate our findings about that community, which should occur only during a trial on the merits, not during the remedial phase of preliminary injunction proceedings. *Id.* at 13–14.

We issued orders clarifying that the scope of the remedial hearing would be limited to "the essential question whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and with Section Two." *Milligan* Doc. 203 at 4; *see also Milligan* Doc. 222 at 9. We cited the rules that "any proposal to remedy a Section Two violation must itself conform with Section Two," and that "[t]o find a violation of Section 2, there must be evidence that the remedial plan denies equal access to the political process." *Milligan* Doc. 222 at 10 (alterations accepted) (quoting *Dillard*, 831 F.2d at 249–50).

Accordingly, we ruled that "[a]lthough the parties may rely on evidence adduced in the original preliminary injunction proceedings conducted in January 2022 to establish their assertions that the 2023 Plan is or is not a sufficient remedy for the Section Two violation found by this Court and affirmed by the Supreme Court, th[e] remedial hearing w[ould] not relitigate the issue of that likely Section Two violation." *Milligan* Doc. 203 at 4. We reasoned that this limitation "follow[ed] applicable binding Supreme Court precedent and [wa]s ***1273** consistent with the nature of remedial proceedings in other redistricting cases." *Id.* (citing *Covington*, 138 S. Ct. at 2550; and *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 3:22-cv-493-MMM-LLL, 2022 WL 17751416, 2022 U.S. Dist. LEXIS 227920 (M.D. Fla. Dec. 19, 2022)). We specifically noted that "[i]f the Defendants seek to answer the Plaintiffs' objections that the 2023 Plan does not fully remediate the likely Section Two violation by offering evidence about 'communities of interest,' 'compactness,' and 'county splits,' they may do so." *Milligan* Doc. 222 at 10. But we reserved ruling on the admissibility of any particular exhibits that the parties intended to offer at the hearing. *Id.* at 10–11.

We explained that "it would be unprecedented for this Court to relitigate the likely Section Two violation during these remedial proceedings," and that we "w[ould] not do so" because "[w]e are not at square one in these cases." *Milligan* Doc. 203 at 4. We observed that "this manner of proceeding [wa]s consistent with the [State's] request that the Court conduct remedial proceedings at this time and delay any final trial on the merits ... until after the 2024 election." *Id.* at 5. And we explained why we would not require Plaintiffs to amend or supplement complaints, as the State suggested. *See id.* at 6–7.

6. The Plaintiffs' Motion *in Limine*

The *Milligan* and *Caster* Plaintiffs also jointly filed a motion *in limine* in advance of the remedial hearing to exclude "the expert testimony of Mr. Thomas Bryan and Mr. Sean Trende, as well as any and all evidence, references to evidence, testimony, or argument relating to the 2023 Plan's maintenance of communities of interest." *Milligan* Doc. 233 at 1. The Plaintiffs asserted that because of the limited scope of the hearing, this evidence was irrelevant and immaterial. *See id.* at 3–12.

As for Mr. Trende, the Plaintiffs asserted that his "analysis—which compares Plaintiffs' illustrative plans, a plan Plaintiffs proposed to the Legislature, and the State's 2021 and 2023 Plans under compactness metrics, county splits, and the degree to which they split three identified communities of interest—sheds no light on whether the 2023 Plan remedies this Court's finding of vote dilution." *Id.* at 4 (internal quotation marks omitted). And the Plaintiffs asserted that "Mr. Bryan's analysis of a smaller subset of the same plans concerning the number of county splits and ... the size and type of population that were impacted by them to offer opinions about whether there is evidence that race predominated in the design of the plans, similarly tilts at windmills." *Id.* (internal quotation marks omitted).

The Plaintiffs further asserted that those experts' "statistics regarding the 2023 Plan" are irrelevant in light of the State's "conce[ssion] that the Black-preferred candidates would have lost" in District 2 in "every single election studied by their own expert." *Id.* They urged us that "[t]he topics on which Mr. Trende and Mr. Bryan seek to testify have already been decided by this Court and affirmed by the Supreme Court." *Id.*

Similarly, the Plaintiffs asserted that the State's evidence about communities of interest is irrelevant. *Id.* at 7–12. The Plaintiffs argued that this evidence does not tend to make any fact of consequence more or less probable because it does not tell us anything about whether the State remedied the vote dilution we found. Put differently, the Plaintiffs say this evidence tells us nothing about whether the 2023 Plan includes an additional opportunity district. *Id.* And because the State concedes that District 2 is not an opportunity district, the Plaintiffs assert the evidence about communities of interest is not relevant at all. *Id.* at 11–12.

***1274** Separately, the Plaintiffs attacked the reliability of Mr. Bryan's testimony. *Id.* at 5–7.

In response to the motion, the State argued that its evidence is relevant to the question whether the 2023 Plan violates Section Two. *Milligan* Doc. 245 at 2–7. More particularly, the State argued that the evidence is relevant to the question whether the Plaintiffs can establish that the 2023 Plan violates Section Two "under the same *Gingles* standard applied at the merits stage." *Id.* at 5 (internal quotation marks omitted). The State reasoned that "[n]o findings have been made (nor could have been made) regarding the 2023 Plan's compliance with § 2." *Id.* at 6. The State defended the reliability of Mr. Bryan's analysis. *Id.* at 7–9.

D. Stipulated Facts

After they filed their briefs, the parties stipulated to the following facts for the remedial hearing. *See Milligan* Doc. 251; *Caster* Doc. 213. We recite their stipulations verbatim.

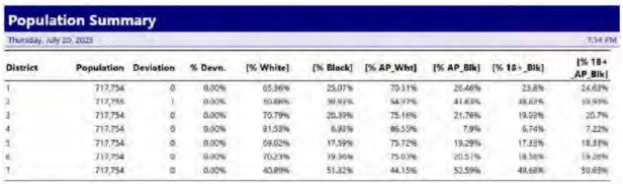
I. Demographics of 2023 Plan

1. The 2023 Plan contains one district that exceeds 50% Black Voting Age Population ("BVAP").

2. According to 2020 Census data, CD 7 in the 2023 Plan has a BVAP of 50.65% Any-Part Black.

3. Under the 2023 Plan, the district with the next-highest BVAP is CD 2.

4. According to 2020 Census data, CD 2 in the 2023 Plan has a BVAP of 39.93% Any-Part Black.



II. General Election Voting Patterns in the 2023 Plan

5. Under the 2023 Plan, Black Alabamians in CD 2 and CD 7 have consistently preferred Democratic candidates in the general election contests Plaintiffs' experts analyzed for the 2016, 2018, 2020, and 2022 general elections, as well as the 2017 special election for U.S. Senate. In those same elections, white Alabamians in CD 2 and CD 7 consistently preferred Republican candidates over (Black-preferred) Democratic candidates. In CD 2, white-preferred candidates (who are Republicans) almost always defeated Black-preferred candidates (who are Democrats). In CD 2, white candidates (who were Republicans) always defeated Black candidates (who were Democrats).

III. Performance of CD 2 in the 2023 Plan

6. The *Caster* Plaintiffs' expert Dr. Maxwell Palmer analyzed the 2023 Plan using 17 contested statewide elections between 2016 and 2022. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 44.5%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 1 out of the 17 contests analyzed.

***1275**

Table 4: Vote Share of Black-Preferred Candidates — SB 5 Plan

		CD 2	CD 7
2022	U.S. Senator*	38.6%	

	Governor*	37.5%	
	Attorney General*	39.1%	
	Sec. of State*	39.2%	
	Supreme Ct., Place 5*	39.7%	
2020	U.S. President	45.4%	61.4%
	U.S. Senator	47.7%	63.2%
2018	Governor	45.1%	63.7%
	Lt. Governor*	45.7%	62.7%
	Attorney General	48.3%	64.5%
	Sec. of State	45.8%	62.6%
	State Auditor*	46.6%	62.9%
	Supreme Ct., Chief	48.1%	65.5%
	Supreme Ct., Place 4	46.1%	63.2%
2017	U.S. Senator	55.8%	72.0%
2016	U.S. President	44.2%	60.3%
	U.S. Senator	43.9%	59.1%

* Indicates that the Black candidate of choice was Black.

7. The *Milligan* Plaintiffs' expert Dr. Baodong Liu completed a performance analysis of the 2023 Plan using 11 statewide biracial elections between 2014 and 2022. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.2%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 11 contests analyzed.

***1276**

Table 1: RPV in the 11 Biracial Elections based on the Livingston Plan, CD2

Election	Black Pref. Cand	White Pref. Cand	% vote cast for BPC in Livingston Plan	Black Support for Black Cand (95% CI)	White Support for Black Cand (95% CI)	BPC Won in Livingston Plan?	RPV?
2022 Governor	Yolanda Flowers	Kay Ivey	37.8%	94.0% (90-96)	4.9% (4-6)	No	Yes
2022 US Senate	Will Boyd	Katie Britt	38.8%	93.5% (89-96)	6.0% (4-9)	No	Yes
2022 Attorney General	Wendell Major	Steve Marshall	39.3%	94.3% (91-97)	6.3% (5-8)	No	Yes
2022 Secretary of State	Pamela Laffitte	Wes Allen	39.4%	94.2% (90-97)	6.0% (4-9)	No	Yes
2022 Supreme Court, Place 5	Anita Kelly	Bradley Byrne	39.9%	94.2% (91-97)	6.6% (5-10)	No	Yes
2018 Lt Governor	Will Boyd	Will Ainsworth	46.0%	93.6% (91-96)	6.3% (5-10)	No	Yes
2018 State Auditor	Miranda Joseph	Jim Zigler	46.9%	94.2% (90-97)	8.2 (6-13)	No	Yes
2018 Public Service Commission, Place 1	Cara McClure	Jeremy Oden	46.9%	95.7% (93-97)	6.5% (5-10)	No	Yes
2014 Secretary of State	Lula Albert-Kaigler	John Merrill	43.6%	91.5% (88-94)	6.2% (5-8)	No	Yes
2014 Lt Governor	James Fields	Kay Ivey	43.4%	91.3% (88-93)	6.3% (4-9)	No	Yes
2014 State Auditor	Miranda Joseph	Jim Zigler	41.7%	88.0% (81-91)	9.1% (6-14)	No	Yes

8. Dr. Liu also analyzed the 2020 presidential election between Biden-Harris and Trump-Pence. His analysis of both the 2020 presidential election and the 11 biracial elections between 2014 and 2022 showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.3%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 12 contests analyzed.

9. The Alabama Legislature analyzed the 2023 Plan in seven election contests: 2018 Attorney General, 2018 Governor, 2018 Lieutenant Governor, 2018 Auditor, 2018 Secretary of State, 2020 Presidential, ***1277** and 2020 Senate. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 46.6%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 7 contests analyzed.

Democrat CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	39.2%	38.5%	36.7%	37.6%	36.9%	34.8%	38.2%	**37.4%**
2	48.5%	45.3%	46.0%	46.8%	46.0%	45.6%	48.0%	**46.6%**
3	33.3%	32.6%	31.2%	31.8%	31.5%	29.3%	31.9%	**31.6%**
4	24.8%	24.8%	21.7%	22.6%	21.7%	18.6%	21.9%	**22.3%**
5	39.2%	38.6%	36.8%	38.0%	37.4%	36.2%	39.5%	**37.9%**
6	35.6%	36.2%	32.8%	33.7%	33.2%	33.4%	35.9%	**34.4%**
7	64.7%	64.0%	62.9%	63.2%	62.9%	61.6%	63.4%	**63.2%**

Republican CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	60.8%	61.5%	63.3%	62.4%	63.1%	65.2%	61.8%	**62.6%**
2	51.5%	54.7%	54.0%	53.2%	54.0%	54.4%	52.0%	**53.4%**
3	66.7%	67.4%	68.8%	68.2%	68.5%	70.7%	68.1%	**68.4%**
4	75.2%	75.2%	78.3%	77.4%	78.3%	81.4%	78.1%	**77.7%**
5	60.8%	61.4%	63.2%	62.0%	62.6%	63.8%	60.5%	**62.1%**
6	64.4%	63.8%	67.2%	66.3%	66.8%	66.6%	64.1%	**65.6%**
7	35.3%	36.0%	37.1%	36.8%	37.1%	38.4%	36.6%	**36.8%**

IV. The 2023 Special Session

10. On June 27, 2023, Governor Kay Ivey called a special legislative session to begin on July 17, 2023 at 2:00 p.m. Her proclamation limited the Legislature to addressing: "***Redistricting***: The Legislature may consider legislation pertaining to the reapportionment of the State, based on the 2020 federal census, into districts for electing members of the United States House of Representatives."

11. For the special session, Representative Chris Pringle and Senator Steve Livingston were the Co-Chairs of the Permanent Legislative Committee on Reapportionment ("the Committee"). The Committee had 22 members, including 7 Black legislators, who are all Democrats, and 15 white legislators, who are all Republicans.

12. Before the Special Session, the Committee held pre-session hearings on June 27 and July 13 to receive input from the public on redistricting plans.

13. At the Committee public hearing on July 13, Representative Pringle moved to re-adopt the 2021 Legislative Redistricting Guidelines ("Guidelines").

14. The Committee voted to re-adopt the 2021 Guidelines.

15. The only plans proposed or available for public comment during the two pre-session hearings were the "VRA Plaintiffs' Remedial Plan" from the *Milligan* and *Caster* Plaintiffs and the plans put forward by Senator Singleton and, Senator Hatcher.

16. On July 17, the first day of the Special Session, Representative Pringle introduced a plan he designated as the "Community of Interest" ("COI") plan.

17. The COI plan had a BVAP of 42.45% in Congressional District 2 ("CD2"), and Representative Pringle said it

maintained ***1278** the core of existing congressional districts.

18. The COI plan passed out of the Committee on July 17 along party and racial lines, with all Democratic and all Black members voting against it. Under the COI plan, the Committee's performance analysis showed that Black-preferred candidates would have won two of the four analyzed-statewide races from 2020 and 2022.

COMMMUNITY OF INTEREST PLAN

		CD2		CD7	
Year	Race	% Dem.	% Rep.	% Dem.	% Rep.
2020	Pres.	47.53	51.56	61.94	37.28
2020	U.S. Senate	50.23	49.77	64.19	35.81
2018	Gov.	47.77	52.23	63.89	36.11
2018	A.G.	50.97	49.03	64.34	35.66

19. The "Opportunity Plan" (or "Livingston 1") was also introduced on July 17. Senator Livingston was the sponsor of the Opportunity Plan.

20. The Opportunity Plan had a BVAP of 38.31% in CD2.

21. Neither the COI Plan nor Opportunity Plan were presented at the public hearings on June 27 or July 13.

22. On July 20, the House passed the Representative Pringle sponsored COI Plan, and the Senate passed the Opportunity Plan. The votes were along party lines with all Democratic house members voting against the COI plan. The house vote was also almost entirely along racial lines, with all Black house members, except one, voting against the COI plan. All Democratic and all Black senators voted against the Opportunity Plan.

23. Afterwards, on Friday, July 21, a six-person bicameral Conference Committee passed Senate Bill 5 ("SB5"), which [is] a modified-version of the Livingston plan ("Livingston 3" plan or the "2023 Plan").

24. The 2023 Plan was approved along party and racial lines, with the two Democratic and Black Conference Committee members (Representative England and Representative Smitherman) voting against it, out of six total members including Representative Pringle and Senator Livingston.

25. Representative England, one of the two Democratic and Black legislators on the Conference Committee, stated that the 2023 Plan was noncompliant with the Court's preliminary-injunction order and that the Court would reject it.

26. On July 21, SB5 was passed by both houses of the legislature and signed by Governor Ivey.

27. In the 2023 Plan enacted in SB5, the Black voting-age population ("BVAP") is 39.9%.

28. The map contains one district, District 7, in which the BVAP exceeds 50%.

29. SB5 passed along party lines and almost entirely along racial lines. Out of all Black legislators, one Republican Black House member voted for SB5, and the remaining Black House members voted against.

30. SB5 includes findings regarding the 2023 Plan. The findings purport to identify ***1279** three specific communities of interest (the Black Belt, the Wiregrass, and the Gulf Coast).

V. Communities of Interest

31. The Black Belt is a community of interest.

32. The Black Belt includes the 18 core counties of Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. In addition, Clarke, Conecuh, Escambia, Monroe, and Washington counties are sometimes but not always included within the definition of the Black Belt.

33. The 2023 Plan divides the 18 core Black Belt counties into two congressional districts (CD-2 and CD-7) and does not split any Black Belt counties.

34. The 2023 Plan keeps Montgomery County whole in District 2.

35. The 2023 Plan places Baldwin and Mobile Counties together in one congressional district.

36. Baldwin and Mobile Counties have been together in one congressional district since redistricting in 1972.

37. Alabama splits Mobile and Baldwin Counties in its current State Board of Education districts, as well as those in the 2011 redistricting cycle.

E. The Remedial Hearing

Before the remedial hearing, the *Milligan* and *Caster* parties agreed to present their evidence on paper, rather than calling witnesses to testify live. *See, e.g., Milligan* Doc. 233 at 1; Aug. 14 Tr. 92. Accordingly, no witnesses testified live at the hearing on August 14. Three events at the hearing further developed the record before us: (1) the attorneys made arguments and answered our questions; (2) we received exhibits into evidence and reserved ruling on some objections (see *infra* at Part VII), and (3) the parties presented for the first time certain deposition transcripts that were filed the night before the hearing, *see Milligan* Doc. 261.[17] We first discuss the deposition transcripts, and we then discuss the attorney arguments.

1. The Deposition Testimony

The *Milligan* Plaintiffs filed transcripts reflecting deposition testimony of seven witnesses: (1) Randy Hinaman, the State's longstanding cartographer, *Milligan* Doc. 261-1; (2) Brad Kimbro, a past Chairman of the Dothan Area Chamber of Commerce, *Milligan* Doc. 261-2, who also prepared a declaration the State submitted, *Milligan* Doc. 220-18; (3) Lee Lawson, current President & CEO of the Baldwin County Economic Development Alliance, *Milligan* Doc. 261-3, who also prepared a declaration, *Milligan* Doc. 220-13; (4) Senator Livingston, *Milligan* Doc. 261-4; (5) Representative Pringle, *Milligan* Doc. 261-5; (6) Mike Schmitz, a former mayor of Dothan, *Milligan* Doc. 261-6, who also prepared a declaration, *Milligan* Doc. 220-17; and (7) Jeff Williams, a banker in Dothan, *Milligan* Doc. 261-7, who also prepared a declaration, *Milligan* Doc. 227-1.

During the remedial hearing, the *Milligan* Plaintiffs played video clips from the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle. (The Court later reviewed all seven depositions in their entirety.)

Mr. Hinaman testified that his understanding of the preliminary injunction was that the Legislature "needed to draw two districts that would give African Americans an opportunity to elect a candidate of their choice." *Milligan* Doc. 261-1 at 20, 22.[18] Mr. Hinaman testified that he drew ***1280** the Community of Interest Plan that the Alabama House of Representatives passed. *Id.* at 23. He testified that of the maps that were sponsored by a member of either the Alabama House or the Alabama Senate, the Community of Interest Plan is the only one he drew. *Id.* at 24.

Mr. Hinaman testified that he did not know who drew the Opportunity Plan, which the Alabama Senate passed. *Id.* at 31–32. He testified that he "believe[d] it was given to Donna Loftin, who is ... supervisor of the reapportionment office, on a thumb drive." *Id.* at 32. Mr. Hinaman testified that he had no understanding of how the Opportunity Plan was drawn or why he did not draw it. *Id.* 32–34.

Mr. Hinaman testified that he had "numerous discussions with members of congress" and their staff during the special session. *Id.* at 45. Mr. Hinaman testified about the performance analyses he considered and that he was "more interested in performance than the raw BVAP number" because "not all 42 or 43 or 41 or 39 percent districts perform the same." *Id.* at 65–66.

When Mr. Hinaman was asked about the legislative findings, he testified that he had not seen them before his deposition, that no one told him about them, and that he was not instructed about them as he was preparing maps. *Id.* at 94.

Senator Livingston testified that he was "familiar" that the preliminary injunction ruled that a remedial map should include "two districts in which Black voters either comprise a voting-age majority or something quite close to it," but that his deposition was the first time he had read that part of the injunction. *Milligan* Doc. 261-4 at 51–52. Senator Livingston testified that he was "personally not paying attention to race" as maps were drawn or shown to him. *Id.* at 56.

When Senator Livingston was asked why he changed his focus from the Community of Interest Plan to other plans, he said it was because "[t]he Committee moved, and [he] was going to be left behind." *Id.* at 66. He testified that the Committee members "had received some additional information they thought they should go in the direction of compactness, communities of interest, and making sure that ... congressmen or women are not paired against each other," but he did not know the source of that information. *Id.* at 67–68.

Senator Livingston testified that a political consultant drew the Opportunity Plan, and Senator Roberts delivered it to the reapportionment office. *Id.* at 70. Senator Livingston testified that he did not have "any belief one way or another about where [the Opportunity Plan] would provide a fair opportunity to black voters to elect a preferred candidate in the second district." *Id.* at 71. Senator Livingston testified that Black-preferred candidates "have an opportunity to win" in

District 2 even if they actually won zero elections. *Id.* at 96–97.

When Senator Livingston was asked who prepared the legislative findings, he identified the Alabama Solicitor General and testified that he did not "have any understanding of why those findings were included in the bill." *Id.* at 101–02.

Representative Pringle testified that he was familiar with the guidance from the Court about the required remedy for the Section Two violation. *Milligan* Doc. 261-5 at 17–18. Representative Pringle testified that he understood "opportunity to elect" to mean "a district which they have the ability to elect or defeat somebody of their choosing," although he "ha[d] no magic number on that." *Id.* at 19–20. Representative Pringle twice testified that his "overriding principle" is "what the United States Supreme Court told us to do." *Id.* at 22–23.

***1281** Representative Pringle testified that during the special session, he spoke with the Speaker of the United States House of Representatives, Mr. Kevin McCarthy. *Id.* He testified that Speaker McCarthy "was not asking us to do anything other than just keep in mind that he has a very tight majority." *Id.* at 22. Representative Pringle testified that like Mr. Hinaman, he had conversations with members of Alabama's congressional delegation and their staff. *Id.* at 23–24.

Representative Pringle testified that the only map drawer that he retained in connection with the special session was Mr. Hinaman. *Id.* at 25. Representative Pringle also testified that the Alabama Solicitor General "worked as a map drawer at some point in time." *Id.* at 26–28. Like Senator Livingston, Representative Pringle testified that the Opportunity Plan was drawn by a political consultant and brought to the Committee by Senator Roberts. *Id.* at 72.

Unlike Senator Livingston, Representative Pringle testified that he did not know who drafted the legislative findings. *Id.* at 90. He testified that he did not know they would be in the bill; the Committee did not solicit anyone to draft them; he did not know why they were included; he had never seen a redistricting bill contain such findings; and he had not analyzed them. *Id.* at 91–94.

Representative Pringle testified repeatedly that he thought that his plan (the Community of Interest Plan) was a better plan because it complied with court orders, but that he could not get it passed in the Senate. *See, e.g., id.* at 99–102.

In heated testimony, Representative Pringle recounted that when he learned his plan would not pass the Senate, he told Senator Livingston that the plan that passed could not have a House bill number or Representative Pringle's name on it. *Id.* at 101–02. When asked why he did not want his name on the plan that passed, Representative Pringle answered that his plan "was a better plan" "[i]n terms of its compliance with the Voting Rights Act." *Id.* at 102.

Representative Pringle was asked about a newspaper article that he read that reported one of his colleagues' public comments about the 2023 Plan. *See id.* at 109–10. Neither he nor his counsel objected to the question, nor to him being shown the article that he testified he had seen before. *Id.* The article reported that the Alabama Speaker of the House had commented: "If you think about where we were, the Supreme Court ruling was five to four. So there's just one judge that needed to see something different. And I think the movement that we have and what we've come to compromise on today gives us a good shot ...." *Id.* at 109.

When Representative Pringle was asked whether he "agree[d] that the legislature is attempting to get a justice to see something differently," he answered that he was not, that he was "trying to comply with what the Supreme Court ruled," but that he did not "want to speak on behalf of 140 members of the legislature." *Id.* at 109–10. Representative Pringle also testified that his colleague had never expressed that sentiment to him privately. *Id.* at 110.

2. Arguments and Concessions

During the opening statements at the remedial hearing, the *Milligan* Plaintiffs emphasized that there is "only one" question now before us: whether the 2023 Plan "remed[ies] the prior vote dilution, and does it provide black voters with an additional opportunity to elect the candidates of their choice." Aug. 14 Tr. 10. Nevertheless, the *Milligan* Plaintiffs walked us through their *Gingles* analysis, in case we perform one. *See* Aug. 14 Tr. 10–23. The *Milligan* Plaintiffs asserted that we previously found and the Supreme Court affirmed that they satisfied *Gingles* I. Aug. ***1282** 14 Tr. 10–11. The *Milligan* Plaintiffs said that we can rely on that finding even though the Legislature enacted the 2023 Plan because *Gingles* I does not "look at the compactness of plaintiffs' map," but "looks at the

compactness of the minority community," which we found and the Supreme Court affirmed. Aug. 14 Tr. 10–11. And the *Milligan* Plaintiffs assert that it is undisputed that they satisfy *Gingles* II and III because "there is serious racially polarized voting" in Alabama. Aug. 14 Tr. 11.

The *Milligan* Plaintiffs further urged that the key elements of the performance analysis are undisputed: "there is no dispute that the 2023 plan does not lead to the election of a ... second African-American candidate of choice," Aug. 14 Tr. 11, and that the 2023 Plan, "like the old plan, also results in vote dilution" because "black candidates would lose every election" in District 2, Aug. 14 Tr. 12.

The *Milligan* Plaintiffs accused the State of "rehash[ing] the arguments that both this Court and the Supreme Court have already rejected," mainly that "there could be no legitimate reason to split Mobile and Baldwin counties," "the Court should compare its allegedly neutral treatment of various communities in the 2023 plan to the treatment of the same alleged communities in" the illustrative plans, and "the use of race in devising a remedy is improper." Aug. 14 Tr. 12–13.

The *Milligan* Plaintiffs said that if we reexamine any aspect of our *Gingles* analysis, we should come out differently than we did previously on Senate Factor 9 (which asks whether the State's justification for its redistricting plan is tenuous). Aug. 14 Tr. 14–22. We made no finding about Factor 9 when we issued the preliminary injunction, but the *Milligan* Plaintiffs said that the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle support a finding now. *See* Aug. 14 Tr. 14–22.

During their opening statement, the *Caster* Plaintiffs argued that the State was in "defiance of the Court's clear instructions," because "[t]here is no dispute that the 2023 Plan ... once again limits the state's black citizens to a single opportunity district." Aug. 14 Tr. 27–28. Based on stipulated facts alone, the *Caster* Plaintiffs urged this Court to enjoin the 2023 Plan because it "perpetuat[es] the same Section 2 violation as the map struck down by this Court last year." Aug. 14 Tr. 28.

The *Caster* Plaintiffs argued that we should understand the State's argument that we are back at square one in these cases as part and parcel of their continued defiance of federal court orders. Aug. 14 Tr. 29. The *Caster* Plaintiffs further argued that we should reject the State's argument that the 2023 Plan remedies the "cracking" of the Black Belt because the 2023 Plan merely "reshuffled Black Belt counties to give the illusion of a remedy." Aug. 14 Tr. 29–30. The *Caster* Plaintiffs reasoned that "Alabama gets no brownie points for uniting black voters and the Black Belt community of interest in a district in which they have no electoral power and in a map that continues to dilute the black vote." Aug. 14 Tr. 30. Finally, the *Caster* Plaintiffs urged us to ignore all the new evidence about communities of interest, because "Section 2 is not a claim for better respect for communities of interest. It is a claim regarding minority vote dilution." Aug. 14 Tr. 30.

In the State's opening statement, it asserted that if the Plaintiffs cannot establish that the 2023 Plan violates federal law, then the 2023 Plan is "governing law." Aug. 14 Tr. 33. The State assailed the Plaintiffs' suggestion that the question is limited to the issue of whether the 2023 Plan includes an additional opportunity ***1283** district as a "tool for demanding proportionality," which is unlawful. Aug. 14 Tr. 36.

The State asserted that the Plaintiffs must come forward with new *Gingles* I evidence because under *Allen*, it "simply cannot be the case" that the Duchin plans and Cooper plans are "up to the task." Aug. 14 Tr. 36. The State's principal argument was that those plans were configured to compete with the 2021 Plan on traditional districting principles such as compactness and respect for communities of interest, and they cannot outdo the 2023 Plan on those metrics. Aug. 14 Tr. 36–39. According to the State, the 2023 Plan "answers the plaintiffs' challenge" with respect to the Black Belt because it "take[s] out ... those purportedly discriminatory components of the 2021 plan." Aug. 14 Tr. 39–41. Because "[t]hat cracking is gone," the State said, "the 2023 plan does not produce discriminatory effects." Aug. 14 Tr. 41.

Much of the State's opening statement cautioned against an additional opportunity district on proportionality grounds and against "abandon[ing]" legitimate traditional districting principles. *See* Aug. 14 Tr. 39–47. According to the State, "now proportionality is all that you are hearing about." Aug. 14 Tr. 47–48.

After opening statements, we took up the Plaintiffs' motion *in limine*. The Plaintiffs emphasized that even if they are required to reprove compactness for *Gingles* I, they could rely on evidence from the preliminary injunction proceeding (and our findings) to do so, because all the law requires is a determination that the minority population is reasonably compact and that an additional opportunity district can be

reasonably configured. The Plaintiffs emphasized that under this reasonableness standard, they need not outperform the 2023 Plan in a beauty contest by submitting yet another illustrative plan. Aug. 14 Tr. 50–51, 58–59. According to the Plaintiffs, "nothing can change the fact that" Black voters in Alabama "as a community are reasonably compact, and you can draw a reasonably configured district around them." Aug. 14 Tr. 54. Indeed, the Plaintiffs say, "[t]he only thing that can substantially change" where Black voters are in Alabama for purposes of *Gingles* I "would be a new census." Aug. 14 Tr. 55.

The Plaintiffs suggested that the State confused the compactness standards for a Section Two case, which focus on the compactness of the minority population, with the compactness standards for a racial gerrymandering case, which focus on the compactness of the challenged district. Aug. 14 Tr. 55, 57.

The State based its response to the motion *in limine* on arguments about the appropriate exercise of judicial power. *See* Aug. 14 Tr. 63. On the State's reasoning, the Plaintiffs "have to relitigate and prove" the *Gingles* analysis because the Court cannot "just transcribe the findings from an old law onto a new law." Aug. 14 Tr. 61, 63. Significantly, the State conceded that the Plaintiffs have met their burden in these remedial proceedings on the second and third *Gingles* requirements and the Senate Factors. Aug. 14 Tr. 64–65. So, according to the State, the only question the Court need answer is whether the Plaintiffs are required to reprove *Gingles* I. *See* Aug. 14 Tr. 64–66. The State said they must, because "it is [the State's] reading of *Allen* that reasonably configured is not determined based on whatever a hired expert map drawer comes in and says, like, this is reasonable enough. It has to be tethered ... to objective factors to a standard or rule that a Legislature can look at ex ante ...." Aug. 14 Tr. 67.

The State answered several questions about whether the Plaintiffs now must offer a new illustrative map that outperforms ***1284** the 2023 Plan with respect to compactness and communities of interest. In one such exchange, we asked whether the State was "essentially arguing [that] whatever the state does, we can just say they shot a bullet, and we have now drawn a bull's eye where that bullet hit, and so it's good?" Aug. 14 Tr. 72. We followed up: "It's just some veneer to justify whatever the state wanted to do that was short of the [Voting Rights Act?]" Aug. 14 Tr. 72. The State responded that precedent "makes clear that the state does have a legitimate interest in promoting these three principles of compactness, counties, and communities of interest." Aug. 14 Tr. 72.

Again, we asked the State whether the Duchin plans and Cooper plans were subject to attack now even though we found (and the Supreme Court affirmed) that the additional opportunity districts they illustrated were reasonably configured. Aug. 14 Tr. 67. The State answered that because the comparator is now the 2023 Plan, the Duchin plans and Cooper plans could be attacked once again, this time for failing to outperform the 2023 Plan even though we found they outperformed the 2021 Plan. Aug. 14 Tr. 67–70.

We further asked the State whether "our statement that the appropriate remedy for the ... likely violation that we found would be an additional opportunity district ha[s] any relevance to what we're doing now?" Aug. 14 Tr. 75. "I don't think so," the State said. Aug. 14 Tr. 75. We pressed the point: "it is the state's position that the Legislature could ... enact a new map that was consistent with those findings and conclusions [by this Court and the Supreme Court] without adding a second opportunity district?" Aug. 14 Tr. 75. "Yes," the State replied. Aug. 14 Tr. 75.

Moreover, the *Caster* Plaintiffs argued (in connection with the State's isolation of the dispute to *Gingles* I) that under applicable law, the *Gingles* I inquiry already has occurred. According to the *Caster* Plaintiffs, "[n]either the size of the black population nor its location throughout the state is a moving target[ ]" between 2021 and 2023. Aug. 14 Tr. 88. Likewise, they say, "[n]othing about the 2023 map, nothing about the evidence that the defendants can now present ... can go back in time" to undermine maps drawn "two years ago." Aug. 14 Tr. 88. They add that "[n]othing about the tradition of Alabama's redistricting criteria has changed[ ]" since 2021, and that "[i]f anything, it is Alabama that has broken with its own tradition ... in creating these brand new findings out of nowhere, unbeknownst to the actual committee chairs who were in charge of the process." Aug. 14 Tr. 89.

We carried the motion *in limine* with the case and received exhibits into evidence (we rule on remaining objections *infra* at Part VII).

We then asked for the State's position if we were to order (again) that an additional opportunity district is required, and the State replied that such an order would be unlawful under *Allen* because it would require the State to adopt a map that violates traditional principles. Aug. 14 Tr. 157. When

asked "at what point the federal court ... ha[s] the ability to comment on whether the appropriate remedy includes an additional opportunity district" — "[o]n liability," "[o]n remedy," "[b]oth," "or [n]ever" — the State said there is not "any prohibition on the Court commenting on what it thinks an appropriate remedy would be." Aug. 14 Tr. 157–58.

The State then answered questions regarding its argument about traditional districting principles and the 2023 Plan. The Court asked the State whether it "acknowledge[d] any point during the ten-year [census] cycle where the [Legislature's] ability to redefine the principles ***1285** cuts off and the Court's ability to order an additional opportunity district attaches." Aug. 14 Tr. 159. The State responded that that "sounds a lot like a preclearance regime." Aug. 14 Tr. 159.

Ultimately, the State offered a practical limitation on the Legislature's ability to redefine traditional districting principles: if the Court rules that "there is a problem with this map," then the State's "time has run out," and "we will have a court drawn map for the 2024 election barring appellate review." Aug. 14 Tr. 159–60.

We continued to try to understand how, in the State's view, a court making a liability finding has any remedial authority. We asked: "[W]hen we made the liability finding, is it the state's position that at that time this Court had no authority to comment on what the appropriate remedy would be because at that time the Legislature was free to redefine traditional districting principles?" Aug. 14 Tr. 160. "Of course, the Court could comment on it[,]" the State responded. Aug. 14 Tr. 160.

Next, we queried the State whether Representative Pringle's testimony about the legislative findings should affect the weight we assign the findings. Aug. 14 Tr. 161–62. The State said no, because Representative Pringle is only one legislator out of 140, there is a presumption of regularity that attaches to the 2023 Plan, and the findings simply describe what we could see for ourselves by looking at the map. Aug. 14 Tr. 162. The State admonished us that "it's somewhat troubling for a federal court to say that they know Alabama's communities of interest better than Alabama's representatives know them." Aug. 14 Tr. 163.

Ultimately, we asked the State whether it "deliberately chose to disregard [the Court's] instructions to draw two majority-black districts or one where minority candidates could be chosen." Aug. 14 Tr. 163. The State reiterated that District 2 is "as close as you are going to get to a second majority-black district without violating *Allen*" and the Constitution. Aug. 14 Tr. 164. Finally, we pressed the question this way: "Can you draw a map that maintains three communities of interest, splits six or fewer counties, but that most likely if not almost certainly fails to create an opportunity district and still comply with Section 2?" Aug. 14 Tr. 164. "Yes. Absolutely," the State said. Aug. 14 Tr. 164*; see also* Aug. 14 Tr. 76.

F. The Preliminary Injunction Hearing

The next day, the Court heard argument on the *Singleton* Plaintiffs' motion for a preliminary injunction. The *Singleton* Plaintiffs walked the Court through the claim that the 2023 Plan "preserves" and "carries forward" a racial gerrymander that has persisted in Alabama's congressional districting plan since 1992, when the State enacted a plan guaranteeing Black voters a majority in District 7 pursuant to a stipulated injunction entered to resolve claims that Alabama had violated Section Two of the Voting Rights Act, *see Wesch*, 785 F. Supp. at 1493, *aff'd sub nom. Camp*, 504 U.S. 902, 112 S.Ct. 1926, *and aff'd sub nom. Figures*, 507 U.S. 901, 113 S.Ct. 1233. August 15 Tr. 8, 10–15. The State disputed that race predominated in the drawing of the 2023 Plan, but made clear that, if the Court disagreed, the State did not contest the *Singleton* Plaintiffs' argument that the 2023 Plan could not satisfy strict scrutiny. Aug. 15 Tr. 82. The Court received some exhibits into evidence and reserved ruling on some objections. Aug. 15 Tr. 25–31, 59–60. We heard live testimony from one of the Plaintiffs, Senator Singleton; the State had the opportunity to cross-examine him. Aug. 15 Tr. 32–58. And we took closing arguments. Aug. 15 Tr. 61–85.

***1286** II. STANDARD OF REVIEW

As the foregoing discussion previewed, the parties dispute the standard of review that applies to the Plaintiffs' objections. We first discuss the standard that applies to requests for preliminary injunctive relief. We then discuss the parties' disagreement over the standard that applies in remedial proceedings, the proper standard we must apply, and the alternative.

A. Preliminary Injunctive Relief

[12] **[13]** "[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 585 U.S. 155, 138 S. Ct. 1942, 1943, 201 L.Ed.2d 398 (2018) (internal quotation marks omitted). "A party seeking a preliminary injunction must establish that (1) it has a substantial likelihood of success on the merits; (2) irreparable

injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1290–91 (11th Cir. 2022) (internal quotation marks and citation omitted).

B. The Limited Scope of the Parties' Disagreement

The Plaintiffs' position is that the liability phase of this litigation has concluded, and we are now in the remedial phase. On the Plaintiffs' logic, the enactment of the 2023 Plan does not require us to revisit any aspect of our liability findings underlying the preliminary injunction. The question now, they say, is only whether the 2023 Plan provides Black voters an additional opportunity district.

The State's position is that the enactment of the 2023 Plan reset this litigation to square one, and the Plaintiffs must prove a new Section Two violation. "Only if the Legislature failed to enact a new plan," the State says, "would we move to a purely remedial process, rather than a preliminary injunction hearing related to a new law." *Milligan* Doc. 205 at 3; *Milligan* Doc. 172 at 45–46. On the State's logic, the Plaintiffs must reprove their entitlement to injunctive relief under *Gingles*, and some (but not all) of the evidence developed during the preliminary injunction proceedings may be relevant for this purpose.

As a practical matter, the parties' dispute is limited in scope: it concerns whether the Plaintiffs must submit additional illustrative maps to establish the compactness part of *Gingles* I, and the related question whether any such maps must "meet or beat" the 2023 Plan on traditional districting principles. This limitation necessarily follows from the fact that the State concedes for purposes of these proceedings that the Plaintiffs have established the numerosity component of *Gingles* I, all of *Gingles* II and III, and the Senate Factors. Aug. 14 Tr. 64–65.

The parties agree that in any event, the Plaintiffs carry the burden of proof and persuasion. *Milligan* Doc. 203 at 4.

C. The Remedial Standard We Apply

[14] **[15]** **[16]** When, as here, a district court finds itself in a remedial posture, tasked with designing and implementing equitable relief, "the scope of a district court's equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 493, 538, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011) (internal quotation marks omitted). But this power is not unlimited. The Supreme Court has long instructed that the "essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." ***1287** *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). The court "must tailor the scope of injunctive relief to fit the nature and extent of the ... violation established." *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982). In other words, the nature and scope of the review at the remedial phase is bound up with the nature of the violation the district court sets out to remedy. *See id.*; *Wright v. Sumter Cnty. Bd. Of Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020) ("[A] district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings.").

[17] The Voting Rights Act context is no exception. Following a finding of liability under Section Two, the "[r]emedial posture impacts the nature of [a court's] review." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in relevant part, rev'd in part*, 585 U.S. 969, 138 S. Ct. 2548, 201 L.Ed.2d 993 (2018). "In the remedial posture, courts must ensure that a proposed[19] remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Id.* Accordingly, the "issue before this Court is whether" the 2023 Plan, "in combination with the racial facts and history" of Alabama, completely corrects, or "fails to correct the original violation" of Section Two. *Dillard*, 831 F.2d at 248 (Johnson, J.).

[18] **[19]** When, as here, a jurisdiction enacts a remedial plan after a liability finding, "it [i]s correct for the court to ask whether the replacement system ... would remedy the violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 599 (7th Cir. 2000) (citing *Harvell v. Blytheville Sch. Dist. # 5*, 71 F.3d 1382, 1386 (8th Cir. 1995)). In a Section Two case such as this, that challenges the State's drawing of single-member district lines in congressional reapportionment, the injury that gives rise to the violation is vote dilution — "that members of a protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' " *Shaw II*, 517 U.S. at 914, 116 S.Ct. 1894. At the remedy phase, the district court therefore properly asks whether the remedial plan "completely remedies the prior dilution of

minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *United States v. Dall. Cnty. Comm'n*, 850 F.2d 1433, 1438 (11th Cir. 1988).

[20] Evidence drawn from the liability phase and the Court's prior findings "form[ ] the 'backdrop' for the Court's determination of whether the Remedial Plan 'so far as possible eliminate[d] the discriminatory effects' " of the original plan. *Cf. Jacksonville Branch of NAACP*, 2022 WL 17751416, at *13, 2022 U.S. Dist. LEXIS 227920 (rejecting city's invitation to conduct analysis of its remedial plan "on a clean slate" because "the remedial posture impacts the nature of the review" (internal quotation marks omitted) (alterations accepted) (quoting *Covington*, 283 F. Supp. 3d at 431). "[T]here [i]s no need for the court to view [the remedial plan] as if it had emerged from thin air." *Harper*, 223 F.3d at 599; *accord Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115–16 (3d Cir. 1993)).

***1288** **[21]** That said, a federal court cannot accept an unlawful map on the ground that it corrects a Section Two violation in an earlier plan. "[A]ny proposal to remedy a Section 2 violation must itself conform with Section 2." *Dillard*, 831 F.2d at 249. So if the 2023 Plan corrects the original violation of Section Two we found, but violates Section Two in a new way or otherwise is unlawful, we may not accept it.

[22] Accordingly, we limit our analysis in the first instance to the question whether the 2023 Plan corrects the likely Section Two violation that we found and the Supreme Court affirmed: the dilution of Black votes in Alabama congressional districts. Because we find that the 2023 Plan perpetuates rather than corrects that violation, *see infra* at Part IV.A, we enjoin it on that ground. If we had found that the 2023 Plan corrected that violation, we then would have considered any claims the Plaintiffs raised that the 2023 Plan violates federal law anew.

For seven separate and independent reasons, we reject the assertion that the Plaintiffs must reprove Section Two liability under *Gingles.*

First, the State has identified no controlling precedent, and we have found none, that instructs us to proceed in that manner. We said in one of our clarification orders that it would be unprecedented for us to relitigate the Section Two violation during remedial proceedings, *see Milligan* Doc. 203 at 4, and the State has not since identified any precedent that provides otherwise.

Second, the main precedent the State cites, *Dillard*, aligns with our approach. *See* 831 F.2d at 247–48. In *Dillard*, Calhoun County stipulated that its at-large system of electing commissioners diluted Black votes in violation of Section Two. *Id.* The County prepared a remedial plan that altered the electoral mechanism to elect commissioners using single-member districts and retained the position of an at-large chair. *Id.* at 248. The plaintiffs objected on the ground that the remedial plan did not correct the Section Two violation. *Id.* The district court agreed that under the totality of the circumstances, the use of at-large elections for the chairperson would dilute Black voting strength. *Id.* at 249.

The Eleventh Circuit reversed on the ground that the district court failed to conduct a fact-specific inquiry into the proposed remedy. *Id.* at 249–50. The appeals court ruled that when the district court simply "transferred the historical record" from the liability phase of proceedings to the remedial phase, it "incompletely assessed the differences between the new and old proposals." *Id.* at 250. The appeals court observed that in the light of the new structure of the commission, the nature of the chairperson's duties and responsibilities, powers, and authority would necessarily differ from those of the commissioners in the old, unlawful system. *See id.* at 250–52. Accordingly, the appeals court held that the district court could not simply rely on the old evidence to establish a continuing violation. *Id.* at 250.

The State overreads *Dillard.* The reason that new factual findings were necessary in *Dillard* was because, as the Eleventh Circuit observed, "procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme." *Id.* at 250. If the new system diluted votes, the method by which that could or would occur might be different, so the court needed to assess it. *See id.* at 250–52. Those concerns are not salient here: there is no difference in electoral mechanism. In 2023, the State just placed district lines in different locations than it did in 2021.

Accordingly, we do not read *Dillard* to support the *Gingles* reset that the State ***1289** requests. When the entire electoral mechanism changes, it makes little sense not to examine the new system. But this reality does not establish an inviolable requirement that every court faced with a remedial task in a

redistricting case must begin its review of a remedial map with a blank slate.

Even if we are wrong that this case is unlike *Dillard*, what the State urges us to do is not what the Eleventh Circuit said or did in *Dillard.* After the appeals court held that the "transcription [of old evidence] does not end the evaluation," it said that it "must evaluate the new system in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction," and it faulted the district court for "incompletely assess[ing] the differences between the new and old proposals." *Id.* at 249–50.

We discern no dispute among the parties that a proper performance analysis of the 2023 Plan evaluates it "in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction." *Id.* at 250; *see Milligan* Doc. 251 at 2–6. Indeed, every performance analysis that we have — the State's, the *Milligan* Plaintiffs', and the *Caster* Plaintiffs' — does just that. *Milligan* Doc. 251 at 2–6. This understanding of a performance analysis is consistent with the analytical approach that the United States urges us to take in its Statement of Interest. *Milligan* Doc. 199 at 9–15.

Accordingly, we understand *Dillard* as guiding us to determine whether District 2 in the 2023 Plan performs as an additional opportunity district, not as directing us to reset the *Gingles* liability determination to ground zero.

Third, Covington, cited by both the State and the Plaintiffs, aligns with our approach. In *Covington*, the North Carolina General Assembly redrew its state legislative electoral maps after a three-judge court enjoined the previous maps as unconstitutional in a ruling that the Supreme Court summarily affirmed. 283 F. Supp. 3d at 413–14, 419. The plaintiffs objected to the remedial map, and the legislative defendants raised jurisdictional objections, including that "the enactment of the [remedial p]lans rendered th[e] action moot." *Id.* at 419, 423–24.

The district court rejected the mootness challenge on the ground that after finding a map unlawful, a district court "has a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future." *Id.* at 424 (internal quotation marks omitted) (quoting *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965)). The district court cited circuit precedent for the proposition that "federal courts *must* review a state's proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable." *Id.* (emphasis in original) (collecting cases, including Section Two cases).

Further, the district court emphasized that its injunction was the only reason the General Assembly redrew the districts that it did. *Id.* at 425. (In *Covington*, the State itself was a party to the case.) The court reasoned that "[i]t is axiomatic that this Court has the inherent authority to enforce its own orders," so the case could not be moot. *Id.* (also describing the court's "strong interest in ensuring that the legislature complied with, but did not exceed, the authority conferred by" the injunction). The Supreme Court affirmed this ruling by the district court. *Covington*, 138 S. Ct. at 2553 (concluding that the plaintiffs' claims "did not become moot ***1290** simply because the General Assembly drew new district lines around them").

[23] We do not decide the constitutional issues before us and the State has not formally raised a mootness challenge, but those distinctions do not make *Covington* irrelevant.[20] Both parties have cited it, *see Caster* Docs. 191, 195; *Milligan* Docs. 220, 225, and we understand it to mean that on remedy, we must (1) ensure that any remedial plan corrects the violation that we found, and (2) reject any proposed remedy that is otherwise unlawful. We do not discern anything in *Covington* to suggest that if we do those two things, we fall short of our remedial task.

None of the other cases the State has cited compel a different conclusion. For instance, in *McGhee v. Granville County*, the County responded to a Section Two liability determination by drawing a remedial plan that switched the underlying electoral mechanism from an at-large method to single-member districts in which Black voters would have an increased opportunity to elect candidates of their choice. 860 F.2d 110, 113 (4th Cir. 1988). The district court rejected the remedial plan as failing to completely remedy the violation, but the Fourth Circuit reversed, holding that the district court was bound to accept this remedial plan because once "a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible *by that means*, the dilution proximately caused by that system." *Id.* at 118 (emphasis in original). The district court was not free to try to eradicate the dilution by altering other "electoral laws, practices, and structures" not actually challenged by the claim; instead, the

district court had to evaluate the extent to which the remedial plan eradicated the dilution in the light of the electoral mechanism utilized by the State. *Id.* (internal quotation marks omitted).

The Fourth Circuit in *McGhee* did not hold that *Gingles* I compels a district court to accept a remedial map that provides *less* than a genuine opportunity for minority voters to elect a candidate of their choice. *See id.* To the contrary, the court emphasized that the "appropriate remedy" for a vote dilution claim is to "restructure the districting system to eradicate ... the dilution proximately caused by that system" "to the maximum extent possible," within the bounds of "the size, compactness, and cohesion elements of the dilution concept." *Id.*

Fourth, consistent with the foregoing discussion and our understanding of our task, district courts regularly isolate the initial remedial determination to the question whether a replacement map corrects a violation found in an earlier map. *See, e.g.,* ***1291** *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006); *GRACE, Inc. v. City of Miami*, 684 F.Supp.3d 1285, 1301-03, 2023 U.S. Dist. LEXIS 134162 (S.D. Fla. July 30, 2023).

[24] One three-judge court — in a ruling affirmed by the Supreme Court — has gone so far as to describe its task as "determining the meaning of the Voting Rights Act at the remedial stage of a case in which defendants are proven violators of the law." *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019, 111 S.Ct. 662, 112 L.Ed.2d 656 (1991). We do not go that far: no part of our ruling rests on assigning lawbreaker status to the State. *Id.* We are ever mindful that we "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus," and we generally presume the good faith of the Legislature. *Abbott*, 138 S. Ct. at 2324 (internal quotation marks omitted). And the Supreme Court has specifically held that the "allocation of the burden of proof [to the plaintiffs] and the presumption of legislative good faith are not changed by a finding of past discrimination." *Id.* This is because "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (internal quotation marks omitted) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 75, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980) (plurality opinion)).

As we explain below, *see infra* at Part IV, we have afforded the 2023 Plan the deference to which it is entitled, we have applied the presumption of good faith, and we have measured it against the evidentiary record by performing the legal analysis that we understand binding precedent to require. Put simply, the 2023 Plan has received a fair shot. (Indeed, we have substantially relaxed the Federal Rules of Evidence to allow the State to submit, and we have admitted, virtually all of the materials that it believes support its defense of the 2023 Plan. *Infra* at Part VII; Aug. 14 Tr. 91–142.)

Fifth, resetting the *Gingles* analysis to ground zero following the enactment of the 2023 Plan is inconsistent with our understanding of this Court's judicial power. At the remedial hearing, we queried the State about the relevance for these remedial proceedings of our statement in the preliminary injunction that the appropriate remedy was an additional opportunity district. *See supra* at Part I.E.2. According to the State, the statement has no legal force, Aug. 14 Tr. 74 — there is not any "prohibition on the Court commenting on what it thinks an appropriate remedy would be," Aug. 14 Tr. 158, but such comments are limited to the context of the 2021 Plan, meaningless when the Legislature undertakes to enact a remedial map, and irrelevant when a court assesses that map. The State did not use the word "advisory," but in substance its argument was that the "comment" had no force or field of application and was merely our (erroneous) advice to the Legislature.

The State's view cannot be squared with this Court's judicial power in at least two ways. As an initial matter, it artificially divorces remedial proceedings in equity from liability proceedings in equity. As we already observed, federal courts must tailor injunctions to the specific violation that the injunction is meant to remedy; the idea is that the equitable powers of a federal court are among its broadest and must be exercised with great restraint, care, and particularity. *See, e.g., Haitian Refugee Ctr.*, 676 F.2d at 1041 ("Although a federal court has broad equitable powers to remedy constitutional violations, it must tailor the scope of injunctive relief to fit the nature and extent of the constitutional violation established.").

***1292** **[25]** In this way, a liability determination shapes the evaluation of potential remedies, and the determination of an appropriate remedy necessarily is informed by the nature of the conduct enjoined. *Id.*; *see also Covington*, 581 U.S. at 488, 137 S.Ct. 1624 (citing *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 183 n.36, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985)). Again, redistricting cases are no exception. *See, e.g., Dillard*, 831 F.2d at 248. We cannot

reconcile these basic principles with the State's suggestion that after an exhaustive liability determination, we cannot make a relevant or meaningful statement about the proper remedy.

Separately, the State's view is inconsistent with the Article III judicial power because it allows the State to constrain (indeed, to manipulate) the Court's authority to grant equitable relief. The State agrees that if the Legislature had passed no map, it would have fallen to us to draw a map. But the State argues that because the Legislature enacted a map, we have no authority to enjoin it on the ground that it does not provide what we said is the legally required remedy. Rather, the State says, we must perform a new liability analysis from ground zero. The State acknowledges that if we find liability, Alabama's 2024 congressional elections will occur according to a court-ordered map, but that's only because time will have run out for the Legislature to enact another remedial map before that election. Aug. 14 Tr. 159–60.

Put differently, the State's view is that so long as the Legislature enacts a remedial map, we have no authority to craft a remedy without first repeating the entire liability analysis. But at the end of each liability determination, the argument goes, we have no authority to order a remedy if the Legislature plans and has time to enact a new map. In essence, the State creates an endless paradox that only it can break, thereby depriving Plaintiffs of the ability to effectively challenge and the courts of the ability to remedy. It cannot be that the equitable authority of a federal district court to order full relief for violations of federal law is always entirely at the mercy of a State electoral and legislative calendar.

Sixth, we discern no limiting principle to the State's argument that we should reset the liability analysis to ground zero, and this causes us grave concern that accepting the argument would frustrate the purpose of Section Two. As the Plaintiffs have rightly pointed out and we have described, the State's view of remedial proceedings puts redistricting litigation in an infinity loop restricted only by the State's electoral calendar and terminated only by a new census. *See Milligan* Doc. 210 at 6. These are practical limitations, not principled ones. The State has not identified, and we cannot identify, any limiting principle to a rule whereby redistricting litigation is reset to ground zero every time a legislature enacts a remedial plan following a liability determination. This is a significant reason not to accept such a rule; it would make it exceedingly difficult, if not impossible, for a district court ever to effectuate relief under Section Two.

It is as though we are three years into a ten-year baseball series. We've played the first game. The Plaintiffs won game one. The State had the opportunity to challenge some of the calls that the umpires made, and the replay officials affirmed those calls. Now, instead of playing game two, the State says that it has changed some circumstances that were important in game one, so we need to replay game one. If we agree, we will only ever play game one; we will play it over and over again, until the ten years end, with the State changing the circumstances every time to try to win a replay. We will never proceed to game two unless, after one of the replays, ***1293** there is simply no time for the State to change the circumstances. Nothing about this litigation is a game, but to us the analogy otherwise illustrates how poorly the State's position fits with any reasonable effort to timely and finally dispose of redistricting litigation.

Seventh, the State's argument that we must reset the *Gingles* analysis to ground zero ignores the simple truth that the 2023 Plan exists only because this Court held — and the Supreme Court affirmed — that the 2021 Plan likely violated Section Two. If the State originally had enacted the 2023 Plan instead of the 2021 Plan, we would have analyzed the Plaintiffs' attacks on the 2023 Plan under *Gingles.* But that's not what happened, so we won't proceed as though it did.

Further, we reject the State's argument that by limiting our initial remedial determination to the question of whether the 2023 Plan provides an additional opportunity district, we violate the proportionality disclaimer in Section Two. The State argues that we have staked the fate of the 2023 Plan on whether it provides proportional representation, which is unlawful. *See Milligan* Doc. 220 at 60–68.

The State is swinging at a straw man: the Plaintiffs' analysis did not and does not rest on proportionality grounds, and neither does ours. As an initial matter, we did not enjoin the 2021 Plan on the ground that it failed to provide proportional representation. We performed a thorough *Gingles* analysis and expressly acknowledged a limited, non-dispositive role for evidence and arguments about proportionality. *See Milligan* Doc. 107 at 193–95. The Supreme Court affirmed our analysis, which we presume it would not have done were the analysis infected with a proportionality error. *See Allen*, 143 S. Ct. at 1502. Our remedial analysis cannot go back in time and taint our earlier ruling.

Likewise, the Plaintiffs do not urge us to enjoin the 2023 Plan on the ground that it fails to provide proportional representation. They urge us to enjoin it on the ground that it fails to provide the required remedy because District 2 is not an opportunity district. *See Milligan* Doc. 200 at 6–7; *Caster* Doc. 179 at 2–3. Federal law does not equate the provision of an additional opportunity district as a remedy for vote dilution with an entitlement to proportional representation; decades of jurisprudence so ensures. *Allen*, 143 S. Ct. at 1508–10. Any suggestion that the Plaintiffs urge us to reject the 2023 Plan because it fails to provide proportional representation blinks reality.

And as we explain below, we do not enjoin the 2023 Plan on the ground that it fails to provide proportional representation. We enjoin it on two separate, independent, and alternative grounds, neither of which raises a proportionality problem. *See infra* at Parts IV.A & IV.B.

For all these reasons, it is not a proportionality fault that we limit our initial determination to whether the 2023 Plan provides the remedy the law requires.

D. In the Alternative

Out of an abundance of caution, we have carefully considered the possibility that the foregoing analysis on the standard of review is wrong. We have concluded that even if it is, after a fresh and new *Gingles* analysis the 2023 Plan still meets the same fate. As we explain in Part IV.B below, even if we reexamine *Gingles* I, II, and III, and all the Senate Factors, relying only on (1) relevant evidence from the preliminary injunction proceedings, (2) relevant and admissible evidence from the remedial proceedings, and (3) stipulations and concessions, we reach the same conclusion with respect to the 2023 Plan that we reached for the 2021 Plan: it likely ***1294** violates Section Two by diluting Black votes.

III. APPLICABLE LAW

[26] **[27]** "This Court cannot authorize an element of an election proposal that will not with certitude *completely* remedy the Section 2 violation." *Dillard*, 831 F.2d at 252 (emphasis in original); *accord, e.g., Covington*, 283 F. Supp. 3d at 431. The requirement of a complete remedy means that we cannot accept a remedial plan that (1) perpetuates the vote dilution we found, *see, e.g., Covington*, 283 F. Supp. 3d at 431; or (2) only partially remedies it, *see, e.g., White v. Alabama*, 74 F.3d 1058, 1069–70 (11th Cir. 1996).

[28] **[29]** The law does not require that a remedial district guarantee Black voters' electoral success. "The circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428, 126 S.Ct. 2594. Rather, the law requires that a remedial district guarantee Black voters an equal opportunity to achieve electoral success. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11, 114 S.Ct. 2647.

Thus, as we said in the preliminary injunction, controlling precedent makes clear that the appropriate remedy for the vote dilution we found is an additional district in which Black voters either comprise a voting-age majority or otherwise have an opportunity to elect a representative of their choice. And as the Supreme Court explained in *Abbott*, this requirement is not new: "In a series of cases tracing back to [*Gingles*], [the Supreme Court has] interpreted [the Section Two] standard to mean that, under certain circumstance, States **must draw** 'opportunity' districts in which minority groups form 'effective majorit[ies].' " 138 S. Ct. at 2315 (emphasis added) (quoting *LULAC*, 548 U.S. at 426, 126 S.Ct. 2594).

Our ruling was consistent with others in which district courts required additional opportunity districts to remedy a vote-dilution violation of Section Two. *See, e.g., Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2012 WL 13124275, at *5, 2012 U.S. Dist. LEXIS 190609 (W.D. Tex. Mar. 19, 2012) (on remand from the Supreme Court, ordering the "creation of a new Latino district" to satisfy Section Two); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 719 (E.D. Tex. 2006) (ordering, on remand from the Supreme Court, a remedial plan that restored an effective opportunity district); *accord, e.g., Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (rejecting a state's remedial plan and adopting a Section Two plaintiff's remedial proposal that increased a remedial district's minority population to ensure an "effective majority-minority" district).

We have reviewed the relevant jurisprudence for guidance about how to determine whether the 2023 Plan includes an additional opportunity district. The State appears to have charted new waters: we found no other Section Two case in which a State conceded on remedy that a plan enacted after a liability finding did not include the additional opportunity district that the court said was required.

In any event, we discern from the case law two rules that guide our determination whether the 2023 Plan in fact includes an additional opportunity district. *First*, we need a performance analysis (sometimes called a functional analysis) to tell us whether a purportedly remedial district completely remedies the vote dilution found in the prior plan. A performance analysis predicts how a district will function based on statistical information about, ***1295** among other things, demographics of the voting-age population in the district, patterns of racially polarized voting and bloc voting, and the interaction of those factors. *See generally Milligan* Doc. 199.

Appellate courts commonly rely on performance analyses to review district court decisions about remedial plans. *See, e.g., LULAC*, 548 U.S. at 427, 126 S.Ct. 2594 (reviewing a district court's evaluation of a proposed remedial district on the basis of a performance analysis that included evidence of the minority share of the population, racially polarized voting in past elections, and projected election results in the new district); *Dall. Cnty. Comm'n*, 850 F.2d at 1440 (rejecting a remedial plan because a performance analysis demonstrated that racially polarized voting would prevent the election of Black-preferred candidates in the proposed remedial district).

District courts also commonly rely on performance analyses to evaluate remedial plans in the first instance. *See, e.g., Osceola County*, 474 F. Supp. 2d at 1256 (rejecting a remedial proposal that, "given the high degree of historically polarized voting," failed to remedy the VRA violation); *League of United Latin Am. Citizens*, 457 F. Supp. 2d at 721 (ordering remedial plan with three new "effective Latino opportunity districts" and basing determination that districts would "perform" on population demographics and statewide election data).

[30] *Second*, the Supreme Court has not dictated a baseline level at which a district must perform to be considered an "opportunity" district. Nor has other precedent set algorithmic criteria for us to use to determine whether an alleged opportunity district will perform. But precedent does clearly tell us what criteria establish that a putative opportunity district will not perform. When a performance analysis shows that a cohesive majority will "often, if not always, prevent" minority voters from electing the candidate of their choice in the purportedly remedial district, there is a "denial of opportunity in the real sense of that term." *LULAC*, 548 U.S. at 427, 429, 126 S.Ct. 2594. And when voting is racially polarized to such a "high degree" that electoral success in the alleged opportunity district is "completely out of the reach" of a minority community, the district is not an opportunity district. *Osceola County*, 474 F. Supp. 2d at 1256.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Our findings and conclusions proceed in two parts. We first consider whether, under the precedent we just described, the 2023 Plan completely remedies the likely Section Two violation that we found and the Supreme Court affirmed. We then consider whether, starting from square one, the Plaintiffs have established that the 2023 Plan likely violates Section Two.

A. The 2023 Plan Does Not Completely Remedy the Likely Section Two Violation We Found and the Supreme Court Affirmed.

[31] The record establishes quite clearly that the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed. The 2021 Plan included one majority-Black congressional district, District 7. This Court concluded that the Plaintiffs were substantially likely to establish that the 2021 Plan violated Section Two by diluting Black votes. *See Milligan* Doc. 107. We determined that under binding precedent, the necessary remedy was either an additional majority-Black district or an additional Black-opportunity district. *Id.* at 5–6. We observed that as a "practical reality," because voting in Alabama is intensely racially polarized, any such district ***1296** would need to include a Black "voting-age majority or something quite close to it." *Id.* at 6.

We explicitly explained that the need for two opportunity districts hinged on the evidence of racially polarized voting in Alabama — which the State concedes at this stage — and that our *Gingles* I analysis served only to determine whether it was reasonably practicable, based on the size and geography of the minority population, to create a reasonably configured map with two majority-minority districts.

The Supreme Court affirmed that order in all respects; it neither "disturb[ed]" our fact findings nor "upset" our legal conclusions. *Allen*, 143 S. Ct. at 1502, 1506. The Supreme Court did not issue any instructions for us to follow when the cases returned to our Court or warn us that we misstated the appropriate remedy. We discern nothing in the majority opinion to hold (or even to suggest) that we misunderstood what Section Two requires. We have carefully reviewed the

portion of the Chief Justice's opinion that received only four votes, as well as Justice Kavanaugh's concurrence, and we discern nothing in either of those writings that adjusts our understanding of what Section Two requires in these cases. We do not understand either of those writings as undermining any aspect of the Supreme Court's affirmance; if they did, the Court would not have affirmed the injunction. We simply see no indication in *Allen* that we misapplied Section Two.

Because there is no dispute that the 2023 Plan does not have two majority-Black districts, *Milligan* Doc. 251 ¶ 1, the dispositive question is whether the 2023 Plan contains an additional Black-opportunity district. We find that it does not, for two separate and independent reasons.

First, we find that the 2023 Plan does not include an additional opportunity district because the State itself concedes that the 2023 Plan does not include an additional opportunity district. *See id.* ¶¶ 5–9; Aug. 14 Tr. 163–64. Indeed, the State's position is that the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 157–61, 163–64.

Second, we find that the 2023 Plan does not include an additional opportunity district because stipulated evidence establishes that fact. District 2 has the second-highest Black voting-age population after District 7, and District 2 is the district the Plaintiffs challenge. *See Milligan* Doc. 200 at 6–7; *Milligan* Doc. 251 ¶ 3. District 2 (with a Black voting-age population of 39.93%) is, according to the State, "as close as you are going to get" to a second majority-Black district. Aug. 14 Tr. 164.

Based on (1) expert opinions offered by the *Milligan* and *Caster* Plaintiffs and (2) the Legislature's own performance analysis, the parties stipulated that in District 2 in the 2023 Plan, white-preferred candidates have "almost always defeated Black-preferred candidates." *Milligan* Doc. 251 ¶ 5; *see also Milligan* Docs. 200-2, 200-3; *Caster* Doc. 179-2.

Standing alone, this stipulation supports a finding that the new District 2 is not an opportunity district. Because voting is so intensely racially polarized in District 2, a Black-voting age population of 39.93% is insufficient to give Black voters a fair and reasonable opportunity to elect a representative of their choice: it will either never happen, or it will happen so very rarely that it cannot fairly be described as realistic, let alone reasonable.

The evidence fully supports the parties' stipulation. The *Milligan* Plaintiffs' expert, Dr. Liu, examined the effectiveness of Districts 2 and 7 of the 2023 Plan in eleven biracial elections between 2014 and 2022. *Milligan* Doc. 200-2 at 1. Dr. Liu opined that in District 2, "[a]ll Black-preferred-candidates ***1297** ... in the 11 biracial elections were defeated." *Id.* at 2. Dr. Liu further opined that the District 2 races were not close: the average two-party vote share for the Black preferred candidates in District 2 was approximately 42%. *Id.* at 3; *Milligan* Doc. 251 ¶ 7. Accordingly, Dr. Liu concluded that "voting is highly racially polarized in [Districts 2] and [7] in the [2023] Plan," and the new District 2 "produces the same results for Black Preferred Candidates" that the 2021 Plan produced. *Milligan* Doc. 200-2 at 1.

The *Caster* Plaintiffs' expert, Dr. Palmer, reached the same conclusion using a different analysis. Dr. Palmer analyzed the 2023 Plan using seventeen contested statewide elections between 2016 and 2022. *Milligan* Doc. 251 ¶ 6; *Caster* Doc. 179-2. Dr. Palmer opined that "Black voters have a clear candidate of choice in each contest, and White voters are strongly opposed to this candidate." *Caster* Doc. 179-2 ¶¶ 8, 11–12. Dr. Palmer further opined that "Black-preferred candidates are almost never able to win elections in" District 2 because "[t]he Black-preferred candidate was defeated in 16 of the 17 elections [he] analyzed." *Id.* ¶¶ 8, 11–12, 18, 20; *accord Milligan* Doc. 251 ¶ 6. Dr. Palmer observed that Black preferred candidates regularly lost by a substantial margin: the two-party vote share for the Black preferred candidates in District 2 was 44.5%. *Caster* Doc. 179-2 ¶ 18; *see also Milligan* Doc. 213 ¶ 6. Accordingly, Dr. Palmer opined that the new District 2 does not allow Black voters to elect a candidate of their choice. *Caster* Doc. 179-2 ¶ 20.

We credited both Dr. Liu and Dr. Palmer in the preliminary injunction proceedings, *see Milligan* Doc. 107 at 174–76, and we credit them now for the same reasons we credited them then. Both experts used the same methodology to develop their opinions for these remedial proceedings that they used to develop their opinions on liability. *See Milligan* Doc. 200-2 at 2; *Caster* Doc. 179-2 ¶ 9 & n.1. And the State has not suggested that we should discredit either expert, or that we should discount their opinions for any reason.

Indeed, the Legislature's analysis of the 2023 Plan materially matches Dr. Liu's and Dr. Palmer's. The Legislature analyzed the 2023 Plan in seven election contests. *Milligan* Doc. 251 ¶ 9. The Legislature's analysis found that "[u]nder the 2023

Plan, the Black-preferred candidate in [District] 2 would have been elected in 0 out of the 7 contests analyzed." *Id.* And it showed that the losses were by a substantial margin: "Under the 2023 Plan," the Legislature's analysis found, "the average two-party vote-share for Black preferred candidates in [District] 2 is 46.6%." *Id.*

All the performance analyses support the same conclusion: the 2023 Plan provides no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan provided. District 2 is the closest the 2023 Plan comes to a second Black-opportunity district, and District 2 is not a Black-opportunity district. Accordingly, the 2023 Plan perpetuates, rather than completely remedies, the likely Section Two violation found by this Court.

B. Alternatively: Even If the Plaintiffs Must Re-Establish Every Element of *Gingles* Anew, They Have Carried that Burden and Established that the 2023 Plan Likely Violates Section Two.

Even if we reset the *Gingles* analysis to ground zero, the result is the same because the Plaintiffs have established that the 2023 Plan likely violates Section Two. We discuss each step of the *Gingles* analysis in turn.

*1298 1. *Gingles* I - Numerosity

[32] The numerosity part of *Gingles* I considers whether Black voters as a group are "sufficiently large ... to constitute a majority" in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455 (internal quotation marks omitted). This issue was undisputed during the preliminary injunction proceedings, *Milligan* Doc. 107 at 146, and the State offers no evidence to challenge our previous finding. Accordingly, we again find that Black voters, as a group, are "sufficiently large ... to constitute a majority" in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301, 137 S.Ct. 1455 (internal quotation marks omitted).

2. *Gingles* I - Compactness

We next consider whether the *Milligan* and *Caster* Plaintiffs have established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured congressional district. We proceed in three steps: *first*, we explain our credibility determinations about the parties' expert witnesses; *second*, we explain why the State's premise that reasonable compactness necessarily requires the Plaintiffs' proposed plans to "meet or beat" the 2023 Plan on all available compactness metrics is wrong; and *third*, we consider the parties' arguments about geographic compactness on the State's own terms.

a. Credibility Determinations

In the preliminary injunction, we found Dr. Duchin and Mr. Cooper "highly credible." *Milligan* Doc. 107 at 148–52. The State has not adduced any evidence or made any argument during remedial proceedings to disturb those findings. We also found credible Dr. Bagley, who earlier testified about the Senate Factors and now opines about communities of interest. *Id.* at 185–87. Likewise, the State has not adduced any evidence or made any argument during remedial proceedings to disturb our original credibility determination about Dr. Bagley. Accordingly, we find credible each of Plaintiffs' *Gingles* I experts.

Although we "assign[ed] very little weight to Mr. Bryan's testimony" in the preliminary injunction and explained at great length why we found it unreliable, *id.* at 152–56, the State again relies on Mr. Bryan as an expert on "race predominance," this time through an unsworn report where he "assessed how county 'splits differ by demographic characteristics when it comes to the division of counties' in Plaintiffs' alternative[ ]' " plans. *See Milligan* Doc. 267 ¶ 156 (quoting *Milligan* Doc. 220-10 at 22). When we read the State's defense of the 2023 Plan, it is as though our credibility determination never occurred: the State repeatedly cites Mr. Bryan's opinions but makes no effort to rehabilitate his credibility. *See generally Milligan* Doc. 220.

Likewise, when we read Mr. Bryan's 2023 report, it is as though our credibility determination never occurred. Mr. Bryan makes no attempt to rehabilitate his own credibility or engage any of the many reasons we assigned little weight to his testimony and found it unreliable. *See generally Milligan* Doc. 220-10. Mr. Bryan even cites this case as one of two cases in which he has testified, without mentioning that we did not credit his testimony. *See id.* at 4. The district court in the other case found "his methodology to be poorly supported" and that his "conclusions carried little, if any, probative value on the question of racial predominance." *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 824 (M.D. La. 2022).

When we read the State's response to the Plaintiffs' motion to exclude Mr. Bryan's 2023 report as unreliable, it is ***1299** again as though our credibility determination never occurred. The State does not acknowledge it or suggest that any of the problems we identified have been remedied (or at least not repeated). *See generally Milligan* Doc. 245.

[33] Against this backdrop, it is especially remarkable that (1) the State did not call Mr. Bryan to testify live at the remedial hearing, and (2) Mr. Bryan's report is not sworn. *See Milligan* Doc. 220-10. "[C]ross-examination is the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (internal quotation marks omitted) (quoting 5 J. Wigmore, Evidence § 1367 at 29 (3d ed. 1940)). Cross-examination strikes us as especially important because this Court already has found this expert witness' testimony incredible and unreliable. It strikes us as even more valuable when, as here, a witness has not reduced his opinions to sworn testimony.

Standing alone, these circumstances preclude us from assigning any weight to Mr. Bryan's 2023 opinion. But these circumstances don't stand alone: even if we were to evaluate Mr. Bryan's 2023 opinion without reference to our earlier credibility determination, we would not admit it or assign any weight to it.

[34] **[35]** As the Supreme Court made clear in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), Federal Rule of Evidence 702 requires this Court to "perform the critical 'gatekeeping' function concerning the admissibility" of expert evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*) (quoting *Daubert*, 509 U.S. at 589 n.7, 113 S.Ct. 2786). That gatekeeping function involves a "rigorous three-part inquiry" into whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id. (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion." *Id.*

[36] **[37]** The State has not met its burden on at least two of these three requirements. *First*, as explained above, this Court ruled that Mr. Bryan was not a credible witness in January 2021. *Milligan* Doc. 107 at 152. *Second*, Mr. Bryan's report is not reliable. For that, the Court "assess[es] 'whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue.' " *Frazier*, 387 F.3d at 1261–62 (quoting *Daubert*, 509 U.S. at 592–93, 113 S.Ct. 2786). There are two parts to the methodology question: relevance and reliability. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310–12 (11th Cir. 1999). Under the relevance part, "the court must ensure that the proposed expert testimony is relevant to the task at hand, ... i.e., that it logically advances a material aspect of the proposing party's case." *Id.* at 1312 (internal quotation marks omitted). "[T]he evidence must have a valid scientific connection to the disputed facts in the case." *Id.*

[38] **[39]** Under the reliability part, courts consider "four noninclusive factors," namely "(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the ***1300** theory has attained general acceptance within the scientific community." *Id.* The "primary focus" should "be solely on principles and methodology, not on the conclusions that they generate," so "the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable." *Id.* (internal quotation marks omitted). As explained below, Mr. Bryan's report is neither relevant nor reliable.

[40] Mr. Bryan's 2023 opinion is that "race predominated in the drawing of both the [Districts 2] and [7] in the [VRA Plan] and the Cooper Plans." *Milligan* Doc. 220-10 ¶ 7. That opinion rests on what Mr. Bryan calls a "[g]eographic [s]plits [a]nalysis of [c]ounties." *Id.* at 22. *First*, as to reliability, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

The Plaintiffs attack Mr. Bryan's 2023 opinion as *ipse dixit*, and we agree. Mr. Bryan's report does not explain how his opinion about race predominance is connected to the geographic splits methodology that he used, or even why an evaluation of race predominance ordinarily might be based on geographic splits analysis. *See Milligan* Doc. 220-10 at 22–26. Mr. Bryan simply presents the results of his geographic splits analysis and then states in one sentence a cursory conclusion about race predominance. *Id.* The State's response does nothing to solve this problem. *See Milligan* Doc. 245 at 7–10.

[41] *Second*, as to helpfulness, the Plaintiffs have not offered the VRA Plan as an illustrative plan for *Gingles* I, so we have no need for Mr. Bryan's opinion about that plan. The Plaintiffs did offer the Cooper plans, but we also have no need for his opinion about those: we presume the preliminary injunction would not have been affirmed if there were an open question whether race played an improper role in the preparation of all of them, given that the State squarely presented this argument to the Supreme Court. And even if we were to accept Mr. Bryan's opinion about the Cooper plans (which we don't), the State stakes no part of its defense of the 2023 Plan on arguments about that opinion: the State cites Mr. Bryan's opinion only once in the argument section of its brief, and that is to make an argument about the VRA Plan. *Milligan* Doc. 220 at 58. Accordingly, nothing in Mr. Bryan's report is helpful to this Court's decision whether the Plaintiffs have established that the 2023 Plan likely violates Section Two.

Because we again do not credit Mr. Bryan and we find his 2023 opinion unreliable and unhelpful, we **GRANT IN PART** the Plaintiffs' motion *in limine* and **EXCLUDE** his opinion from our analysis. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589–92, 113 S.Ct. 2786. For those same reasons, even if we were to receive Mr. Bryan's opinion into evidence, we would assign it no weight.

We turn next to Mr. Trende's opinion. *See Milligan* Doc. 220-12. The State relies on Mr. Trende to "assess[ ] the 2023 Plan and each of Plaintiffs' alternative plans based on the three compactness measures Dr. Duchin used in her earlier report." *Milligan* Doc. 220 at 57–58. Mr. Trende is a Senior Elections Analyst at Real Clear Politics, he is a doctoral candidate at Ohio State University, and he has a master's degree in applied statistics. *Milligan* Doc. 220-12 at 2–4.

***1301** The Plaintiffs do not contest Mr. Trende's qualifications to testify as an expert. And because he uses the same common statistical measures of compactness that Dr. Duchin used, the Plaintiffs do not contest the reliability of his methods. Accordingly, we admit Mr. Trende's report for the limited and alternative purpose of conducting a new *Gingles* analysis. We explain the weight we assign it in that analysis below.

b. The "Meet or Beat" Requirement

We now pause to correct a fundamental misunderstanding in the State's view of step one of the *Gingles* analysis. Our task is not, as the State repeatedly suggests, to compare the Plaintiffs' illustrative plans with the 2023 Plan to determine which plan would prevail in a "beauty contest." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). As the Supreme Court affirmed in this very case, "[t]he District Court ... did not have to conduct a beauty contest between plaintiffs' maps and the State's." *Id.* (internal quotation marks omitted) (alterations accepted); *see also Vera*, 517 U.S. at 977, 116 S.Ct. 1941 (plurality opinion) ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" is not required "to defeat rival compact districts designed by [the State] in endless 'beauty contests.' " (emphasis in original)).

Nevertheless, the State frames the "focus" of these proceedings as "whether Plaintiffs can produce an alternative map that equals the 2023 Plan on the traditional principles that *Allen* reaffirmed were the basis of the § 2 analysis." *Milligan* Doc. 220 at 33. But neither *Allen* nor any other case law stands for that proposition. Our preliminary injunction order — affirmed by the Supreme Court — explained that "[c]ritically, our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are 'better than' or 'preferable' to a majority-Black district drawn a different way. Rather, the rule is that '[a] § 2 district that is **reasonably** compact and regular, taking into account traditional districting principles,' need not also 'defeat [a] rival compact district[ ]' in a 'beauty contest[ ].' " *Milligan* Doc. 107 at 165 (emphasis in original) (quoting *Vera*, 517 U.S. at 977–78, 116 S.Ct. 1941 (plurality opinion)).

Instead of the "meet-or-beat" requirement the State propounds, the essential question under *Gingles* I is and has always been whether the minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*,

581 U.S. at 301, 137 S.Ct. 1455 (internal quotation marks omitted). This standard does not require that an illustrative plan outperform the 2023 Plan by a prescribed distance on a prescribed number of prescribed metrics. An illustrative plan may be reasonably configured even if it does not outperform the 2023 Plan on every (or any particular) metric. The standard does not require the Plaintiffs to offer the *best* map; it requires them to offer a reasonable one. Indeed, requiring a plaintiff to meet or beat an enacted plan on every redistricting principle a State selects would allow the State to immunize from challenge a racially discriminatory redistricting plan simply by claiming that it best satisfied a particular principle the State defined as non-negotiable.

Accordingly, that the 2023 Plan preserves communities of interest differently from the Plaintiffs' illustrative maps, or splits counties differently from the illustrative maps, does not automatically make the illustrative maps unreasonable. As Mr. Cooper testified, different maps will necessarily prioritize traditional districting criteria ***1302** in different ways. This is why the maps offered by a Section Two plaintiff are only ever *illustrative*; states are free to prioritize the districting criteria as they wish when they enact a remedial map, so long as they satisfy Section Two. The State has essentially conceded that it failed to do so here, maintaining that it can skirt Section Two by excelling at whatever traditional districting criteria the Legislature deems most pertinent in a redistricting cycle.

The bottom line is that the Plaintiffs' illustrative maps can still be "reasonably configured" even if they do not outperform the 2023 Plan on every (or any particular) metric. The premise that forms the backbone of the State's defense of the 2023 Plan therefore fails.

More fundamentally, even if we were to find that the 2023 Plan respects communities of interest better or is more compact than the 2021 Plan — that the 2023 Plan "beats" the 2021 Plan — that would not cure the likely violation we found because the violation was not that the 2021 Plan did not respect communities of interest, or that it was not compact enough. We found that the 2021 Plan likely diluted Black votes. The State cannot avoid the mandate of Section Two by improving its map on metrics **other than compliance with Section Two**. Otherwise, it could forever escape remediating a Section Two violation by making each remedial map slightly more compact, or slightly better for communities of interest, than the predecessor map. That is not the law: a Section Two remedy must be tailored to the specific finding of Section Two liability.

In any event, we do not find that the 2023 Plan respects communities of interest or county lines better than the Plaintiffs' illustrative maps. *See* infra at Part IV.B.2.d.

c. Geographic Compactness Scores

We next turn, as we did in the preliminary injunction, to the question whether the compactness scores for the Duchin plans and the Cooper plans indicate that the majority-Black congressional districts in those plans are reasonably compact. In the preliminary injunction, we based our reasonableness finding about the scores on (1) the testimony of "eminently qualified experts in redistricting," and (2) "the relative compactness of the districts in the [illustrative] plans compared to that of the districts in the [2021] Plan." *See Milligan* Doc. 107 at 157.

[42] The enactment of the 2023 Plan has not changed any aspect of Dr. Duchin and Mr. Cooper's testimony that the compactness scores of the districts in their plans are reasonable. *See id.* (citing such testimony at Tr. 446, 471, 492–493, 590, 594). Because that testimony was not relative — it opined about the Duchin plans and Cooper plans standing alone, not compared to any other plan — the enactment of a new plan did not affect it.

Neither does Dr. Trende's opinion affect the testimony of Dr. Duchin and Mr. Cooper about reasonableness. When we originally analyzed that testimony, we concluded that because Mr. Bryan "offered no opinion on what is reasonable and what is not reasonable in terms of compactness," "the corollary of our decision to credit Dr. Duchin and Mr. Cooper is a finding that the Black population in the majority-Black districts in the Duchin plans and the Cooper plans is reasonably compact." *Id.* at 157–58 (internal quotation marks omitted). Like Mr. Bryan then, Mr. Trende now offers no opinion on what is reasonable or what is not reasonable in terms of compactness. *See Milligan* Doc. 220-12 at 6–11 ("Analysis of Maps"). Accordingly, the State still has adduced no evidence to question, let alone disprove, the Plaintiffs' ***1303** evidence that the Black population in the majority-Black districts in the illustrative plans is reasonably compact.

When we examine the relative compactness of the districts in the Duchin plans and the Cooper plans compared to that

of the districts in the 2023 Plan, the result remains the same. Mr. Trende acknowledges that on an average Polsby-Popper metric, Duchin plan 2 is "marginally more compact" than the 2023 Plan, and that on a cut edges metric, Duchin plan 2 outperforms the 2023 Plan. *Id.* at 10. (Nevertheless, Mr. Trende opines that the 2023 Plan outperforms all illustrative plans when all three metrics are taken in account. *Id.*) And Mr. Trende does not opine that any of the Duchin plans or Cooper plans that received lower statistical scores received unreasonably lower scores or unreasonable scores. *See id.* at 8–10.

"[A]s far as compactness scores go, all the indicators [again] point in the same direction. Regardless how we study this question, the answer is the same each time. We find that based on statistical scores of geographic compactness, each set of Section Two plaintiffs has submitted remedial plans that strongly suggest that Black voters in Alabama are sufficiently numerous and reasonably compact to comprise a second majority-Black congressional district." *Milligan* Doc. 107 at 159.

d. Reasonable Compactness and Traditional Redistricting Principles

As we said in the preliminary injunction, "[c]ompactness is about more than geography." *Id.* If it is not possible to draw an additional opportunity district that is reasonably configured, Section Two does not require such a district. In the preliminary injunction, we began our analysis on this issue with two visual assessments: one of the Black population in Alabama, and one of the majority-Black districts in the Duchin and Cooper plans. *See id.* at 160–62.

Our first visual assessment led us to conclude that "[j]ust by looking at the population map [of the Black population in Alabama], we can see why Dr. Duchin and Mr. Cooper expected that they could easily draw two reasonably configured majority-Black districts." *Id.* at 161. The State suggests no reason why we should reconsider that finding now. And the enactment of the 2023 Plan does not change the map we visually assessed, or the conclusion that we drew from it.

Our second visual assessment led us to conclude that we "d[id] not see tentacles, appendages, bizarre shapes, or any other obvious irregularities [in the Duchin or Cooper plans] that would make it difficult to find that any District 2 could be considered reasonably compact." *Id.* at 162. The enactment of the 2023 Plan does not change the maps that we visually assessed, nor the conclusion that we drew from them.

In the preliminary injunction, "we next turn[ed] to the question whether the Duchin plans and the Cooper plans reflect reasonable compactness when our inquiry takes into account, as it must, 'traditional districting principles such as maintaining communities of interest and traditional boundaries.' " *Id.* (quoting *LULAC*, 548 U.S. at 433, 126 S.Ct. 2594). We follow the same analytic path now.

This step of the analysis is at the heart of the State's assertion that the 2023 Plan moved the needle on *Gingles* I. The State argues that "the lesson from *Allen* is that Section 2 requires Alabama to avoid discriminatory effects in how it treats communities of interest, even if that means sacrificing core retention," and that neither we nor the Supreme Court have "ever said that [Section Two] requires the State to subordinate 'nonracial communities of interest' in the Gulf and Wiregrass to Plaintiffs' racial goals." *Milligan* Doc. 267 ***1304** ¶¶ 215–16 (quoting *LULAC*, 548 U.S. at 433, 126 S.Ct. 2594). The State contends that the Plaintiffs cannot "show that there is a reasonably configured alternative remedy that would also maintain communities of interest in the Black Belt, Gulf, and Wiregrass, on par with the 2023 Plan." *Milligan* Doc. 220 at 37 (internal quotation marks omitted).

At its core, the State's position is that no Duchin plan or Cooper plan can "meet or beat" the 2023 Plan with respect to these three communities of interest and county splits. The State leans heavily on additional evidence about these communities of interest, the rule that Section Two "never require[s] adoption of districts that violate traditional redistricting principles," *Allen*, 143 S. Ct. at 1510 (internal quotation marks omitted), and the legislative findings that accompany the 2023 Plan.

The State contends that "this is no longer a case in which there would be a split community of interest" in both the Plaintiffs' plans and the enacted plan, because in the 2023 Plan, the "Black Belt, Gulf, and Wiregrass communities are maintained to the maximum extent possible." *Milligan* Doc. 220 at 51 (internal quotation marks omitted) (alterations accepted). The State asserts that the 2023 Plan "rectifies what Plaintiffs said was wrong with the 2021 Plan" because it "puts all 18 counties that make up the Black Belt entirely within Districts 2 and 7" and keeps Montgomery whole in District 2. *Id.* at 42–43.

For their part, the *Milligan* Plaintiffs say that the 2023 Plan changed nothing. They attack the legislative findings about traditional districting principles — more particularly, the legislative findings about communities of interest, county splits, and protection of incumbents — as perpetuating the vote dilution we found because these findings were "tailored to disqualify" the Plaintiffs' illustrative plans. *Milligan* Doc. 200 at 20. The *Milligan* Plaintiffs accuse the State of "ignor[ing] that the Supreme Court recognized" that the Duchin plans and Cooper plans "comported with traditional districting criteria, even though they split Mobile and Baldwin counties"; they say that the record continues to support that conclusion; and they cite a declaration from the first Black Mayor of Mobile and a supplemental report prepared by Dr. Bagley. *Id.* at 21–22 (internal quotation marks omitted). The *Milligan* Plaintiffs assert that the 2023 Plan keeps together only the Gulf Coast while perpetuating vote dilution in the Black Belt and splitting the Wiregrass between Districts 1 and 2. *Id.* at 22–23.

Before we explain our findings and conclusions on these issues, we repeat the foundational observations that we made in the preliminary injunction: (1) these issues were "fervently disputed," (2) the State continues to insist that "there is no legitimate reason to separate Mobile County and Baldwin County," (3) our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are "better than" any other possible majority-Black district, and (4) "we are careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win." *Milligan* Doc. 107 at 164–65.

i. Communities of Interest

As we previously found and the Supreme Court affirmed, the Black Belt "stands out to us as quite clearly a community of interest of substantial significance," but the State "overstate[s] the point" about the Gulf Coast. *See Milligan* Doc. 107 at 165–71; *accord Allen*, 143 S. Ct. at 1505. The evidence about the Gulf Coast is now more substantial than it was before, but it is still considerably weaker than the record on the Black Belt, which rests on extensive stipulated facts and includes extensive expert testimony, and which ***1305** spanned a range of demographic, cultural, historical, and political issues. *See Milligan* Doc. 107 at 165–67.

As the Supreme Court recognized, in the preliminary injunction we found that, "[n]amed for its fertile soil, the Black Belt contains a high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, ... lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted).

We now have the additional benefit of Dr. Bagley's testimony about the Black Belt, Gulf Coast, and Wiregrass. *See Milligan* Doc. 200-15. We credit his testimony and find his opinions helpful, particularly (1) his opinion further describing the shared experience of Black Alabamians in the Black Belt; and (2) his opinion that "treating Mobile and Baldwin Counties as an inviolable" community of interest is "ahistorical" in light of the connections between Mobile and the Black Belt. *See id.* at 1.

Dr. Bagley's testimony further describes the shared experiences of Alabamians in the Black Belt, which are "not only related to the fertility of the soil and the current poverty" there, but "are also characterized by" many shared racial experiences, including "Indian Removal, chattel slavery, cotton production, Reconstruction and Redemption, sharecropping, convict leasing, white supremacy, lynching, disenfranchisement, the birth of Historically Black Colleges and Universities ..., struggles for civil and voting rights, Black political and economic organization, backlash in the form of violence and economic reprisal, repressive forms of taxation, [and] white flight," to name a few. *Id.* at 2.

Dr. Bagley opines that "many of these characteristics" also apply to "metropolitan Mobile," which Dr. Bagley describes as "Black Mobile." *Id.* at 2–3. Dr. Bagley explains that the Port of Mobile (a cornerstone of the State's arguments about the Gulf Coast community of interest) "historically saw the importation and exportation of human chattel, up to the illegal importation of enslaved individuals by the crew of the Clotilda in 1860," as well as "the export of the cotton grown by the enslaved people in the Black Belt." *Id.* at 2. And Dr. Bagley explains that Black Alabamians living in modern Mobile share experiences of "concentrated poverty" and a "lack of access to healthcare" with Alabamians in the Black Belt, such that Black Alabamians in Mobile have more in common with people in the Black Belt than they do with people in whiter Baldwin County. *Id.* at 3–4.

Further, Dr. Bagley opines that treating Mobile and Baldwin Counties as an inseparable community of interest is "ahistorical." *Id.* at 1, 4–7. His testimony is that the State overstates the evidence of "alleged connections" between Mobile and Baldwin Counties and fails to acknowledge the reality that "Black Mobile is geographically compact and impacted by poverty relative to Baldwin County, which is, by contrast, affluent and white." *Id.* at 4.

The State does little to diminish Dr. Bagley's testimony. *See Milligan* Doc. 220 at 44–49. *First*, the State disputes only a few of the many details he discusses, none of which undermines his substantive point. *See id. Second*, without engaging Dr. Bagley's testimony about the connections between the Black Belt and Mobile, or his testimony that treating the Gulf Coast as "inviolable" is "ahistorical," the State reiterates its previous argument that the Gulf Coast is "indisputably" a community of interest that Plaintiffs would split along racial lines. *Id.* at 39–40. *Third*, without engaging Dr. Bagley's point about the shared racial experiences of Alabamians living in the Black Belt (or the stipulated ***1306** facts), the State asserts that the 2023 Plan successfully unites the Black Belt as a "nonracial community of interest." *Id.* at 38. And *fourth*, the State urges us to assign Dr. Bagley's opinion little weight because a "paid expert cannot supersede legislative findings, especially where, as here, the expert's opinions are based on a selective retelling of facts." *Id.* at 48–49. We discuss each argument in turn.

First, the State's effort to refute specific details of Dr. Bagley's testimony about the Black Belt is unpersuasive. Dr. Bagley's report is well-supported and factually dense. *See Milligan* Doc. 200-15. Even if we accept *arguendo* the State's isolated factual attacks, *see Milligan* Doc. 220 at 44–49, neither the basis for nor the force of the report is materially diminished.

Second, the State continues to insist that the Gulf Coast is "indisputably" a community of interest that cannot be separated, especially "along racial lines," but the record does not bear this out, particularly in the light of the State's failure to acknowledge, let alone rebut, much of Dr. Bagley's testimony. The State says nothing about Dr. Bagley's testimony that treating Mobile and Baldwin Counties as inseparable is ahistorical because those Counties were in separate congressional districts for almost all the period between 1876 and the 1970s. *Milligan* Doc. 200-15 at 7. The State ignores his testimony that Black Alabamians living in poverty in Mobile don't have very much in common with white, affluent Alabamians living in Baldwin County. The State ignores his testimony that those Black Alabamians have more in common (both historically and to the present day) with Black Alabamians living in the Black Belt. Put simply, even if we accept all the new evidence about the Gulf Coast, it fails to establish that the Gulf Coast cannot be separated under any circumstance, let alone to avoid or remedy vote dilution.

Third, Dr. Bagley's report further disproves what the parties' fact stipulations already had precluded: the State's assertion that the Black Belt is merely one of three "nonracial" communities of interest that the 2023 Plan keeps together as much as possible. *Milligan* Doc. 220 at 38. The Plaintiffs have supported their claims with arguments and evidence about the cracking of Black voting strength in the Black Belt. *See, e.g., Milligan* Doc. 69 at 19, 29–30; *Caster* Doc. 56 at 7, 9–10. Extensive stipulations of fact and extensive expert testimony have described a wide range of demographic, cultural, historical, and political characteristics of the Black Belt, many of which relate to race. *See Milligan* Doc. 107 at 165–67.

On remedy, the Plaintiffs argue that the new District 2 perpetuates rather than remedies the dilution we found in the Black Belt. *Milligan* Doc. 200 at 19. And Dr. Bagley's testimony is that many of the shared experiences of Alabamians living in the Black Belt are steeped in race. *Milligan* Doc. 200-15 at 1–4. The State's failure to rebut Dr. Bagley's testimony undermines its insistence that the Black Belt is no longer at the heart of this case and is merely one of three nonracial communities of interest maintained in the 2023 Plan.

We already faulted the State once for pressing an overly simplistic view of the Black Belt. In the preliminary injunction, we relied on the substantial body of evidence about the Black Belt (much of it undisputed) to reject the State's assertion that the Plaintiffs' "attempt to unite much of the Black Belt as a community of interest in a remedial District 2 is 'merely a blunt proxy for skin color.' " *Milligan* Doc. 107 at 168 (quoting *Milligan* Doc. 78 at 86). As we explained, "[t]he Black Belt is overwhelmingly Black, but it blinks reality to say that it is a 'blunt proxy' for race – on the record before us, the reasons why it ***1307** is a community of interest have many, many more dimensions than skin color." *Id.* at 169. The State's assertion that the Black Belt is a "nonracial" community of interest now swings the pendulum to the opposite, equally inaccurate, end of the spectrum.

Fourth, the State argues that as between Dr. Bagley's testimony about communities of interest and the legislative findings about communities of interest, we are required by law to defer to the legislative findings. *Milligan* Doc. 220 at 48–49. But the State ignores the Plaintiffs' argument that no deference is owed to a legislature's redistricting policies that perpetuate rather than remedy vote dilution. *Compare Milligan* Doc. 200 at 20 (*Milligan* Plaintiffs' objection to deference, citing discussions of core retention in *Allen* and incumbency protection and partisan political goals in *LULAC*), *with Milligan* Doc. 220 (State's filing, making no response).

We regard it as beyond question that if we conclude that the 2023 Plan perpetuates vote dilution, we may not defer to the legislative findings in that Plan. Ordinarily, that rule would not matter for our present task: because the point of a *Gingles* I analysis is to determine whether a challenged plan dilutes votes, we would not refuse deference to legislative findings for *Gingles* I purposes on the ground that the findings perpetuate vote dilution. It would be circular reasoning for us to assume the truth of our conclusion as a premise of our analysis.

This is not the ordinary case: we found that the Plaintiffs established that the 2021 Plan likely violated Section Two by diluting Black votes, and the State has conceded that District 2 in the 2023 Plan is not a Black-opportunity district. In this circumstance, we discern no basis in federal law for us to defer to the legislative findings.

The *Milligan* Plaintiffs impugn the findings on numerous other grounds — namely, that they were "after the fact 'findings' tailored to disqualify" the Plaintiffs' illustrative plans; "contradict" the guidelines; "were never the subject of debate or public scrutiny"; "ignored input from Black Alabamians and legislators"; and "simply parroted attorney arguments already rejected by this Court and the Supreme Court." *Milligan* Doc. 200 at 20. And the *Milligan* Plaintiffs urge us to reject the findings' attempt to "enshrine as 'non-negotiable' certain supposed 'traditional redistricting principles' " about communities of interest and county splits. *Id.* Ultimately, the *Milligan* Plaintiffs suggest that the legislative findings are not what they purport to be: the result of the deliberative legislative process. The testimony and evidence were that the findings were drafted by the Alabama Solicitor General, were adopted without review or debate by the Legislature or even really knowing why they were placed there, and included only at counsel's instigation.

We have reviewed the legislative findings carefully and make three observations about them for present purposes. *First*, although the northern half of Alabama is home to numerous universities, a substantial military installation, various engines of economic growth, and two significant metropolitan areas (Huntsville and Birmingham), the legislative findings identify no communities of interest in that half of the state. *See* App. A. *Second*, the legislative findings, unlike the guidelines, give no indication that the Legislature considered whether the 2023 Plan dilutes minority voting strength. The guidelines set that as a priority consideration, but the legislative findings do not mention it and set other items as "non-negotiable" priorities (*i.e.*, keeping together communities of interest ***1308** and not pairing incumbents).[21] The only reason why the 2023 Plan exists is because we enjoined the 2021 Plan on the ground that it likely diluted minority voting strength. And *third*, there is a substantial difference between the definition of "community of interest" in the legislative findings and that definition in the guidelines: the legislative findings stripped race out of the list of "similarities" that are included in the guidelines definition. *Compare* App. A at 4, *with* App. B. In a case involving extensive expert testimony about a racial minority's shared experience of a long and sordid history of race discrimination, this deletion caught our eye. We further observe that the legislative findings explicitly invoke the "French and Spanish colonial heritage" of the Gulf Coast region while remaining silent on the heritage of the Black Belt. App. A at 6.

In any event, we do not decline to defer to the legislative findings on the grounds the *Milligan* Plaintiffs suggest. We decline to defer to them because the State (1) concedes that District 2 in the 2023 Plan is not an opportunity district, and (2) fails to respond to the Plaintiffs' (valid) point that we cannot readily defer to the legislative findings if we find that they perpetuate vote dilution.

Ultimately, we find that the new evidence about the Gulf Coast does not establish that the Gulf Coast is the community of interest of primary importance, nor that the Gulf Coast is more important than the Black Belt, nor that there can be no legitimate reason to separate Mobile and Baldwin Counties.

And we repeat our earlier finding that the Legislature has repeatedly split Mobile and Baldwin Counties in creating maps for the State Board of Education districts in Alabama, and the Legislature did so at the same time it drew the 2021

Plan. *Milligan* Doc. 107 at 171 (citing *Caster* Doc. 48 ¶¶ 32–41).

We further find that the new evidence about the Gulf Coast does not establish that separating the Gulf Coast to avoid diluting Black votes in the Black Belt violates traditional districting principles. At most, while the State has developed evidence that better substantiates its argument that the Gulf Coast is or could be a community of interest, the State has not adduced evidence that the Gulf Coast is an inseparable one.

We specifically reject the State's argument that the 2023 Plan "rectifies what Plaintiffs said was wrong with the 2021 Plan" by "unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Milligan* Doc. 220 at 27, 42; *accord* Aug. 14 Tr. 39 (arguing that the 2023 Plan "cures the cracking" of the Black Belt); July 31, 2023 Tr. 32 (arguing that "now there are three communities of interest that are at issue," the State "cracked none of them," and the Plaintiffs "cracked two of them"). On this reasoning, the State says that "there is no longer any need to split the Gulf" to respect the Black Belt, because the 2023 Plan keeps the Gulf Coast together and splits the Black Belt into only two districts. *Milligan* Doc. 267 at ¶ 225.

The problem with this argument is the faulty premise that splitting the Black Belt into only two districts remedies the cracking problem found in the 2021 Plan. "Cracking" does not mean "divided," and the finding of vote dilution in the 2021 Plan rested on a thorough analysis, not the bare fact that the 2021 Plan divided the Black Belt into three districts. *See, e.g., Milligan* Doc. 107 at 55, 147–74. As the Supreme ***1309** Court has explained, "cracking" refers to "the dispersal of blacks into districts in which they constitute an ineffective minority of voters." *Bartlett*, 556 U.S. at 14, 129 S.Ct. 1231 (plurality opinion) (quoting *Gingles*, 478 U.S. at 46 n.11, 106 S.Ct. 2752).

The Plaintiffs have established — and the State concedes — that in the new District 2, Black voters remain an ineffective minority of voters. *Milligan* Doc. 251 ¶¶ 5–9. This evidence — and concession — undermines the State's assertion that the 2023 Plan remedies the cracking of Black voting strength in the Black Belt simply by splitting the Black Belt into fewer districts. In turn, it explains the reason why there remains a need to split the Gulf Coast: splitting the Black Belt as the 2023 Plan does dilutes Black voting strength, while splitting the Gulf Coast precipitates no such racially discriminatory harm.

The long and the short of it is that the new evidence the State has offered on the Gulf Coast at most may show that the Black Belt and the Gulf Coast are geographically overlapping communities of interest that tend to pull in different directions. These communities of interest are not airtight. At best, the Defendants have established that there are two relevant communities of interest and the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash when measured against this metric. In other words, "[t]here would be a split community of interest in both." *Allen*, 143 S. Ct. at 1505. Thus, positing that there are two communities of interest does not undermine in any way the determination we already made that the eleven illustrative maps presented in the preliminary injunction are reasonably configured and are altogether consonant with traditional redistricting criteria.

In our view, the evidence about the community of interest in the Wiregrass is sparse in comparison to the extensive evidence about the Black Belt and the somewhat new evidence about the Gulf Coast. The basis for a community of interest in the Wiregrass — essentially in the southeastern corner of the State — is rural geography, a university (Troy), and a military installation (Fort Novosel). These few commonalities do not remotely approach the hundreds of years of shared and very similar demographic, cultural, historical, and political experiences of Alabamians living in the Black Belt. And they are considerably weaker than the common coastal influence and historical traditions for Alabamians living in the Gulf Coast. Not to mention that these commonalities could apply to other regions in Alabama that the State fails to mention as possible communities of interest.

Further, there is substantial overlap between the Black Belt and the Wiregrass. Three of the nine Wiregrass Counties (Barbour, Crenshaw, and Pike) are also in the Black Belt. Accordingly, any districting plan must make tradeoffs with these communities to meet equal population and contiguity requirements.

Finally, a careful review of the testimony about the Wiregrass reveals that the State makes the same error with its Wiregrass argument that we (and the Supreme Court) previously identified in its Gulf Coast argument. To support its assertions about the community of interest in the Wiregrass, the State relies on three witnesses: a former Mayor of Dothan, a past Chairman of the Dothan Area Chamber of Commerce, and a commercial banker in Dothan. *See Milligan* Doc.

261-2 (Kimbro deposition); *Milligan* Doc. 220-18 (Kimbro declaration); *Milligan* Doc. 261-6 (Schmitz deposition); *Milligan* Doc. 220-17 (Schmitz declaration); *Milligan* Doc. 261-7 (Williams deposition); *Milligan* Doc. 227-1 (Williams declaration). Much of their testimony focuses on the loss of political influence and ***1310** efficacy that may occur if the Wiregrass region is not mostly kept together in a single congressional district. *See Milligan* Docs. 220-17 ¶¶ 3–5, 7, 9 (Schmitz Declaration); 220-18 ¶¶ 5–9 (Kimbro Declaration); 224-1 ¶¶ 11–13 (Williams Declaration). But as we earlier found with respect to the Gulf Coast, testimony about keeping a community of interest together "simply to preserve political advantage" cannot support an argument that the community is inseparable. *See Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). Accordingly, we assign very little weight to the argument and evidence about a community of interest in the Wiregrass.

We do not reject only the State's **factual** argument — that the Plaintiffs' illustrative plans are not reasonably compact because they violate traditional redistricting principles related to communities of interest. More broadly, we also reject the State's legal argument that communities of interest somehow are a dispositive factor in our analysis such that we must accept a remedial map that purports to respect communities of interest, but does not cure the vote dilution we found in the 2021 Plan.

Throughout remedial proceedings, the State has used arguments about communities of interest as the foundation of its defense of the 2023 Plan. The State starts with the premise that "[t]here are many ways for a plan to comply with" Section Two, *Milligan* Doc. 267 ¶ 179, *see also* Aug. 14 Tr. 46; cites the rule that Section Two "never require[s] adoption of districts that violate traditional redistricting principles," *Milligan* Doc. 220 at 8, 10, 14, 34, 39, 60 (internal quotation marks omitted); says that the Legislature knows Alabama's communities of interest better than federal courts, Aug. 14 Tr. 163; and extrapolates from these truths that any illustrative plan that splits an area the State defines as a community of interest does not satisfy *Gingles* because it "violates" communities of interest, *Milligan* Doc. 267 ¶¶ 158, 208; *see also Milligan* Doc. 220 at 40, 59. The State's position is that if it can prove that the 2023 Plan serves communities of interest better than the Plaintiffs' illustrative plans, the 2023 Plan survives a Section Two challenge on that ground regardless of whether it includes one or two Black-opportunity districts. Indeed, on the State's reasoning, because the 2023 Plan better serves communities of interest than do the Plaintiffs' illustrative plans, an order requiring an additional Black-opportunity district to cure vote dilution is unlawful. Aug. 14 Tr. 157. The State maintains that this is true even if we find (as we do) that the 2023 Plan perpetuates rather than remedies the vote dilution that we and the Supreme Court found in the 2021 Plan. Aug. 14 Tr. 157–60. Put differently, the State asserts that communities of interest are the ultimate trump card: because the 2023 Plan best serves communities of interest in southern Alabama, we must not enjoin it even if we find that it perpetuates vote dilution. *See* Aug. 14 Tr. 157–60.

We cannot reconcile the State's position with any of the authorities that control our analysis. We cannot reconcile it with the text or purpose of Section Two, nor with the Supreme Court's ruling in this case, nor with other controlling Supreme Court precedents. We discuss each authority in turn.

First, we cannot reconcile the State's position that communities of interest work as a trump card with the text or purpose of Section Two. As the Supreme Court explained in this case, the Voting Rights Act " 'create[d] stringent new remedies for voting discrimination,' attempting to forever 'banish the blight of racial discrimination in voting.' " *Allen*, 143 S. Ct. at 1499 ***1311** (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)). To that end, for more than forty years, Section Two has expressly provided that a violation is established based on the "totality of circumstances." *Id.* at 1507 (internal quotation marks omitted) (quoting 52 U.S.C. § 10301(b)). Subsection (b) of Section Two of the Voting Rights Act provides, in pertinent part:

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b).

Section Two does not mention, let alone elevate or emphasize, communities of interest as a particular circumstance. *See id.* If communities of interest really are (or even could be) **the** dispositive circumstance in a Section Two analysis (liability or remedy), the statute would not direct a reviewing court's

attention to the totality of circumstances without saying a word about communities of interest.

Second, we cannot reconcile the State's position that communities of interest work as a trump card with the Supreme Court's ruling in this case. The Supreme Court "d[id] not find the State's argument persuasive" on communities of interest for two reasons: the evidence did not support the "overdrawn" assertion that "there can be no legitimate reason to split" the Gulf Coast, and even if the Gulf Coast is a community of interest, splitting it is not a fatal flaw in the Plaintiffs' illustrative plans because those plans better respect a different community of interest, the Black Belt. *See Allen*, 143 S. Ct. at 1505 (internal citations omitted). The Supreme Court then continued its analysis of the "totality of circumstances" and affirmed our preliminary injunction on the ground that the 2021 Plan likely violated Section Two. *Id.* at 1506.

Nothing in the Court's ruling says, let alone suggests, that a remedial plan would cure vote dilution if only the evidence were better on the Gulf Coast and the Black Belt were not split quite so much. The Supreme Court specifically ruled that we "did not have to conduct a beauty contest between plaintiffs' maps and the State's," and the Supreme Court emphasized the importance of considering the "totality" of circumstances. *Id.* at 1505–07 (internal quotation marks omitted) (alterations accepted). Indeed, the Supreme Court rejected the State's proposed "race-neutral benchmark" in part because that approach "suggest[ed] there is only one circumstance that matters," and "[t]hat single-minded view of § 2 cannot be squared with the [statute's] demand that courts employ a more refined approach." *Id.* at 1506–08 (internal quotation marks omitted) (alterations accepted).

Third, we cannot reconcile the State's position with other Supreme Court precedents. Our research has produced no Section Two precedent that rises and falls on how well a plan respects any particular community of interest.

Further, as Section Two precedents have tested the idea that one circumstance is particularly important in the *Gingles* analysis, the Supreme Court has time and again rejected the idea that any circumstance can be the circumstance that allows a plan to dilute votes. *See, e.g., id.* at 1505 (rejecting argument that core retention metric is dispositive and reasoning that Section Two "does not permit a State to provide some voters less opportunity ... to participate in the political process just ***1312** because the State has done it before" (internal quotation marks omitted)); *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 142 S. Ct. 1245, 1250, 212 L.Ed.2d 251 (2022) (per curiam) (faulting district court for "focus[ing] exclusively on proportionality" instead of "totality of circumstances analysis"); *LULAC*, 548 U.S. at 440–41, 126 S.Ct. 2594 (rejecting argument that incumbency protection can justify exclusion of voters from a district when exclusion has racially discriminatory effects). Indeed, we have been unable to locate any case where the Supreme Court has prioritized one traditional districting criterion above all others.

For each and all these reasons, we reject the State's argument that because the 2023 Plan best serves communities of interest in southern Alabama, we cannot enjoin it even if we find that it perpetuates racially discriminatory vote dilution.

ii. County Splits

In the preliminary injunction, we found that the Plaintiffs' illustrative plans "reflect reasonable compactness" because they respected county lines. *See Milligan* Doc. 107 at 162–63. When it affirmed this finding, the Supreme Court observed that "some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Allen*, 143 S. Ct. at 1504 (emphasis in original).

By way of reference: the only applicable guideline when the 2021 Plan was passed was that "the Legislature shall try to minimize the number of counties in each district"; the 2021 Plan split six counties; and no illustrative plan splits more than nine counties. *See Milligan* Doc. 107 at 32, 61, 88–89.

When the Legislature passed the 2023 Plan, it enacted a "finding" that "the congressional districting plan shall contain no more than six splits of county lines, which is the minimum necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines." App. A at 3. Like the 2021 Plan, the 2023 Plan splits six counties.

The State now argues that because of the Legislature's finding, we must discard any illustrative map that contains more than six county splits. *Milligan* Doc. 220 at 58–59. Based on the report of the State's expert, Mr. Trende, this ceiling would disqualify five of the Plaintiffs' illustrative maps: Cooper Plans 2 and 6, which split seven counties; Duchin Plan B, which splits seven counties; and Duchin Plans A and C, which

split nine counties. *See Caster* Doc. 48 at 22; *Milligan* Doc. 220 at 58; *Milligan* Doc. 220-12 at 12. Most notably, this ceiling would disqualify Duchin Plan B, which is the only illustrative plan that the State concedes ties or beats the 2023 Plan on statistical measures of compactness (Polsby-Popper and Cut Edges). *See Milligan* Doc. 220 at 57–58. So when looking at the county splits metric alone, even on the State's analysis, six of the Plaintiffs' illustrative maps satisfy the ceiling the Legislature imposed: Cooper Plans 1, 3, 4, 5, and 7, and Duchin Plan D. Mr. Trende's chart shows this clearly:

***1313**

Number of County Splits, by Map

Map	County Splits
Illustrative 7	5
Duchin 4	6
Illustrative 1	6
Illustrative 3	6
Illustrative 4	6
Illustrative 5	6
2021 Map	6
2023 Map	6
Duchin 2	7
Illustrative 2	7
Illustrative 6	7
Ps Remedial	7
Duchin 1	9
Duchin 3	9

Milligan Doc. 220-12 at 12.

But the State would not have us look at the county splits metric alone. As we understand the State's argument about the legislative finding capping county splits at the stated minimum, the finding operates like the ace of spades: after ten of the eleven illustrative plans lose in a compactness beauty contest, the finding trumps the last illustrative plan left (Duchin Plan B). On the State's reasoning, the Plaintiffs have no plays left because the Legislature has decreed that the cap on county splits is "non-negotiable." App. A at 3.

But we already have refused to conduct the compactness beauty contest, so the legislative finding cannot work that way. If it guides our analysis, it must function differently. For all the same reasons we refused to conduct a compactness beauty contest, this legislative finding cannot demand that we conduct a county-split beauty contest. *See supra* at Part IV.B.2.b.

Nevertheless, in an abundance of caution, we measure all the illustrative maps against the legislative finding. As explained above, if we limit our analysis to the illustrative plans that comply with the finding, we consider six plans: Duchin Plan D and Cooper Plans 1, 3, 4, 5, and 7. *See Milligan* Doc. 220-12 at 12.

We first discuss Cooper Plan 7, because it is the only illustrative plan that outperforms the 2023 Plan on county splits. (Duchin Plan D and Cooper Plans 1, 3, 4, and 5 tie the 2023 Plan. *See id.*) Even if we were to indulge the idea that the legislative finding capping county splits works as an ace, it could not trump Cooper Plan 7. The State attacks Cooper Plan 7 on the ground that it does not minimize population deviation. *Milligan* Doc. 220 at 58 n.13.

The State's argument about Cooper Plan 7 is an unwelcome surprise. We found in the preliminary injunction that all the illustrative maps "equalize population across districts." *Milligan* Doc. 107 at 162–63. We based that finding on the agreement of the parties and the evidence. *See id.* (citing *Milligan* Doc. 68-5 at 8, 13; *Caster* Doc. 48 at 21–34; *Caster* Doc. 65 at 2–6; Tr. 930). And the Supreme Court affirmed that finding. *Allen*, 143 S. Ct. at 1504 (finding that the Plaintiffs' maps "contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns").

We returned to Cooper Plan 7 to confirm that it minimizes population deviation. *See Caster* Doc. 65 at 5 fig.2. The least populated congressional district in Cooper Plan 7 includes 717,752 people; the most populated congressional district in Cooper Plan 7 includes 717,755 people. *Id.* We summarily reject the State's cursory, unsupported suggestion in a footnote that a deviation of three humans (or 0.00000418%) precludes a finding that Cooper ***1314** Plan 7 equalizes population across districts and disqualifies Cooper Plan 7 as a reasonably configured illustrative map under *Gingles* I.

Thus, even if we were to conduct the "meet or beat" beauty contest that the State asks us to, the undisputed evidence shows that the Plaintiffs have submitted at least one illustrative map that beats the 2023 Plan with respect to county splits. We also find that the Plaintiffs have submitted at least five illustrative maps (Duchin Plan D and Cooper Plans 1, 3, 4, and 5) that meet the 2023 Plan on this metric by splitting the same number of counties — six.

***

Accordingly, we again find that the Plaintiffs have established that an additional Black-opportunity district can be reasonably configured without violating traditional districting principles relating to communities of interest and county splits. This finding does not run afoul of the Supreme Court's caution that Section Two never requires the adoption of districts that violate traditional redistricting principles. It simply rejects as unsupported the State's assertion that the Plaintiffs' illustrative plans violate traditional redistricting principles relating to communities of interest and county splits.

3. *Gingles* II & III – Racially Polarized Voting

During the preliminary injunction proceedings, "there [wa]s no serious dispute that Black voters are politically cohesive nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." *Milligan* Doc. 107 at 174 (internal quotation marks omitted); *accord Allen*, 143 S. Ct. at 1505.

At the remedial hearing, the State stipulated that *Gingles* II and III are again satisfied. Aug. 14 Tr. 64–65 ("We will have no problem stipulating for these proceedings solely that they have met II and III.").

The evidence fully supports the State's stipulation: Dr. Liu opined "that voting is highly racially polarized in" District 2 and District 7 of the 2023 Plan "and that this racial polarization ... produces the same results for Black Preferred Candidates in both [Districts 2] and [7] as the results in the 2021" Plan. *Milligan* Doc. 200-2 at 1. Dr. Palmer's opinion is materially identical. *Caster* Doc. 179-2 ¶¶ 11–14, 16–20.

4. The Senate Factors

During the preliminary injunction proceedings, we found that Senate Factors 1, 2, 3, 5, 6, and 7 weighed in favor of the Plaintiffs. *Milligan* Doc. 107 at 178–92. We adopt those findings here. We made no finding about Senate Factors 8 and 9. *Id.* at 192–93.

During the remedial hearing, the State conceded that it has put forth no new evidence about the Senate Factors and the Plaintiffs have "met their burden" on the Factors for purposes of remedial proceedings. Aug. 14 Tr. 65.

The *Milligan* and *Caster* Plaintiffs now urge us, if we reset the *Gingles* analysis, to consider evidence adduced since we issued the preliminary injunction that bears on Factors 8 and 9. Aug. 14 Tr. 147–48. The State concedes that the evidence relevant to an analysis of these Factors is "exceedingly

broad." Aug. 15 Tr. 79. We consider each remaining Senate Factor in turn, and we limit our discussion to new evidence.

a. Senate Factor 8

Senate Factor 8: "[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752.

[43] Senate Factor 8 considers "the political responsiveness of" elected officials. ***1315** *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984) (emphasis omitted). The Plaintiffs' argument is that the political responsiveness of elected officials to this litigation — more particularly, to the Supreme Court's affirmance of the preliminary injunction — weighs in favor of the Plaintiffs. Based on our review of undisputed evidence, we cannot help but find that the circumstances surrounding the enactment of the 2023 Plan reflect "a significant lack of responsiveness on the part of elected officials to the particularized needs" of Black voters in Alabama. *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752. Our finding rests on three undisputed facts.

First, the process by which the Legislature considered potential remedies for the vote dilution that Black Alabamians experienced precludes a finding of responsiveness. The 2023 Plan was neither proposed nor available for comment during the two public hearings held by the Committee. *Milligan* Doc. 251 ¶ 15. Likewise, neither of the plans that originally passed the Alabama House (Representative Pringle's plan, the Community of Interest Plan), and the Alabama Senate (Senator Livingston's plan), was proposed or available for comment during the Committee's public hearings. *See id.* ¶¶ 15–21.

The 2023 Plan was passed by the Conference Committee on the last day of the Special Session. *Id.* ¶ 23. Representative Pringle did not see the bill that became the 2023 Plan, including its legislative findings and the State's performance analysis showing that Black voters would consistently lose in the new District 2, until that morning. *See Milligan* Doc. 261-5 at 92, 97. He first saw those documents that morning, and the 2023 Plan was Alabama law by that evening. As Representative Pringle testified, "[i]t all happened so fast." *Id.* at 105.

The availability of the 2023 Plan is noteworthy not only because of its late timing, but also because of its apparently mysterious provenance: its original source and cartographer were unknown to one of the Committee chairs, Senator Livingston, when he voted on it. *See Milligan* Doc. 238-2 at 3. To this day, the record before us does not make clear who prepared the 2023 Plan.

Representative Pringle testified about his frustration that his plan did not carry the day, and his reason is important: he thought his plan was the better plan for compliance with Section Two (based in part on a performance analysis that he considered), his plan was initially expected to pass both the House and the Senate, and he either did not understand or did not agree with the reason why support for it unraveled in the Senate the day it passed the House. *See Milligan* Doc. 261-5 at 22–23, 31–32, 41–42, 69–70, 75–76, 80–81, 98–102.

Representative Pringle testified that he was not a part of the discussions that led his Senate colleagues to reject his plan because those occurred behind closed doors. *Id.* at 28, 101. Although Representative Pringle ultimately voted for the 2023 Plan, he testified (testily) that he told Senator Livingston that he did not want his name or an Alabama House bill number on it. *Id.* at 101–02. When asked why the Alabama Senate insisted on leaving District 2 at a 39.93% Black voting-age population in the 2023 Plan, Representative Pringle directed the question to Senator Livingston or the Alabama Solicitor General. *Id.* When asked specifically about a media comment from Representative Ledbetter (the Speaker of the Alabama House) that the 2023 Plan gives the State "a good shot" at getting "just one judge" on the Supreme Court "to see something different," Representative Pringle testified that ***1316** he was not "attempting to get a justice to see something differently," but he did not "want to speak on behalf of 140" Legislators. *Id.* at 109–10.

For his part, Senator Livingston testified that his focus shifted from Representative Pringle's plan to a new plan after other senators "received some additional information" which caused them to "go in [a different] direction" focused on "compactness, communities of interest, and making sure that" incumbents are not paired. *Milligan* Doc. 261–4 at 67–68. According to Senator Livingston, this "information" was a "large hiccup" — it was the reason why "the committee moved" and "changed focus" away from Representative Pringle's plan. *Id.* at 65–68. But Senator Livingston testified that he did not know what this "information" was, where it had come from, or even who received it. *Id.* Senator Livingston recalled that he first learned of the "information"

in a "committee conversation," but he did not recall who told him about it and had no "idea at all" of its source. *Id.* at 68.

Second, the unprecedented legislative findings that accompany the 2023 Plan preclude a finding of responsiveness. *See* App. A. This is for two reasons. As an initial matter, as we have already previewed, a careful side-by-side review of the legislative findings and the guidelines (which were the same in 2021 and 2023) reveal that the findings excluded the statement in the guidelines that "[a] redistricting plan shall have neither the purpose nor the effect of diluting minority voting strength." *Compare* App. B at 1, *with* App. A. at 2. Although the findings eliminated the requirement of nondilution, they prioritized as "non-negotiable" the principles that the 2023 Plan would "keep together communities of interest" and "not pair incumbent[s]." App. A at 3. Under this circumstance, we cannot find that the legislative findings support an inference that when the Legislature passed the 2023 Plan, it was trying to respond to the need that we identified for Black Alabamians not to have their voting strength diluted.

Separately, the undisputed testimony of members of the Legislature counsels against an inference in favor of the State based on the findings. Representative Pringle and Senator Livingston both testified that the Alabama Solicitor General drafted the findings, and they did not know why the findings were included in the 2023 Plan. *Milligan* Doc. 261-4 at 102 (Senator Livingston); *Milligan* Doc. 261-5 at 91 (Representative Pringle); *Milligan* Doc. 238-2 at 6 (joint interrogatory responses). Representative Pringle testified that he had not seen another redistricting bill contain similar (or any) findings. *Milligan* Doc. 261-5 at 91. And of the three members of the Legislature who testified during remedial proceedings, none had a role in drafting the findings. *Milligan* Doc. 261-4 at 101–03 (Senator Livingston); *Milligan* Doc. 261-5 at 90–91 (Representative Pringle); Aug. 15 Tr. 58 (Senator Singleton). In the light of this testimony, which we reiterate is not disputed (or even questioned), we cannot conclude that the findings weigh in favor of the 2023 Plan.

If we had any lingering doubt about whether the 2023 Plan reflects an attempt to respond to the needs of Black Alabamians that have been established in this litigation, that doubt was eliminated at the remedial hearing when the State explained that in its view, the Legislature could remedy the vote dilution we found without providing the remedy we said was required: an additional opportunity district. *See* Aug. 14 Tr. 163–64. For purposes of Factor 8, we are focused not on the tenuousness of the policy underlying that position, but on how clearly it illustrates the lack of political will to respond to the needs of Black voters in Alabama in the ***1317** way that we ordered. We infer from the Legislature's decision not to create an additional opportunity district that the Legislature was unwilling to respond to the well-documented needs of Black Alabamians in that way.

Lest a straw man arise on appeal: we say clearly that in our analysis, we did not deprive the Legislature of the presumption of good faith. *See, e.g., Abbott*, 138 S. Ct. at 2324. We simply find that on the undisputed evidence, Factor 8, like the other Factors, weighs in favor of the Plaintiffs.

b. Senate Factor 9

Senate Factor 9: Whether the policy underlying the 2023 Plan "is tenuous." *Gingles*, 478 U.S. at 37, 106 S.Ct. 2752. We again make no finding about Senate Factor 9.

C. We Reject the State's Remaining Argument that Including an Additional Opportunity District in a Remedial Plan To Satisfy Section Two Is Unconstitutional Affirmative Action in Redistricting.

The State asserts that the Plaintiffs' illustrative plans "sacrifice communities of interest, compactness, and county splits to hit predetermined racial targets"; that if those "underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be court-ordered enforcement of a map that violates the 2023 Plan's traditional redistricting principles in favor of race"; and that this would be "affirmative action in redistricting" that would be unconstitutional. *Milligan* Doc. 220 at 59–60; *see also id.* at 60–68.

As an initial matter, it is premature (and entirely unfounded) for the State to assail any plan we might order as a remedy as "violat[ing] the 2023 Plan's traditional redistricting principles in favor of race." *Milligan* Doc. 220 at 59. Moreover, we have rejected based on the evidence before us every premise of the State's argument: that the Plaintiffs' plans "sacrifice" traditional redistricting principles, that their illustrative plans are "underperforming," and that the 2023 Plan "more fully and fairly applies legitimate principles across the State." *See supra* Parts IV.A & IV.B. We also have rejected the faulty premise that by accepting the Plaintiffs' illustrative plans for

Gingles purposes, we improperly held that the Plaintiffs are entitled to "proportional ... racial representation in Congress." *Milligan* Doc. 107 at 195 (internal quotation marks omitted).

This mistaken premise explains why affirmative action cases, like the principal case on which the State relies, *Harvard*, 143 S. Ct. 2141, are fundamentally unlike this case. In the *Harvard* case, the Supreme Court held that Harvard and the University of North Carolina's use of race in their admissions programs violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. *Id.* at 2175. Based on the record before it, the Supreme Court found that the admissions programs were impermissibly aimed at achieving "proportional representation" of minority students among the overall student-body population, and that the universities had "promis[ed] to terminate their use of race only when some rough percentage of various racial groups is admitted." *Id.* at 2172. Based on these findings, the Court concluded that the admissions programs lacked any "logical end point" because they " 'effectively assure that race will always be relevant and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.' " *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)).

In contrast, the Voting Rights Act and the *Gingles* analysis developed to guide ***1318** application of the statute "do[ ] not mandate a proportional number of majority-minority districts." *Allen*, 143 S. Ct. at 1518 (Kavanaugh, J., concurring). Section Two expressly disclaims any "right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). And "properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Id.* at 1508 (majority opinion). So unlike affirmative action in the admissions programs the Supreme Court analyzed in *Harvard*, which was expressly aimed at achieving balanced racial *outcomes* in the makeup of the universities' student bodies, the Voting Rights Act guarantees only "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11, 114 S.Ct. 2647. The Voting Rights Act does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most "fundamental political right," in that it is "preservative of all rights" — the right to vote. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019).

But a faulty premise and prematurity are not the only problems with the State's argument: it would fly in the face of forty years of Supreme Court precedent — including precedent *in this case* — for us to hold that it is unconstitutional to order a remedial districting plan to include an additional minority-opportunity district to satisfy Section Two. In the Supreme Court, the State argued that the Fifteenth Amendment "does not authorize race-based redistricting as a remedy for § 2 violations." *Allen*, 143 S. Ct. at 1516. The Supreme Court rejected this argument in two sentences: "But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent ... we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress." *Id.* at 1516–17 (internal citations omitted).

D. The Record Establishes the Elements of Preliminary Injunctive Relief

We find that the Plaintiffs have established the elements of their request for preliminary injunctive relief. We discuss each element in turn.

For the reasons we have discussed, *see supra* Parts IV.A & IV.B, we find that the Plaintiffs are substantially likely to succeed on the merits of their claims that (1) the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed in the 2021 Plan; and (2) the 2023 Plan likely violates Section Two as well because it continues to dilute the votes of Black Alabamians.

[44] **[45]** We further find that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 congressional elections based on a likely unlawful redistricting plan. "Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997); and ***1319** *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)).

[46] **[47]** "Voting is the beating heart of democracy," and a "fundamental political right, because it is preservative of all rights." *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1315 (internal quotation marks omitted) (alterations accepted). And "once the election occurs, there can be no do-over and no redress" for voters whose rights were violated and votes were diluted. *League of Women Voters of N.C.*, 769 F.3d at 247.

The Plaintiffs already suffered this irreparable injury once in this census cycle, when they voted under the unlawful 2021 Plan. The State has made no argument that if the Plaintiffs were again required to cast votes under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer an irreparable harm absent injunctive relief.

We observe that absent relief now, the Plaintiffs will suffer this irreparable injury until 2026, which is more than halfway through this census cycle. Weighed against the harm that the State will suffer — having to conduct elections according to a court-ordered districting plan — the irreparable harm to the Plaintiffs' voting rights unquestionably is greater.

[48] We next find that a preliminary injunction is in the public interest. The State makes no argument that if we find that the 2023 Plan perpetuates the vote dilution we found, or that the 2023 Plan likely violates Section Two anew, we should decline to enjoin it. Nevertheless, we examine applicable precedent.

The principal Supreme Court precedent is older than the Voting Rights Act. In *Reynolds*, which involved a constitutional challenge to an apportionment plan, the Court explained "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585, 84 S.Ct. 1362. "However," the Court acknowledged, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* The Court explained that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Id.*

More recently, the Supreme Court has held that district courts should apply a necessity standard when deciding whether to award or withhold immediate relief. In *Upham v. Seamon*, the Court explained: "[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations." 456 U.S. 37, 44, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) (per curiam) (internal citations omitted).

We conclude that under these precedents, we should not withhold relief. Alabama's congressional elections are not close, let alone imminent. The general election is more than fourteen months away. The qualifying deadline to participate in the primary elections for the major political parties is more than two months away. Ala. Code § 17-13-5(a). And this Order ***1320** issues well ahead of the "early October" deadline by which the Secretary has twice told us he needs a final congressional electoral map. *See* Milligan Doc. 147 at 3; *Milligan* Doc. 162 at 7.

V. REMEDY

Having found that the 2023 Plan perpetuates rather than corrects the Section Two violation we found, we look to Section Two and controlling precedent for instructions about how to proceed. In the Senate Report that accompanied the 1982 amendments to Section Two that added the proportionality disclaimer, the Senate Judiciary Committee explained that it did not "prescribe[e] in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances." S. Rep. No. 97-417 at 31, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Adm. News 177, 208.

Rather, that committee relied on "[t]he basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated," and explained its expectation that courts would "exercise [our] traditional equitable powers to fashion ... relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Id.*

That committee cited the seminal Supreme Court decision about racially discriminatory voting laws, *Louisiana*, 380 U.S. at 154, 85 S.Ct. 817. S. Rep. No. 97-417 at 31 n.121. In *Louisiana*, the Supreme Court explained that upon finding such discrimination, federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154, 85 S.Ct. 817.

The Supreme Court has since held that a district court does not abuse its discretion by ordering a Special Master to draw a remedial map to ensure that a plan can be implemented as part of an orderly process in advance of elections, where the State was given an opportunity to enact a compliant map but failed to do so. *See Covington*, 138 S. Ct. at 2553–54 (rejecting State's argument that district court needed to "giv[e] the General Assembly—which 'stood ready and willing to promptly carry out its sovereign duty'—another chance at a remedial map," and affirming appointment of Special Master because the district court had "determined that 'providing the General Assembly with a second bite at the apple' risked 'further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle' " (internal citations omitted)).

[49] Because we enjoin the use of the 2023 Plan, a new congressional districting plan must be devised and implemented in advance of Alabama's upcoming congressional elections. The State has conceded that it would be practically impossible for the Legislature to reconvene in time to enact a new plan for use in the upcoming election. Aug. 14 Tr. 167. Accordingly, we find that there is no need to "provid[e] the [Legislature] with a second bite at the apple" or other good cause to further delay remedial proceedings. *See Covington*, 138 S. Ct. at 2554.

We will therefore undertake our "duty to cure" violative districts "through an orderly process in advance of elections" by directing the Special Master and his team to draw remedial maps. *Id.* (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5). We have previously appointed Mr. Richard Allen as a Special Master and provided him a team, including a cartographer, David R. Ely, ***1321** and Michael Scodro and his law firm, Mayer Brown LLP to prepare and recommend to the Court a remedial map or maps for the Court to order Secretary of State Allen to use in Alabama's upcoming congressional elections. *See Milligan* Docs. 102, 166, 183. The procedural history preceding these appointments has already been catalogued at length in our prior orders. *See Milligan* Docs. 166, 183. Specific instructions for the Special Master and his team will follow by separate order.

VI. CONSTITUTIONAL OBJECTIONS TO THE 2023 PLAN

In the light of our decision to enjoin the use of the 2023 Plan on statutory grounds, and because Alabama's upcoming congressional elections will not occur on the basis of the map that is allegedly unconstitutional, we decline to decide any constitutional issues at this time. More particularly, we **RESERVE RULING** on (1) the constitutional objections to the 2023 Plan raised by the *Singleton* and the *Milligan* Plaintiffs, and (2) the motion of the *Singleton* Plaintiffs for preliminary injunctive relief on constitutional grounds, *Singleton* Doc. 147.

[50] This restraint is consistent with our prior practice, *see Milligan* Doc. 107, and the longstanding canon of constitutional avoidance, *see Lyng*, 485 U.S. at 445, 108 S.Ct. 1319 (collecting cases dating back to *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)). Where, as here, a decision on the constitutional issue would not entitle a plaintiff "to relief beyond that to which they [are] entitled on their statutory claims," a "constitutional decision would [be] unnecessary and therefore inappropriate." *Id.* at 446, 108 S.Ct. 1319. This principle has particular salience when a court considers (as we do here) a request for equitable relief, *see id.*, and is commonly applied by three-judge courts in redistricting cases, *see, e.g., LULAC*, 548 U.S. at 442, 126 S.Ct. 2594; *Gingles*, 478 U.S. at 38, 106 S.Ct. 2752.

VII. EVIDENTIARY RULINGS

During the remedial hearing, the Court accepted into evidence many exhibits. *See generally* Aug. 14 Tr. 91–142. Most were stipulated, although some were stipulated only for a limited purpose. *Id.* We have since excluded one exhibit: the State's Exhibit J, Mr. Bryan's 2023 Report. *See supra* at Part IV.B.2.a.

At the hearing we reserved ruling on the motion *in limine* and on some objections to certain of the State's exhibits. *See* Aug. 14 Tr. 91, 105–142. Most of the objections we reserved on were relevance objections raised in connection with the motion *in limine*. *See id.* at 108–30 (discussing such objections to State Exhibits C2, D, E, F2, G, H, I, L, M, N, O, P, Q, R, and S).

As we discussed in Parts II.B and II.C, we conclude that our remedial task is confined to a determination whether the 2023 Plan completely remedies the vote dilution we found in the 2021 Plan and is not otherwise unlawful, but we consider in the alternative whether under *Gingles* and the totality of the circumstances the Plaintiffs have established that the 2023 Plan likely violates Section Two. *See supra at* Parts II.B, II.C, IV.A & IV.B.

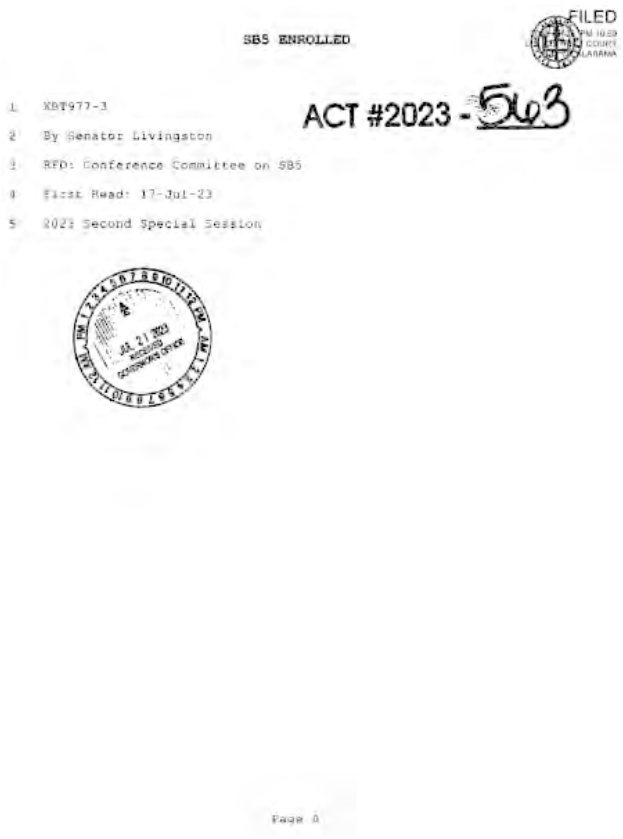
Accordingly, the motion *in limine* is **GRANTED IN PART AND DENIED IN PART**, and all of the Plaintiffs' relevance objections raised in connection with the motion *in limine* are **OVERRULED** to the extent that we consider the evidence as appropriate in our alternative holding.

After considerable deliberation, we dispose of the remaining objections this way:

- Objections to State Exhibits A, B2, B3, C2, D, N, and P are **OVERRULED**. These exhibits are admitted to establish what was said at public hearings held by the Committee ***1322** and what materials were considered by the Committee, but not for the truth of any matter asserted therein.
- Objections to State Exhibits E, F2, G, H, I, L, M, O, Q, R, and S are **OVERRULED**. These exhibits are admitted.
- Objections to the *Milligan* Plaintiffs' Exhibits M13, M32, M38, and M47 are **SUSTAINED**. These exhibits are excluded.

DONE and **ORDERED** this 5th day of September, 2023.

APPENDIX A



SB5 ENROLLED

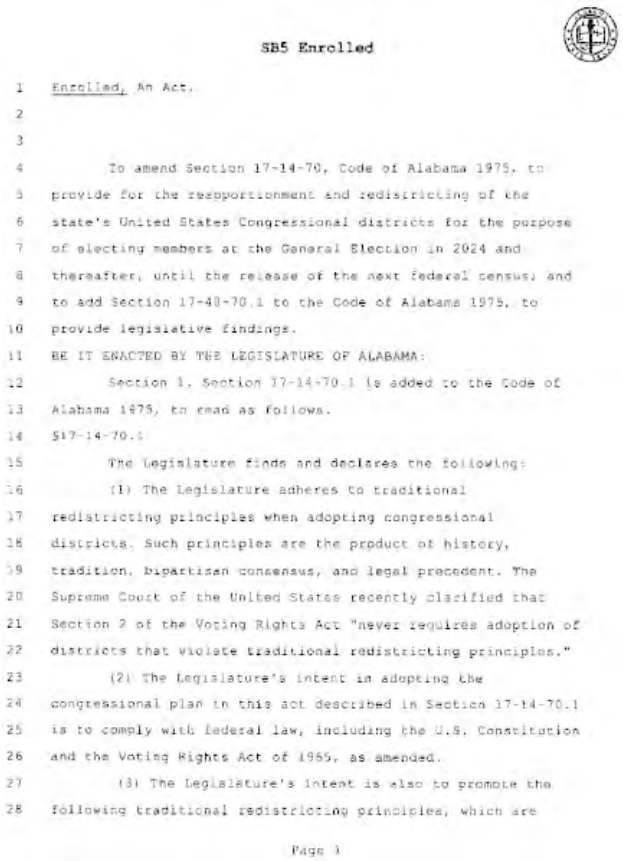
FILED

ACT #2023 - 563

XBT977-3
By Senator Livingston
RFD: Conference Committee on SB5
First Read: 17-Jul-23
2023 Second Special Session

Page 0

***1323**



SB5 Enrolled

Enrolled, An Act.

To amend Section 17-14-70, Code of Alabama 1975, to provide for the reapportionment and redistricting of the state's United States Congressional districts for the purpose of electing members at the General Election in 2024 and thereafter, until the release of the next federal census; and to add Section 17-40-70.1 to the Code of Alabama 1975, to provide legislative findings.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 17-14-70.1 is added to the Code of Alabama 1975, to read as follows.

§17-14-70.1

The Legislature finds and declares the following:

(1) The Legislature adheres to traditional redistricting principles when adopting congressional districts. Such principles are the product of history, tradition, bipartisan consensus, and legal precedent. The Supreme Court of the United States recently clarified that Section 2 of the Voting Rights Act "never requires adoption of districts that violate traditional redistricting principles."

(2) The Legislature's intent in adopting the congressional plan in this act described in Section 17-14-70.1 is to comply with federal law, including the U.S. Constitution and the Voting Rights Act of 1965, as amended.

(3) The Legislature's intent is also to promote the following traditional redistricting principles, which are

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given effect in the plan created by this act:

a. Districts shall be based on total population as reported by the federal decennial census and shall have minimal population deviation.

b. Districts shall be composed of contiguous geography, meaning that every part of every district is contiguous with every other part of the same district.

c. Districts shall be composed of reasonably compact geography.

d. The congressional districting plan shall contain no more than six splits of county lines, which is the minimum number necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines.

e. The congressional districting plan shall keep together communities of interest, as further provided for in subdivision (4).

f. The congressional districting plan shall not pair incumbent members of Congress within the same district.

g. The principles described in this subdivision are non-negotiable for the Legislature. To the extent the following principles can be given effect consistent with the principles above, the congressional districting plan shall also do all of the following:

1. Preserve the cores of existing districts.

2. Minimize the number of counties in each district.

3. Minimize splits of neighborhoods and other political subdivisions in addition to minimizing the splits of counties

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and communities of interest.

(4)a. A community of interest is a defined area of the state that may be characterized by, among other commonalities, shared economic interests, geographic features, transportation infrastructure, broadcast and print media, educational institutions, and historical or cultural factors.

b. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

c. If it is necessary to divide a community of interest between congressional districts to promote other traditional districting principles like compactness, contiguity, or equal population, division into two districts is preferable to division into three or more districts. Because each community of interest is different, the division of one community among multiple districts may be more or less significant to the community than the division of another community.

d. The Legislature declares that at least the three following regions are communities of interest that shall be kept together to the fullest extent possible in this congressional redistricting plan: the Black Belt, the Gulf Coast, and the Wiregrass.

e.1. Alabama's Black Belt region is a community of interest composed of the following 18 core counties: Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. Moreover, the following five

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counties are sometimes considered part of the Black Belt: Clarke, Conecuh, Escambia, Monroe, and Washington.

2. The Black Belt is characterized by its rural geography, fertile soil, and relative poverty, which have shaped its unique history and culture.

3. The Black Belt region spans the width of Alabama from the Mississippi boarder to the Georgia border.

4. Because the Black Belt counties cannot be combined within one district without causing other districts to violate the principle of equal population among districts, the 18 core Black Belt counties shall be placed into two reasonably compact districts, the fewest number of districts in which this community of interest can be placed. Moreover, of the five other counties sometimes considered part of the Black Belt, four of those counties are included within the two Black Belt districts — Districts 2 and 7.

f.1. Alabama's Gulf Coast region is a community of interest composed of Mobile and Baldwin Counties.

2. Owing to Mobile Bay and the Gulf of Mexico coastline, these counties also comprise a well-known and well-defined community with a long history and unique interests. Over the past half-century, Baldwin and Mobile Counties have grown even more alike as the tourism industry has grown and the development of highways and bay-crossing bridges have made it easier to commute between the two counties.

3. The Gulf Coast community has a shared interest in tourism, which is a multi-billion-dollar industry and a

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significant and unique economic driver for the region.

4. Unlike other regions in the state, the Gulf Coast community is home to major fishing, port, and ship-building industries. Mobile has a Navy shipyard and the only deep-water port in the state. The port is essential for the international export of goods produced in Alabama.

5. The Port of Mobile is the economic hub for the Gulf counties. Its maintenance and further development are critical for the Gulf counties in particular but also for many other parts of the state. The Port of Mobile handles over 55 million tons of international and domestic cargo for exporters and importers, delivering eighty-five billion dollars ($85,000,000,000) in economic value to the state each year. Activity at the port's public and private terminals directly and indirectly generates nearly 313,000 jobs each year.

6. Among the over 21,000 direct jobs generated by the Port of Mobile, about 42% of the direct jobholders reside in the City of Mobile, another 39% reside in Mobile County but outside of the City of Mobile, and another 13% reside in Baldwin County.

7. The University of South Alabama serves the Gulf Coast community of interest both through its flagship campus in Mobile and its campus in Baldwin County.

8. Federal appropriations have been critical to ensuring the port's continued growth and maintenance. In 2020, the Army Corps of Engineers allocated over two hundred seventy-four million dollars ($274,000,000) for the Port of Mobile to allow the dredging and expansion of the port.

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Federal appropriations have also been critical for expanding bridge projects to further benefit the shared interests of the region.

9. The Gulf Coast community has a distinct culture stemming from its French and Spanish colonial heritage. That heritage is reflected in the celebration of shared social occasions, such as Mardi Gras, which began in Mobile. This shared culture is reflected in Section 1-3-8(c), Code of Alabama 1975, which provides that "Mardi Gras shall be deemed a holiday in Mobile and Baldwin Counties and all state offices shall be closed in those counties on Mardi Gras." Mardi Gras is observed as a state holiday only in Mobile and Baldwin Counties.

10. Mobile and Baldwin Counties also work together as part of the South Alabama Regional Planning Commission, a regional planning commission recognized by the state for more than 50 years. The local governments of Mobile, Baldwin, and Escambia Counties, as well as 29 municipalities within those counties, work together through the commission with the Congressional Representative from District 1 to carry out comprehensive economic development planning for the region in conjunction with the U.S. Economic Development Administration. Under Section 11-85-51(b), factors the Governor considers when creating such a regional planning commission include "community of interest and homogeneity; geographic features and natural boundaries; patterns of communication and transportation; patterns of urban development; total population and population density; [and] similarity of social

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and economic problems."

g.1. Alabama's Wiregrass region is a community of interest composed of the following nine counties: Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike.

2. The Wiregrass region is characterized by rural geography, agriculture, and a major military base. The Wiregrass region is home to Troy University's flagship campus in Troy and its campus in Dothan.

3. All of the Wiregrass counties are included in District 2, with the exception of Covington County, which is placed in District 1 so that the maximum number of Black Belt counties can be included within just two districts.

Section 2. Section 17-14-70, Code of Alabama 1975, is amended to read as follows:

"§17-14-70

(a) The State of Alabama is divided into seven congressional districts as provided in subsection (b).

(b) The numbers and boundaries of the districts are designated and established by the map prepared by the Permanent Legislative Committee on Reapportionment and identified and labeled as ~~Pringle Congressional Plan 1~~ Livingston Congressional Plan 3-2023, including the corresponding boundary description provided by the census tracts, blocks, and counties, and are incorporated by reference as part of this section.

(c) The Legislature shall post for viewing on its public website the map referenced in subsection (b), including

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the corresponding boundary description provided by the census tracts, blocks, and counties, and any alternative map, including the corresponding boundary description provided by the census tracts, blocks, and counties, introduced by any member of the Legislature during the legislative session in which this section is added or amended.

(d) Upon enactment of ~~Act 2021-555, adding~~the act amending this section and adopting the map identified in subsection (b), the Clerk of the House of Representatives or the Secretary of the Senate, as appropriate, shall transmit the map and the corresponding boundary description provided by the census tracts, blocks, and counties identified in subsection (b) for certification and posting on the public website of the Secretary of State.

(e) The boundary descriptions provided by the certified map referenced in subsection (b) shall prevail over the boundary descriptions provided by the census tracts, blocks, and counties generated for the map."

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 4. This act shall be effective for the election of members of the state's U.S. Congressional districts at the General Election of 2024 and thereafter, until the state's U.S. Congressional districts are reapportioned and redistricted after the 2030 decennial census.

Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its

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otherwise becoming law.

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President and Presiding Officer of the Senate

Speaker of the House of Representatives

SB5
Senate 19-Jul-23
I hereby certify that the within Act originated in and passed the Senate, as amended.

Senate 21-Jul-23
I hereby certify that the within Act originated in and passed the Senate, as amended by Conference Committee Report.

Patrick Harris,
Secretary.

House of Representatives
Amended and passed: 21-Jul-23

House of Representatives
Passed 21-Jul-23, as amended by Conference Committee Report.

By: Senator Livingston

APPROVED July 21, 2023
TIME 5:28 PM
Kay Ivey
GOVERNOR

Alabama Secretary Of State
Act Num....: 2023-363
Bill Num...: S-5
Recv'd 07/21/23 05141pmBLF

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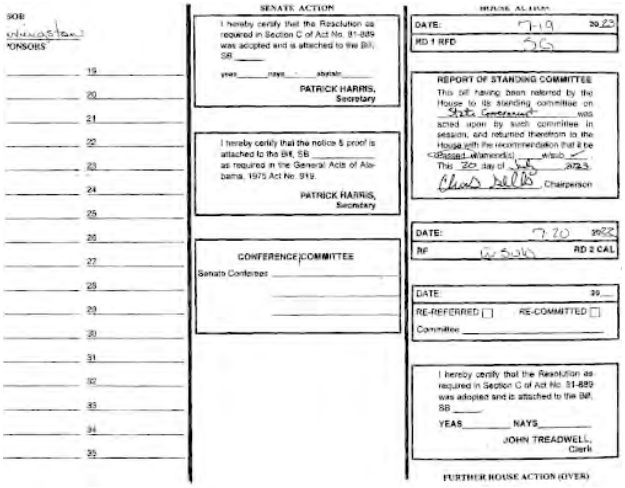
SENATE ACTION

I hereby certify that the Resolution as required in Section C of Act No. 21-885 was adopted and is attached to the Bill, SB ____

PATRICK HARRIS, Secretary

I hereby certify that the notice & proof is attached to the Bill, SB ____ as required in the General Acts of Alabama, 1975 Act No. 919.

PATRICK HARRIS, Secretary

CONFERENCE COMMITTEE

Senate Conferees

HOUSE ACTION

DATE: 7-19 20 23

RD 1 RFD

REPORT OF STANDING COMMITTEE

This bill having been referred by the House to its standing committee on State Government was acted upon by such committee in session, and returned therefrom to the House with the recommendation that it be (Passed, w/amend(s)) w/sub ✓

This 20 day of July 2023

Chairperson

DATE: 7-20 2023

RF RD 2 CAL

DATE: 20__

RE-REFERRED ☐ RE-COMMITTED ☐

Committee: _____

I hereby certify that the Resolution as required in Section C of Act No. 21-889 was adopted and is attached to the Bill, SB ____

YEAS _____ NAYS _____

JOHN TREADWELL, Clerk

FURTHER HOUSE ACTION (OVER)

APPENDIX B

REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES

May 5, 2021

I. POPULATION

The total Alabama state population, and the population of defined subunits thereof, as reported by the 2020 Census, shall be the permissible data base used for the development, evaluation, and analysis of proposed redistricting plans. It is the intention of this provision to exclude from use any census data, for the purpose of determining compliance with the one person, one vote requirement, other than that provided by the United States Census Bureau.

***1334 II. CRITERIA FOR REDISTRICTING**

a. Districts shall comply with the United States Constitution, including the requirement that they equalize total population.

b. Congressional districts shall have minimal population deviation.

c. Legislative and state board of education districts shall be drawn to achieve substantial equality of population among the districts and shall not exceed an overall population deviation range of ±5%.

d. A redistricting plan considered by the Reapportionment Committee shall comply with the one person, one vote principle of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

e. The Reapportionment Committee shall not approve a redistricting plan that does not comply with these population requirements.

f. Districts shall be drawn in compliance with the Voting Rights Act of 1965, as amended. A redistricting plan shall have neither the purpose nor the effect of diluting minority voting strength, and shall comply with Section 2 of the Voting Rights Act and the United States Constitution.

g. No district will be drawn in a manner that subordinates race-neutral districting criteria to considerations of race, color, or membership in a language-minority group, except that race, color, or membership in a language-minority group may predominate over race-neutral districting criteria to comply with Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in support of such a race-based choice. A strong basis in evidence exists when there is good reason to believe that race must be used in order to satisfy the Voting Rights Act.

h. Districts will be composed of contiguous and reasonably compact geography.

i. The following requirements of the Alabama Constitution shall be complied with:

(i) Sovereignty resides in the people of Alabama, and all districts should be drawn to reflect the democratic will of all the people concerning how their governments should be restructured.

(ii) Districts shall be drawn on the basis of total population, except that voting age population may be considered, as necessary to comply with Section 2 of the Voting Rights Act or other federal or state law.

(iii) The number of Alabama Senate districts is set by statute at 35 and, under the Alabama Constitution, may not exceed 35.

(iv) The number of Alabama Senate districts shall be not less than one-fourth or more than one-third of the number of House districts.

(v) The number of Alabama House districts is set by statute at 105 and, under the Alabama Constitution, may not exceed 106.

(vi) The number of Alabama House districts shall not be less than 67.

(vii) All districts will be single-member districts.

(viii) Every part of every district shall be contiguous with every other part of the district.

j. The following redistricting policies are embedded in the political values, traditions, customs, and usages of the State of Alabama and shall be observed to the extent that they do not violate or subordinate the foregoing policies prescribed by the Constitution and laws of the United States and of the State of Alabama:

(i) Contests between incumbents will be avoided whenever possible.

(ii) Contiguity by water is allowed, but point-to-point contiguity and long-lasso contiguity is not.

***1335** (iii) Districts shall respect communities of interest, neighborhoods, and political subdivisions to the extent practicable and in compliance with paragraphs a through i. A community of interest is defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

(iv) The Legislature shall try to minimize the number of counties in each district.

(v) The Legislature shall try to preserve the cores of existing districts.

(vi) In establishing legislative districts, the Reapportionment Committee shall give due consideration to all the criteria herein. However, priority is to be given to the compelling State interests requiring equality of population among districts and compliance with the Voting Rights Act of 1965, as amended, should the requirements of those criteria conflict with any other criteria.

g. The criteria identified in paragraphs j(i)-(vi) are not listed in order of precedence, and in each instance where they conflict, the Legislature shall at its discretion determine which takes priority.

III. PLANS PRODUCED BY LEGISLATORS

1. The confidentiality of any Legislator developing plans or portions thereof will be respected. The Reapportionment Office staff will not release any information on any Legislator's work without written permission of the Legislator developing the plan, subject to paragraph two below.

2. A proposed redistricting plan will become public information upon its introduction as a bill in the legislative process, or upon presentation for consideration by the Reapportionment Committee.

3. Access to the Legislative Reapportionment Office Computer System, census population data, and redistricting work maps will be available to all members of the Legislature upon request. Reapportionment Office staff will provide technical assistance to all Legislators who wish to develop proposals.

4. In accordance with Rule 23 of the Joint Rules of the Alabama Legislature "[a]ll amendments or revisions to redistricting plans, following introduction as a bill, shall be drafted by the Reapportionment Office." Amendments or revisions must be part of a whole plan. Partial plans are not allowed.

5. In accordance with Rule 24 of the Joint Rules of the Alabama Legislature, "[d]rafts of all redistricting plans which are for introduction at any session of the Legislature, and which are not prepared by the Reapportionment Office, shall be presented to the Reapportionment Office for review of proper form and for entry into the Legislative Data System at least ten (10) days prior to introduction."

IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC HEARINGS

1. All meetings of the Reapportionment Committee and its sub-committees will be open to the public and all plans presented at committee meetings will be made available to the public.

2. Minutes of all Reapportionment Committee meetings shall be taken and maintained as part of the public record. Copies ***1336** of all minutes shall be made available to the public.

3. Transcripts of any public hearings shall be made and maintained as part of the public record, and shall be available to the public.

4. All interested persons are encouraged to appear before the Reapportionment Committee and to give their comments and input regarding legislative redistricting. Reasonable opportunity will be given to such persons, consistent with the criteria herein established, to present plans or amendments redistricting plans to the Reapportionment Committee, if desired, unless such plans or amendments fail to meet the minimal criteria herein established.

5. Notice of all Reapportionment Committee meetings will be posted on monitors throughout the Alabama State House, the Reapportionment Committee's website, and on the Secretary of State's website. Individual notice of Reapportionment Committee meetings will be sent by email to any citizen or organization who requests individual notice and provides the necessary information to the Reapportionment Committee staff. Persons or organizations who want to receive this information should contact the Reapportionment Office.

V. PUBLIC ACCESS

1. The Reapportionment Committee seeks active and informed public participation in all activities of the Committee and the widest range of public information and citizen input into its deliberations. Public access to the Reapportionment Office computer system is available every Friday from 8:30 a.m. to 4:30 p.m. Please contact the Reapportionment Office to schedule an appointment.

2. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization by written presentation at a public meeting or by submission in writing to the Committee. All plans submitted to the Reapportionment Committee will be made part of the public record and made available in the same manner as other public records of the Committee.

3. Any proposed redistricting plan drafted into legislation must be offered by a member of the Legislature for introduction into the legislative process.

4. A redistricting plan developed outside the Legislature or a redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the Reapportionment Committee must:

a. Be clearly depicted on maps which follow 2020 Census geographic boundaries;

b. Be accompanied by a statistical sheet listing total population for each district and listing the census geography making up each proposed district;

c. Stand as a complete statewide plan for redistricting.

d. Comply with the guidelines adopted by the Reapportionment Committee.

5. Electronic Submissions

a. Electronic submissions of redistricting plans will be accepted by the Reapportionment Committee.

b. Plans submitted electronically must also be accompanied by the paper materials referenced in this section.

c. See the Appendix for the technical documentation for the electronic submission of redistricting plans.

6. Census Data and Redistricting Materials

a. Census population data and census maps will be made available through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

***1337** b. Summary population data at the precinct level and a statewide work maps will be made available to the public through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

c. All such fees shall be deposited in the state treasury to the credit of the general fund and shall be used to cover the expenses of the Legislature.

Appendix.

ELECTRONIC SUBMISSION OF REDISTRICTING PLANS REAPPORTIONMENT COMMITTEE - STATE OF ALABAMA

The Legislative Reapportionment Computer System supports the electronic submission of redistricting plans. The electronic submission of these plans must be via email or a flash drive. The software used by the Reapportionment Office is Maptitude.

The electronic file should be in DOJ format (Block, district # or district #, Block). This should be a two column, comma delimited file containing the FIPS code for each block, and the district number. Maptitude has an automated plan import that creates a new plan from the block/district assignment list.

Web services that can be accessed directly with a URL and ArcView Shapefiles can be viewed as overlays. A new plan would have to be built using this overlay as a guide to assign units into a blank Maptitude plan. In order to analyze the plans with our attribute data, edit, and report on, a new plan will have to be built in Maptitude.

In order for plans to be analyzed with our attribute data, to be able to edit, report on, and produce maps in the most efficient, accurate and time saving procedure, electronic submissions are REQUIRED to be in DOJ format.

Example: (DOJ FORMAT BLOCK, DISTRICT #)

SSCCCTTTTTTBBBBDDDD

SS	is the 2 digit state FIPS code
CCC	is the 3 digit county FIPS code
TTTTTT	is the 6 digit census tract code
BBBB	is the 4 digit census block code
DDDD	is the district number, right adjusted

Contact Information:

Legislative Reapportionment Office

Room 317, State House

11 South Union Street

Montgomery, Alabama 36130

(334) 261-0706

For questions relating to reapportionment and redistricting, please contact:

Donna Overton Loftin, Supervisor

Legislative Reapportionment Office

***1338** donna.overton@alsenate.gov

Please Note: The above e-mail address is to be used only for the purposes of obtaining information regarding redistricting. Political messages, including those relative to specific legislation or other political matters, cannot be answered or disseminated via this email to members of the Legislature. Members of the Permanent Legislative Committee on Reapportionment may be contacted through information contained on their Member pages of the Official Website of the Alabama Legislature, legislature.state.al.us/aliswww/default.aspx.

All Citations

690 F.Supp.3d 1226, 122 Fed. R. Evid. Serv. 1012

Footnotes

1 *Singleton* remains before this three-judge Court but is not a part of the Section Two remedial proceedings. *See infra* at Part I.C.5.

2 When we cite an order or other filing that appears in more than one of these cases, for the reader's ease we cite only the document filed in the *Milligan* case.

3 Page number pincites in this order are to the CM/ECF page number that appears in the top right-hand corner of each page, if such a page number is available.

4 In a later filing, the State advised the Court that Secretary Allen needs a final map by October 1, 2023. *Milligan* Doc. 162 at 7.

5 On January 16, 2023, Wes Allen became the Secretary of State of Alabama. Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Allen was substituted for former Secretary Merrill as a defendant in these cases. *Milligan* Doc. 161.

6 Former Senator Jim McClendon then served as co-chair of the Committee. Senator Steve Livingston has since become co-chair of the Committee. *See Milligan* Doc. 173. Pursuant to Federal Rule of Civil Procedure 25(d), Senator Livingston was substituted as a defendant in these cases. *Milligan* Doc. 269.

7 The parties previously stipulated that the Black Belt "is named for the region's fertile black soil. The region has a substantial Black population because of the many enslaved people brought there to work in the antebellum period. All the counties in the Black Belt are majority-or near majority-BVAP," where "BVAP" means Black share of the voting-age population. *Milligan* Doc. 53 ¶ 60. They further stipulated that the Black Belt includes eighteen "core counties" (Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox), and that five other counties (Clarke, Conecuh, Escambia, Monroe, and Washington) are "sometimes included." *Id.* ¶ 61.

8 We already have described the Black Belt. *See supra* at n.7. When the State refers to the "Gulf Coast," it refers to Mobile and Baldwin counties. *See Milligan* Doc. 220-11 at 5. When the State refers to the "Wiregrass," it refers to an area in the southeast part of the state that includes Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike counties. *See id.* at 8.

9 When we use the phrase "opportunity district" or "Black-opportunity," we mean a district in which a "meaningful number" of non-Black voters often "join[ ] a politically cohesive black community to elect" the Black-preferred candidate. *Cooper*, 581 U.S. at 303, 137 S.Ct. 1455. We distinguish an opportunity district from a majority-Black district, in which Black people comprise "50 percent or more of the voting population and ... constitute a compact voting majority" in the district. *Bartlett*, 556 U.S. at 19, 129 S.Ct. 1231 (plurality opinion). For additional discussion, see *infra* at Part III.

10 When we cite to the transcript from the 2022 preliminary injunction hearing, pincites are to the numbered pages of the transcript, not the CM/ECF pagination. *See Milligan* Doc. 105.

11 For an explanation of these metrics, *see Milligan* Doc. 107 at 61–62 n.9.

12 We distinguish Part III-B-1, the opinion of four justices, from a "plurality opinion." "A plurality opinion is one that doesn't garner enough appellate judges' votes to constitute a majority, but has received the greatest number of votes of any of the opinions filed, among those opinions supporting the mandate." Bryan A. Garner, et al., The Law of Judicial Precedent 195 (2016) (internal quotation marks and footnote omitted) (alterations accepted). All the other parts of the Chief Justice's opinion garnered five votes.

13 The *Milligan* Plaintiffs relied on testimony from Dr. Liu during the preliminary injunction proceedings, and we found him credible. *Milligan* Doc. 107 at 174–75.

14 The *Milligan* Plaintiffs relied on expert testimony from Dr. Bagley about the Senate Factors during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 107 at 78–81 and 185–87.

15 The *Caster* Plaintiffs relied on testimony from Dr. Palmer during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 174–76.

16 The *Milligan* and *Caster* Plaintiffs do not offer the VRA Plan in this litigation as a remedial map for purposes of satisfying *Gingles* I or for any other purpose. *See* Aug. 14 Tr. 123. It is in the record only because they proposed it to the Committee and the State's expert witness, Mr. Bryan, prepared a report that includes statements about it. *See Milligan* Doc. 220-10 at 53, *discussed infra* at Part IV.B.2.a.

17 The depositions were taken after the briefing on the Plaintiffs' objections to the 2023 Plan was complete. *See Milligan* Doc. 261. The State did not raise a timeliness objection, and we discern no timeliness problem.

18 When we cite a deposition transcript, pincites are to the numbered pages of the transcript, not the CM/ECF pagination.

19 We understand that the 2023 Plan is enacted, not merely proposed. *Covington* used "proposed" to describe a remedial plan that had been passed by both houses of the North Carolina General Assembly after the previous maps were ruled unconstitutional. *See* 283 F. Supp. 3d at 413–14, 419; *see also infra* at 1289-91.

20 Notwithstanding that the issue was never formally presented to us by motion, federal courts have an "independent obligation to ensure that jurisdiction exists before federal judicial power is exercised over the merits" of a case, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1275 (11th Cir. 2000), so we have carefully considered the mootness issue. It is clear to us that under *Covington* this case is not moot. Just as the district court in *Covington* (1) "ha[d] a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future," and (2) "ha[d] the inherent authority to enforce its own orders," 283 F. Supp. 3d at 424–25, so too do we (1) have a duty to ensure that the State's proposed remedy completely cures the Section Two violation we have already found, and (2) have the inherent authority to enforce our preliminary injunction order. Moreover, we are acutely aware of the fact that Black Alabamians will be forced, if we do not address the matter, to continue to vote under a map that we have found likely violates Section Two. That constitutes a live and ongoing injury.

21 To facilitate the reader's opportunity to make this comparison conveniently, we attach the guidelines to this order as Appendix B. *Compare* App. B at 1, *with* App. A at 2.

2023 WL 6567895
Only the Westlaw citation is currently available.
United States District Court, N.D.
Alabama, Southern Division.

Bobby SINGLETON, et al., Plaintiffs,

v.

Wes ALLEN, in his official capacity as Secretary of State of Alabama, et al., Defendants.

Evan Milligan, et al., Plaintiffs,

v.

Wes Allen, in his official capacity as Secretary of State of Alabama, et al., Defendants.

Case No.: 2:21-cv-1291-AMM,
Case No.: 2:21-cv-1530-AMM
|
Signed October 5, 2023

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Robert Smith Vance, III, Dominick Feld Hyde, Birmingham, AL, for Amicus The Brennan Center for Justice at N.Y.U. School of Law in No. 2:21-cv-1530.

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

INJUNCTION, ORDER, AND COURT-ORDERED REMEDIAL MAP

***1** BY THE COURT:

These congressional redistricting cases are before this Court for us to order the Secretary of State ("the Secretary") to conduct Alabama's congressional elections according to a districting plan that remedies racially discriminatory vote dilution that we found and the Supreme Court of the United States affirmed in Alabama's previous plan. *See Allen v. Milligan*, 143 S. Ct. 1487, 1498, 1502 (2023).

These cases allege that Alabama's previous plan ("the 2021 Plan") was racially gerrymandered in violation of the United States Constitution and/or diluted the votes of Black Alabamians in violation of Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section Two"). *See Singleton v. Allen*, No. 2:21-cv-1291-AMM (asserting only constitutional challenges); *Milligan v. Allen*, No. 2:21-cv-1530-AMM (asserting both constitutional and statutory challenges); *Caster v. Allen*, No. 2:21-cv-1536-AMM (asserting only statutory challenges).

The 2021 Plan included one majority-Black district: District 7, which became majority-Black in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992) (three-judge court), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), *and aff'd sub nom. Figures v. Hunt*, 507 U.S. 901 (1993).

After an extensive seven-day hearing in January 2022, we concluded that the 2021 Plan likely violated Section Two and enjoined the State from using that plan. *See Milligan* Doc. 107.[1] Based on controlling precedent, we held that "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Id.* at 5.[2] We observed that "[a]s the Legislature consider[ed remedial] plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it." *Id.* at 6.

The Secretary and legislative defendants ("the Legislators") appealed. *Milligan* Doc. 108; *Allen*, 143 S. Ct. at 1502.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction in all respects. *Allen*, 143 S. Ct. at 1502. The Supreme Court "s[aw] no reason to disturb th[is] Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event." *Id.* at 1506. Likewise, the Supreme Court concluded there was no "basis to upset th[is] Court's legal conclusions" because we "faithfully applied [Supreme Court] precedents and correctly determined that, under existing law, [the 2021 Plan] violated" Section Two. *Id.*

***2** On return from the Supreme Court, *Milligan* came before this three-judge Court, and *Caster* before Judge Manasco alone, for remedial proceedings.[3] The State requested that we allow the Legislature approximately five weeks — until July 21, 2023 — to enact a new plan. *Milligan* Doc. 166.

All parties understood the urgency of remedial proceedings. The Secretary previously advised this Court that because of pressing state-law deadlines, he needs a final congressional map by "early October" for the 2024 election. *Milligan* Doc. 147 at 3. (In April 2022, mindful that under Alabama law, the last date candidates may qualify with major political parties to participate in the 2024 primary election is November 10, 2023, Ala. Code § 17-13-5(a), we directed the State to identify the latest date by which the Secretary must have a final map to hold the 2024 election, *Milligan* Doc. 145. The Secretary advised that he needs the map "by early October" 2023. *Milligan* Doc. 147 at 3. He later advised that he needs the map "by around October 1, 2023." *Milligan* Doc. 162 at 7.) In the light of that urgency, and to balance the deference given to the Legislature with the considerations outlined by the Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), we delayed proceedings, entered a scheduling order, and told the parties to expect a remedial hearing on the date they proposed: August 14, 2023. *Milligan* Doc. 168.

On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map ("the 2023 Plan"). *Milligan* Doc. 186. Just like the 2021 Plan, the 2023 Plan includes only one majority-Black district: District 7. *Milligan* Doc. 186-1 at 2.

All Plaintiffs timely objected to the 2023 Plan and requested another preliminary injunction. *See Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. In relevant part, the *Milligan* and *Caster* Plaintiffs argued that the 2023 Plan did not cure the unlawful vote dilution we found because it did not create a second district in which Black voters have an opportunity to elect a candidate of their choice (an "opportunity district"). *Milligan* Doc. 200 at 16–23; *Caster* Doc. 179 at 8–11. On August 14, 2023, we conducted a remedial hearing on the *Milligan* and *Caster* Plaintiffs' Section Two objections to the 2023 Plan. *Milligan* Doc. 265. On August 15, 2023, we conducted a separate preliminary injunction hearing on the *Singleton* Plaintiffs' constitutional claims. *Singleton* Doc. 185. We evaluated the objections with the benefit of an extensive record, which included not only the evidence drawn from the previous preliminary injunction proceedings, but also new expert reports, deposition transcripts, and other evidence submitted during the remedial phase. *See Singleton* Docs. 147, 162, 165; *Milligan* Docs. 200, 220, 225; *Caster* Docs. 179, 191, 195; Aug. 14 Tr. 92–93; Aug. 15 Tr. 24–25. We also had the benefit of the parties' briefs, three *amicus* briefs, and a statement of interest filed by the Attorney General of the United States. *Milligan* Docs. 199, 234, 236, 260.

The State conceded that the 2023 Plan does not include an additional opportunity district. Indeed, the State asserted that notwithstanding our preliminary injunction order and the Supreme Court's affirmance, the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 159–64. The State's conduct and concession put this case in an unusual posture. We are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district.

***3** Based on that concession and the evidentiary record, on September 5, 2023, we issued a second preliminary injunction. *Milligan* Doc. 272. We enjoined the Secretary from using the 2023 Plan because it does not remedy the likely Section Two violation that we found and the Supreme Court affirmed, and in the alternative, because the *Milligan* Plaintiffs are substantially likely to establish anew that the 2023 Plan violates Section Two. *See generally id.*

Under the Voting Rights Act and binding precedent, the appropriate remedy for racially discriminatory vote dilution is, as we already said, a congressional districting plan that includes either an additional majority-Black district, or an additional district in which Black voters otherwise have an

opportunity to elect a representative of their choice. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion); *Cooper v. Harris*, 581 U.S. 285, 306 (2017).

"Redistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (internal quotation marks omitted), but this Court "ha[s] its own duty to cure" districts drawn in violation of federal law, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). Accordingly, in our second preliminary injunction we instructed the Special Master, cartographer, and Special Master's counsel we previously appointed ("the Special Master Team") to commence work on drawing a remedial map. *Milligan* Doc. 272 at 7. We set a deadline of September 25, 2023, for the Special Master Team to recommend three remedial maps, and we issued detailed instructions for their work. *See Milligan* Doc. 273.

The Special Master solicited proposed plans and comments from the parties and the public. *See generally In re Redistricting 2023*, No. 2:23-mc-01181-AMM (N.D. Ala.) ("*Redistricting*"). The Special Master recommended three remedial plans. *Milligan* Doc. 295–96. We received objections and held a hearing on October 3, 2023. *See Milligan* Docs. 301, 302, 303, 304, 305; *Caster* Doc. 248; *Redistricting* Docs. 48, 49.

For the reasons we explain below, under Federal Rule of Civil Procedure 65(d) the Secretary is **ORDERED** to administer Alabama's upcoming congressional elections using the plan the Special Master recommended called "Remedial Plan 3," which is appended to this Order. As we explain, this plan satisfies all constitutional and statutory requirements while hewing as closely as reasonably possible to the Alabama Legislature's 2023 Plan.

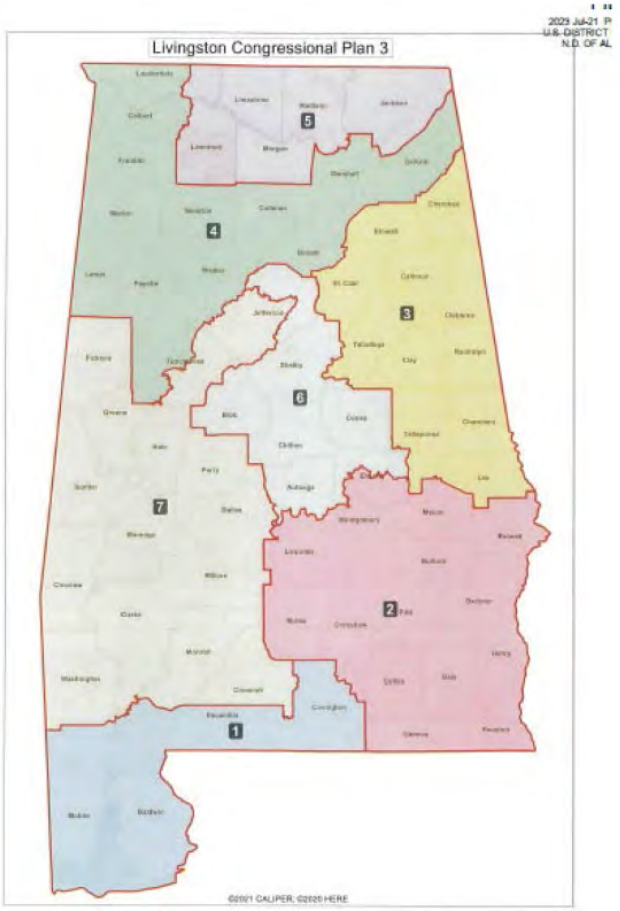
The Court appreciates the thorough and expeditious work of the Special Master Team. The Court has previously ordered that their fees and expenses will be paid by the State of Alabama. *Milligan* Docs. 130 at 7, 273 at 12. The Special Master Team is **INSTRUCTED** to file a Fee Statement within 30 days of the date of this Order. The Fee Statement must set forth expenses incurred (with supporting documentation), hours worked and work performed, hourly rate, and any additional information necessary for the Court to assess the reasonableness of the expenses and fees claimed, for the Special Master, his counsel, and the cartographer. Each Defendant is **ORDERED** to respond to the Fee Statement within 14 days of the date it is filed.

I. BACKGROUND

A. Procedural Posture

After these cases returned from the Supreme Court, the Secretary and the Legislators advised us that "the ... Legislature intend[ed] to enact a new congressional redistricting plan" and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2. We delayed remedial proceedings, and a special session of the Legislature commenced on July 17, 2023. *Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the "Community of Interest Plan." *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, the "Opportunity Plan." *Id.* ¶¶ 19, 22. The next day, a bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan and Governor Ivey signed it into law. *Milligan* Doc. 186; *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70.

***4** The 2023 Plan, like the 2021 Plan, has only one district that is majority-Black or Black-opportunity. *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 107 at 2–3. The 2023 Plan includes both a districting plan (which appears below) and legislative findings. *See* Ala. Code § 17-14-70.



The legislative findings state that the Legislature "f[ound] and declare[d]" that its "intent" when it adopted the 2023 Plan was to comply with federal law and "promote" certain "redistricting principles." *Id.*; *Milligan* Doc. 272 at 199–200.[4] The legislative findings are appended to our second preliminary injunction. *See Milligan* Doc. 272, app. A.

For present purposes, two provisions of the legislative findings are particularly relevant. *First*, the legislative findings provide that the "principle[ ]" that "[t]he congressional districting plan shall contain no more than six splits of county lines" is "non-negotiable." *Id.* at 200. *Second*, the legislative findings identify three communities of interest that "shall be kept together to the fullest extent possible" — the Black Belt, the Gulf Coast, and the Wiregrass. *Id.* at 201.

The parties previously stipulated that the Black Belt is an area of Alabama that "is named for the region's fertile black soil. The region has a substantial Black population because of the many enslaved people brought there to work in the antebellum period. All the counties in the Black Belt are majority- or near majority-BVAP." *Milligan* Doc. 53 ¶ 60; *see also Allen*, 143 S. Ct. at 1505 (defining the Black Belt similarly: "Named for its fertile soil, the Black Belt contains a high proportion of black voters, who 'share a rural geography, concentrated poverty, unequal access to government services, ... lack of adequate healthcare,' and a lineal connection to 'the many enslaved people brought there to work in the antebellum period.' "). They further stipulated that the Black Belt includes eighteen "core counties" (Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox), and that five other counties (Clarke, Conecuh, Escambia, Monroe, and Washington) are "sometimes included." *Id.* ¶ 61. When the State refers to the "Gulf Coast," it refers to Mobile and Baldwin counties. *See Milligan* Doc. 220-11 at 5. When the State refers to the "Wiregrass," it refers to an area in the southeast part of the state that includes Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike counties. *See id.* at 8.

We enjoined the use of the 2023 Plan on September 5, 2023. *Milligan* Doc. 272. Later that day, the Secretary — but not the Legislators — appealed our preliminary injunction order and sought an emergency stay. *Milligan* Docs. 274, 275, 276. We denied a stay, the Secretary moved the Supreme Court for a stay, and the Supreme Court summarily denied a stay with no noted dissents. *Milligan* Doc. 281; *Allen v. Milligan*, Emergency Application for Stay, No. 23A231 (Sept. 11, 2023); *Allen v. Milligan*, Order Denying Stay, No. 23A231 (Sept. 26, 2023).[5] After that summary denial, the Secretary stipulated the dismissal of his appeal to the Supreme Court and his appeal of the *Caster* preliminary injunction to the Eleventh Circuit. *Milligan* Doc. 307; *Caster* Doc. 251.

B. Instructions to the Special Master Team

***5** Also on September 5, 2023, we issued detailed instructions to the Special Master Team. *See Milligan* Doc. 273. The Special Master Team is led by the Special Master, Mr. Richard Allen. *See Milligan* Doc. 130 at 3–4. Mr. Allen is an "esteemed public servant with eminent knowledge of Alabama state government." *Id.* at 3. Mr. Allen served as Chief Deputy Attorney General under four Alabama Attorneys General, served as the Commissioner of the Alabama Department of Corrections, practiced law for many years in Montgomery, and retired from military service with the rank of Brigadier General. *See id.* at 4. The Special Master was assisted by his counsel, Mr. Michael Scodro and the Mayer Brown LLP law firm; and the Court's cartographer, Mr. David Ely. *See Milligan* Docs. 226 at 5, 264.

Although all parties had an opportunity to object to these appointments, no party objected. *See id.* Pursuant to Federal Rule of Civil Procedure 53(a)(2), Mr. Allen, Mr. Ely, and Mr. Scodro filed affidavits attesting that they were aware of no grounds for their disqualification under 28 U.S.C. § 455. *Milligan* Docs. 239, 240, 241.

In our detailed instructions, we directed the Special Master to file three proposed plans to remedy the likely Section Two violation we found in the 2023 Plan; to include color maps and demographic data with each map; and to file a Report and Recommendation with the maps to explain "in some detail the choices made" in each plan and why each proposed remedial plan remedies the likely vote dilution we found. *See Milligan* Doc. 273 at 6. We directed the Special Master to discuss "the facts and legal analysis supporting the proposed districts' compliance with the U.S. Constitution, the Voting Rights Act, traditional redistricting criteria, and the other criteria" that we listed. *See id.* at 6–7.

We directed that each recommended plan must "[c]ompletely remedy the likely Section 2 violation," which required each plan to "include[ ] either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Id.* at 7 (second alteration in original).[6]

We further directed that each recommended plan must comply with the U.S. Constitution and the Voting Rights Act, and must comply "with the one-person, one-vote principle guaranteed by the Equal Protection Clause of the Fourteenth Amendment, based on data from the 2020 Census." *Id.* at 7.

We directed that each recommended plan must "[r]espect traditional redistricting principles to the extent reasonably practicable," and we observed that "[o]rdinarily, these principles [i]nclud[e] compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *Id.* at 8–9 (quoting *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (quotation marks and citations omitted)). But because we are " 'forbidden to take into account the purely political considerations that might be appropriate for legislative bodies,' " such as incumbency protection and political affiliation, *id.* at 9 (quoting *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) (three-judge court)), we limited the Special Master's consideration of traditional districting criteria to compactness, contiguity, respect for political subdivisions, and communities of interest. *Id.*

***6** We expressly allowed the Special Master Team to consider "as background, among other things, the eleven illustrative plans submitted by the *Milligan* and *Caster* Plaintiffs; the remedial maps submitted by the *Singleton* Plaintiffs ...; and the 2021 Plan and the 2023 Plan, which were both found to likely violate Section 2," as well as the Alabama Legislature's Reapportionment Committee Redistricting Guidelines ("the guidelines") and the legislative findings enacted with the 2023 Plan. *Id.* at 10. We also said the Special Master could consider "all the record evidence received in the first preliminary injunction hearing conducted by this Court in January 2022, as well as the record evidence received by this Court at the remedial hearing conducted on August 14, 2023, and the record evidence received by this Court at the preliminary injunction hearing conducted on August 15, 2023." *Id.* We also allowed the Special Master Team to consider proposals from the general public and additional submissions by the parties.

Although we allowed the Special Master Team to engage in *ex parte* communications with the Court as the need arose in their work, we disallowed *ex parte* communications with the parties or their counsel. *Id.*

We authorized the Special Master to issue appropriate orders "as may be reasonably necessary for him to accomplish his task within the time constraints imposed by this Order, and the time exigencies surrounding these proceedings." *Id.* And we directed him to "invite submissions and comments from the parties and other interested persons," and to hold a hearing and take testimony as he deemed necessary. *Id.* at 11. We required the Special Master Team to "maintain orderly files consisting of all documents submitted to them by the parties and any written orders, findings, and recommendations" and to preserve all materials and datasets relating to their work until we relieve them of that obligation. *Id.* To facilitate the work of the Special Master, we ordered the parties to provide him data relating to the Plaintiffs' illustrative maps and the 2021 Plan and 2023 Plan, as well as other relevant data. *Id.* at 11–12.

We ordered that all reasonable expenses incurred by the Special Master Team, as well as their reasonable compensation, would be (subject to our approval) paid by the State of Alabama. *Id.* at 12. We instructed the Special Master Team to protect against unreasonable expenses. *Id.*

Finally, we ordered that after the Special Master filed his Recommendation, "the parties and all interested persons shall have three (3) days" to file objections. *Id.* at 13. We told the parties that we reserved October 3, 2023, for a hearing. *Id.*

C. Submissions to the Special Master

On September 7, 2023, the Special Master set deadlines for parties and interested non-parties to submit proposed plans or comments. *Redistricting* Doc. 2. The Special Master reviewed eleven proposed remedial plans. *Redistricting* Doc. 44 at 12. The *Milligan* and *Caster* Plaintiffs jointly proposed a plan, the *Singleton* Plaintiffs proposed a plan, Representative Pringle proposed the Community of Interest Plan passed by the Alabama House of Representatives, and several non-parties proposed plans. *See id.* The Special Master also received six sets of comments. *See id.* at 13. And the Special Master had the eleven illustrative maps that the *Milligan* and *Caster* Plaintiffs submitted in the preliminary injunction proceedings. *Id.* at 12.

During the comment period, Alabama's lone Black member of Congress, Terri Sewell, who represents District 7, objected to the *Singleton* Plaintiffs' proposed plan on the ground that it would "eliminate a district in which Black-preferred candidates are likely to be elected" (District 7). *Redistricting* Doc. 21 at 3. And the *Caster* Plaintiffs filed objections to Representative Pringle's Community of Interest proposed plan, the *Singleton* Plaintiffs' proposed plan, and other proposed plans. *Redistricting* Doc. 23. The *Caster* Plaintiffs and the *Milligan* Plaintiffs filed a joint opposition to the proposed plans filed by non-party Michael Moriarty. *Redistricting* Doc. 35.

***7** The Special Master observed that the proposals and comments were "necessarily done on an expedited basis but were nonetheless of extremely high quality and were clearly the product of extensive work and thoughtful analysis." *Id.* at 13. The Special Master "reviewed and carefully considered" each submission. *Id.*

D. The Special Master's Recommendation

The Special Master filed a 43-page Report and Recommendation on September 25, 2023. *See Milligan* Doc. 295. The Special Master explained in his Recommendation that he limited his analysis exactly as we directed. *See id.* at 13–15. The Special Master ensured that each recommended plan (1) complies with the primary criteria set out in our instructions (*i.e.*, it completely remedies the likely Section Two violation, complies with one-person, one-vote requirements, and otherwise complies with the Constitution and the Voting Rights Act), and (2) respects traditional districting criteria ("compactness, contiguity, respect for political subdivisions, and maintenance of communities of interest"). *Id.* at 13. The Special Master (3) carefully minimized changes to the 2023 Plan by "preserv[ing] boundaries from the 2023 Plan except where modifications are needed to remedy the Section Two violation," *id.* at 27, and "maintaining most district boundaries and retaining the vast majority of people within the same districts they were in under the 2023 Plan," *id.* at 14. And (4) the Special Master did not " 'target' any particular Black population percentage in any district," but instead "prioritized following county, voting district (precinct), and municipal boundaries." *Id.* "After preparing each draft plan, Mr. Ely performed an election analysis ... to determine how frequently the Black-preferred candidate would have won past election contests in each district." *Id.* at 15.

The Special Master left Districts 3, 4, and 5 entirely unchanged from the 2023 Plan in each recommended plan. *Id.* at 27. Districts 6 and 7 are modified only minimally as explained below. *Id.* The Special Master recommended plans with a population deviation of only one person, and his plans "have only contiguous districts." *Id.* at 35, 39. The Special Master confirmed that his recommended plans are not racial gerrymanders or intentionally discriminatory in violation of the Equal Protection Clause and the Fifteenth Amendment. *See id.* at 36. Notably, Mr. Ely "did not display racial demographic data while drawing districts or examining others' proposed remedial plans within the mapping software, Maptitude. Instead, Mr. Ely relied on other characteristics and criteria" related to communities of interest and political subdivisions. *Id.*

For each recommended plan, the Special Master provided core retention metrics, a performance analysis, compactness scores, and information about respect for political subdivisions and communities of interest. *See id.* at 27–28 tbl.2; *id.* at 32 tbl.4; *id.* at 38 tbl.6; *id.* at 41–43. We discuss in turn each category of information.

The Special Master provided core retention metrics to indicate (1) the percentage of the population of each district in the 2023 Plan that was retained in that district in each recommended plan, and (2) that statistic on a statewide basis. *Id.* at 27–28 tbl.2. The recommended plans retain between

86.9% and 88.9% of Alabama's population in the same districts they were in under the 2023 Plan. *See id.*

***8** The Special Master explained that a "performance analysis assesses whether, using recent election results, a candidate preferred by a particular group would be elected from a proposed opportunity district." *Id.* at 30. The Special Master reasoned that for a proposed remedial district to perform as an opportunity district, a performance analysis "should demonstrate that the Black-preferred candidate often would win an election in the subject district." *Id.*

As the Special Master explained, the parties "used a variety of different elections for their performance analyses of the 2023 Plan." *Id.* The *Milligan* Plaintiffs' expert, Dr. Baodong Liu, considered eleven biracial statewide elections between 2014 and 2022. *See id.* The *Caster* Plaintiffs' expert, Dr. Maxwell Palmer, considered seventeen contested statewide elections between 2016 and 2022. *See id.* The Legislature considered seven statewide elections. *See id.* Mr. Ely prepared a performance analysis by using election data provided by the Legislature (prepared by their expert, Dr. M.V. Hood) for twelve election contests, and election data provided by the *Milligan* Plaintiffs (prepared by their expert, Dr. Liu) for twelve election contests. *See id.* at 31. Seven of these contests overlap, so Mr. Ely considered seventeen distinct contests. *See id.* From this data, the Special Master determined that each of his recommended plans includes two opportunity districts, Districts 2 and 7. *Id.*

The Special Master provided four compactness scores for each recommended plan, including the metrics we previously considered (Polsby-Popper, Reock, and Cut-Edges scores). *See id.* at 38 tbl.6. The Special Master also considered the Population Polygon metric, which is a "statistical measure that examines the shape of a district and the location of where people live in and around the district." *Id.* at 37. The Special Master concluded that all his recommended plans are "reasonably compact." *Id.* at 38.

The Special Master provided data to establish that his plans respect political subdivisions, including information about county splits, municipality splits, and precinct splits. *Id.* at 39–41. The Special Master explained that when he was required to shift residents from District 6 to District 7 to equalize population, the boundaries of the City of Birmingham guided his decisions. *Id.* at 40. Likewise, he relied on the boundaries of the City of Mobile to determine where to split Mobile County. *Id.*

Finally, the Special Master explained how his plans respect communities of interest. *See id.* at 41–43. The Special Master focused on the three communities the Legislature identified: the Black Belt, the Gulf Coast, and the Wiregrass. *See id.* The Special Master preserved unsplit every core Black Belt county in his plans, and his plans situate every core Black Belt county in one of two districts. *See id.* at 42.

1. Remedial Plan 1

Remedial Plan 1 is a "modest variation" of a plan that the *Milligan* and *Caster* Plaintiffs proposed to the Legislature before the 2023 Plan was enacted ("the VRA Plan"). *Id.* at 15. The VRA Plan was based on one of the illustrative plans prepared by Mr. Cooper in 2021, "Cooper Plan 2." *Id.* The VRA Plan modified Cooper Plan 2 to "keep all 18 core Black Belt counties intact and within Districts 2 and 7 and to enhance population overlap with the 2021 Plan." *Id.* at 15–16. The Special Master modified the VRA Plan because it was designed as an alternative to the 2021 Plan, and the Special Master worked off the 2023 Plan. *Id.* at 16.

***9** Remedial Plan 1 makes no changes from the 2023 Plan to Districts 3, 4, and 5, and "only minimal changes" to Districts 6 and 7. *Id.* The Special Master explained that minimal changes were necessary because Districts 6 and 7 sit in the middle of the state, adjacent to District 2. *Id.* at 17–21. Remedial Plan 1 splits seven counties and retains 88.9% of Alabamians in their district under the 2023 Plan. *Id.* at 28.

2. Remedial Plan 2

Like Remedial Plan 1, Remedial Plan 2 is a modified version of Cooper Plan 2 and makes no changes from the 2023 Plan to Districts 3, 4, and 5, and only minimal changes to Districts 6 and 7. *See id.* at 22–23. Remedial Plan 2 splits only six counties. *Id.* The Special Master explained that this was in service to the six-split cap in the legislative findings and respected the Black Belt and the Wiregrass. *See id.* (explaining that in Remedial Plan 2, all of the Wiregrass counties that are not in the Black Belt are entirely in District 1, and reflecting that all eighteen core Black Belt counties are in two districts, either District 2 or District 7). Remedial Plan 2 includes 71.9% of the population of the City of Mobile in a single district, and it retains 87.5% of Alabamians in their district under the 2023 Plan. *Id.* at 22, 28.

3. Remedial Plan 3

"Mr. Ely prepared Remedial Plan 3 without reference to any other illustrative" or proposed plan. *Id.* at 23. To prepare Remedial Plan 3, Mr. Ely left Districts 3, 4, and 5 unchanged from the 2023 Plan; preserved all eighteen core counties in the Black Belt within Districts 2 and 7 without splitting any of those counties; and minimized changes to Districts 6 and 7. *Id.* at 23–24. Remedial Plan 3 splits only six counties. *Id.* Although Remedial Plan 2 placed Henry County (part of the Wiregrass) in District 2, Remedial Plan 3 placed it with the majority of the Wiregrass counties (Houston, Dale, Coffee, Geneva, and Covington) in District 1. *Id.* at 24.

In Remedial Plan 3, Mr. Ely sought to "better preserve the cities of Mobile and Birmingham within single districts and to follow municipal boundaries where possible. He also sought to minimize splitting voting districts (precincts) except where needed to equalize population." *Id.* Remedial Plan 3 preserves 93.3% of the City of Birmingham in a single district and 90.4% of the City of Mobile in a single district. *Id.* tbl.1. Neither of the Special Master's other plans preserve more than 72% of the City of Mobile in a single district. *See id.* And neither of the Special Master's other plans preserve more than 89.6% of the City of Birmingham in a single district. *See id.* "Mr. Ely accessed median income data from the U.S. Census Bureau's American Community Survey, which is relevant to the social and economic factors identified in the Legislature's guidelines and findings, to confirm an appropriate bifurcation of Mobile County outside the city of Mobile." *Id.* Remedial Plan 3 retains 86.9% of Alabamians in their district under the 2023 Plan. *Id.* at 28.

4. Proposed Plans that the Special Master Did Not Recommend

The Special Master explained why he rejected the other proposed plans. *See id.* at 28–29. The critical reason common to all rejected plans is that they proposed significant changes "beyond the minimum" changes to the 2023 Plan "needed to remedy the Section Two violation." *Id.* at 29.

Eight of the eleven proposals the Special Master rejected would have changed every district in the state when compared to the 2023 Plan: the VRA Plan submitted by the *Milligan* and *Caster* Plaintiffs, the *Singleton* Plaintiffs' Plan, the Community of Interest Plan proposed by Representative Pringle, the plans proposed by non-parties the Alabama Democratic Conference, Quin Hillyer, and Michael Moriarty, and one of the plans proposed by non-party Professor Bernard Grofman. *See id.* tbl.3.

***10** Two of the remaining three proposals would have changed nearly every district in the state: both plans proposed by non-parties Zac McCrary and Stephen Wolf redrew six of Alabama's seven districts. *See id.*

In contrast, the three plans the Special Master recommended, and one of the Grofman Plans, changed only four congressional districts from the 2023 Plan. *See id.*

E. Objections

The Secretary objected to the Special Master's Remedial Plans as "unconstitutional racial gerrymanders that harm Alabama voters by subjecting them to racial classifications." *Milligan* Doc. 301 at 2. The Secretary asserted that even if Mr. Ely performed his work "race blind," his "starting point was a plan where race predominates over traditional criteria, and the changes were too modest to undo the race-based decisions." *Id.* The Secretary further objected that Section Two does not require a remedial plan to "sacrifice compactness, county integrity, communities of interest, or other traditional criteria." *Id.* at 3.

The Secretary asserted that Remedial Plan 1 was the "most objectionable" of the Special Master's plans "because of its unnecessary split of Houston County." *Id.* The Secretary asserted that Remedial Plan 2 splits the Wiregrass "more than necessary to remedy the likely § 2 violation" by including Henry County in District 2 rather than District 1. *Id.* at 5. The Secretary "note[d]" that Remedial Plan 3 would make it "more difficult for election officials in Mobile County to reassign voters accurately by the applicable deadlines." *Id.* Notably, however, the Secretary did not argue that it would be too difficult to fully implement any of the three Remedial Plans in advance of the 2024 congressional election deadlines, or otherwise raise any *Purcell* argument. *See generally id.*

The Legislators' objections tracked the Secretary's. *Compare Milligan* Doc. 302, *with Milligan* Doc. 301.

The *Milligan* Plaintiffs urge us to adopt either the Special Master's Remedial Plan 1 or Remedial Plan 3, and they "oppose" Remedial Plan 2 on the ground that it will not "with certitude completely remedy the Section 2 violation."

Milligan Doc. 304 at 4 n.2, 5, 6 (quoting *Dillard v. Crenshaw County*, 831 F.2d 246, 252 (11th Cir. 1987)). The *Milligan* Plaintiffs base their opposition to Remedial Plan 2 on a view of Mr. Ely's performance analysis restricted to the 2022 elections, in which that analysis predicts that the Black-preferred candidate would have lost four out of five contests analyzed in District 2. *See id.* at 6.

The *Caster* Plaintiffs made the same points that the *Milligan* Plaintiffs made, but they did not formally object in writing to the Special Master's Remedial Plan 2. *See Caster* Doc. 248. The *Caster* Plaintiffs asserted that the 2022 elections in Mr. Ely's performance analysis "cast[ ] significant doubt on whether Remedial Plan's CD-2 would provide a meaningful opportunity district for Black voters in future elections." *Id.* at 4. "By contrast," the *Caster* Plaintiffs observed, in Mr. Ely's analysis District 2 in Remedial Plans 1 and 3 "performed for Black-preferred candidates in 2022 elections 60% or 80% of the time." *Id.* Because "Remedial Plan 2 serves no interest not already captured in the [Special Master's] other proposals," the *Caster* Plaintiffs urged us to adopt Remedial Plan 1 or 3. *Id.*

***11** The *Singleton* Plaintiffs did not object to any of the three Remedial Plans either. *Redistricting* Doc. 49 at 1. Among the plans recommended by the Special Master, the *Singleton* Plaintiffs state that Remedial Plan 3 is best. *Id.* Not only does that Plan "perform[ ] as well or better than Remedial Plans 1 and 2 on every criterion the Court has laid out," *id.*, the *Singleton* Plaintiffs point out that Remedial Plan 3 "goes [the] farthest" in "work[ing] to reduce the gerrymander of Birmingham" they contend was present in the 2023 Plan by keeping the largest portion of Birmingham in one congressional district, *id.* at 4. The *Singleton* Plaintiffs also favor Remedial Plan 3 for its similar respect for the City of Mobile. *Id.* at 5.

Several non-parties filed objections to the Special Master's Remedial Plans. The Alabama Democratic Conference ("ADC") asserted that "none of [the Special Master's plans] provides a complete remedy to the likely Section 2 violation" and that the Court should adopt the plan the ADC proposed because in that plan, "White voters wouldn't have veto power" over Black voters' choices in District 2. *Milligan* Doc. 305 at 1, 8. The ADC did not supply a performance analysis to contravene the analysis Mr. Ely performed. *See id.* Quin Hillyer objected to the Special Master's Plans on the ground that they "split[ ] Mobile County." *Redistricting* Doc. 48 at 1.

We directed the Special Master to file a written response to the question whether his Remedial Plan 2 "provides an opportunity for Black voters in CD2 to elect their preferred candidate." *See Redistricting* Docs. 55, 56. The Special Master's response explained in detail why District 2 in Remedial Plan 2 performs as an opportunity district. *See Redistricting* Doc. 56. More particularly, the Special Master set forth data and analysis to demonstrate that the average margin of victory for a Black-preferred candidate in District 2 was 8.2% in Remedial Plan 2, but 10.3% in Remedial Plans 1 and 3, and that those two percentage points "would have changed the outcome of several 2022 elections in District 2 in Remedial Plan 2, but not in Remedial Plans 1 and 3" because "[a] less competitive slate of Democratic nominees for statewide office in 2022, who were dramatically underfunded, contributed to depressed voter turnout, particularly among Democrats" in the 2022 elections. *Id.* at 4, 8, 9.

F. Our Hearing

On October 3, 2023, we heard the objections raised to the Special Master's recommendations. All parties and interested non-parties had an opportunity to be heard, and we received argument from the *Milligan* Plaintiffs, the *Caster* Plaintiffs, the *Singleton* Plaintiffs, the Secretary of State, the Legislators, the Alabama Democratic Conference, and Mr. Hillyer.

Ultimately, a consensus among the Plaintiffs developed around Remedial Plan 3 recommended by the Special Master. Oct. 3, 2023. Tr. 54. Remedial Plan 1 splits seven counties instead of six, and the *Milligan* and *Caster* Plaintiffs object to Remedial Plan 2 out of a concern that it may not perform as an opportunity district so as to completely remedy the vote dilution we found. *See, e.g.*, Oct. 3, 2023 Tr. 19, 22 (*Caster* Plaintiffs' formal oral objection). Notably, the *Singleton* Plaintiffs did not object to Remedial Plan 3 as a racial gerrymander, they urged us that Remedial Plan 3 "keeps counties together" better than Remedial Plan 1, and they pointed out that Remedial Plan 3 "does a much better job [than Remedial Plan 1] at preserving two of the State's largest municipalities – Birmingham and Mobile." Oct. 3, 2023 Tr. 33–34.

The *Caster* Plaintiffs suggested that Remedial Plan 1 "has the benefit of having been vetted by the Court in the course of this litigation" because it is a variant of one of the illustrative maps the *Caster* Plaintiffs submitted in the first preliminary injunction proceedings, Cooper Plan 2. Oct. 3, 2023 Tr. 20–21. But on questioning about the substantial similarities between Remedial Plans 1 and 3, counsel for the *Caster*

Plaintiffs agreed that Remedial Plans 1 and 3 are sufficiently similar that it is not "accurate to say that as between [Remedial Plan] 1 and [Remedial Plan] 3, only [Remedial Plan] 1 has the benefit of all of that vetting." Oct. 3, 2023 Tr. 21.

***12** The Secretary and the Legislators object to all the Special Master's recommended plans as racial gerrymanders, but they do not raise any specific objection to Remedial Plan 3. Oct. 3, 2023 Tr. 40–41. At the hearing, although the Secretary argued that Remedial Plan 3 is less compact than the 2023 Plan, by his own admission the Secretary did not develop any evidence that the mathematical compactness scores of Remedial Plan 3 suggest that it is not reasonably compact. Oct. 3, 2023 Tr. 37–39.

The Alabama Democratic Conference assailed the Special Master's work as "back-of-the-napkin" analysis, but could not identify a single legal precedent that suggested that the Special Master failed to consider information that he should have considered or precedent that enabled this Court to "disregard the Special Master's analysis." Oct. 3, 2023 Tr. 44–46. Mr. Hillyer urged us to consider a possibility that District 2 in Remedial Plan 2 might not be contiguous because it includes a bridge across Mobile Bay, but he could not identify any controlling precedent that suggests that a bridge could present a contiguity problem.[7] Oct. 3, 2023 Tr. 49–51. In any event, each set of Plaintiffs, the Secretary, and the Legislators confirmed that they do not have any contiguity objections. Oct. 3, 2023 Tr. 52–54.

II. STANDARD OF REVIEW

Controlling Supreme Court precedent dictates rules that we must follow in ordering a remedial districting plan. We do not have the authority to simply select the plan that outperforms all other proposed plans on any particular metric and order the Secretary to use that plan. We must give the Alabama Legislature as much deference as possible, and we may not disturb the policy choices it made in the 2023 Plan any more than is necessary to remedy the likely Section Two violation we found. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971).

This is a robust rule. A district court errs "when, in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state-proposed plan." *Upham*, 456 U.S. at 42. Put differently, "[t]he **only** limits on judicial deference to state apportionment policy ... [a]re the substantive constitutional and statutory standards to which such state plans are subject." *Id.* (emphasis added). So we must select the plan that "most clearly approximated the reapportionment of the state legislature," while also satisfying federal constitutional and statutory requirements. *White v. Weiser*, 412 U.S. 783, 798 (1973).

This rule is consistent with the judiciary's limited role. "From the beginning, [the Supreme Court] ha[s] recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' " *White*, 412 U.S. at 794–95 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). Indeed, the Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (opinion of White, J.).

***13** We have repeatedly explained that we understand our limited role. *See Milligan* Docs. 272 at 7, 168 at 2, 130 at 9. We reiterate our understanding that the Court acts within the bounds of its authority only "if [our] modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43. We must not "pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' " *White*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

And we reiterate that we regard this task — "to devise and impose a reapportionment plan" for Alabama to conduct its upcoming congressional elections without the taint of racially discriminatory vote dilution — as an "unwelcome obligation." *Wise*, 437 U.S. at 540; *Milligan* Doc. 107 at 52. We held, and the Supreme Court agreed, that the required remedy is the creation of a second district where Black Alabamians, like everyone else, have a fair and reasonable opportunity to elect their preferred candidates. It did not have to be this way. And it would not have been this way if the Legislature had created a second opportunity district or majority-minority district. They did not do so in 2021, and as the State conceded at the remedial hearing, they failed again to do so in 2023.

Notably, "[i]n discharging this duty, [we] will be held to stricter standards" than would have applied to the Legislature had it enacted a lawful remedial map. *Wise*, 437 U.S. at 540 (internal quotation marks omitted). Although the Legislature

had the discretion to redraw every district in the state when it enacted the 2023 Plan, we do not have the discretion to redraw every district now. We limit our changes to districts that were challenged and found unlawful, and to those changes to adjacent districts that are necessary to satisfy applicable constitutional and statutory requirements. *See, e.g., Covington*, 138 S. Ct. at 2554.

Additionally, although the Legislature had the discretion to consider various political factors when it enacted the 2023 Plan (for example, such as whether any redrawn district paired incumbents), we may not consider such factors now. *See, e.g., Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) (per curiam) (three-judge court) (explaining that "in the process of adopting reapportionment plans, the courts are forbidden to take into account the purely political considerations that might be appropriate for legislative bodies," and that "many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts") (quoting *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. Unit A Feb. 1981),[8] and *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) (per curiam)) (internal quotation marks omitted).

Finally, we underscore that Section Two of the Voting Right Act ensures only equal opportunity, not a guaranteed result for any group. *See United States v. Dall. Cnty. Comm'n*, 850 F.2d 1433, 1438 n.6 (11th Cir. 1998). As we have previously explained, Section Two does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most "fundamental political right," in that it is "preservative of all rights" — the right to vote. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019).

***14** "[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) (internal quotation marks omitted). "A party seeking a preliminary injunction must establish that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1290–91 (11th Cir. 2022) (internal quotation marks and citation omitted). Ordinarily, a preliminary injunction is "prohibitory and generally seeks only to maintain the status quo pending a trial on the merits." *Tom Doherty Assocs. v. Saban Ent. Inc.*, 60 F.3d 27, 34 (2d Cir. 1995).

When a party seeks an injunction that "goes beyond the status quo and seeks to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed on the moving party is increased." *Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009) (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Service Corp.*, 441 F.2d 560, 561 (5th Cir. 1971)). An affirmative injunction "should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." *Exhibitors Poster Exch., Inc.*, 441 F.2d at 561 (per curiam) (quoting *Miami Beach Fed. Sav. & Loan Ass'n. v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) and collecting cases).

III. ANALYSIS

We have carefully reviewed each proposed plan, all comments submitted to the Special Master, the Special Master's Report and Recommendation (and all supporting documents), and each objection raised or comment filed to that Recommendation. We also heard from the parties and other interested persons at the hearing we held on October 3, 2023. Like the Special Master Team, we find that although the proposals and comments were necessarily prepared on an expedited basis, they are clearly the product of thoughtful analysis by the parties and interested members of the public. We do not discuss all of them in detail in this Order, but we found all of them helpful.

A. Remedial Plan 3 Completely Remedies the Vote Dilution We Found While Best Preserving the State's Legislative Preferences Expressed Through the 2023 Plan.

We begin by limiting our analysis to the proposed plans that do not exceed our authority. *See Covington*, 138 S. Ct. at 2554. Districts 3, 4, and 5 are not challenged in this litigation, and it is not necessary to redraw the boundaries the 2023 Plan assigned to them to remedy the vote dilution we found. So we will not redraw those districts at all. This eliminates all proposals other than the Special Master's plans and the Grofman 2023 Plan. *See Milligan* Doc. 295 at 29 tbl.3.

We next limit our analysis to the proposed plans that satisfy the Legislature's limit of six county splits. We do not find that

we are required to defer to that cap, but we can completely remedy the vote dilution we found without exceeding it, *see infra*, so we will not exceed it. This eliminates one of the Special Master's plans as well: Remedial Plan 1, which splits seven counties.

Three plans remain: Remedial Plans 2 and 3 recommended by the Special Master, and the Grofman 2023 Plan. We next consider the extent to which those plans respect political subdivisions other than counties. The 2023 Plan split eleven voting districts (out of a total of 1,837), Remedial Plan 2 splits thirteen voting districts, and Remedial Plan 3 splits fourteen voting districts. *Id.* at 41. The Grofman 2023 Plan splits thirty-eight voting districts, well more than double the number split by either Remedial Plan 2 or 3. *Id.* Accordingly, the Grofman 2023 Plan splits substantially more voting districts than is necessary to remedy the vote dilution we found. Further, the Grofman 2023 Plan is very similar to Remedial Plan 2, which we do not adopt for the reasons explained below. *See infra.* And the Grofman 2023 Plan has not been subjected to the same rigorous examination, performance analysis, and opportunity for written and oral objection as Remedial Plans 2 and 3. Accordingly, we do not adopt that plan.

***15** The two remaining proposals — Remedial Plan 2 and Remedial Plan 3 — are quite similar. Districts 3, 4, 5, 6, and 7 are identical or very nearly identical in both plans. *Compare Milligan* Doc. 295 at 23, *with id.* at 25. They both retain 100% of Districts 3, 4, and 5 from the 2023 Plan, and both retain 94.1% of District 6 and 92.7% of District 7. *See id.* at 29 tbl.2. Districts 1 and 2 differ based on how they treat Henry County and where they split Mobile County.

Remedial Plan 3 better respects municipal boundaries and the communities of interest that the Legislature identified. Both plans keep the eighteen "core" Black Belt counties together in two districts, with eight counties placed in District 2 and ten counties placed in District 7. *Id.* at 40–42. Both plans also split the Gulf Coast, in line with our finding that such a split is necessary to remedy the likely dilution of Black voting power that we have found, *see Milligan* Doc. 272 at 166, but Remedial Plan 3 keeps 90.4% of the City of Mobile in a single district, whereas Remedial Plan 2 keeps only 71.9% of that city in a single district. *Milligan* Doc. 295 at 24 tbl.1. Remedial Plan 3 also keeps 93.3% of the City of Birmingham in a single district, whereas Remedial Plan 2 keeps only 89.6%. *Id.* And more broadly, Remedial Plan 3 splits only thirty-one municipalities (out of a total of 462), whereas Remedial Plan 2 splits thirty-four. *Id.* at 41. Further, although the State has introduced precious little evidence to establish the existence of the Wiregrass community of interest, to the extent the Legislature has expressed a preference to keep the Wiregrass counties together in District 1, Remedial Plan 3 keeps six such counties together by including Henry County with the other Wiregrass counties in District 1. *Id.* at 24. Remedial Plan 2, in contrast, keeps only five of the Wiregrass counties together, instead joining Henry County with the Black Belt in District 2.

Accordingly, we find that of all the proposed remedial plans before us, Remedial Plan 3 "most closely approximate[s]" the plan that the Legislature enacted and we enjoined. *See Upham*, 456 U.S. at 42.

Although the Secretary's only "relevant duties are to administer elections," *Singleton* Doc. 25 at 5; *Caster* Doc. 60 at 5, counsel for the Secretary asserts that the Special Master's recommended plans are an "absurd disfigurement" of the 2023 Plan that "cast aside" Alabama's "communities, local economies, and basic geography ... in the radical pursuit of racial quotas,"[9] "court-ordered racial gerrymander[s]",[10] and in service of "separate but equal" congressional districts.[11] The Legislators did not join these statements, and the evidence we have just described plainly refutes them. There can be no genuine argument that meaningfully changing only two districts out of seven, and perfectly tracking county boundaries in nineteen of the twenty-one counties in those two districts, is a "disfigurement." Likewise, there can be no earnest argument that departing from the 2023 Plan in this way to remedy racially discriminatory vote dilution — while leaving 86.9% of Alabamians in precisely the same district they were in under the 2023 Plan — remotely approaches the abhorrent practice of racially segregating public schools for children.

***16** We well understand the legitimate concern about the role that considerations of race have in redistricting, but as we have found and the Supreme Court has affirmed, the record simply does not bear out that concern in this case. *Allen*, 143 S. Ct. at 1517. Nor can one fairly assert that the Special Master conducted his work in a way that runs afoul of the Equal Protection Clause.

Remedial Plan 3 also performs better than Remedial Plan 2 on the various compactness metrics to which the parties and nonparties have directed our attention. Remedial Plans 2 and 3 tie on the Reock Score (0.35) and the Polsby-Popper score (0.24), but Remedial Plan 3 has the better Cut

Edges score (3,597) and Population Polygon score (0.69). *Milligan* Doc. 295 at 36. Based on these metrics, the Special Master's opinion, and our own "eyeball test," we conclude that Remedial Plan 3 is reasonably compact. *See id.* at 37–38; *see also Allen*, 143 S. Ct. at 1517–18 (Kavanaugh, J., concurring). We see no "tentacles, appendages, bizarre shapes, or other obvious irregularities," *Allen*, 143 S. Ct. at 1504, and the boundaries of District 2 track county lines perfectly except insofar as they split Clarke and Mobile Counties to satisfy other requirements of federal law, *see Milligan* Doc. 295 at 25.

Separately, we find that Remedial Plan 3 completely remedies the vote dilution we found. Compared to the 2023 Plan, Remedial Plan 3 contains an additional district (District 2) in which Black voters have an opportunity to elect a candidate of their choice. In that District, the Black-preferred candidate would have won sixteen of the seventeen elections that Mr. Ely analyzed to evaluate the performance of District 2 as an opportunity district. *See id.* at 32 tbl.4. Mr. Ely's performance analysis underscores what we have explained and the Supreme Court has found: that voting in Alabama is extremely racially polarized. *See Milligan* Doc. 295 at 32 & tbl.4 (predicting that in all districts other than Districts 2 and 7, the Black-preferred candidate will never win a single election, and that every loss is by more than 29%). We also note that District 2 in Remedial Plan 3 is not majority-Black; the Black voting-age population is 48.7%. *Id.* at 34 tbl.5. District 7 in Remedial Plan 3 remains majority-Black, with a Black voting-age population of 51.9%. *Id.*

Finally, we find that Remedial Plan 3 complies with the one-person, one-vote requirement of the Fourteenth Amendment. The "rounded ideal" of voting-age population per district in Alabama is 717,754. *Milligan* Doc. 68-5 at 8. Remedial Plan 3 (like the other remedial plans recommended by the Special Master), contains a population deviation of one person. *Milligan* Doc. 295 at 34. Because no proposed remedial plan contained a lower deviation while also remedying the likely Section Two violation, we find that a deviation of one person is mathematically necessary and, therefore, that Remedial Plan 3 satisfies one-person, one-vote. *See id.*

Accordingly, we find that Remedial Plan 3 completely remedies the vote dilution we found and satisfies all applicable federal constitutional and statutory requirements while most closely approximating the policy choices the Alabama Legislature made in the 2023 Plan. Put differently, we find that Remedial Plan 3 limits our modifications of the 2023 Plan only to those necessary to cure the statutory defect that we identified, and that Remedial Plan 3 does not intrude on Alabama policy any more than is necessary to bring the 2023 Plan into compliance with Section Two of the Voting Rights Act.

B. None of the Objections to the Special Master's Report and Recommendation Alter this Conclusion.

***17** Remedial Plan 3 enjoyed broad support among those who filed responses to the Special Master's Report & Recommendation. The *Milligan, Caster*, and *Singleton* Plaintiffs all support the adoption of Remedial Plan 3, and the Secretary and the Legislators have indicated that it is less objectionable than Remedial Plan 1.

Some non-parties have objected to Remedial Plan 3, but we do not find their objections persuasive. The ADC objected on the ground that District 2 in Remedial Plan 3 is not an opportunity district. *Milligan* Doc. 305 at 1, 8. But the ADC does not identify any legal precedent demonstrating that the Special Master's performance analysis of District 2 is in any way deficient. *See generally id.* Nor could the ADC identify any such precedent in response to direct questioning at the October 3 Hearing. Oct. 3, 2023 Tr. 45–47. More fundamentally, the ADC's objection fails because it would have us reject Remedial Plan 3 on the ground that it fails to guarantee victory for the Black-preferred candidate in District 2. The ADC's objection makes clear that the ADC objects to any plan that does not contain two majority-Black districts, because white voters could theoretically still retain an "effective veto" over Black voters' choices. *See Milligan* Doc. 305 at 7-8 & n.2. But Section Two ensures only equal opportunity, not a guaranteed result for any group. *See Dall. Cnty.*, 850 F.2d at 1438 n.6. Sustaining the ADC's objection would cause us to run afoul of controlling precedent and the text of Section Two itself. *See* 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

The Secretary and the Legislators object generally to all the Special Master's Remedial Plans on the ground that the Special Master allowed race to predominate over traditional districting principles. *Milligan* Doc. 301 at 2–3. In essence, this is the same argument that we and the Supreme Court have rejected at each successive stage of this litigation — that any map that fails to "meet or beat" the 2023 Plan on traditional districting criteria favored by the State necessarily allows race to predominate in its creation. *See Milligan* Doc. 272 at 147–

150. We reject that argument again for the same reasons we set forth in our second injunction. *See id.*; *see also supra* at 19–20 (explaining that Mr. Ely did not display race data while drawing districts or examining proposed plans).

Finally, Mr. Hillyer objects to Remedial Plan 3 on the ground that it splits Mobile County. *Redistricting* Doc. 48 at 1. But as we previously explained, splitting the Gulf Coast is necessary to remedy the vote dilution we identified. *Milligan* Doc. 272 at 166. Mr. Hillyer has not produced or pointed us to any plan that fully remediates the likely Section Two violation without doing so, while also complying with the Constitution's one-person, one-vote requirement. *See Milligan* Doc. 295 at 34 (explaining that Mr. Hillyer's proposed plan violates one-person, one-vote because it contains a maximum population deviation of 1,193 people).

In the light of the submissions received by the Special Master, the comments and submissions in response to his Report & Recommendation, and after extensive analysis, we conclude that Remedial Plan 3 completely remedies the likely Section Two violation we identified while best preserving the State's legislative preferences, as expressed through the 2023 Plan, and otherwise complies with the requirements of the Constitution and the Voting Rights Act of 1965.

C. The Requirements for Injunctive Relief Are Satisfied.

***18** We further find that all the requirements for injunctive relief are satisfied for us to order the Secretary to conduct Alabama's congressional elections according to Remedial Plan 3. For all the reasons we discussed in our second preliminary injunction (which the Secretary no longer appeals), *see Milligan* Doc. 272, we repeat our finding that the Plaintiffs are substantially likely to succeed on the merits of their claims that the 2023 Plan (1) does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed in the 2021 Plan (indeed, it made no effort to do so), and (2) likely violates Section Two because it continues to dilute the votes of Black Alabamians.

We further find that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 elections based on a likely unlawful redistricting plan. "Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997); and *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)).

"Voting is the beating heart of democracy," and a "fundamental political right, because it is preservative of all rights." *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1315 (internal quotation marks omitted) (alterations accepted). And "once the election occurs, there can be no do-over and no redress" for voters whose rights were violated and whose votes were diluted. *League of Women Voters of N.C.*, 769 F.3d at 247. The Plaintiffs already suffered this irreparable injury once in this census cycle, when they voted in 2022 under the unlawful 2021 Plan. Accordingly, we find that the Plaintiffs will suffer an irreparable harm absent injunctive relief.

We also find that the entry of a preliminary injunction is decidedly in the public interest. We have enjoined the 2023 Plan as likely unlawful, and Alabama's public interest is in the conduct of lawful elections. Accordingly, an affirmative injunction ordering the State to use a plan that we have imposed to remedy the vote dilution we found is in the public interest.

The timing of our Order does not weaken our finding. In *Upham*, the Supreme Court explained that when it has "authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements," "[n]ecessity has been the motivating factor." 456 U.S. at 44 (internal citations omitted). Alabama's next general congressional election is more than thirteen months away. The qualifying deadline to participate in the primary elections for the major political parties is approximately one month away. Ala. Code § 17-13-5(a). Considering the exigencies of time, we have conducted remedial proceedings on precisely the schedule the parties proposed, and we issue this Order in time for the "early October" deadline by which the Secretary of State told us he needs a final electoral map. *See Milligan* Doc. 147 at 3; *Milligan* Doc. 162 at 7.

Finally, we find — as we must, to issue an affirmative injunction — that this case presents a "rare instance[ ] in which the facts and law are clearly in favor of the moving party." *Exhibitors Poster Exch., Inc.*, 441 F.2d at 561 (quoting *Miami Beach Fed. Sav. & Loan Ass'n*, 256 F.2d at 415).

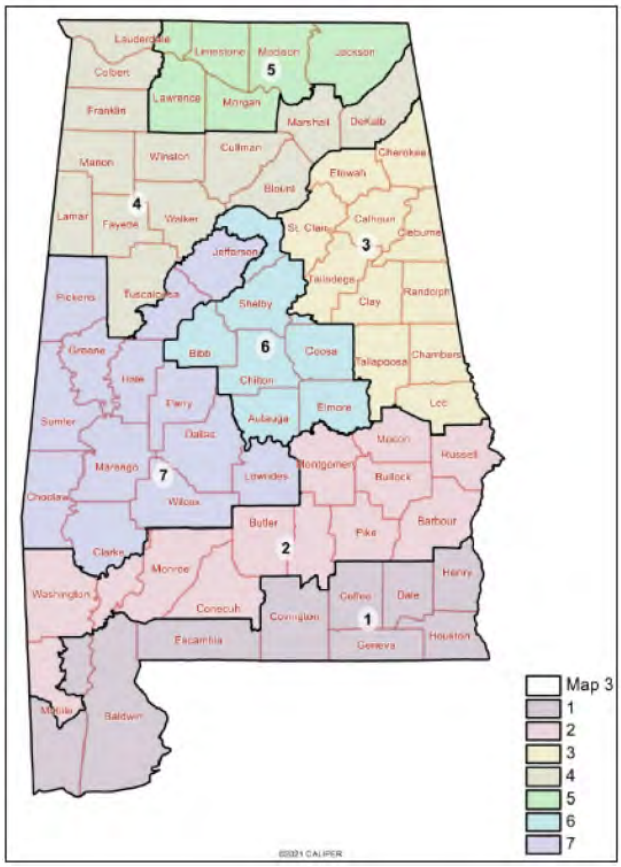
We have the benefit of **four** extensive evidentiary records (the *Milligan* and *Caster* records in connection with both injunctions); numerous hearings (including a preliminary injunction hearing that was longer than many bench trials); an interlocutory affirmance (in all respects) by the Supreme Court; and able assistance from the dozens of lawyers who have appeared for the parties and their *amici* in this litigation. Indeed, we thank able counsel for their expeditious work to prepare these robust records, particularly on the tight timeframe that this litigation demanded. In the plainest terms, we have no doubt that the facts and the law support the entry of this preliminary injunction.

***19** Accordingly, the Alabama Secretary of State is **ORDERED** to administer Alabama's upcoming congressional elections according to the Special Master's Remedial Plan 3, which is appended to this order as Appendix A.

DONE and **ORDERED** this 5th day of October, 2023.

APPENDIX A

Remedial Plan 3



All Citations

Slip Copy, 2023 WL 6567895

Footnotes

1 When we cite a filing that appears in multiple cases, we cite the *Milligan* filing.

2 Page number pincites in this order are to the CM/ECF page number that appears in the top right-hand corner of each page, if such a page number is available.

3 *Singleton* remains before this three-judge Court, but was not a part of the Section Two remedial proceedings.

4 During remedial proceedings, the *Milligan* and *Caster* Plaintiffs developed evidence that the legislative findings were not the result of the deliberative process and urged us to ignore them. *See Milligan* Doc. 272 at 66–70, 98–100, 154, 162–64. For present purposes, we consider the findings without considering that evidence.

5 The Secretary also moved the Eleventh Circuit for a stay in *Caster. See Allen v. Caster*, Emergency Application for Stay, No. 23-12923 (Sept. 11, 2023)

6 We have explained that when we say "opportunity district," we mean a district in which a "meaningful number" of non-Black voters often "join[ ] a politically cohesive black community to elect" the Black-preferred candidate. *Cooper*, 581 U.S. at 303. We distinguish an opportunity district from a majority-Black district, in which Black people comprise "50 percent or more of the voting population" in the district. *Bartlett*, 556 U.S. at 19 (plurality opinion).

7 In his submission before the Court, Mr. Hillyer argued that this bridge destroyed contiguity for District 2 in Remedial Plan 1.

8 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

9 Attorney General Marshall Issues Statement on Redistricting to the People of Alabama (Sept. 26, 2023), https://www.alabamaag.gov/attorney-general-marshall-issues-statement-on-redistricting-to-the-people-of-alabama/ (Sept. 26, 2023) [hereinafter "Attorney General's Statement"].

10 *Allen v. Milligan*, Emergency Application for Stay, No. 23A231 (Sept. 11, 2023).

11 *See* Attorney General Marshall's Statement, *supra* n.9.

86 S.Ct. 803
Supreme Court of the United States

STATE OF SOUTH CAROLINA, Plaintiff,

v.

Nicholas deB. KATZENBACH,
Attorney General of the United States.

No. 22, Original.
|
Argued Jan. 17, 18, 1966.
|
Decided March 7, 1966.

Synopsis
Bill in equity for determination of validity of selected provisions of Voting Rights Act of 1965 and for injunction against enforcement of provisions by United States Attorney General. The Supreme Court, Mr. Chief Justice Warren, held that provisions of Voting Rights Act of 1965 pertaining to suspension of eligibility tests or devices, review of proposed alteration of voting qualifications and procedures, appointment of federal voting examiners, examination of applicants for registration, challenges to eligibility listings, termination of listing procedures, and enforcement proceedings in criminal contempt cases were appropriate means for carrying out Congress' constitutional responsibilities under the Fifteenth Amendment and were consonant with all other provisions of the Constitution.

Bill dismissed.

Mr. Justice Black dissented in part.

West Headnotes (41)

[1] **Federal Courts** Controversies between a state and citizens of another state

Original jurisdiction of bill in equity for determination of constitutionality of provisions of Voting Rights Act of 1965 was founded on presence of controversy between a state and citizen of another state. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; U.S.C.A.Const. art. 3, § 2.

[2] **Election Law** Purpose and construction in general

Voting Rights Act of 1965 was designed by Congress to banish racial discrimination in voting. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

75 Cases that cite this headnote

[3] **Constitutional Law** Fifteenth Amendment
Election Law In general; power to prohibit discrimination

Provisions of Voting Rights Act of 1965 pertaining to suspension of eligibility tests or devices, review of proposed alteration of voting qualifications and procedures, appointment of federal voting examiners, examination of applicants for registration, challenges to eligibility listings, termination of listing procedures, and enforcement proceedings in criminal contempt cases were appropriate means for carrying out Congress' constitutional responsibilities under the Fifteenth Amendment and were consonant with all other provisions of the Constitution. Voting Rights Act of 1965, §§ 4(a-d), 5, 6(b), 7, 9, 13(a), 14, 42 U.S.C.A. §§ 1973b(a-d), 1973c, 1973d(b), 1973e, 1973g, 1973k(a), 1973*l*.

19 Cases that cite this headnote

[4] **Constitutional Law** Scope of inquiry in general

Constitutional propriety of Voting Rights Act of 1695 was to be judged with reference to historical experience which it reflected. Voting Rights Act of 1695, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

5 Cases that cite this headnote

[5] **Constitutional Law** Ripeness; prematurity

Absent showing by state that any person had been subjected to or threatened with criminal sanctions authorized by provisions of Voting Rights Act of 1965 defining prohibited acts and setting forth civil and criminal sanctions for commission of prohibited acts, state's attack on such provisions was premature. Voting Rights Act of 1965, §§ 11, 12(a-c), 42 U.S.C.A. §§ 1973i, 1973j(a-c).

2 Cases that cite this headnote

[6] **Constitutional Law** Government Entities

Word "person" in context of due process clause of the Fifth Amendment cannot be expanded to encompass states of the union. U.S.C.A.Const. Amend. 5.

107 Cases that cite this headnote

[7] **Constitutional Law** Bills of Attainder; Bills of Pains and Penalties

Constitutional Law Separation of Powers

Bill of attainder clause and principle of separation of powers are intended only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt. U.S.C.A.Const. art. 1.

10 Cases that cite this headnote

[8] **Constitutional Law** Particular Constitutional Provisions in General

Constitutional Law Due Process

State is without standing as parent of its citizens to invoke due process clause of Fifth Amendment and bill of attainder clause of Article 1 against federal government. U.S.C.A.Const. art. 1.

49 Cases that cite this headnote

[9] **United States** In general; nature

Federal government is ultimate parens patriae of every American citizen.

27 Cases that cite this headnote

[10] **Constitutional Law** Elections

State was without standing to assert invalidity of provisions of Voting Rights Act of 1965 based on due process, bill of attainder, or separation of powers arguments. Voting Rights Act of 1965, §§ 4(a-d), 5, 6(b), 9, 14(b), 42 U.S.C.A. §§ 1973b(a-d), 1973c, 1973d(b), 1973g, 1973*l*(b); U.S.C.A.Const. art. 1; U.S.C.A.Const. Amend. 5.

2 Cases that cite this headnote

[11] **States** Civil rights

As against reserved powers of states, Congress may use any rational means to effectuate constitutional prohibition of racial discrimination in voting. U.S.C.A.Const. Amend. 15.

9 Cases that cite this headnote

[12] **Constitutional Law** Particular Provisions

Constitutional Law Fifteenth Amendment

Fifteenth Amendment prohibition against denial of right to vote on account of race, color or previous condition of servitude is self-executing and invalidates state voting qualifications or procedures which are discriminatory on their face or in practice. U.S.C.A.Const. Amend. 15, § 1.

25 Cases that cite this headnote

[13] **Election Law** State legislatures

States have broad powers to determine conditions under which right of suffrage may be exercised.

1 Case that cites this headnote

[14] **Constitutional Law** Fifteenth Amendment

Fifteenth Amendment supersedes contrary exertions of state power. U.S.C.A.Const. Amend. 15.

[15] **Federal Courts** State or federal matters in general

When state exercises power wholly within domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as instrument for circumventing federally protected right.

1 Case that cites this headnote

[16] **Constitutional Law** Fifteenth Amendment

Provision of Fifteenth Amendment granting to Congress power to enforce amendment by appropriate legislation was intended to make Congress chiefly responsible for implementing rights created by amendment. U.S.C.A.Const. Amend. 15, § 2.

15 Cases that cite this headnote

[17] **Election Law** Racial and language minorities in general

Congress, in addition to courts, has full remedial powers to effectuate constitutional prohibition against racial discrimination in voting. U.S.C.A.Const. Amend. 15, § 2.

71 Cases that cite this headnote

[18] **Constitutional Law** Fifteenth Amendment
Constitutional Law Encroachment on Judiciary
Election Law In general; power to prohibit discrimination

Allowing Congress to strike down state statutes and procedures by enactment of Voting Rights Act of 1965 deprived courts of no exclusive constitutional role but was, on the contrary, in accord with express terms of Fifteenth Amendment that "Congress shall have the power to enforce this article by appropriate legislation". U.S.C.A.Const. Amend. 15, § 2.

19 Cases that cite this headnote

[19] **Constitutional Law** Fifteenth Amendment
States Particular laws in general

Basic test to be applied in all cases concerning express powers of Congress with relation to reserved powers of states, including cases involving Fifteenth Amendment's grant of power to enforce amendment by appropriate legislation, is that laid down by Marshall: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional". U.S.C.A.Const.Amend. 15, § 2.

13 Cases that cite this headnote

[20] **Civil Rights** Power to enact and validity
Election Law Congress

Whatever legislation is appropriate, that is, adapted to carry out the objects the Civil War amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

13 Cases that cite this headnote

[21] **Constitutional Law** Fifteenth Amendment

Power of Congress to enforce Fifteenth Amendment by appropriate legislation is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in Constitution. U.S.C.A.Const. Amend. 15, § 2.

10 Cases that cite this headnote

[22] **Election Law** In general; power to prohibit discrimination

Inclusion in Voting Rights Act of 1965 of remedies for voting discrimination which go into effect without any need for prior adjudication was legitimate response to problem, where

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent voting discrimination because of inordinate amount of time and energy required to overcome obstructionist tactics invariably encountered in such lawsuits. Voting Rights Act of 1965, § 4(a-d), 42 U.S.C.A. § 1973b (a-d).

19 Cases that cite this headnote

[23] **Election Law** In general; power to prohibit discrimination

States Relations Among States Under Constitution of United States

Provisions of Voting Rights Act of 1965 confining remedies for voting discrimination to small number of states and political subdivisions was permissible method of dealing with problem where Congress had learned that substantial voting discrimination was taking place in certain sections of country and it knew no way of accurately forecasting whether evil might spread elsewhere in future, and such approach was not barred by doctrine of equality of states. Voting Rights Act of 1965, § 4(a–d), 42 U.S.C.A. § 1973b(a–d).

23 Cases that cite this headnote

[24] **States** Relations Among States Under Constitution of United States

Doctrine of equality of states applies only to terms upon which states are admitted to union and not to remedies for local evils which have subsequently appeared.

1 Case that cites this headnote

[25] **Constitutional Law** Fifteenth Amendment

Election Law In general; power to prohibit discrimination

Imposition of remedies provided by Voting Rights Act of 1965 in states and political subdivisions within Act's coverage formula was within congressional power under Fifteenth Amendment. Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b (b); U.S.C.A.Const. Amend. 15.

27 Cases that cite this headnote

[26] **Constitutional Law** Nature and scope in general

In identifying past evils, Congress may avail itself of information from any probative source.

[27] **Election Law** Voting Prerequisites; Tests and Devices

Voter registration tests and devices are relevant to voting discrimination because of their long history as tool for perpetrating evil; similarly, low voting rate is pertinent for obvious reason that widespread disenfranchisement must inevitably affect number of actual voters; accordingly, Voting Rights Act of 1965 coverage formula is rational in both practice and theory. Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b (b); U.S.C.A.Const. Amend. 15.

18 Cases that cite this headnote

[28] **Constitutional Law** Fifteenth Amendment

Congress is not bound by rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under Fifteenth Amendment. U.S.C.A.Const. Amend. 15.

[29] **Election Law** Voting Prerequisites; Tests and Devices

That Voting Rights Act of 1965 coverage formula excluded certain localities which did not employ voting tests and devices but for which there was evidence of voting discrimination by other means was irrelevant in determining propriety of extension of formula in particular states and political subdivisions. Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b (b); U.S.C.A.Const. Amend. 15.

5 Cases that cite this headnote

[30] **Constitutional Law** Class Legislation; Discrimination and Classification in General

Legislation need not deal with all phases of problem in same way so long as distinctions drawn have some basis in practical experience.

34 Cases that cite this headnote

[31] **Election Law** Voting Prerequisites; Tests and Devices

That there were no states or political subdivisions exempted from coverage under Voting Rights Act of 1965 in which record revealed recent racial discrimination involving tests and devices confirmed rationality of coverage formula. Voting Rights Act of 1965, § 4(b), 42 U.S.C.A. § 1973b(b); U.S.C.A.Const. Amend. 15.

1 Case that cites this headnote

[32] **Federal Courts** Power of Congress to establish courts and define their jurisdiction

Inclusion in Voting Rights Act of 1965 of provision that litigation to terminate special statutory coverage might be brought only in United States District Court for the District of Columbia was within power of Congress to ordain and establish inferior federal tribunals. Voting Rights Act of 1965, § 4(a, b), 42 U.S.C.A. § 1973b(a, b); U.S.C.A.Const. art. 3, § 1.

5 Cases that cite this headnote

[33] **Election Law** In general; power to prohibit discrimination

Procedures to terminate special statutory coverage under Voting Rights Act of 1965 were not shown to impose impossible burden upon states or political subdivisions which might seek relief, particularly since relevant facts relating to conduct of voting officials are peculiarly within knowledge of states and political subdivisions themselves. Voting Rights Act of 1965, § 4(a–d), 42 U.S.C.A. § 1973b(a–d); U.S.C.A.Const. Amend. 15.

3 Cases that cite this headnote

[34] **Election Law** In general; power to prohibit discrimination

Provision of Voting Rights Act of 1965 barring direct judicial review of findings by Attorney General and Director of Census which trigger application of coverage formula was not invalid on theory that it allowed new remedies to be imposed in arbitrary way since such findings consisted of objective statistical determinations by Census Bureau and routine analysis of state statutes by Justice Department, neither of which was likely to arouse any plausible dispute, and since affected area could in any event seek termination of coverage if it could prove it had not been guilty of voting discrimination in recent years. Voting Rights Act of 1965, § 4(b, d), 42 U.S.C.A. § 1973b(b, d); U.S.C.A.Const. Amend. 15.

8 Cases that cite this headnote

[35] **Constitutional Law** Fifteenth Amendment

Election Law Voting Prerequisites; Tests and Devices

Where in most of states within Voting Rights Act of 1965 coverage formula, various voting tests and devices had been instituted with purpose of disenfranchising Negroes, had been framed in such a way as to facilitate aim, and had been administered in discriminatory fashion for many years, Fifteenth Amendment was violated. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; U.S.C.A.Const. Amend. 15.

26 Cases that cite this headnote

[36] **Election Law** Voting Prerequisites; Tests and Devices

Provision of Voting Rights Act of 1965 suspending literacy tests and similar devices for a period of five years from last occurrence of substantial voting discrimination was legitimate response to problem in view of practice of affected states and political subdivisions of freely registering white illiterates and in view of congressional determination that continuance

of tests and devices presently in use would freeze effect of past discrimination in favor of unqualified white registrants. Voting Rights Act of 1965, § 4(a-d), 42 U.S.C.A. § 1973b(a-d); U.S.C.A.Const. Amend. 15.

30 Cases that cite this headnote

[37] **Statutes** Validity

Exceptional conditions can justify legislative measures not otherwise appropriate.

6 Cases that cite this headnote

[38] **Constitutional Law** Fifteenth Amendment

Election Law In general; covered jurisdictions

Provision of Voting Rights Act of 1965 suspending new voting regulations pending scrutiny by federal authorities to determine whether their use would violate Fifteenth Amendment was valid in view of congressional determination that states might otherwise adopt new rules of various kinds for sole purpose of perpetuating voting discrimination in circumvention of act. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

51 Cases that cite this headnote

[39] **Constitutional Law** Elections

Election Law Bailout suits

Federal Civil Procedure Power of Congress

Requiring states and political subdivisions within Voting Rights Act of 1965 coverage formula to litigate validity of proposed new voting rules in United States District Court for the District of Columbia and placing burden of proof on area seeking relief was not beyond congressional power and did not authorize District Court to issue advisory opinions. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; U.S.C.A.Const. art. 3, §§ 1, 2.

25 Cases that cite this headnote

[40] **Election Law** Appointment of observers or referees

Provision of Voting Rights Act of 1965 pertaining to appointment of federal examiners to list qualified applicants was appropriate response to problem in view of congressional determination that state voting officials had persistently employed variety of procedural tactics to deny Negroes franchise often in direct defiance or evasion of federal decrees. Voting Rights Act of 1965, §§ 6(b), 7(d), 11(c), 42 U.S.C.A. §§ 1973d(b), 1973e(d), 1973i(c); U.S.C.A.Const. Amend. 15.

5 Cases that cite this headnote

[41] **Election Law** Appointment and Tenure of Officers

Public Employment Election or appointment

Attorney General's discretion in appointing federal voting examiners was not unlimited but was to be guided by relevant provisions of Voting Rights Act of 1965. Voting Rights Act of 1965, §§ 4(b), 6(b), 13(a), 42 U.S.C.A. §§ 1973b(b), 1973d(b), 1973k(a).

16 Cases that cite this headnote

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Opinion

***307** Mr. Chief Justice WARREN delivered the opinion of the Court.

[1] By leave of the Court, 382 U.S. 898, 86 S.Ct. 229, South Carolina has filed a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965[1] violate the Federal Constitution, and asking for an injunction against enforcement of these provisions by the Attorney General. Original jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, s 2, of the Constitution. See State of Georgia v. Pennsylvania, R. Co., 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051. Because no issues of fact were raised in the complaint, and because of South Carolina's desire to obtain a ruling prior to its primary elections in June 1966, we dispensed with appointment of a special master and expedited our hearing of the case.

Recognizing that the questions presented were of urgent concern to the entire country, we invited all of the States ****808** to participate in this proceeding as friends of the Court. A majority responded by submitting or joining in briefs on the merits, some supporting South Carolina and others the Attorney General.[2] Seven of these States ***308** also requested and received permission to argue the case orally at our hearing. Without exception, despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyerlike and constructive. All viewpoints on the issues have been fully developed, and this additional assistance has been most helpful to the Court.

[2] **[3]** The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from s 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by 'appropriate' measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

I.

[4] The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. ***309** [3] More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.[4] At the close of these deliberations, the verdict of both chambers was overwhelming. The House approved the bill by a vote of 328—74, and the measure passed the Senate by a margin of 79—18.

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Seond: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. We pause here to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these ****809** reactions by Congress.[5] See H.R.Rep. No. 439, 89th Cong., 1st Sess., 8—16 (hereinafter cited as House Report); S.Rep.No. 162, pt. 3, 89th Cong., 1st Sess., 3—16, U.S. Code Congressional and Administrative News, p. 2437 (hereinafter cited as Senate Report).

***310** The Fifteenth Amendment to the Constitution was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870,[6] which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year[7] to provide for detailed federal supervision of the electoral process, from registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894.[8] The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting.[9] Typically, they made the ability to read and write ***311** a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write.[10] At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, ****810** 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, and Myers v. Anderson, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349. Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281. The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. Improper challenges were nullified in United States v. Thomas, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535. Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110. Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093; ***312** Alabama v. United States, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112, and Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709.

According to the evidence in recent Justice Department voting suits, the latter stratagem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment.[11] Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread 'pattern or practice.' White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers.[12] Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error.[13] The good-morals requirement ***313** is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.[14] Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.[15]

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil ****811** Rights Act of 1957[16] authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960[17] permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964[18] expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of

voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

***314** The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.[19] Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.[20] The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

During the hearings and debates on the Act, Selma, Alabama, was repeatedly referred to as the pre-eminent example of the ineffectiveness of existing legislation. In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination. Yet in those four years, Negro registration ***315** rose only from 156 to 383, although there are approximately 15,000 Negroes of voting age in the county. Any possibility that these figures were attributable to political apathy was dispelled by the protest demonstrations in Selma in the early months of 1965. The House Committee on the Judiciary summed up the reaction of Congress to these developments in the following words:

'The litigation in Dallas County took more than 4 years to open ****812** the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.

'Such is the essential justification for the pending bill.' House Report 11.

II.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting.[21] The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4(a)—(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in s 4(a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second ***316** remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in ss 6(b), 7, 9, and 13(a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

Other provisions of the Act prescribe subsidiary cures for persistent voting discrimination. Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10(d) excuses those made eligible to vote in sections of the country covered by s 4(b) of the Act from paying accumulated past poll taxes for state and local elections. Section 12(e) provides for balloting by persons denied access to the polls in areas where federal examiners have been appointed.

The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds. Sections 3, 6(a) and 13(b) strengthen existing procedures for attacking voting discrimination by means of litigation. Section 4(e) excuses citizens educated in American schools conducted in a foreign language from passing English-language literacy tests. Section 10(a)—(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections. Sections 11 and 12(a)—(d) authorize civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act.

[5] At the outset, we emphasize that only some of the many portions of the Act are properly before us. South Carolina has not challenged ss 2, 3, 4(e), 6(a), 8, 10, 12(d) and (e), 13(b), and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must

await subsequent litigation. ***317** [22] In addition, ****813** we find that South Carolina's attack on ss 11 and 12(a)—(c) is premature. No person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize. See United States v. Raines, 362 U.S. 17, 20—24, 80 S.Ct. 519, 522—524, 4 L.Ed.2d 524. Consequently, the only sections of the Act to be reviewed at this time are ss 4(a)—(d), 5, 6(b), 7, 9, 13(a), and certain procedural portions of s 14, all of which are presently in actual operation in South Carolina. We turn now to a detailed description of these provisions and their present status.

Coverage formula.

The remedial sections of the Act assailed by South Carolina automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a 'test or device,' and (2) the Director of the Census has determined that less than 50% of its votingage residents were registered on November 1, 1964, or voted in the presidential election of November 1964. These findings are not reviewable in any court and are final upon publication in the Federal Register. s 4(b). As used throughout the Act, the phrase 'test or device' means any requirement that a registrant or voter must '(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications ***318** by the voucher of registered voters or members of any other class.' s 4(c).

Statutory coverage of a State or political subdivision under s 4(b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if he has no reason to believe that the facts are otherwise. s 4(a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been promptly corrected, if their continuing effects have been abated, and if they are unlikely to recur in the future. s 4(d). On the other hand, no area may obtain a declaratory judgment for five years after the final decision of a federal court (other than the denial of a judgment under this section of the Act), determining that discrimination through the use of tests or devices has occurred anywhere in the State or political subdivision. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. s 4(a).

South Carolina was brought within the coverage formula of the Act on August 7, 1965, pursuant to appropriate administrative determinations which have not been challenged in this proceeding.[23] On the same day, coverage was also extended to Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, 26 counties in North Carolina, and one county in Arizona.[24] Two more counties in Arizona, one county in Hawaii, and one county in Idaho were added to the list on November 19, 1965.[25] ***319** Thus far Alaska, the three Arizona counties, and the single county in Idaho have asked the District Court for the District of Columbia to grant a declaratory judgment terminating statutory coverage.[26]

****814** Suspension of tests.

In a State or political subdivision covered by s 4(b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a 'test or device.' s 4(a).

On account of this provision, South Carolina is temporarily barred from enforcing the portion of its voting laws which requires every applicant for registration to show that he:
'Can both read and write any section of (the State) Constitution submitted to (him) by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more.' S.C.Code Ann. s 23—62(4) (1965 Supp.).

The Attorney General has determined that the property qualification is inseparable from the literacy test,[27] and South Carolina makes no objection to this finding. Similar tests and devices have been temporarily suspended in the other sections of the country listed above.[28]

Review of new rules.

In a State or political subdivision covered by s 4(b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a voting qualification or procedure different from those in force on ***320** November 1, 1964. This suspension of new rules is terminated, however, under either of the following circumstances: (1) if the area has submitted the rules to the Attorney General, and he has

not interposed an objection within 60 days, or (2) if the area has obtained a declaratory judgment from the District Court for the District of Columbia, determining that the rules will not abridge the franchise on racial grounds. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. s 5.

South Carolina altered its voting laws in 1965 to extend the closing hour at polling places from 6 p.m. to 7 p.m.[29] The State has not sought judicial review of this change in the District Court for the District of Columbia, nor has it submitted the new rule to the Attorney General for this scrutiny, although at our hearing the Attorney General announced that he does not challenge the amendment. There are indications in the record that other sections of the country listed above have also altered their voting laws since November 1, 1964.[30]

Federal examiners.

In any political subdivision covered by s 4(b) of the Act, the Civil Service Commission shall appoint voting examiners whenever the Attorney General certifies either of the following facts: (1) that he has received meritorious written complaints from at least 20 residents alleging that they have been disenfranchised under color of law because of their race, or (2) that the appointment of examiners is otherwise necessary to effectuate the guarantees of the Fifteenth Amendment. In making the latter determination, the Attorney General must consider, among other factors, whether the registration ratio of non-whites to whites seems reasonably attributable to ***321** racial discrimination, or whether there is substantial evidence of good-faith efforts to comply with the Fifteenth Amendment. s 6(b). These certifications are not reviewable in any court and are effective upon publication in the Federal Register. s 4(b).

The examiners who have been appointed are to test the voting qualifications ****815** of applicants according to regulations of the Civil Service Commission prescribing times, places, procedures, and forms. ss 7(a) and 9(b). Any person who meets the voting requirements of state law, insofar as these have not been suspended by the Act, must promptly be placed on a list of eligible voters. Examiners are to transmit their lists at least once a month to the appropriate state or local officials, who in turn are required to place the listed names on the official voting rolls. Any person listed by an examiner is entitled to vote in all elections held more than 45 days after his name has been transmitted. s 7(b).

A person shall be removed from the voting list by an examiner if he has lost his eligibility under valid state law, or if he has been successfully challenged through the procedure prescribed in s 9(a) of the Act. s 7(d). The challenge must be filed at the office within the State designated by the Civil Service Commission; must be submitted within 10 days after the listing is made available for public inspection; must be supported by the affidavits of at least two people having personal knowledge of the relevant facts; and must be served on the person challenged by mail or at his residence. A hearing officer appointed by the Civil Service Commission shall hear the challenge and render a decision within 15 days after the challenge is filed. A petition for review of the hearing officer's decision must be submitted within an additional 15 days after service of the decision on the person seeking review. The court of appeals for the circuit in which the person challenged resides is to ***322** hear the petition and affirm the hearing officer's decision unless it is clearly erroneous. Any person listed by an examiner is entitled to vote pending a final decision of the hearing officer or the court. s 9(a).

The listing procedures in a political subdivision are terminated under either of the following circumstances: (1) if the Attorney General informs the Civil Service Commission that all persons listed by examiners have been placed on the official voting rolls, and that there is no longer reasonable cause to fear abridgement of the franchise on racial grounds, or (2) if the political subdivision has obtained a declaratory judgment from the District Court for the District of Columbia, ascertaining the same facts which govern termination by the Attorney General, and the Director of the Census has determined that more than 50% of the non-white residents of voting age are registered to vote. A political subdivision may petition the Attorney General to terminate listing procedures or to authorize the necessary census, and the District Court itself shall request the census if the Attorney General's refusal to do so is arbitrary or unreasonable. s 13(a). The determinations by the Director of the Census are not reviewable in any court and are final upon publication in the Federal Register. s 4(b).

On October 30, 1965, the Attorney General certified the need for federal examiners in two South Carolina counties,[31] and examiners appointed by the Civil Service Commission have been serving there since November 8, 1965. Examiners have also been assigned to 11 counties in Alabama, five parishes in Louisiana, and 19 counties in Mississippi.[32] The examiners are listing people found eligible to vote, and the

challenge procedure has been ***323** employed extensively.[33] No political subdivision has yet sought to have federal examiners withdrawn through the Attorney General or the ****816** District Court for the District of Columbia.

III.

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the amici curiae also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in s 4(a)—(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation. They claim that the review of new voting rules required in s 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in s 6(b) abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in s 9 denies due process on account of its speed. Finally, South Carolina and certain of the amici curiae maintain that ss 4(a) and 5, buttressed by s 14(b) of the Act, abridge due process by limiting litigation to a distant forum.

[6] **[7]** **[8]** **[9]** **[10]** Some of these contentions may be dismissed at the outset. The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge ***324** this has never been done by any court. See International Shoe Co. v. Cocreham, 246 La. 244, 266, 164 So.2d 314, 322, n. 5, cf. United States v. City of Jackson, 318 F.2d 1, 8 (C.A.5th Cir.). Likewise, courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to non-judicial determinations of guilt. See United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484; Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366. Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen. Com. of Massachusetts v. Mellon, 262 U.S. 447, 485—486, 43 S.Ct. 597, 600—601, 67 L.Ed. 1078; State of Florida v. Mellon, 273 U.S. 12, 18, 47 S.Ct. 265, 267, 71 L.Ed. 511. The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

[11] The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. Cf. our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in Heart of Atlanta Motel v. United States, 379 U.S. 241, 258—259, 261—262, 85 S.Ct. 348, 358—359, 360, 13 L.Ed.2d 258, and Katzenbach v. McClung, 379 U.S. 294, 303—304, 85 S.Ct. 377, 383—384, 13 L.Ed.2d 290. We turn now to a more detailed description of the standards which govern our review of the Act.

***325** **[12]** **[13]** **[14]** **[15]** Section 1 of the Fifteenth Amendment declares that '(t)he right of citizens of the United States to vote shall not be denied or abridged by the United ****817** States or by any State on account of race, color, or previous condition of servitude.' This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. See Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567; Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340; Myers v. Anderson, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349; Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; Schnell v. Davis, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152; United States v. Thomas, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535; Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110; Alabama v. United States, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112; Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709. These decisions have been rendered with full respect for the general rule, reiterated last Term in Carrington v. Rash, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675, that States 'have broad powers to determine the conditions under which the right of suffrage

may be exercised.' The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. 'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.' Gomillion v. Lightfoot, 364 U.S., at 347, 81 S.Ct., at 130.

[16] **[17]** **[18]** South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, s 2 of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.' By adding this ***326** authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in s 1. 'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation Some legislation is contemplated to make the (Civil War) amendments fully effective.' Ex parte Virginia, 100 U.S. 339, 345, 25 L.Ed. 676. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld. For recent examples, see the Civil Rights Act of 1957, which was sustained in United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524; United States v. Thomas, supra; and Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307; and the Civil Rights Act of 1960, which was upheld in Alabama v. United States, supra; Louisiana v. United States, supra; and United States v. Mississippi, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717. On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment. See United States v. Reese, 92 U.S. 214, 23 L.Ed. 563; James v. Bowman, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979.

[19] **[20]** The basic test to be applied in a case involving s 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 ****818** years before the Fifteenth Amendment was ratified:

'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579.

***327** The Court has subsequently echoed his language in describing each of the Civil War Amendments:

'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.' Ex parte Virginia, 100 U.S., at 345—346, 25 L.Ed. 676.

This language was again employed, nearly 50 years later, with reference to Congress' related authority under s 2 of the Eighteenth Amendment. James Everard's Breweries v. Day, 265 U.S. 545, 558—559, 44 S.Ct. 628, 631, 68 L.Ed. 1174.

[21] We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under s 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L.Ed. 23.

IV.

[22] Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into ***328** effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See Katzenbach v. McClung, 379 U.S. 294, 302—304, 85 S.Ct. 377, 383—384, 13 L.Ed.2d 290; United States

v. Darby, 312 U.S. 100, 120—121, 61 S.Ct. 451, 460, 85 L.Ed. 609. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.[34] After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil, and to this question we shall presently address ourselves.

[23] **[24]** Second: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name.[35] This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination ****819** presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future.[36] In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See McGowan v. State of Maryland, 366 U.S. 420, 427, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393; Salsburg v. State of Maryland, 346 U.S. 545, 550—554, 74 S.Ct. 280, 282—285, 98 L.Ed.2d 281. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms ***329** upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See Coyle v. Smith, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853, and cases cited therein.

Coverage formula.

[25] We now consider the related question of whether the specific States and political subdivisions within s 4(b) of the Act were an appropriate target for the new remedies. South Carolina contends that the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions which have nothing to do with racial discrimination. These arguments, however, are largely beside the point.[37] Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by s 4(b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment. Cf. North American Co. v. S.E.C., 327 U.S. 686, 710—711, 66 S.Ct. 785, 798—799, 90 L.Ed. 945; Assigned Car Cases, 274 U.S. 564, 582—583, 47 S.Ct. 727, 733, 71 L.Ed. 1204.

[26] To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination.[38] Section 4(b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of ***330** recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission.[39] All of these areas were appropriately subjected to the new remedies. In identifying past evils, Congress obviously may avail itself of information from any probative source. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 252—253, 85 S.Ct. 348, 354—355, 13 L.Ed.2d 258; Katzenbach v. McClung, 379 U.S., at 299—301, 85 S.Ct. at 381—382, 13 L.Ed.2d 290.

[27] **[28]** The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious ****820** reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years. Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under s 2 of the Fifteenth Amendment. Compare United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210; Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519.

[29] **[30]** **[31]** It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and ***331** devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed.[40] At the same time, through ss 3, 6(a), and 13(b) of the Act, Congress strengthened existing remedies for voting discrimination in other areas of the country. Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See Williamson v. Lee Optical Co., 348 U.S. 483, 488—489, 75 S.Ct. 461, 464—465, 99 L.Ed. 563; Railway Express Agency v. People of State of New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533. There are no States or political subdivisions exempted from coverage under s 4(b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula.

[32] Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years. Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, s 1, to 'ordain and establish' inferior federal tribunals. See Bowles v. Willingham, 321 U.S. 503, 510—512, 64 S.Ct. 641, 645, 646, 88 L.Ed. 892; Yakus v. United States, 321 U.S. 414, 427—431, 64 S.Ct. 660, 668, 670, 88 L.Ed. 834; Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. At the present time, contractual claims against the United States for more than $10,000 must be brought in the Court of Claims, and, until 1962, the District of Columbia was the sole venue of suits against ***332** federal officers officially residing in the Nation's Capital.[41] We have discovered no suggestion that Congress exceeded constitutional bounds in imposing these limitations on litigation against the Federal Government, and the Act is no less reasonable in this respect.

[33] South Carolina contends that these termination procedures are a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief. As the Attorney General pointed out during hearings on the Act, however, an area need do no more than submit affidavits from voting officials, asserting that ****821** they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government.[42] Section 4(d) further assures that an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings. The burden of proof is therefore quite bearable, particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves. See United States v. New York, N.H. & R.R. Co., 355 U.S. 253, 256, n. 5, 78 S.Ct. 212, 214, 2 L.Ed.2d 247; cf. S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126, 73 S.Ct. 981, 985, 97 L.Ed. 1494.

[34] The Act bars direct judicial review of the findings by the Attorney General and the Director of the Census which trigger application of the coverage formula. We reject the claim by Alabama as amicus curiae that this provision is invalid because it allows the new remedies of ***333** the Act to be imposed in an arbitrary way. The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the statutory rights of private parties. For example, see United States v. California Eastern Line, 348 U.S. 351, 75 S.Ct. 419, 99 L.Ed. 383; Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. In this instance, the findings not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under s 4(b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review.

Suspension of tests.

[35] We now arrive at consideration of the specific remedies prescribed by the Act for areas included within the coverage formula. South Carolina assails the temporary suspension of existing voting qualifications, reciting the rule laid down by Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072, that literacy tests and related devices are not in themselves contrary to the Fifteenth Amendment. In that very case, however, the Court went on to say, 'Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which

the Fifteenth Amendment was designed to uproot.' Id., at 53, 79 S.Ct. at 991. The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered ***334** in a discriminatory fashion for many years.[43] Under these circumstances, the Fifteenth Amendment has clearly been violated. See Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709; State of Alabama v. United States, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112; Schnell v. Davis, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093.

[36] The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. Ibid. Underlying the response was the feeling that ****822** States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about 'dilution' of their electorates through the registration of Negro illiterates.[44] Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.[45] Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives.[46]

Review of new rules.

[37] **[38]** The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. See ***335** Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413; Wilson v. New, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755. Congress knew that some of the States covered by s 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.[47] Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

[39] For reasons already stated, there was nothing inappropriate about limiting litigation under this provision to the District Court for the District of Columbia, and in putting the burden of proof on the areas seeking relief. Nor has Congress authorized the District Court to issue advisory opinions, in violation of the principles of Article III invoked by Georgia as amicus curiae. The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision wishing to make use of a recent amendment to its voting laws therefore has a concrete and immediate 'controversy' with the Federal Government. Cf. Public Utilities Comm. v. United States, 355 U.S. 534, 536—539, 78 S.Ct. 446, 448—450, 2 L.Ed.2d 470; United States v. State of California, 332 U.S. 19, 24—25, 67 S.Ct. 1658, 1661, 91 L.Ed. 1889. An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment.

Federal examiners.

[40] The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter ***336** entitled to vote, subject to an expeditious challenge procedure. This was clearly an appropriate response to the problem, closely related to remedies authorized in prior cases. See Alabama v. United States, supra; United States v. Thomas, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535. In many of the political subdivisions covered by s 4(b) of the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance ****823** or evasion of federal court decrees.[48] Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. As for the briskness of the challenge procedure, Congress knew that in some of the areas affected, challenges had been persistently employed to harass registered Negroes. It chose to forestall this abuse, at the same time providing alternative ways for removing persons listed through error or fraud.[49] In addition to the judicial challenge procedure, s 7(d) allows for the removal of names by the examiner himself, and s 11(c) makes it a crime to obtain a listing through fraud.

[41] In recognition of the fact that there were political subdivisions covered by s 4(b) of the Act in which the appointment of federal examiners might be unnecessary, Congress assigned the Attorney General the task of determining the localities to which examiners should be sent.[50] There is no warrant for the claim, asserted by Georgia as amicus curiae, that the Attorney General is free to use this power in an arbitrary fashion, without regard to the purposes of the Act. Section 6(b) sets adequate standards to guide the exercise of his discretion, by directing him to calculate the registration ratio of non-whites to whites, and to weigh evidence of good-faith ***337** efforts to avoid possible voting discrimination. At the same time, the special termination procedures of s 13(a) provide indirect judicial review for the political subdivisions affected, assuring the withdrawal of federal examiners from areas where they are clearly not needed. Cf. Carlson v. Landon, 342 U.S. 524, 542—544, 72 S.Ct. 525, 535—536, 96 L.Ed. 547; Mulford v. Smith, 307 U.S. 38, 48—49, 59 S.Ct. 648, 652, 83 L.Ed. 1092.

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them.[51] We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly '(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.'

The bill of complaint is dismissed.

Bill dismissed.

APPENDIX TO OPINION OF THE COURT.

VOTING RIGHTS ACT OF 1965.

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress ***338** assembled, That this Act shall be known as the 'Voting Rights Act of 1965.'

Sec. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

****824** Sec. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of ***339** tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying

equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Sec. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been ***340** made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the ****825** action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

***341** (b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase ‘test or device’ shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters of members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant ***342** classroom

language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, ****826** State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, ***343** or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Sec. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or (b) unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to ***344** enforce the guarantees of the fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9(a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by ****827** the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U.S.C. 118i), prohibiting partisan political activity: Provided, That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

Sec. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9(b), to have the

qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9(a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner ***345** shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): Provided, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose ***346** of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court.

Sec. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by ****828** a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

***347** (b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpena the attendance and testimonony of witnesses and the production of documentar evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service

of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Sec. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons ***348** as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, ****829** for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judge designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political ***349** subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

Sec. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, , and report such person's vote

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another ***350** individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements ****830** or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Sec. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

***351** (c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11(a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (a) to permit persons listed under this Act of vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided ***352** in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

Sec. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration ****831** roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney ***353** General's refusal to request such survey or census to be arbitrary or unreasonable.

Sec. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory

judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred ***354** miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

Sec. 15. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word 'Federal' wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

Sec. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, ****832** 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

Sec. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

Sec. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

***355** Sec. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

Mr. Justice BLACK, concurring and dissenting.

I agree with substantially all of the Court's opinion sustaining the power of Congress under s 2 of the Fifteenth Amendment to suspend state literacy tests and similar voting qualifications and to authorize the Attorney General to secure the appointment of federal examiners to register qualified voters in various sections of the country. Section 1 of the Fifteenth Amendment provides that 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' In addition to this unequivocal command to the States and the Federal Government that no citizen shall have his right to vote denied or abridged because of race or color, s 2 of the Amendment unmistakably gives Congress specific power to go further and pass appropriate legislation to protect this right to vote against any method of abridgement no matter how subtle. Compare my dissenting opinion in Bell v. State of Maryland, 378 U.S. 226, 318, 84 S.Ct. 1814, 1864, 12 L.Ed.2d 822. I have no doubt whatever as to the power of Congress under s 2 to enact the provisions of the Voting Rights Act of 1965 dealing with the suspension of state voting tests that have been used as notorious means to deny and abridge voting rights on racial grounds. This same congressional power necessarily exists to authorize appointment of federal examiners. I also agree with the judgment of the Court upholding s 4(b) of ***356** the Act

which sets out a formula for determining when and where the major remedial sections of the Act take effect. I reach this conclusion, however, for a somewhat different reason than that stated by the Court, which is that 'the coverage formula is rational in both practice and theory.' I do not base my conclusion on the fact that the formula is rational, for it is enough for me that Congress by creating this formula has merely exercised its hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect. By stating in specific detail that the major remedial sections of the Act are to be applied in areas where certain conditions exist, and by granting the Attorney General and the Director of the Census unreviewable power to make the mechanical determination of which areas come within the formula of s 4(b), I believe that Congress has acted within its established power to set out preconditions upon which the Act is to go into effect. See, e.g., Martin v. Mott, 12 Wheat. 19, 6 L.Ed. 537; United States v. George S. Bush & Co., 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259; Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

Though, as I have said, I agree with most of the Court's conclusions, I dissent from its holding that every part ****833** of s 5 of the Act is constitutional. Section 4(a), to which s 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of s 4(b). Section 5 goes on to provide that a State covered by s 4(b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

***357** (a) The Constitution gives federal courts jurisdiction over cases and controversies only. If it can be said that any case or controversy arises under this section which gives the District Court for the District of Columbia jurisdiction to approve or reject state laws or constitutional amendments, then the case or controversy must be between a State and the United States Government. But it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied. And if by this section Congress has created a case or controversy, and I do not believe it has, then it seems to me that the most appropriate judicial forum for settling these important questions is this Court acting under its original Art. III, s 2, jurisdiction to try cases in which a State is a party.[1] At least a trial in this Court would treat the States with the dignity to which they should be entitled as constituent members of our Federal Union.

The form of words and the manipulation of presumptions used in s 5 to create the illusion of a case or controversy should not be allowed to cloud the effect of that section. By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to ***358** secure precisely the type of advisory opinion our Constitution forbids. As I have pointed out elsewhere, see my dissenting opinion in Griswold v. State of Connecticut, 381 U.S. 479, 507, n. 6, pp. 513—515, 85 S.Ct. 1678, 1694, pp. 1697, 1698, 14 L.Ed.2d 510, some of those drafting our Constitution wanted to give the federal courts the power to issue advisory opinions and propose new laws to the legislative body. These suggestions were rejected. We should likewise reject any attempt by Congress to flout constitutional limitations by authorizing federal courts to render advisory opinions when there is no case or controversy before them. Congress has ample power to protect the rights of citizens to vote without resorting to the unnecessarily circuitous, indirect and unconstitutional route it has adopted in this section.

(b) My second and more basic objection to s 5 is that Congress has here exercised its power under s 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. As the Court says the limitations of the power granted under s 2 are the same as the limitations imposed on the exercise of any of the powers expressly granted Congress by the Constitution. The classic ****834** formulation of these constitutional limitations was stated by Chief Justice Marshall when he said in McCulloch v. State of Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579, 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' (Emphasis added.) Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state

and federal power almost meaningless. One *359 of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either 'to the States respectively, or to the people.' Certainly if all the provisions to the King's 'transporting us beyond power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them.[2] Moreover, it seems to me that s 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government.' I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to *360 create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments. Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against **835 state officials once and operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected. *361 [3] The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments.[4] Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress—denied a power in itself to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases—they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval.

In this and other prior Acts Congress has quite properly vested the Attorney General with extremely broad power to protect voting rights of citizens against discrimination on account of race or color. Section 5 viewed in this context is of very minor importance and in my judgment is likely to serve more as an irritant to *362 the States than as an aid to the enforcement of the Act. I would hold s 5 invalid for the reasons stated above with full confidence that the Attorney General has ample power to give vigorous, expeditious and effective protection to the voting rights of all citizens.[5]

All Citations

383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769

Footnotes

1 79 Stat. 437, 42 U.S.C. s 1973 et seq. (1964 ed., Supp. I).

2 States supporting South Carolina: Alabama, Georgia, Louisiana, Mississippi, and Virginia. States supporting the Attorney General: California, Illinois, and Massachusetts, joined by Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

3 See Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as House Hearings); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. U.S.Code Congressional and Administrative News, p. 480 (hereinafter cited as Senate Hearings).

4 See the Congressional Record for April 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26; July 6, 7, 8, 9; August 3 and 4, 1965.

5 The facts contained in these reports are confirmed, among other sources, by United States v. State of Louisiana, D.C., 225 F.Supp. 353, 363—385 (Wisdom, J.), aff'd, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709; United States v. State of Mississippi, D.C., 229 F.Supp. 925, 983—997 (dissenting opinion of Brown, J.), rev'd and rem'd, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717; United States v. State of Alabama, D.C., 192 F.Supp. 677 (Johnson, J.), aff'd, 5 Cir., 304 F.2d 583, aff'd, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112; Comm'n on Civil Rights, Voting in Mississippi; 1963 Comm'n on Civil Rights, Rep., Voting; 1961 Comm'n on Civil Rights Rep., Voting, pt. 2; 1959 Comm'n on Civil Rights Rep., pt. 2. See generally Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 Stan.L.Rev. 1; Note, Federal Protection of Negro Voting Rights, 51 Va.L.Rev. 1051.

6 16 Stat. 140.

7 16 Stat. 433.

8 28 Stat. 36.

9 The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes. Key, Southern Politics, 537—539. Senator Ben Tillman frankly explained to the state delegates the aim of the new literacy test: '(T)he only thing we can do as patriots and as statesmen is to take from (the 'ignorant blacks') every ballot that we can under the laws of our national government.' He was equally candid about the exemption from the literacy test for persons who could 'understand' and 'explain' a section of the state constitution: 'There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, (laughter,) or discriminating.' He described the alternative exemption for persons paying state property taxes in the same vein: 'By means of the $300 clause you simply reach out and take in some more white men and a few more colored men.' Journal of the Constitutional Convention of the State of South Carolina 464, 469, 471 (1895). Senator Tillman was the dominant political figure in the state convention, and his entire address merits examination.

10 Prior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write. Following the war, these States rapidly instituted racial segregation in their public schools. Throughout the period, free public education in the South had barely begun to develop. See Brown v. Board of Education, 347 U.S. 483, 489—490, n. 4, 74 S.Ct. 686, 688—689, 98 L.Ed. 873; 1959 Comm'n on Civil Rights Rep. 147—151.

11 For example, see three voting suits brought against the States themselves: United States v. State of Alabama, D.C., 192 F.Supp. 677, aff'd, 5 Cir., 304 F.2d 583, aff'd, 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112; United States v. State of Louisiana, D.C., 225 F.Supp. 353, aff'd, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709; United States v. State of Mississippi, 5 Cir., 339 F.2d 679.

12 A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, 'FRDUM FOOF SPETGH.' United States v. State of Louisiana, D.C., 225 F.Supp. 353, 384. A white applicant in Alabama who had never completed the first grade of school was enrolled after the registrar filled out the entire form for him. United States v. Penton, D.C., 212 F.Supp. 193, 210—211.

13 In Panola County, Mississippi, the registrar required Negroes to interpret the provision of the state constitution concerning 'the rate of interest on the fund known as the 'Chickasaw School Fund.'' United States v. Duke, 5 Cir., 332 F.2d 759, 764.

In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts. United States v. Lynd, 5 Cir., 301 F.2d 818, 821.

14 For example, see United States v. Atkins, 5 Cir., 323 F.2d 733, 743.

15 For example, see United States v. Logue, 5 Cir., 344 F.2d 290, 292.

16 71 Stat. 634.

17 74 Stat. 86.

18 78 Stat. 241, 42 U.S.C. s 1971 (1964 ed.).

19 The Court of Appeals for the Fifth Circuit ordered the registrars of Forrect County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. United States v. State of Mississippi, D.C., 229 F.Supp. 925, 996—997 (dissenting opinion).

20 For example, see United States v. Parker, D.C., 236 F.Supp. 511; United States v. Palmer, D.C., 230 F.Supp. 716.

21 For convenient reference, the entire Act is reprinted in an Appendix to this opinion.

22 Section 4(e) has been challenged in Morgan v. Katzenbach, D.C., 247 F.Supp. 196, prob. juris. noted, 382 U.S. 1007, 86 S.Ct. 621, and in United States v. County Bd. of Elections, D.C., 248 F.Supp. 316. Section 10(a)—(c) is involved in United States v. Texas, D.C., 252 F.Supp. 234 and in United States v. Alabama, D.C., 252 F.Supp. 95; see also Harper v. Virginia State Bd. of Elections, 382 U.S. 951, 86 S.Ct. 425, and Butts v. Harrison, 382 U.S. 806, 86 S.Ct. 94, 15 L.Ed.2d 57, which were argued together before this Court on January 25 and 26, 1966.

23 30 Fed.Reg. 9897.

24 Ibid.

25 30 Fed.Reg. 14505.

26 Alaska v. United States, Civ.Act. 101—66; Apache County v. United States, Civ.Act. 292—66; Elmore County v. United States, Civ.Act. 320—66.

27 30 Fed.Reg. 14045—14046.

28 For a chart of the tests and devices in effect at the time the Act was under consideration, see House Hearings 30—32; Senate Report 42—43.

29 S.C.Code Ann. s 23—342 (1965 Supp.).

30 Brief for Mississippi as amicus curiae, App.

31 30 Fed.Reg. 13850.

32 30 Fed.Reg. 9970—9971, 10863, 12363, 12654, 13849—13850, 15837; 31 Fed.Reg. 914.

33 See Comm'n on Civil Rights, The Voting Rights Act (1965).

34 House Report 9—11; Senate Report 6—9.

35 House Report 13; Senate Report 52, 55.

36 House Hearings 27; Senate Hearings 201.

37 For Congress' defense of the formula, see House Report 13—14; Senate Report 13—14.

38 House Report 12; Senate Report 9—10.

39 Georgia: House Hearings 160—176; Senate Hearings 1182—1184, 1237, 1253, 1300—1301, 1336—1345. North Carolina: Senate Hearings 27—28, 39, 246—248. South Carolina: House Hearings 114—116, 196—201; Senate Hearings 1353—1354.

40 House Hearings 75—77; Senate Hearings 241—243.

41 Regarding claims against the United States, see 28 U.S.C. ss 1491, 1346(a) (1964 ed.). Concerning suits against federal officers, see Stroud v. Benson, 4 Cir., 254 F.2d 448; H.R.Rep. No. 536, 87th Cong., 1st Sess.; S.Rep. No. 1992, 87th Cong., 2d Sess.; 28 U.S.C. s 1391(e) (1964 ed.); 2 Moore, Federal Practice 4.29 (1964 ed.).

42 House Hearings 92—93; Senate Hearings 26—27.

43 House Report 11—13; Senate Report 4—5, 9—12.

44 House Report 15; Senate Report 15—16.

45 House Report 15; Senate Report 16.

46 House Hearings 17; Senate Hearings 22—23.

47 House Report 10—11; Senate Report 8, 12.

48 House Report 16; Senate Report 15.

49 Senate Hearings 200.

50 House Report 16.

51 See Comm'n on Civil Rights, The Voting Rights Act (1965).

1 If s 14(b) of the Act by stating that no court other than the District Court for the District of Columbia shall issue a judgment under s 5 is an attempt to limit the constitutionally created original jurisdiction of this Court, then I think that section is also unconstitutional.

2 The requirement that States come to Washington to have their laws judged is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies. One of the abuses complained of most bitterly was the King's practice of holding legislative and judicial proceedings in inconvenient and distant places. The signers of the Declaration of Independence protested that the King ‘has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures,’ and they objected to the King's ‘transporting us beyound Seas to be tried for pretended offences.’ These abuses were fresh in the minds of the Framers of our Constitution and in part caused them to include in Art. 3, s 2, the provision that criminal trials ‘shall be held in the State where the said Crimes shall have been committed.’ Also included in the Sixth Amendment was the requirement that a defendant in a criminal prosecution be tried by a ‘jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.’

3 See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of the American States (1927), pp. 605, 789, 856.

4 One speaker expressing what seemed to be the prevailing opinion of the delegates said of the proposal, 'Will any State ever agree to be bound hand & foot in this manner. It is worse than making mere corporations of them * * *.' Id., at 604.

5 Section 19 of the Act provides as follows:

'If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.'

143 S.Ct. 2141
Supreme Court of the United States.

STUDENTS FOR FAIR ADMISSIONS, INC., Petitioner
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE
Students for Fair Admissions, Inc., Petitioner
v.
University of North Carolina, et al.

No. 20-1199, No. 21-707
|
Argued October 31, 2022
|
Decided June 29, 2023

Synopsis

Background: In first case, nonprofit organization brought action for declaratory and injunctive relief against private college, alleging that its race-based admissions program violated Equal Protection Clause, Title VI of Civil Rights Act, and federal statute prohibiting racial discrimination in contracting. The United States District Court for the District of Massachusetts, Allison D. Burroughs, J., 261 F.Supp.3d 99, denied motion to dismiss for lack of Article III standing, and following bench trial entered judgment for college, 397 F.Supp.3d 126. Organization appealed. The United States Court of Appeals for the First Circuit, Lynch, Circuit Judge, 980 F.3d 157, affirmed. Certiorari was granted. In second case, same nonprofit organization brought action for declaratory and injunctive relief against public university, asserting same constitutional and statutory claims as in first case. Following a bench trial, the United States District Court for the Middle District of North Carolina, Loretta C. Biggs, J., 567 F.Supp.3d 580, entered judgment for university. Organization appealed to the United States Court of Appeals for the Fourth Circuit, and the Supreme Court granted certiorari before judgment.

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

[1] nonprofit organization established its representational or organizational standing under Article III;

[2] college's asserted compelling interests for race-based admissions program did not satisfy requirement of being sufficiently measurable to permit strict scrutiny for equal protection violation, which would also be a Title VI violation;

[3] university's asserted compelling interests were not sufficiently measurable;

[4] college and university failed to articulate a meaningful connection between the means they employed and their diversity goals;

[5] admissions programs failed strict scrutiny by using race as a stereotype or negative; and

[6] admissions programs failed strict scrutiny by lacking a logical end point.

Court of Appeals reversed in first case; District Court reversed in second case.

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined.

Justice Thomas filed a concurring opinion.

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

Justice Kavanaugh filed a concurring opinion.

Justice Sotomayor filed a dissenting opinion, in which Justice Kagan joined, and in which Justice Jackson joined as it applied to second case.

Justice Jackson filed a dissenting opinion in second case, in which Justices Sotomayor and Kagan joined.

Justice Jackson took no part in consideration or decision of first case.

West Headnotes (38)

[1] **Civil Rights** Publicly assisted programs

Discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI, which provides that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601, 42 U.S.C.A. § 2000d.

6 Cases that cite this headnote

[2] **Federal Courts** Jurisdiction, powers, and authority in general

Before turning to the merits in a case in which the Supreme Court has granted certiorari review, it must assure itself of its jurisdiction.

2 Cases that cite this headnote

[3] **Federal Courts** Case or Controversy Requirement

Federal Courts Nature of dispute; concreteness

Article III limits the judicial power of the United States to "cases" or "controversies," ensuring that federal courts act only as a necessity in the determination of real, earnest, and vital disputes. U.S. Const. art. 3, § 2, cl. 1.

4 Cases that cite this headnote

[4] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Courts Case or Controversy Requirement

To state a case or controversy under Article III, as required for federal jurisdiction, a plaintiff must establish standing, and that, in turn, requires a plaintiff to demonstrate that it has: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

13 Cases that cite this headnote

[5] **Associations** Injury or interest in general

Associations Suits on Behalf of Members; Associational or Representational Standing

Where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways: either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert standing solely as the representative of its members. U.S. Const. art. 3, § 2, cl. 1.

45 Cases that cite this headnote

[6] **Associations** Suits on Behalf of Members; Associational or Representational Standing

For an organization, as a plaintiff, to invoke representational or organizational standing under Article III, it must demonstrate that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. U.S. Const. art. 3, § 2, cl. 1.

57 Cases that cite this headnote

[7] **Associations** Education

Civil Rights Education

Declaratory Judgment Subjects of relief in general

Nonprofit organization established its representational or organizational standing under Article III to bring actions for declaratory and injunctive relief against private college and

public university, alleging that their race-based admissions programs violated Equal Protection Clause and Title VI, by identifying its members and offering declarations that members were being represented in good faith, and thus, further scrutiny into how the organization operated was not required; organization offered evidence in action against college that it was validly incorporated 501(c)(3) nonprofit with 47 members who joined voluntarily to support its mission, and in action against university, four high school graduates who had been denied admission filed declarations stating they voluntarily joined organization, supported its mission, received updates about status of case from organization's president, and had opportunity for input and direction on organization's case. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 14; 26 U.S.C.A. § 501(c)(3); Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

24 Cases that cite this headnote

[8] **Constitutional Law** Persons or Entities Protected

Constitutional Law Race, National Origin, or Ethnicity

The Equal Protection Clause is a broad and benign provision that applies to all persons, and in the eye of the law, hostility to race and nationality is not justified. U.S. Const. Amend. 14.

1 Case that cites this headnote

[9] **Constitutional Law** Discrimination and Classification

Under the Equal Protection Clause, separate cannot be equal. U.S. Const. Amend. 14.

12 Cases that cite this headnote

[10] **Constitutional Law** Public Elementary and Secondary Education

Racial segregation in public schools violates the Equal Protection Clause, even if the physical facilities and other tangible factors provided to Black students and white students are of roughly the same quality; the mere act of separating children because of their race generates a feeling of inferiority. U.S. Const. Amend. 14.

[11] **Constitutional Law** Public Elementary and Secondary Education

Constitutional Law Elementary and Secondary Education

Under the Equal Protection Clause, the right to a public education must be made available to all on equal terms, and no State has any authority to use race as a factor in affording educational opportunities among its citizens. U.S. Const. Amend. 14.

[12] **Constitutional Law** Race, National Origin, or Ethnicity

The Equal Protection Clause requires equality of treatment before the law for all persons without regard to race or color. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[13] **Constitutional Law** Intentional or purposeful action

The Equal Protection Clause proscribes all invidious racial discriminations. U.S. Const. Amend. 14.

5 Cases that cite this headnote

[14] **Constitutional Law** Race, National Origin, or Ethnicity

The core purpose of the Equal Protection Clause is to do away with all governmentally imposed discrimination based on race. U.S. Const. Amend. 14.

4 Cases that cite this headnote

[15] **Constitutional Law** Race, National Origin, or Ethnicity

The Equal Protection Clause applies without regard to any differences of race, of color, or

of nationality—it is universal in its application. U.S. Const. Amend. 14.

3 Cases that cite this headnote

[16] **Constitutional Law** Race, National Origin, or Ethnicity

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination under strict scrutiny, with a court asking, first, whether the racial classification is used to further compelling governmental interests, and second, if so, whether the government's use of race is narrowly tailored—meaning necessary—to achieve that interest. U.S. Const. Amend. 14.

12 Cases that cite this headnote

[17] **Constitutional Law** Affirmative action in general

Under strict scrutiny for an equal protection violation, compelling interests that permit resort to race-based government action are remediating specific, identified instances of past discrimination that violated the Constitution or a statute, and avoiding imminent and serious risks to human safety in prisons, such as a race riot. U.S. Const. Amend. 14.

12 Cases that cite this headnote

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

Even the most rigid scrutiny for an equal protection violation can sometimes fail to detect an illegitimate racial classification, and any retreat from the most searching judicial inquiry can only increase the risk of such error occurring in the future. U.S. Const. Amend. 14.

[19] **Constitutional Law** Race, National Origin, or Ethnicity

Under the Equal Protection Clause, distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality, and that principle cannot be overridden except in the most extraordinary case. U.S. Const. Amend. 14.

4 Cases that cite this headnote

[20] **Constitutional Law** Race, National Origin, or Ethnicity

Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake, which the Equal Protection Clause forbids. U.S. Const. Amend. 14.

1 Case that cites this headnote

[21] **Constitutional Law** Admissions

Because racial discrimination is invidious in all contexts, universities must operate their race-based admissions programs in a manner that is sufficiently measurable to permit judicial review under the rubric of strict scrutiny for an equal protection violation. U.S. Const. Amend. 14.

6 Cases that cite this headnote

[22] **Constitutional Law** Public Elementary and Secondary Education

To satisfy strict scrutiny for an equal protection violation, classifying and assigning students based on their race requires more than an amorphous end. U.S. Const. Amend. 14.

1 Case that cites this headnote

[23] **Civil Rights** Admission

Constitutional Law Admissions

Interests that private college asserted as compelling interests for its race-based admissions program did not satisfy requirement of being sufficiently measurable to permit judicial review under rubric of strict scrutiny for equal protection violation, which would also be a Title VI violation; college identified, as educational benefits it was pursuing, training future leaders in public and private sectors, preparing graduates to adapt to increasingly

pluralistic society, better educating its students through diversity, and producing new knowledge stemming from diverse outlooks. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

3 Cases that cite this headnote

[24] **Civil Rights** Admission

Constitutional Law Admissions

Interests that public university asserted as compelling interests for its race-based admissions program did not satisfy requirement of being sufficiently measurable to permit judicial review under rubric of strict scrutiny for equal protection violation, which would also be a Title VI violation; university identified, as educational benefits it was pursuing, promoting the robust exchange of ideas, broadening and refining understanding, fostering innovation and problem-solving, preparing engaged and productive citizens and leaders, enhancing appreciation, respect, empathy, and cross-racial understanding, and breaking down stereotypes. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

2 Cases that cite this headnote

[25] **Civil Rights** Admission

Constitutional Law Admissions

Education Admission or Matriculation

Private college and public university failed to articulate a meaningful connection between the means they employed, i.e., assigning applicants to racial categories, and diversity goals they pursued, as would be required for their race-based admissions programs to survive strict scrutiny for an equal protection violation, which would also be a Title VI violation; categories were arbitrary or undefined, e.g., "Hispanic," or plainly overbroad, e.g., grouping together all Asian students, or underinclusive, e.g., it was unclear how applicants from Middle Eastern countries were classified, and using opaque racial categories undermined the goals. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

[26] **Constitutional Law** Post-Secondary Institutions

While courts give a degree of deference to a university's academic decisions, any deference must exist within constitutionally prescribed limits, and deference does not imply abandonment or abdication of judicial review for equal protection violations, and thus, courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. U.S. Const. Amend. 14.

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

Under the Equal Protection Clause, racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. U.S. Const. Amend. 14.

[28] **Civil Rights** Admission

Constitutional Law Admissions

Education Admission or Matriculation

Under strict scrutiny, race-based admissions programs of private college and public university violated Equal Protection Clause, which violation was also a Title VI violation, by using race as a stereotype or negative; college's consideration of race led to 11.1% decrease in number of Asian-Americans admitted, college and university acknowledged that race was determinative for at least some—if not many—of the students they admitted, and the point of their admissions programs was that there was an inherent benefit in race for race's sake, e.g., college's program rested on pernicious stereotype that a Black student could usually bring something that a white person could not offer. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

14 Cases that cite this headnote

[29] **Constitutional Law** Discrimination and Classification

Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. U.S. Const. Amend. 14.

[30] **Constitutional Law** Students

Under the Equal Protection Clause, universities may not operate their admissions programs on the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. U.S. Const. Amend. 14.

1 Case that cites this headnote

[31] **Constitutional Law** Intentional or purposeful action

Equal protection does not allow government actors to intentionally allocate preference to those who may have little in common with one another but the color of their skin. U.S. Const. Amend. 14.

[32] **Constitutional Law** Race, National Origin, or Ethnicity

One of the principal reasons race is treated as a forbidden classification under the Equal Protection Clause is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[33] **Civil Rights** Admission

Constitutional Law Admissions

Education Admission or Matriculation

Under strict scrutiny, race-based admissions programs of private college and public university violated Equal Protection Clause, which violation was also a Title VI violation, by lacking a logical end point; by promising to terminate their use of race when some rough percentage of various racial groups was admitted, college and university effectively assured that race would always be relevant and that ultimate goal of eliminating race as a criterion would never be achieved, and while college and university asserted that they would no longer need to engage in race-based admissions when, in their absence, students nevertheless received educational benefits of diversity, it was not clear how a court was supposed to determine when stereotypes had broken down or productive citizens and leaders had been created. U.S. Const. Amend. 14; Civil Rights Act of 1964 § 601 et seq., 42 U.S.C.A. § 2000d et seq.

2 Cases that cite this headnote

[34] **Constitutional Law** Affirmative action in general

Outright racial balancing is patently unconstitutional, because at the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class. U.S. Const. Amend. 14.

2 Cases that cite this headnote

[35] **Constitutional Law** Affirmative action in general

Under strict scrutiny for an equal protection violation, remedying the effects of societal discrimination is not a compelling interest for racial classification; such an interest presents an amorphous concept of injury that may be ageless in its reach into the past, and it cannot justify a racial classification that imposes disadvantages upon persons who bear no responsibility for whatever harms the beneficiaries of the race-based classification are thought to have suffered. U.S. Const. Amend. 14.

1 Case that cites this headnote

[36] **Constitutional Law** Admissions

Under the Equal Protection Clause, race-based university admissions programs must have reasonable durational limits, and their deviation from the norm of equal treatment must be a temporary matter. U.S. Const. Amend. 14.

5 Cases that cite this headnote

[37] **Constitutional Law** Constitutional Rights in General

Constitutional Law Race, National Origin, or Ethnicity

The Constitution deals with substance, not shadows, and the Equal Protection Clause's prohibition against racial discrimination is leveled at the thing, not the name. U.S. Const. Amend. 14.

6 Cases that cite this headnote

[38] **Constitutional Law** Admissions

Under the Equal Protection Clause, for university admissions, an applicant must be treated based on his or her experiences as an individual, not on the basis of race, and thus, a benefit to an applicant who overcame racial discrimination must be tied to that applicant's courage and determination, or a benefit to an applicant whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. U.S. Const. Amend. 14.

****2147** *Syllabus*[*]

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar admissions process. Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories. Readers are required to consider the applicant's race as a factor in their review. Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization whose stated purpose is "to defend

human and civil rights secured by law, including the right of individuals to equal protection under the law." SFFA filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. After separate bench trials, both admissions programs were found permissible under the Equal Protection Clause and this Court's precedents. In the Harvard case, the First Circuit affirmed, and this Court granted certiorari. In the UNC case, this Court granted certiorari before judgment.

Held: Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 2156 - 21761.

(a) Because SFFA complies with the standing requirements for organizational plaintiffs articulated by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383, SFFA's obligations under Article III are satisfied, and this Court has jurisdiction to consider the merits of SFFA's claims.

The Court rejects UNC's argument that SFFA lacks standing because it is not a "genuine" membership organization. An organizational plaintiff can satisfy Article III jurisdiction in two ways, one of which is to assert "standing solely as the representative of its members," *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343, an approach known as representational or organizational standing. To invoke it, an organization must satisfy the three-part test in *Hunt*. Respondents do not suggest that SFFA fails *Hunt*'s test for organizational standing. They argue instead that SFFA cannot invoke organizational standing at all because SFFA was not a genuine membership organization at the time it filed suit. Respondents maintain that, under *Hunt*, a group qualifies as a genuine membership organization only if it is controlled and funded by its members. In *Hunt*, this Court determined that a state agency with no traditional members could still qualify as a genuine membership organization in substance because the agency represented the interests of individuals and otherwise satisfied *Hunt*'s three-part test for organizational standing. See 432 U.S. at 342, 97 S.Ct. 2434. *Hunt*'s "indicia of membership" analysis, however, has no applicability here. As the courts below found, SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt*. Pp. 2156 - 2159.

(b) Proposed by Congress and ratified by the States in the wake of the Civil War, the Fourteenth Amendment provides that no State shall "deny to any person ... the equal protection of the laws." Proponents of the Equal Protection Clause described its "foundation[al] principle" as "not permit[ing] any distinctions of law based on race or color." Any "law which operates upon one man," they maintained, should "operate equally upon all." Accordingly, as this Court's early decisions interpreting the Equal Protection Clause explained, the Fourteenth Amendment guaranteed "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States."

Despite the early recognition of the broad sweep of the Equal Protection Clause, the Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873. Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208. But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149. By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. There, the Court overturned the separate but equal regime established in *Plessy* and began on the path of invalidating all *de jure* racial discrimination by the States and Federal

Government. The conclusion reached by the *Brown* Court was unmistakably clear: the right to a public education "must be made available to all on equal terms." 347 U.S. at 493, 74 S.Ct. 686. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083.

In the years that followed, *Brown*'s "fundamental principle that racial discrimination in public education is unconstitutional," *id.,* at 298, 75 S.Ct. 753, reached other areas of life—for example, state and local laws requiring segregation in busing, *Gayle v. Browder*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (*per curiam*); racial segregation in the enjoyment of public beaches and bathhouses *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (*per curiam*); and antimiscegenation laws, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. These decisions, and others like them, reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421.

Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750.

Any exceptions to the Equal Protection Clause's guarantee must survive a daunting two-step examination known as "strict scrutiny," *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158, which asks first whether the racial classification is used to "further compelling governmental interests," *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304, and second whether the government's use of race is "narrowly tailored," *i.e.,* "necessary," to achieve that interest, *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474. Acceptance of race-based state action is rare for a reason: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007. Pp. 2158 - 2163.

(c) This Court first considered whether a university may make race-based admissions decisions in *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750. In a deeply splintered decision that produced six different opinions, Justice Powell's opinion for himself alone would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325. After rejecting three of the University's four justifications as not sufficiently compelling, Justice Powell turned to its last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. Justice Powell found that interest to be "a constitutionally permissible goal for an institution of higher education," which was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." 438 U.S. at 311–312, 98 S.Ct. 2733. But a university's freedom was not unlimited—"[r]acial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. Accordingly, a university could not employ a two-track quota system with a specific number of seats reserved for individuals from a preferred ethnic group. *Id.,* at 315, 98 S.Ct. 2733. Neither still could a university use race to foreclose an individual from all consideration. *Id.,* at 318, 98 S.Ct. 2733. Race could only operate as "a 'plus' in a particular applicant's file," and even then it had to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Id.,* at 317, 98 S.Ct. 2733. Pp. 2162 - 2164.

(d) For years following *Bakke*, lower courts struggled to determine whether Justice Powell's decision was "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. Then, in *Grutter* v. *Bollinger*, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Ibid.* The *Grutter* majority's analysis tracked Justice Powell's in many respects, including its insistence on limits on how universities may consider race in their admissions programs. Those limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S.

469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (plurality opinion). Admissions programs could thus not operate on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs: At some point, the Court held, they must end. *Id.*, at 342, 123 S.Ct. 2325. Recognizing that "[e]nshrining a permanent justification for racial preferences would offend" the Constitution's unambiguous guarantee of equal protection, the Court expressed its expectation that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." *Id.*, at 343, 123 S.Ct. 2325. Pp. 2164 - 2166.

(e) Twenty years have passed since *Grutter*, with no end to race-based college admissions in sight. But the Court has permitted race-based college admissions only within the confines of narrow restrictions: such admissions programs must comply with strict scrutiny, may never use race as a stereotype or negative, and must—at some point—end. Respondents' admissions systems fail each of these criteria and must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment. Pp. 2165 - 2173.

(1) Respondents fail to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny. *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511. First, the interests that respondents view as compelling cannot be subjected to meaningful judicial review. Those interests include training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens. While these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. It is unclear how courts are supposed to measure any of these goals, or if they could, to know when they have been reached so that racial preferences can end. The elusiveness of respondents' asserted goals is further illustrated by comparing them to recognized compelling interests. For example, courts can discern whether the temporary racial segregation of inmates will prevent harm to those in the prison, see *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949, but the question whether a particular mix of minority students produces "engaged and productive citizens" or effectively "train[s] future leaders" is standardless.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, respondents measure the racial composition of their classes using racial categories that are plainly overbroad (expressing, for example, no concern whether *South* Asian or *East* Asian students are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern students). The unclear connection between the goals that respondents seek and the means they employ preclude courts from meaningfully scrutinizing respondents' admissions programs.

The universities' main response to these criticisms is "trust us." They assert that universities are owed deference when using race to benefit some applicants but not others. While this Court has recognized a "tradition of giving a degree of deference to a university's academic decisions," it has made clear that deference must exist "within constitutionally prescribed limits." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Respondents have failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires. Pp. 2166 - 2168.

(2) Respondents' race-based admissions systems also fail to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The First Circuit found that Harvard's consideration of race has resulted in fewer admissions of Asian-American students. Respondents' assertion that race is never a negative factor in their admissions programs cannot withstand scrutiny. College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.

Respondents admissions programs are infirm for a second reason as well: They require stereotyping—the very thing *Grutter* foreswore. When a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of

their race, think alike." *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762. Such stereotyping is contrary to the "core purpose" of the Equal Protection Clause. *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879. Pp. 2168 - 2169.

(3) Respondents' admissions programs also lack a "logical end point" as *Grutter* required. 539 U.S. at 342, 123 S.Ct. 2325. Respondents suggest that the end of race-based admissions programs will occur once meaningful representation and diversity are achieved on college campuses. Such measures of success amount to little more than comparing the racial breakdown of the incoming class and comparing it to some other metric, such as the racial makeup of the previous incoming class or the population in general, to see whether some proportional goal has been reached. The problem with this approach is well established: "[O]utright racial balancing" is "patently unconstitutional." *Fisher,* 570 U.S. at 311, 133 S.Ct. 2411. Respondents' second proffered end point—when students receive the educational benefits of diversity—fares no better. As explained, it is unclear how a court is supposed to determine if or when such goals would be adequately met. Third, respondents suggest the 25-year expectation in *Grutter* means that race-based preferences must be allowed to continue until at least 2028. The Court's statement in *Grutter*, however, reflected only that Court's expectation that race-based preferences would, by 2028, be unnecessary in the context of racial diversity on college campuses. Finally, respondents argue that the frequent reviews they conduct to determine whether racial preferences are still necessary obviates the need for an end point. But *Grutter* never suggested that periodic review can make unconstitutional conduct constitutional. Pp. 2169 - 2173.

(f) Because Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. At the same time, nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university. Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice. Pp. 39–40.

980 F.3d 157; 567 F.Supp.3d 580, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. THOMAS, J., filed a concurring opinion. GORSUCH, J., filed a concurring opinion, in which THOMAS, J., joined. KAVANAUGH, J., filed a concurring opinion. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which JACKSON, J., joined as it applies to No. 21–707. JACKSON, J., filed a dissenting opinion in No. 21–707, in which SOTOMAYOR and KAGAN, JJ., joined. JACKSON, J., took no part in the consideration or decision of the case in No. 20–1199.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***190** ****2154** In these cases we consider whether the admissions systems used by Harvard College and the University of North ***191** Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

***192** I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 ***193** people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. ***194** See 980 F.3d 157, 166–169 (CA1 2020). It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. *Ibid.* A rating of "1" is the best; a rating of "6" the worst. *Ibid.* In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. *Id.*, at 167–168. A score of "1" on the overall rating—a composite of the five other ratings—"signifies an exceptional candidate with >90% chance of admission." *Id.*, at 169 (internal quotation marks omitted). In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions committee. *Id.*, at 169–170. The subcommittees can and do take an applicant's race into account when making their recommendations. *Id.*, at 170.

****2155** The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. *Ibid.* At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off " in minority admissions from the prior class. 2 App. in No. 20–1199, pp. 744, 747–748. Each applicant considered by the full committee is discussed ***195** one by one, and every member of the committee must vote on admission. 980 F.3d at 170. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. *Ibid.* At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students

is disclosed to the committee. *Ibid.*; 2 App. in No. 20–1199, at 861.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. 980 F.3d at 170. The full committee decides as a group which students to lop. 397 F.Supp.3d 126, 144 (Mass. 2019). In doing so, the committee can and does take race into account. *Ibid.* Once the lop process is complete, Harvard's admitted class is set. *Ibid.* In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F.Supp.3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for its freshman class of 4,200." *Id.*, at 595.

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. *Id.*, at 596, 598. Readers are required to consider "[r]ace and ethnicity ... as one factor" in their review. *Id.*, at 597 (internal quotation marks omitted). Other factors include ***196** academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. *Id.*, at 600. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. *Ibid.* During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, ... extracurricular activities," and essays. *Id.*, at 616–617.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." *Id.*, at 598 (internal quotation marks omitted). In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." *Id.*, at 601 (internal quotation marks omitted). ****2156** The admissions decisions made by the first readers are, in most cases, "provisionally final." *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954, 2020 WL 13414000 (MDNC, Nov. 9, 2020), ECF Doc. 225, p. 7, ¶52.

Following the first read process, "applications then go to a process called 'school group review' ... where a committee composed of experienced staff members reviews every [initial] decision." 567 F.Supp.3d at 599. The review committee receives a report on each student which contains, among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their status as residents, legacies, or special recruits." *Ibid.* (footnote omitted). The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may ***197** also consider the applicant's race. *Id.*, at 607; 2 App. in No. 21–707, p. 407.[1]

C

[1] Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." 980 F.3d at 164 (internal quotation marks omitted). In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their ***198** race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2] ****2157** See 397 F.Supp.3d at 131–132; 567 F.Supp.3d at 585–586. The District Courts in both cases held bench trials to evaluate SFFA's claims. See 980 F.3d at 179; 567 F.Supp.3d at 588. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. See 397 F.Supp.3d at 132, 183. The First Circuit affirmed that determination. See 980 F.3d at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was

permissible under the Equal Protection Clause. 567 F.Supp.3d at 588, 666.

We granted certiorari in the Harvard case and certiorari before judgment in the UNC case. 595 U. S. ——, 142 S.Ct. 895, 211 L.Ed.2d 604 (2022).

II

[2] Before turning to the merits, we must assure ourselves of our jurisdiction. See *Summers v. Earth Island Institute*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). UNC argues that SFFA lacks standing to bring its claims because it is not a "genuine" membership organization. Brief for University Respondents in No. 21–707, pp. 23–26. Every court to have considered ***199** this argument has rejected it, and so do we. See *Students for Fair Admissions, Inc. v. University of Tex. at Austin*, 37 F.4th 1078, 1084–1086, and n. 8 (CA5 2022) (collecting cases).

[3] **[4]** Article III of the Constitution limits "[t]he judicial power of the United States" to "cases" or "controversies," ensuring that federal courts act only "as a necessity in the determination of real, earnest and vital" disputes. *Muskrat v. United States*, 219 U.S. 346, 351, 359, 31 S.Ct. 250, 55 L.Ed. 246 (1911) (internal quotation marks omitted). "To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 133, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011). That, in turn, requires a plaintiff to demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

[5] **[6]** In cases like these, where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert "standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The latter approach is known as representational or organizational standing. *Ibid.*; *Summers*, 555 U.S. at 497–498, 129 S.Ct. 1142. To invoke it, an organization must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

****2158** Respondents do not contest that SFFA satisfies the three-part test for organizational standing articulated in *Hunt*, and like the courts below, we find no basis in the record to conclude otherwise. See 980 F.3d at 182–184; ***200** 397 F.Supp.3d at 183–184; No. 1:14–cv–954 (MDNC, Sept. 29, 2018), App. D to Pet. for Cert. in No. 21–707, pp. 237–245 (2018 DC Opinion). Respondents instead argue that SFFA was not a "genuine 'membership organization' " when it filed suit, and thus that it could not invoke the doctrine of organizational standing in the first place. Brief for University Respondents in No. 21–707, at 24. According to respondents, our decision in *Hunt* established that groups qualify as genuine membership organizations only if they are controlled and funded by their members. And because SFFA's members did neither at the time this litigation commenced, respondents' argument goes, SFFA could not represent its members for purposes of Article III standing. Brief for University Respondents in No. 21–707, at 24 (citing *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434).

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington's apple industry. See *id.*, at 336–341, 97 S.Ct. 2434. We recognized, however, that as a state agency, "the Commission [wa]s not a traditional voluntary membership organization ..., for it ha[d] no members at all." *Id.*, at 342, 97 S.Ct. 2434. As a result, we could not easily apply the three-part test for organizational standing, which asks whether an organization's *members* have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were *effectively* members of the Commission. *Id.*, at 344, 97 S.Ct. 2434. The growers and dealers "alone elect[ed] the members of the Commission," "alone ... serve[d] on the Commission," and "alone finance[d] its activities"—they possessed, in other words, "all of the indicia of membership." *Ibid.* The Commission was therefore a genuine membership organization in substance, if not in form. And it was "clearly" entitled to ***201** rely on the

doctrine of organizational standing under the three-part test recounted above. *Id.*, at 343, 97 S.Ct. 2434.

[7] The indicia of membership analysis employed in *Hunt* has no applicability in these cases. Here, SFFA *is* indisputably a voluntary membership organization with identifiable members—it is not, as in *Hunt*, a state agency that concededly has no members. See 2018 DC Opinion 241–242. As the First Circuit in the Harvard litigation observed, at the time SFFA filed suit, it was "a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission." 980 F.3d at 184. Meanwhile in the UNC litigation, SFFA represented four members in particular—high school graduates who were denied admission to UNC. See 2018 DC Opinion 234. Those members filed declarations with the District Court stating "that they have voluntarily joined SFFA; they support its mission; they receive updates about the status of the case from SFFA's President; and they have had the opportunity to have input and direction on SFFA's case." *Id.*, at 234–235 (internal quotation marks omitted). Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates. Because SFFA complies with the standing requirements demanded of organizational ****2159** plaintiffs in *Hunt*, its obligations under Article III are satisfied.

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) ***202** (Cong. Globe). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." *Id.*, at 2462. And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.*, at 2766. For "[w]ithout this principle of equal justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

[8] At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder v. West Virginia*, 100 U.S. 303, 307–309, 25 L.Ed. 664. "[T]he broad and benign provisions of the Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to ... race and nationality" "which in the eye of the law is not justified." *Yick Wo v. Hopkins*, 118 U.S. 356, 368–369, 373–374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); see also *id.*, at 368, 6 S.Ct. 1064 (applying the Clause to "aliens and subjects of the Emperor of China"); *Truax v. Raich*, 239 U.S. 33, 36, 36 S.Ct. 7, 60 L.Ed. 131 (1915) ("a native of Austria"); semble *Strauder*, 100 U.S. at 308–309 ("Celtic Irishmen") (dictum).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly ***203** failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 381 (1949).

[9] After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education*, 347 U.S. 483, 491, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Some cases ****2160** in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex*

rel. Gaines v. Canada, 305 U.S. 337, 349–350, 59 S.Ct. 232, 83 L.Ed. 208 (1938) ("The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups ...."). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640–642, 70 S.Ct. 851, 94 L.Ed. 1149 (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal.... But they signify that the State ... sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

[10] The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned ***204** *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. 347 U.S. at 494–495, 74 S.Ct. 686. *Brown* concerned the permissibility of racial segregation in public schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." *Id.*, at 493, 74 S.Ct. 686 (emphasis added). The mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494, 74 S.Ct. 686.

[11] The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." *Id.*, at 493, 74 S.Ct. 686. As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952); see also Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief."); *post*, at 2197, n. 7 (THOMAS, J., concurring). The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown v. Board of Education*, 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." *Id.*, at 298, 75 S.Ct. 753.

[12] So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. In *Gayle* v. *Browder*, for example, we summarily affirmed a decision ***205** invalidating state and local laws that required segregation in busing. 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956) (*per curiam*). As the lower court explained, "[t]he equal protection clause requires equality of treatment ****2161** before the law for all persons without regard to race or color." *Browder v. Gayle*, 142 F.Supp. 707, 715 (MD Ala. 1956). And in *Mayor and City Council of Baltimore* v. *Dawson*, we summarily affirmed a decision striking down racial segregation at public beaches and bathhouses maintained by the State of Maryland and the city of Baltimore. 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) (*per curiam*). "It is obvious that racial segregation in recreational activities can no longer be sustained," the lower court observed. *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386, 387 (CA4 1955) (*per curiam*). "[T]he ideal of equality before the law which characterizes our institutions" demanded as much. *Ibid.*

[13] In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": " 'the Constitution ... forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (Harlan, J., for the Court)). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] ... all invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 8, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Id.*, at 11–12, 87 S.Ct. 1817; see also *Yick Wo*, 118 U.S. at 373–375, 6 S.Ct. 1064 (commercial property); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (housing covenants); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866

(1954) (composition of juries); *Dawson*, 350 U.S. at 877, 76 S.Ct. 133 (beaches and bathhouses); ***206** *Holmes v. Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955) (*per curiam*) (golf courses); *Browder*, 352 U.S. at 903, 77 S.Ct. 145 (busing); *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958) (*per curiam*) (public parks); *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) (*per curiam*) (transportation facilities); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (education); *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory jury strikes).

[14] These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (footnote omitted). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10, 87 S.Ct. 1817; see also *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

[15] Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly ****2162** held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U.S. at 369, 6 S.Ct. 1064. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290, 98 S.Ct. 2733.

[16] Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Under that standard we ask, first, whether the racial classification ***207** is used to "further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 311–312, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*) (internal quotation marks omitted).

[17] **[18]** Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); *Shaw v. Hunt*, 517 U.S. 899, 909–910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *post*, at 2186 - 2187, 2192 - 2193 (opinion of THOMAS, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson v. California*, 543 U.S. 499, 512–513, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).[3]

***208** **[19]** Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." ****2163** *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. 438 U.S. at 272–276, 98 S.Ct. 2733. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. *Id.*, at 272–275, 98 S.Ct. 2733. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. *Id.*, at 276–277, 98 S.Ct. 2733. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323, 123 S.Ct. 2325.

[20] Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group ***209** for no reason other than race or ethnic origin." *Bakke*, 438 U.S. at 306–307, 98 S.Ct. 2733 (internal quotation marks omitted). Yet that was "discrimination for its own sake," which "the Constitution forbids." *Id.*, at 307, 98 S.Ct. 2733 (citing, *inter alia*, *Loving*, 388 U.S. at 11, 87 S.Ct. 1817). Justice Powell next observed that the goal of "remedying ... the effects of 'societal discrimination' " was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733. Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas. *Id.*, at 310, 98 S.Ct. 2733.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." *Id.*, at 311–312, 98 S.Ct. 2733. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." *Id.*, at 312, 98 S.Ct. 2733.

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291, 98 S.Ct. 2733. A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." *Id.*, at 315, 98 S.Ct. 2733. Nor could it impose a "multitrack ****2164** program with a prescribed number of seats set aside for each identifiable category of applicants." *Ibid.* And neither still could it use race to foreclose an individual "from all consideration ... simply because he was not the right color." *Id.*, at 318, 98 S.Ct. 2733.

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." *Id.*, at 317, 98 S.Ct. 2733. And ***210** even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.* Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. *Id.*, at 316, 98 S.Ct. 2733. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." *Ibid.* (internal quotation marks omitted). Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." *Ibid.* (internal quotation marks omitted). The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions." *Ibid.* (internal quotation marks omitted).

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." *Id.*, at 362, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. In their view, it "seem[ed] clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government." *Id.*, at 416, 98 S.Ct. 2733 (Stevens, J., joined by Burger, C. J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). The Davis program therefore flatly contravened a core "principle imbedded in the constitutional *and* moral understanding of the times": the prohibition against "racial discrimination." *Id.*, at 418, n. 21, 98 S.Ct. 2733 (internal quotation marks omitted).

***211** C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U.S. at 325, 123 S.Ct. 2325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311, 123 S.Ct. 2325. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325, 123 S.Ct. 2325.

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328, 123 S.Ct. 2325. In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on ****2165** separate admissions tracks." *Id.*, at 334, 123 S.Ct. 2325. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority ***212** viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341, 123 S.Ct. 2325.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U.S. at 298, 98 S.Ct. 2733 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals," were "dangerous." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325. And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 341, 123 S.Ct. 2325 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342, 123 S.Ct. 2325. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid.*; see also ***213** *id.*, at 342–343, 123 S.Ct. 2325 (quoting N. Nathanson & C. Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chi. Bar Rec. 282, 293 (May–June 1977), for the proposition that "[i]t would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life").

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years ****2166** from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S. at 343, 123 S.Ct. 2325.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date

on it." Tr. of Oral Arg. in No. 20–1199, p. 85; Brief for Respondent in No. 201199, p. 52. Neither does UNC's. 567 F.Supp.3d at 612. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

***214** A

[21] **[22]** Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 381, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than ... an amorphous end to justify it." *Parents Involved*, 551 U.S. at 735, 127 S.Ct. 2738.

[23] **[24]** Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F.3d at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F.Supp.3d at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F.3d at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point ***215** at which there exists sufficient "innovation and problem-solving," or ****2167** students who are appropriately "engaged and productive." 567 F.Supp.3d at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U.S. at 512–513, 125 S.Ct. 1141. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. 567 F.Supp.3d at 656; 980 F.3d at 173–174. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

[25] Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational ***216** benefits of diversity, UNC works to avoid the

underrepresentation of minority groups, 567 F.Supp.3d at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year, Brief for Respondent in No. 20–1199, at 16. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397 F.Supp.3d at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories ... reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other ****2168** categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 2210 - 2211 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

***217** Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.' " *Parents Involved*, 551 U.S. at 724, 127 S.Ct. 2738 (quoting *Grutter*, 539 U.S. at 329, 123 S.Ct. 2325). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

[26] **[27]** The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. Brief for University Respondents in No. 21–707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," *ibid.*, and that "deference does not imply abandonment or abdication of judicial review," *Miller–El* v. *Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (internal quotation marks ***218** omitted). The programs at issue here do not satisfy that standard.[5]

B

[28] The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F.3d at 170, n. 29. And the District Court ****2169** observed that Harvard's "policy of considering applicants' race ... overall results in fewer Asian American and white students being admitted." 397 F.Supp.3d at 178.

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs,

but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." Brief for Respondent in No. 20–1199, at 51. But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative' " to be a student with lower grades and lower test scores. *Ibid.* This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit ***219** provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

[29] Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d at 633. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley*, 334 U.S. at 22, 68 S.Ct. 836.[6]

[30] Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause ***220** jurisprudence more generally. See, *e.g.*, *Schuette v. BAMN*, 572 U.S. 291, 308, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike ....' " (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993))).

Yet by accepting race-based admissions programs in which some students may obtain ****2170** preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U.S. at 316, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id.*, at 96 (analogizing being of a certain race to being from a rural area).

[31] We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

[32] "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517, 120 S.Ct. 1044. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that ***221** [students] of a particular race, because of their race, think alike," *Miller v. Johnson*, 515 U.S. 900, 911–912, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912, 115 S.Ct. 2475 (internal quotation marks omitted). Such stereotyping can only "cause[ ] continued hurt and injury," *Edmonson*, 500 U.S. at 631, 111 S.Ct. 2077, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U.S. at 432, 104 S.Ct. 1879.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. Tr. of Oral Arg. in No. 21–707, at 167. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," *id.*, at 86; or "precise number or percentage," *id.*, at 167; or "specified percentage," Brief for Respondent in No. 20–1199, at 38 (internal quotation marks omitted). So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F.Supp.3d at 146. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." *Ibid.*; see also *id.*, at 147 (District Court ***222** finding that Harvard uses race to "trac[k] how ****2171** each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity"); 2 App. in No. 20–1199, at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race

	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%
Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%

Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Brief for Petitioner in No. 20–1199 etc., p. 23. Harvard's focus on numbers is obvious.[7]

***223** UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," Brief for University Respondents in No. 21–707, at 7, a metric that turns solely on whether a group's "percentage enrollment ****2172** within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F.Supp.3d at 591, n. 7; see also Tr. of Oral Arg. in No. 21–707, at 79. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7; see also 567 F.Supp.3d at 594.

[33] **[34]** The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 (internal quotation marks omitted). That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U.S. at 911, 115 S.Ct. 2475 (internal quotation marks omitted). By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on ***224** its head. Their admissions programs "effectively assure[ ] that race will always be relevant ... and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U.S. at 495, 109 S.Ct. 706 (internal quotation marks omitted).

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. 567 F.Supp.3d at 656. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707, at 78; but see *Fisher II*, 579 U.S. at 381, 136 S.Ct. 2198 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable").

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U.S. at 343, 123 S.Ct. 2325. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. See Tr. of Oral Arg. in No. 20–1199, at 84–85; Tr. of Oral Arg. in No. 21–707, at 85–86. Indeed, the high school applicants that Harvard and ***225** UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews

to determine **2173 whether racial preferences are still necessary to achieve student body diversity." 539 U.S. at 342, 123 S.Ct. 2325. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 2163 - 2164.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F.Supp.3d at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

*226 V

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

[35] The dissents' interpretation of the Equal Protection Clause is not new. In *Bakke*, four Justices would have permitted race-based admissions programs to remedy the effects of societal discrimination. 438 U.S. at 362, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). But that minority view was just that—a minority view. Justice Powell, who provided the fifth vote and controlling opinion in *Bakke*, firmly rejected the notion that societal discrimination constituted a compelling interest. Such an interest presents "an amorphous concept of injury that may be ageless in its reach into the past," he explained. *Id.*, at 307, 98 S.Ct. 2733. It cannot "justify a [racial] classification that imposes disadvantages upon persons ... who bear no responsibility for whatever harm the beneficiaries of the [race-based] admissions program are thought to have suffered." *Id.*, at 310, 98 S.Ct. 2733.

The Court soon adopted Justice Powell's analysis as its own. In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest," we said plainly in *Hunt*, a 1996 case about the Voting Rights Act. 517 U.S. at 909–910, 116 S.Ct. 1894. We reached the same conclusion in *Croson*, a case that concerned a preferential government contracting program. Permitting "past societal discrimination" to "serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief ' for every disadvantaged *227 group." 488 U.S. at 505, 109 S.Ct. 706. Opening that door would shutter another—"[t]he dream of a Nation of equal citizens ... would be lost," we observed, "in a mosaic of shifting **2174 preferences based on inherently unmeasurable claims of past wrongs." *Id.*, at 505–506, 109 S.Ct. 706. "[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Id.*, at 506, 109 S.Ct. 706.

The dissents here do not acknowledge any of this. They fail to cite *Hunt*. They fail to cite *Croson*. They fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before. There is a reason the principal dissent must invoke Justice Marshall's partial dissent in *Bakke* nearly a dozen times while mentioning Justice Powell's controlling opinion barely once (Justice JACKSON's opinion ignores Justice Powell altogether). For what one dissent denigrates as "rhetorical flourishes about colorblindness," *post*, at 2232 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of *stare decisis* while pursuing it.[8]

[36] The dissents are no more faithful to our precedent on race-based admissions. To hear the principal dissent tell it, *Grutter* blessed such programs indefinitely, until "racial inequality *228 will end." *Post*, at 2255 (opinion

of SOTOMAYOR, J.). But *Grutter* did no such thing. It emphasized—not once or twice, but at least six separate times—that race-based admissions programs "must have reasonable durational limits" and that their "deviation from the norm of equal treatment" must be "a temporary matter." 539 U.S. at 342, 123 S.Ct. 2325. The Court also disclaimed "[e]nshrining a permanent justification for racial preferences." *Ibid.* Yet the justification for race-based admissions that the dissent latches on to is just that—unceasing.

The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a "*sui generis*" race-based admissions program used by the University of Texas, 579 U.S. at 377, 136 S.Ct. 2198, whose "goal" it was to enroll a "critical mass" of certain minority students, *Fisher I*, 570 U.S. at 297, 133 S.Ct. 2411. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator).

Fisher II also recognized the "enduring challenge" that race-based admissions systems place on "the constitutional promise of equal treatment." 579 U.S. at 388, 136 S.Ct. 2198. The Court thus reaffirmed the "continuing obligation" of universities "to satisfy the burden of strict scrutiny." *Id.*, at 379, 136 S.Ct. 2198. To drive the point home, *Fisher II* limited itself just as ****2175** *Grutter* had—in duration. The Court stressed that its decision did "*not* necessarily mean the University may rely on the same policy" going forward. 579 U.S. at 388, 136 S.Ct. 2198 (emphasis added); see also *Fisher I*, 570 U.S. at 313, 133 S.Ct. 2411 (recognizing that "*Grutter* ... approved the plan at issue upon concluding that it ... was limited in time"). And the Court openly acknowledged ***229** that its decision offered limited "prospective guidance." *Fisher II*, 579 U.S. at 379, 136 S.Ct. 2198.[9]

The principal dissent wrenches our case law from its context, going to lengths to ignore the parts of that law it does not like. The serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences go unrecognized. The unambiguous requirements of the Equal Protection Clause—"the most rigid," "searching" scrutiny it entails—go without note. *Fisher I*, 570 U.S. at 310, 133 S.Ct. 2411. And the repeated demands that race-based admissions programs must end go overlooked—contorted, worse still, into a demand that such programs never stop.

Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is "*inherently* unequal," said *Brown,* 347 U.S. at 495, 74 S.Ct. 686 (emphasis added). It depends, says the dissent.

***230** That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo. "Justice Harlan knew better," one of the dissents decrees. *Post*, at 2265 (opinion of JACKSON, J.). Indeed he did:

> "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

****2176** **[37]** **[38]** At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. See, *e.g.*, 4 App. in No. 21–707, at 1725–1726, 1741; Tr. of Oral Arg. in No. 20–1199, at 10. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other

means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1867). A benefit ***231** to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

The judgments of the Court of Appeals for the First Circuit and of the District Court for the Middle District of North Carolina are reversed.

It is so ordered.

Justice JACKSON took no part in the consideration or decision of the case in No. 20–1199.

Justice THOMAS, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Amdts. 13, 14. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. After forsaking the principle for decades, offering a judicial *imprimatur* to segregation ***232** and ushering in the Jim Crow era, the Court finally corrected course in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), announcing that primary schools must either desegregate with all deliberate speed or else close their doors. See also *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*). It then pulled back in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), permitting universities to discriminate based on race in their admissions process (though only temporarily) in order to achieve alleged "educational benefits of diversity." *Id.*, at 319, 123 S.Ct. 2325. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I wrote separately in *Grutter*, explaining that the use of race in higher education ****2177** admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. *Id.*, at 351, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 315, 328, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (concurring opinion) (*Fisher I*); *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 389, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (dissenting opinion). Today, and despite a lengthy interregnum, the Constitution prevails.

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with ***233** the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no*

textual reference to race whatsoever. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record —particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color." Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 115 (U. S. *Brown* Reargument Brief).

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." 163 U.S. at 559, 16 S.Ct. 1138. It was the view of the Court in *Brown*, which rejected " 'any authority ... to use race as a factor in affording educational opportunities.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 747, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). And, it is the view adopted in the Court's opinion today, requiring "the absolute equality of all citizens" under the law. *Ante*, at 2159 (internal quotation marks omitted).

A

In its 1864 election platform, the Republican Party pledged to amend the Constitution to accomplish the "utter ***234** and complete extirpation" of slavery from "the soil of the Republic." 2 A. Schlesinger, History of U. S. Political Parties 1860–1910, p. 1303 ****2178** (1973). After their landslide victory, Republicans quickly moved to make good on that promise. Congress proposed what would become the Thirteenth Amendment to the States in January 1865, and it was ratified as part of the Constitution later that year. The new Amendment stated that "[n]either slavery nor involuntary servitude ... shall exist" in the United States "except as a punishment for crime whereof the party shall have been duly convicted." § 1. It thus not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it "allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system." A. Amar, America's Constitution: A Biography 362 (2005) (internal quotation marks omitted). The Amendment also authorized "Congress ... to enforce" its terms "by appropriate legislation"—authority not granted in any prior Amendment. § 2. Proponents believed this enforcement clause permitted legislative measures designed to accomplish the Amendment's broader goal of equality for the freedmen.

It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment's adoption, the reconstructed Southern States began to enact "Black Codes," which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, "imposed all sorts of disabilities" on blacks, "including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting." E. Foner, The Second Founding 48 (2019).

Congress responded with the landmark Civil Rights Act of 1866, 14 Stat. 27, in an attempt to pre-empt the Black ***235** Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress' authority under the Thirteenth Amendment. As enacted, it stated:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white

citizens in the categories enumerated. See M. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 958 (1995) ("Note that the bill neither forbade racial discrimination generally nor did it guarantee particular rights to all persons. Rather, it required an equality in certain specific rights"). And, while the 1866 Act used the rights of **2179 "white citizens" as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens "of every race and color" and providing the same rights to all.

*236 The 1866 Act's evolution further highlights its rule of equality. To start, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), had previously held that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." *Id.*, at 407, 411. The Act, however, would effectively overrule *Dred Scott* and ensure the equality that had been promised to blacks. But the Act went further still. On January 29, 1866, Senator Lyman Trumbull, the bill's principal sponsor in the Senate, proposed text stating that "all persons of African descent born in the United States are hereby declared to be citizens." Cong. Globe, 39th Cong., 1st Sess., 474. The following day, Trumbull revised his proposal, removing the reference to "African descent" and declaring more broadly that "all persons born in the United States, and not subject to any foreign Power," are "citizens of the United States." *Id.*, at 498.

"In the years before the Fourteenth Amendment's adoption, jurists and legislators often connected citizenship with equality," where "the absence or presence of one entailed the absence or presence of the other." *United States* v. *Vaello Madero*, 596 U. S. ——, ——, 142 S.Ct. 1539, 1547, 212 L.Ed.2d 496 (2022) (THOMAS, J., concurring). The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. Indeed, the drafters later included a specific carveout for "Indians not taxed," demonstrating the breadth of the bill's otherwise general citizenship language. 14 Stat. 27.[1] As Trumbull explained, the provision created a bond between all Americans; "any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens," was "an unjust encroachment upon his liberty" and a "badge of servitude" prohibited *237 by the Constitution. Cong. Globe, 39th Cong., 1st Sess., at 474 (emphasis added).

Trumbull and most of the Act's other supporters identified the Thirteenth Amendment as a principal source of constitutional authority for the Act's nondiscrimination provisions. See, *e.g.*, *id.*, at 475 (statement of Sen. Trumbull); *id.*, at 1152 (statement of Rep. Thayer); *id.*, at 503–504 (statement of Sen. Howard). In particular, they explained that the Thirteenth Amendment allowed Congress not merely to legislate against slavery itself, but also to counter measures "which depriv[e] any citizen of civil rights which are secured to other citizens." *Id.*, at 474.

But opponents argued that Congress' authority did not sweep so broadly. President Andrew Johnson, for example, contended that Congress lacked authority to pass the measure, seizing on the breadth of the citizenship text and emphasizing state authority over matters of state citizenship. See S. Doc. No. 31, 39th Cong., 1st Sess., 1, 6 (1866) (Johnson veto message). Consequently, "doubts about the constitutional authority conferred by that measure led supporters to supplement their Thirteenth Amendment arguments with other sources of constitutional authority." R. Williams, **2180 Originalism and the Other Desegregation Decision, 99 Va. L. Rev. 493, 532–533 (2013) (describing appeals to the naturalization power and the inherent power to protect the rights of citizens). As debates continued, it became increasingly apparent that safeguarding the 1866 Act, including its promise of black citizenship and the equal rights that citizenship entailed, would require further submission to the people of the United States in the form of a proposed constitutional amendment. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 498 (statement of Sen. Van Winkle).

B

Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the *238 principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. One such proposal, approved by the Joint Committee on Reconstruction and then submitted to the House of Representatives on February 26, 1866, would have declared that "[t]he Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." *Id.*, at 1033–1034. Representative John Bingham, its drafter,

was among those who believed Congress lacked the power to enact the 1866 Act. See *id.*, at 1291. Specifically, he believed the "very letter of the Constitution" already required equality, but the enforcement of that requirement "is of the reserved powers of the States." Cong. Globe, 39th Cong., 1st Sess., at 1034, 1291 (statement of Rep. Bingham). His proposed constitutional amendment accordingly would provide a clear constitutional basis for the 1866 Act and ensure that future Congresses would be unable to repeal it. See W. Nelson, The Fourteenth Amendment 48–49 (1988).

Discussion of Bingham's initial draft was later postponed in the House, but the Joint Committee on Reconstruction continued its work. See 2 K. Lash, The Reconstruction Amendments 8 (2021). In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, "[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude." S. Doc. No. 711, 63d Cong., 1st Sess., 31–32 (1915) (reprinting the Journal of the Joint Committee on Reconstruction for the Thirty-Ninth Congress). Stevens' proposal was later revised to read as follows: " 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any ***239** person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' " *Id.*, at 39. This revised text was submitted to the full House on April 30, 1866. Cong. Globe, 39th Cong., 1st Sess., at 2286–2287. Like the eventual first section of the Fourteenth Amendment, this proposal embodied the familiar Privileges or Immunities, Due Process, and Equal Protection Clauses. And, importantly, it also featured an enforcement clause—with text borrowed from the Thirteenth Amendment—conferring upon Congress the power to enforce its provisions. *Ibid.*

Stevens explained that the draft was intended to "allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." *Id.*, at 2459. Moreover, Stevens' later statements indicate that he did not believe there was a ****2181** difference "in substance between the new proposal and" earlier measures calling for impartial and equal treatment without regard to race. U. S. *Brown* Reargument Brief 44 (noting a distinction only with respect to a suffrage provision). And, Bingham argued that the need for the proposed text was "one of the lessons that have been taught ... by the history of the past four years of terrific conflict" during the Civil War. Cong. Globe, 39th Cong., 1st Sess., at 2542. The proposal passed the House by a vote of 128 to 37. *Id.*, at 2545.

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?" *Id.*, at 2766. In keeping with this view, he proposed an introductory sentence, declaring that " 'all persons born in the United States, and ***240** subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.' " *Id.*, at 2869. This text, the Citizenship Clause, was the final missing element of what would ultimately become § 1 of the Fourteenth Amendment. Howard's draft for the proposed citizenship text was modeled on the Civil Rights Act of 1866's text, and he suggested the alternative language to "remov[e] all doubt as to what persons are or are not citizens of the United States," a question which had "long been a great desideratum in the jurisprudence and legislation of this country." *Id.*, at 2890. He further characterized the addition as "simply declaratory of what I regard as the law of the land already." *Ibid.*

The proposal was approved in the Senate by a vote of 33 to 11. *Id.*, at 3042. The House then reconciled differences between the two measures, approving the Senate's changes by a vote of 120 to 32. See *id.*, at 3149. And, in June 1866, the amendment was submitted to the States for their consideration and ratification. Two years later, it was ratified by the requisite number of States and became the Fourteenth Amendment to the United States Constitution. See 15 Stat. 706–707; *id.*, at 709–711. Its opening words instilled in our Nation's Constitution a new birth of freedom:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." § 1.

As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. It begins by

guaranteeing citizenship status, invoking the "longstanding ***241** political and legal tradition that closely associated the status of citizenship with the entitlement to legal equality." *Vaello Madero*, 596 U. S., at ——, 142 S.Ct., at 1547 (THOMAS, J., concurring) (internal quotation marks omitted). It then confirms that States may not "abridge the rights of national citizenship, including whatever civil equality is guaranteed to 'citizens' under the Citizenship Clause." *Id.*, at ——, n. 3, 142 S.Ct., at 1550 n. 3. Finally, it pledges that even noncitizens must be treated equally "as individuals, and not as members of racial, ethnic, or religious groups." ****2182** *Missouri v. Jenkins*, 515 U.S. 70, 120–121, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring).

The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment's overall goal. "The available materials ... show," however, "that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color." U. S. *Brown* Reargument Brief 65 (citation omitted). For example, the Pennsylvania debate suggests that the Fourteenth Amendment was understood to make the law "what justice is represented to be, blind" to the "color of [one's] skin." App. to Pa. Leg. Record XLVIII (1867) (Rep. Mann).

The most commonly held view today—consistent with the rationale repeatedly invoked during the congressional debates, see, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 2458–2469—is that the Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses. See, *e.g.*, J. Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L. J. 1385, 1388 (1992) (noting that the "primary ***242** purpose" of the Fourteenth Amendment "was to mandate certain rules of racial equality, especially those contained in Section 1 of the Civil Rights Act of 1866").[2] The Amendment's phrasing supports this view, and there does not appear to have been any argument to the contrary predating *Brown*.

Consistent with the Civil Rights Act of 1866's aim, the Amendment definitively overruled Chief Justice Taney's opinion in *Dred Scott* that blacks "were not regarded as a portion of the people or citizens of the Government" and "had no rights which the white man was bound to respect." 19 How. at 407, 411. And, like the 1866 Act, the Amendment also clarified that American citizenship conferred rights not just against the Federal Government but also the government of the citizen's State of residence. Unlike the Civil Rights Act, however, the Amendment employed a wholly race-neutral text, extending privileges or immunities to all "citizens"—even if its practical effect was to provide all citizens with the same privileges then enjoyed by whites. That citizenship guarantee was often linked with the concept of equality. *Vaello Madero*, 596 U. S., at ——, 142 S.Ct., at 1548 (THOMAS, J., concurring). Combining the citizenship guarantee with the Privileges or Immunities Clause and the Equal Protection Clause, the Fourteenth Amendment ensures protection for all equal citizens of the Nation without regard to race. Put succinctly, "[o]ur Constitution is color-blind." ****2183** *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

***243** C

In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875, ch. 114, 18 Stat. 335–337, and the justifications offered by proponents of that measure are further evidence for the colorblind view of the Fourteenth Amendment.

The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era. Advocates of so-called separate-but-equal systems, which allowed segregated facilities for blacks and whites, had argued that laws permitting or requiring such segregation treated members of both races precisely alike: Blacks could not attend a white school, but symmetrically, whites could not attend a black school. See *Plessy*, 163 U.S. at 544, 16 S.Ct. 1138 (arguing that, in light of the social circumstances at the time, racial segregation did not "necessarily imply the inferiority of either race to the other"). Congress was not persuaded. Supporters of the soon-to-be 1875 Act successfully countered that symmetrical restrictions

did not constitute equality, and they did so on colorblind terms.

For example, they asserted that "free government demands the abolition of all distinctions founded on color and race." 2 Cong. Rec. 4083 (1874). And, they submitted that "[t]he time has come when all distinctions that grew out of slavery ought to disappear." Cong. Globe, 42d Cong., 2d Sess., 3193 (1872) ("[A]s long as you have distinctions and discriminations between white and black in the enjoyment of legal rights and privileges[,] you will have discontent and parties divided between black and white"). Leading Republican Senator Charles Sumner compellingly argued that "any rule excluding a man on account of his color is an indignity, an insult, and a wrong." *Id.*, at 242; see also *ibid.* ("I insist ***244** that by the law of the land all persons without distinction of color shall be equal before the law"). Far from conceding that segregation would be perceived as inoffensive if race roles were reversed, he declared that "[t]his is plain oppression, which you ... would feel keenly were it directed against you or your child." *Id.*, at 384. He went on to paraphrase the English common-law rule to which he subscribed: "[The law] makes no discrimination on account of color." *Id.*, at 385.

Others echoed this view. Representative John Lynch declared that "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875). Senator John Sherman believed that the route to peace was to "[w]ipe out all legal discriminations between white and black [and] make no distinction between black and white." Cong. Globe, 42d Cong., 2d Sess., at 3193. And, Senator Henry Wilson sought to "make illegal all distinctions on account of color" because "there should be no distinction recognized by the laws of the land." *Id.*, at 819; see also 3 Cong. Rec., at 956 (statement of Rep. Cain) ("[M]en [are] formed of God equally .... The civil-rights bill simply declares this: that there shall be no discriminations between citizens of this land so far as the laws of the land are concerned"). The view of the Legislature was clear: The Constitution "neither knows nor tolerates classes among citizens." ****2184** *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting).

D

The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. Their statements characterizing the Amendment evidence its commitment to equal rights for all citizens, regardless of the color of their skin. See *ante*, at 2159 – 2160.

In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), the Court identified the "pervading purpose" of the Reconstruction ***245** Amendments as "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 67–72. Yet, the Court quickly acknowledged that the language of the Amendments did not suggest "that no one else but the negro can share in this protection." *Id.*, at 72. Rather, "[i]f Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, [the Thirteenth Amendment] may safely be trusted to make it void." *Ibid.* And, similarly, "if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." *Ibid.* The Court thus made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races, including Asian Americans, ensuring all citizens equal treatment under law.

Seven years later, the Court relied on the *Slaughter-House* view to conclude that "[t]he words of the [Fourteenth A]mendment ... contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored." *Strauder v. West Virginia*, 100 U.S. 303, 307–308, 25 L.Ed. 664 (1880). The Court thus found that the Fourteenth Amendment banned "expres[s]" racial classifications, no matter the race affected, because these classifications are "a stimulant to ... race prejudice." *Id.*, at 308. See also *ante*, at 2159 – 2160. Similar statements appeared in other cases decided around that time. See *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and ***246** criminal, of the two races exactly the same"); *Ex parte Virginia*, 100 U.S. 339, 344–345, 25 L.Ed. 676 (1880) ("One great purpose of [the Thirteenth and Fourteenth Amendments] was to raise the colored race from that condition of inferiority and servitude in which most of

them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States").

This Court's view of the Fourteenth Amendment reached its nadir in *Plessy*, infamously concluding that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U.S. at 544, 16 S.Ct. 1138. That holding stood in sharp contrast to the Court's earlier embrace of the Fourteenth Amendment's equality ideal, as Justice Harlan emphasized in dissent: The Reconstruction Amendments had aimed to remove "the race line from our systems of governments." *Id.*, at 563, 16 S.Ct. 1138. For Justice Harlan, the Constitution was ****2185** colorblind and categorically rejected laws designed to protect "a dominant race—a superior class of citizens," while imposing a "badge of servitude" on others. *Id.*, at 560–562, 16 S.Ct. 1138.

History has vindicated Justice Harlan's view, and this Court recently acknowledged that *Plessy* should have been overruled immediately because it "betrayed our commitment to 'equality before the law.' " *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ——, ——, 142 S.Ct. 2228, 2265, 213 L.Ed.2d 545 (2022). Nonetheless, and despite Justice Harlan's efforts, the era of state-sanctioned segregation persisted for more than a half century.

E

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an "antisubordination" view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in ***247** the original meaning of the Fourteenth Amendment. Respondents cite a smattering of federal and state statutes passed during the years surrounding the ratification of the Fourteenth Amendment. And, Justice SOTOMAYOR's dissent argues that several of these statutes evidence the ratifiers' understanding that the Equal Protection Clause "permits consideration of race to achieve its goal." *Post*, at 2228. Upon examination, however, it is clear that these statutes are fully consistent with the colorblind view.

Start with the 1865 Freedmen's Bureau Act. That Act established the Freedmen's Bureau to issue "provisions, clothing, and fuel ... needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children" and the setting "apart, for the use of loyal refugees and freedmen," abandoned, confiscated, or purchased lands, and assigning "to every male citizen, whether refugee or freedman, ... not more than forty acres of such land." Ch. 90, §§ 2, 4, 13 Stat. 507. The 1866 Freedmen's Bureau Act then expanded upon the prior year's law, authorizing the Bureau to care for all loyal refugees and freedmen. Ch. 200, 14 Stat. 173–174. Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. And, because "not all blacks in the United States were former slaves," " 'freedman' " was a decidedly under-inclusive proxy for race. M. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 98 (2013) (Rappaport). Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees. P. Moreno, Racial Classifications and Reconstruction Legislation, 61 J. So. Hist. 271, 276–277 (1995); R. Barnett & E. Bernick, The Original Meaning of the Fourteenth Amendment 119 (2021). And, advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination. To the contrary, they explicitly clarified that the equality sought by the law was not one in which all men shall be "six feet high"; ***248** rather, it strove to ensure that freedmen enjoy "equal rights before the law" such that "each man shall have the right to pursue in his own way life, liberty, and happiness." Cong. Globe, 39th Cong., 1st Sess., at 322, 342.

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. For example, an 1866 law adopted special rules and procedures for the payment of "colored" servicemen in the Union Army to agents who helped them secure bounties, pensions, and other payments that they were due. 14 Stat. 367–368. At ****2186** the time, however, Congress believed that many "black servicemen were significantly overpaying for these agents' services in part because [the servicemen] did not understand how the payment system operated." Rappaport 110; see also S. Siegel, The Federal Government's Power To Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 561 (1998). Thus, while this legislation appears to have provided a discrete race-based benefit, its aim—to prohibit race-based exploitation—may not have been possible at the time without using a racial screen. In other words, the statute's racial classifications may well have survived strict scrutiny. See Rappaport 111–112. Another law, passed in 1867, provided funds for "freedmen or destitute

colored people" in the District of Columbia. Res. of Mar. 16, 1867, No. 4, 15 Stat. 20. However, when a prior version of this law targeting only blacks was criticized for being racially discriminatory, "it was defended on the grounds that there were various places in the city where former slaves ... lived in densely populated shantytowns." Rappaport 104–105 (citing Cong. Globe, 39th Cong., 1st Sess., at 1507). Congress thus may have enacted the measure not because of race, but rather to address a special problem in shantytowns in the District where blacks lived.

These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action "undo[ing] the effects of past discrimination in [a way] ***249** that do[es] not involve classification by race," even though they had "a racially disproportionate impact." *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in judgment) (internal quotation marks omitted). The government can plainly remedy a race-based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness. See *id.*, at 505, 109 S.Ct. 706 (majority opinion). In that way, "[r]ace-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were ... not inconsistent with the colorblind Constitution." *Parents Involved*, 551 U.S. at 772, n. 19, 127 S.Ct. 2738 (THOMAS, J., concurring). Moreover, the very same Congress passed both these laws *and* the unambiguously worded Civil Rights Act of 1866 that clearly prohibited discrimination on the basis of race.[3] And, as noted above, the proponents of these laws explicitly sought equal rights without regard to race while disavowing any antisubordination view.

Justice SOTOMAYOR argues otherwise, pointing to "a number of race-conscious" federal laws passed around the time of the Fourteenth Amendment's enactment. *Post*, at 2228 (dissenting opinion). She identifies the Freedmen's Bureau Act of 1865, already discussed above, as one such law, but she admits that the programs did not benefit blacks exclusively. She also does not dispute that legislation targeting the needs of newly freed blacks in 1865 could be understood as directly remedial. Even today, nothing prevents the States from according an admissions preference to identified victims of discrimination. See *Croson*, 488 U.S. at 526, 109 S.Ct. 706 ***250** (opinion of Scalia, J.) ("While most of the beneficiaries might be black, neither the ****2187** beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*" (emphasis in original)); see also *ante*, at 2175 – 2176.

Justice SOTOMAYOR points also to the Civil Rights Act of 1866, which as discussed above, mandated that all citizens have the same rights as those "enjoyed by white citizens." 14 Stat. 27. But these references to the station of white citizens do not refute the view that the Fourteenth Amendment is colorblind. Rather, they specify that, in meeting the Amendment's goal of equal citizenship, States must level up. The Act did not single out a group of citizens for special treatment—rather, all citizens were meant to be treated the same as those who, at the time, had the full rights of citizenship. Other provisions of the 1866 Act reinforce this view, providing for equality in civil rights. See Rappaport 97. Most notably, § 14 stated that the basic civil rights of citizenship shall be secured "without respect to race or color." 14 Stat. 176–177. And, § 8 required that funds from land sales must be used to support schools "without distinction of color or race, ... in the parishes of " the area where the land had been sold. *Id.*, at 175.

In addition to these federal laws, Harvard also points to two state laws: a South Carolina statute that placed the burden of proof on the defendant when a "colored or black" plaintiff claimed a violation, 1870 S. C. Acts pp. 387–388, and Kentucky legislation that authorized a county superintendent to aid "negro paupers" in Mercer County, 1871 Ky. Acts pp. 273–274. Even if these statutes provided race-based benefits, they do not support respondents' and Justice SOTOMAYOR's view that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures. Cf., *e.g.*, O. Fiss, Groups and the Equal Protection Clause, 5 Philos. & Pub. Aff. 107, 147 (1976) (articulating the antisubordination view); ***251** R. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*, 117 Harv. L. Rev. 1470, 1473, n. 8 (2004) (collecting scholarship). At most, these laws would support the kinds of discrete remedial measures that our precedents have permitted.

If services had been given only to white persons up to the Fourteenth Amendment's adoption, then providing those same services only to previously excluded black persons would work to equalize treatment against a concrete baseline of government-imposed inequality. It thus may have been the case that Kentucky's county-specific, race-based public

aid law was necessary because that particular county was not providing certain services to local poor blacks. Similarly, South Carolina's burden-shifting framework (where the substantive rule being applied remained notably race neutral) may have been necessary to streamline litigation around the most commonly litigated type of case: a lawsuit seeking to remedy discrimination against a member of the large population of recently freed black Americans. See 1870 S. C. Acts, at 386 (documenting "persist[ent]" racial discrimination by state-licensed entities).

Most importantly, however, there was a wide range of federal and state statutes enacted at the time of the Fourteenth Amendment's adoption and during the period thereafter that explicitly sought to discriminate *against* blacks on the basis of race or a proxy for race. See Rappaport 113–115. These laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate. Yet, proponents of an antisubordination view necessarily do not take those ****2188** laws as evidence of the Fourteenth Amendment's true meaning. And rightly so. Neither those laws, nor a small number of laws that appear to target blacks for preferred treatment, displace the equality vision reflected in the history of the Fourteenth Amendment's enactment. This is particularly true in light of the clear equality requirements present in the ***252** Fourteenth Amendment's text. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ——, —— – ——, 142 S.Ct. 2111, 2128–2129, 213 L.Ed.2d 387 (2022) (noting that text controls over inconsistent postratification history).

II

Properly understood, our precedents have largely adhered to the Fourteenth Amendment's demand for colorblind laws.[4] That is why, for example, courts "must subject all racial classifications to the strictest of scrutiny." *Jenkins*, 515 U.S. at 121, 115 S.Ct. 2038 (THOMAS, J., concurring); see also *ante*, at 2166, n. 4 (emphasizing the consequences of an insufficiently searching inquiry). And, in case after case, we have employed strict scrutiny vigorously to reject various forms of racial discrimination as unconstitutional. See *Fisher I*, 570 U.S. at 317–318, 133 S.Ct. 2411 (THOMAS, J., concurring). The Court today rightly upholds that tradition and acknowledges the consequences that have flowed from *Grutter*'s contrary approach.

Three aspects of today's decision warrant comment: First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental ***253** discrimination must be closely tailored to address *that* particular past governmental discrimination.

A

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter* recognized "only one" interest sufficiently compelling to justify race-conscious admissions programs: the "educational benefits of a diverse student body." 539 U.S. at 328, 333, 123 S.Ct. 2325. Expanding on this theme, Harvard and UNC have offered a grab bag of interests to justify their programs, spanning from " 'training future leaders in the public and private sectors' " to " 'enhancing appreciation, respect, and empathy,' " with references to " 'better educating [their] students through diversity' " in between. *Ante*, at 2166. The Court today finds that each of these interests are too vague and immeasurable to suffice, *ibid.*, and I agree.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a ****2189** diverse student body." 539 U.S. at 333, 123 S.Ct. 2325. Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link.

Harvard, for example, offers a report finding that meaningful representation of racial minorities promotes several goals. Only one of those goals—"producing new knowledge stemming from diverse outlooks," 980 F.3d 157, 174 (CA1 2020)—bears any possible relationship to educational benefits. Yet, it too is extremely vague and offers no indication that, for example, student test scores increased as a result of Harvard's efforts toward racial diversity.

More fundamentally, it is not clear how racial diversity, as opposed to other forms of diversity, uniquely and independently advances Harvard's goal. This is particularly true because ***254** Harvard blinds itself to other forms of applicant diversity, such as religion. See 2 App. in No. 20–

1199, pp. 734–743. It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students' reasoning skills. But, it is not clear how diversity with respect to race, *qua* race, furthers this goal. Two white students, one from rural Appalachia and one from a wealthy San Francisco suburb, may well have more diverse outlooks on this metric than two students from Manhattan's Upper East Side attending its most elite schools, one of whom is white and other of whom is black. If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." Brief for University Respondents in No. 21707, p. 39. This may well be important to a university experience, but it is a *social* goal, not an educational one. See *Grutter*, 539 U.S. at 347–348, 123 S.Ct. 2325 (Scalia, J., concurring in part and dissenting in part) (criticizing similar rationales as divorced from educational goals). And, again, UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.

Nor have *amici* pointed to any concrete and quantifiable *educational* benefits of racial diversity. The United States focuses on alleged civic benefits, including "increasing tolerance and decreasing racial prejudice." Brief for United States as *Amicus Curiae* 21–22. Yet, when it comes to educational benefits, the Government offers only one study purportedly showing that "college diversity experiences are significantly and positively related to cognitive development" and that "interpersonal interactions with racial diversity are the most strongly related to cognitive development." ***255** N. Bowman, College Diversity Experiences and Cognitive Development: A Meta-Analysis, 80 Rev. Educ. Research 4, 20 (2010). Here again, the link is, at best, tenuous, unspecific, and stereotypical. Other *amici* assert that diversity (generally) fosters the even-more nebulous values of "creativity" and "innovation," particularly in graduates' future workplaces. See, *e.g.*, Brief for Major American Business Enterprises as *Amici Curiae* 7–9; Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 16–17 (describing experience at IBM). Yet, none of those assertions deals exclusively with *racial* diversity—as ****2190** opposed to cultural or ideological diversity. And, none of those *amici* demonstrate measurable or concrete benefits that have resulted from universities' race-conscious admissions programs.

Of course, even if these universities had shown that racial diversity yielded any concrete or measurable benefits, they would still face a very high bar to show that their interest is compelling. To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. See *Cooper v. Aaron*, 358 U.S. 1, 16, 78 S.Ct. 1401, 3 L.Ed.2d 5, 3 L.Ed.2d 19 (1958) (following *Brown*, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights"). As the Court's opinions in these cases make clear, all racial stereotypes harm and demean individuals. That is why "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity" sufficient to satisfy strict scrutiny today. *Grutter*, 539 U.S. at 353, 123 S.Ct.. 2325 (opinion of THOMAS, J.) (internal quotations marks omitted). Cf. *Lee v. Washington*, 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *Croson*, 488 U.S. at 521, 109 S.Ct. 706 (opinion of Scalia, J.) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and ***256** limb ... can justify [racial discrimination]"). For this reason, "just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see *Brown* v. *Board of Education*, the alleged educational benefits of diversity cannot justify racial discrimination today." *Fisher I*, 570 U.S. at 320, 133 S.Ct. 2411 (THOMAS, J., concurring) (citation omitted).

B

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling. It instead demands that the "interests [universities] view as compelling" must be capable of being "subjected to meaningful judicial review." *Ante*, at 2166. In other words, a court must be able to measure the goals asserted and determine when they have been reached. *Ante*, at 2166 – 2167. The Court's opinion today further insists that universities must be able to "articulate a meaningful connection between the means they employ and the goals they pursue." *Ante*, at 2167. Again, I agree.

Universities' self-proclaimed righteousness does not afford them license to discriminate on the basis of race.

In fact, it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. See *Grutter*, 539 U.S. at 362–364, 123 S.Ct. 2325 (opinion of THOMAS, J.); see also *Fisher I*, 570 U.S. at 318–319, 133 S.Ct. 2411 (THOMAS, J., concurring); *United States v. Virginia*, 518 U.S. 515, 551, n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (refusing to defer to the Virginia Military Institute's judgment that the changes necessary to accommodate the admission of women would be too great and characterizing the necessary changes as "manageable"). We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer. See ***257** *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803–805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). And, Congress has passed numerous ****2191** laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators.

This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct. Take, for example, the university respondents here. Harvard's "holistic" admissions policy began in the 1920s when it was developed to exclude Jews. See M. Synnott, The Half-Opened Door: Discrimination and Admission at Harvard, Yale, and Princeton, 1900–1970, pp. 58–59, 61, 69, 73–74 (2010). Based on *de facto* quotas that Harvard quietly implemented, the proportion of Jews in Harvard's freshman class declined from 28% as late as 1925 to just 12% by 1933. J. Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 172 (2005). During this same period, Harvard played a prominent role in the eugenics movement. According to then-President Abbott Lawrence Lowell, excluding Jews from Harvard would help maintain admissions opportunities for Gentiles and perpetuate the purity of the Brahmin race—New England's white, Protestant upper crust. See D. Okrent, The Guarded Gate 309, and n. * (2019).

UNC also has a checkered history, dating back to its time as a segregated university. It admitted its first black undergraduate students in 1955—but only after being ordered to do so by a court, following a long legal battle in which UNC sought to keep its segregated status. Even then, UNC did not turn on a dime: The first three black students admitted as undergraduates enrolled at UNC but ultimately earned their bachelor's degrees elsewhere. See M. Beauregard, Column: The Desegregation of UNC, The Daily Tar Heel, Feb. 16, 2022. To the extent past is prologue, the university ***258** respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals.

Of course, none of this should matter in any event; courts have an independent duty to interpret and uphold the Constitution that no university's claimed interest may override. See *ante*, at 2168, n. 5. The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.

C

In an effort to salvage their patently unconstitutional programs, the universities and their *amici* pivot to argue that the Fourteenth Amendment permits the use of race to benefit only certain racial groups—rather than applicants writ large. Yet, this is just the latest disguise for discrimination. The sudden narrative shift is not surprising, as it has long been apparent that " 'diversity [was] merely the current rationale of convenience' " to support racially discriminatory admissions programs. *Grutter*, 539 U.S. at 393, 123 S.Ct. 2325 (Kennedy, J., dissenting). Under our precedents, this new rationale is also lacking.

To start, the case for affirmative action has emphasized a number of rationales over the years, including: (1) restitution to compensate those who have been victimized by past discrimination, (2) fostering "diversity," (3) facilitating "integration" and the destruction of perceived racial castes, and (4) countering longstanding ****2192** and diffuse racial prejudice. See R. Kennedy, For Discrimination: Race, Affirmative Action, and the Law 78 (2013); see also P. Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 22–46 (2002). Again, this Court has

only recognized one interest as compelling: the educational benefits of diversity ***259** embraced in *Grutter*. Yet, as the universities define the "diversity" that they practice, it encompasses social and aesthetic goals far afield from the education-based interest discussed in *Grutter*. See *supra*, at 2188. The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests. See, *e.g.*, *post*, at 2237 – 2238, 2248 – 2249, 2262 (opinion of SOTOMAYOR, J.) (noting that UNC's black admissions percentages "do not reflect the diversity of the State"; equating the diversity interest under the Court's precedents with a goal of "integration in higher education" more broadly; and warning of "the dangerous consequences of an America where its leadership does not reflect the diversity of the People"); *post*, at 2275 – 2276 (opinion of JACKSON, J.) (explaining that diversity programs close wealth gaps). But language—particularly the language of controlling opinions of this Court—is not so elastic. See J. Pieper, Abuse of Language—Abuse of Power 23 (L. Krauth transl. 1992) (explaining that propaganda, "in contradiction to the nature of language, intends not to communicate but to manipulate" and becomes an "[i]nstrument of power" (emphasis deleted)).

The Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise. See *ante*, at 2172 – 2174. As the Court points out, the interest for which respondents advocate has been presented to and rejected by this Court many times before. In *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the University of California made clear its rationale for the quota system it had established: It wished to "counteract effects of generations of pervasive discrimination" against certain minority groups. Brief for Petitioner, O. T. 1977, No. 76811, p. 2. But, the Court rejected this distinctly remedial rationale, with Justice Powell adopting in its place the familiar "diversity" interest that appeared later in *Grutter*. See *Bakke*, 438 U.S. at 306, 98 S.Ct. 2733 (plurality opinion). The Court similarly did not adopt the broad remedial rationale ***260** in *Grutter*; and it rejects it again today. Newly and often minted theories cannot be said to be commanded by our precedents.

Indeed, our precedents have repeatedly and soundly distinguished between programs designed to compensate victims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action. *Croson*, 488 U.S. at 504–505, 109 S.Ct. 706; *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 226–227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy. See *United States v. Fordice*, 505 U.S. 717, 731, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). Today's opinion for the Court reaffirms the need for such a close remedial fit, hewing to the same line we have consistently drawn. *Ante*, at 2167 – 2168.

Without such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination. Even *Grutter* itself could not tolerate this outcome. It accordingly imposed a ****2193** time limit for its race-based regime, observing that " 'a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.' " 539 U.S. at 341–342, 123 S.Ct. 2325 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984); alterations omitted).

The Court today enforces those limits. And rightly so. As noted above, both Harvard and UNC have a history of racial discrimination. But, neither have even attempted to explain how their current racially discriminatory programs are even remotely traceable to their past discriminatory conduct. Nor could they; the current race-conscious admissions programs take no account of ancestry and, at least for Harvard, likely have the effect of discriminating against some of ***261** the very same ethnic groups against which Harvard previously discriminated (*i.e.*, Jews and those who are not part of the white elite). All the while, Harvard and UNC ask us to blind ourselves to the burdens imposed on the millions of innocent applicants denied admission because of their membership in a currently disfavored race.

The Constitution neither commands nor permits such a result. "Purchased at the price of immeasurable human suffering," the Fourteenth Amendment recognizes that classifications based on race lead to ruinous consequences for individuals and the Nation. *Adarand Constructors, Inc.*, 515 U.S. at 240, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment). Consequently, "*all*" racial classifications are "inherently suspect," *id.*, at 223–224, 115 S.Ct. 2097 (majority opinion) (emphasis added; internal quotation marks omitted), and must be subjected to the searching inquiry conducted by the Court, *ante*, at 2165 – 2173.

III

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in *Grutter* that universities would voluntarily end their race-conscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimination is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as *good*. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities." *Fisher I*, 570 U.S. at 328, 133 S.Ct. 2411 (THOMAS, J., concurring).

We cannot be guided by those who would desire less in our Constitution, or by those who would desire more. "The ***262** Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter*, 539 U.S. at 353, 123 S.Ct. 2325 (opinion of THOMAS, J.).

A

The Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that "all men are created equal." Those words featured prominently in our Declaration of Independence and were inspired by a rich tradition of political thinkers, from Locke to Montesquieu, who considered equality to be the ****2194** foundation of a just government. See, *e.g.*, J. Locke, Second Treatise of Civil Government 48 (J. Gough ed. 1948); T. Hobbes, Leviathan 98 (M. Oakeshott ed. 1962); 1 B. Montesquieu, The Spirit of Laws 121 (T. Nugent transl., J. Prichard ed. 1914). Several Constitutions enacted by the newly independent States at the founding reflected this principle. For example, the Virginia Bill of Rights of 1776 explicitly affirmed "[t]hat all men are by nature equally free and independent, and have certain inherent rights." Ch. 1, § 1. The State Constitutions of Massachusetts, Pennsylvania, and New Hampshire adopted similar language. Pa. Const., Art. I (1776), in 2 Federal and State Constitutions 1541 (P. Poore ed. 1877); Mass. Const., Art. I (1780), in 1 *id*., at 957; N. H. Const., Art. I (1784), in 2 *id*., at 1280.[5] And, prominent Founders publicly mused ***263** about the need for equality as the foundation for government. *E.g.*, 1 Cong. Register 430 (T. Lloyd ed. 1789) (Madison, J.); 1 Letters and Other Writings of James Madison 164 (J. Lippincott ed. 1867); N. Webster, The Revolution in France, in 2 Political Sermons of the Founding Era, 1730–1805, pp. 1236–1299 (1998). As Jefferson declared in his first inaugural address, "the minority possess their equal rights, which equal law must protect." First Inaugural Address (Mar. 4, 1801), in 8 The Writings of Thomas Jefferson 4 (Washington ed. 1854).

Our Nation did not initially live up to the equality principle. The institution of slavery persisted for nearly a century, and the United States Constitution itself included several provisions acknowledging the practice. The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise. As Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding. See Speech at Chicago, Ill. (July 10, 1858), in 2 The Collected Works of Abraham Lincoln 488–489, 499 (R. Basler ed. 1953). Thus, in Lincoln's view, " 'the natural rights enumerated in the Declaration of Independence' " extended to blacks as his " 'equal,' " and " 'the equal of every living man.' " The Lincoln-Douglas Debates 285 (H. Holzer ed. 1993).

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

***264** Of course, even the promise of the second founding took time to materialize. Seeking to perpetuate a segregationist system in the wake of the Fourteenth Amendment's ratification, proponents urged a "separate but equal" regime. They met with initial success, ossifying the segregationist view for over a half century. As this Court said in *Plessy*:

> ****2195** "A statute which implies merely a legal distinction between the white and colored races—a

> distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." 163 U.S. at 543, 16 S.Ct.. 1138.

Such a statement, of course, is precisely antithetical to the notion that all men, regardless of the color of their skin, are born equal and must be treated equally under the law. Only one Member of the Court adhered to the equality principle; Justice Harlan, standing alone in dissent, wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.*, at 559, 16 S.Ct. 1138. Though Justice Harlan rightly predicted that *Plessy* would, "in time, prove to be quite as pernicious as the decision made ... in the *Dred Scott* case," the *Plessy* rule persisted for over a half century. *Ibid.* While it remained in force, Jim Crow laws prohibiting blacks from entering or utilizing public facilities such as schools, libraries, restaurants, and theaters sprang up across the South.

This Court rightly reversed course in *Brown* v. *Board of Education*. The *Brown* appellants—those challenging segregated schools—embraced the equality principle, arguing that "[a] racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction." Brief for Appellants in ***265** *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 7 (citation omitted).[6] Embracing that view, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place" and "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U.S. at 493, 495, 74 S.Ct. 686. Importantly, in reaching this conclusion, *Brown* did not rely on the particular qualities of the Kansas schools. The mere separation of students on the basis of race—the "*segregation* complained of," *id.*, at 495, 74 S.Ct. 686 (emphasis added)—constituted a constitutional injury. See *ante*, at 2160 ("Separate cannot be equal").

Just a few years later, the Court's application of *Brown* made explicit what was already forcefully implied: "[O]ur decisions have foreclosed any possible contention that ... a statute or regulation" fostering segregation in public facilities "may stand consistently with the Fourteenth Amendment." *Turner v. Memphis*, 369 U.S. 350, 353, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962) (*per curiam*); cf. A. Blaustein & C. Ferguson, Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 145 (rev. 2d ed. 1962) (arguing that the Court in *Brown* had "adopt[ed] a constitutional standard" declaring "that all classification by race is unconstitutional *per se*").

Today, our precedents place this principle beyond question. In assessing racial segregation during a race-motivated prison riot, for example, this Court applied strict scrutiny without requiring an allegation of ****2196** unequal treatment among the segregated facilities. *Johnson v. California*, 543 U.S. 499, 505–506, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). The Court today reaffirms the rule, stating that, following *Brown*, "[t]he time for making distinctions ***266** based on race had passed." *Ante*, at 2160. "What was wrong" when the Court decided *Brown* "in 1954 cannot be right today." *Parents Involved*, 551 U.S. at 778, 127 S.Ct. 2738 (THOMAS, J., concurring). Rather, we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.

B

Respondents and the dissents argue that the universities' race-conscious admissions programs ought to be permitted because they accomplish positive social goals. I would have thought that history had by now taught a "greater humility" when attempting to "distinguish good from harmful uses of racial criteria." *Id.*, at 742, 127 S.Ct. 2738 (plurality opinion). From the Black Codes, to discriminatory and destructive social welfare programs, to discrimination by individual government actors, bigotry has reared its ugly head time and again. Anyone who today thinks that some form of racial discrimination will prove "helpful" should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.

Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed "to preserve harmony and peace and at the same time furnish equal education to both groups." Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, p. 94; see also *id.*, at 79 (" '[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions' "). And, parties consistently attempted to convince the Court that the time was not right to disrupt segregationist systems.

See Brief for Appellees in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, O. T. 1949, No. 34, p. 12 (claiming that a holding rejecting separate but equal would "necessarily result ... [i]n the *abandoning* of many of the ***267** state's existing educational establishments" and the "*crowding* of other such establishments"); Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County"). Litigants have even gone so far as to offer straight-faced arguments that segregation has practical benefits. Brief for Respondents in *Sweatt* v. *Painter*, at 77–78 (requesting deference to a state law, observing that " 'the necessity for such separation [of the races] still exists in the interest of public welfare, safety, harmony, health, and recreation ...' " and remarking on the reasonableness of the position); Brief for Appellees in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 3, p. 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the ****2197** general welfare will be definitely harmed ... there would be more friction developed" (internal quotation marks omitted)). In fact, slaveholders once "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life," and "segregationists similarly asserted that segregation was not only benign, but good for black students." *Fisher I*, 570 U.S. at 328–329, 133 S.Ct. 2411 (THOMAS, J., concurring).

"Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories." *Parents Involved*, 551 U.S. at 780–781, 127 S.Ct. 2738 (THOMAS, J., concurring). ***268** We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is "good" for black students. Though I do not doubt the sincerity of my dissenting colleagues' beliefs, experts and elites have been wrong before—and they may prove to be wrong again. In part for this reason, the Fourteenth Amendment outlaws government-sanctioned racial discrimination of all types. The stakes are simply too high to gamble.[7] Then, as now, the views that motivated *Dred Scott* and *Plessy* have not been confined to the past, and we must remain ever vigilant against *all* forms of racial discrimination.

C

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See T. Sowell, Affirmative Action Around the World 145–146 (2004). ***269** In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. *Ibid.* The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools ... in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332, 133 S.Ct. 2411 (THOMAS, J., concurring).

It is self-evident why that is so. As anyone who has labored over an algebra textbook has undoubtedly discovered, academic advancement results from hard work and practice, not mere declaration. Simply treating students as though their grades put them at the top of their high school classes does nothing to enhance the performance level of those students or otherwise prepare them for competitive college environments. In fact, studies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately ****2198** large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. See, *e.g.*, R. Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 Stan. L. Rev. 367, 371–372 (2004); see also R. Sander & R. Steinbuch, Mismatch and Bar Passage: A School-Specific Analysis (Oct. 6, 2017), https://ssrn.com/abstract=3054208. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who

did not receive such a preference. F. Smith & J. McArdle, Ethnic and Gender Differences in Science Graduation at Selective Colleges With Implications for Admission Policy and College Choice, 45 Research in Higher Ed. 353 (2004). "Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can ***270** mean that such students are generally overmatched throughout all levels of higher education." T. Sowell, Race and Culture 176–177 (1994).[8]

These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions "stamp [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). They thus "tain[t] the accomplishments of all those who are admitted as a result of racial discrimination" as well as "all those who are the same race as those admitted as a result of racial discrimination" because "no one can distinguish those students from the ones whose race played a role in their admission." *Fisher I*, 570 U.S. at 333, 133 S.Ct. 2411 (opinion of THOMAS, J.). Consequently, "[w]hen blacks" and, now, Hispanics "take positions in the highest places of government, industry, or academia, it is an open question ... whether their skin color played a part in their advancement." *Grutter*, 539 U.S. at 373, 123 S.Ct. 2325 (THOMAS, J., concurring). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those ... who would succeed without discrimination." *Ibid.*

***271** Yet, in the face of those problems, it seems increasingly clear that universities are focused on "aesthetic" solutions unlikely to help deserving members of minority groups. In fact, universities' affirmative action programs are a particularly poor use of such resources. To start, these programs are overinclusive, providing the same admissions bump to a wealthy black applicant given every advantage in life as to a black applicant from a poor family with seemingly insurmountable barriers to overcome. In doing so, the programs may wind up helping the most well-off members of minority races without meaningfully assisting those who struggle with real hardship. Simultaneously, the programs risk ****2199** continuing to ignore the academic underperformance of "the purported 'beneficiaries' " of racial preferences and the racial stigma that those preferences generate. *Grutter*, 539 U.S. at 371, 123 S.Ct. 2325 (opinion of THOMAS, J.). Rather than performing their academic mission, universities thus may "see[k] only a facade—it is sufficient that the class looks right, even if it does not perform right." *Id.*, at 372, 123 S.Ct. 2325.

D

Finally, it is not even theoretically possible to "help" a certain racial group without causing harm to members of other racial groups. "It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others." *Adarand*, 515 U.S. at 241, n. *, 115 S.Ct. 2097 (opinion of THOMAS, J.). And, even purportedly benign race-based discrimination has secondary effects on members of other races. The antisubordination view thus has never guided the Court's analysis because "whether a law relying upon racial taxonomy is 'benign' or 'malign' either turns on 'whose ox is gored' or on distinctions found only in the eye of the beholder." *Ibid.* (citations and some internal quotation marks omitted). Courts are not suited to the impossible task of determining which racially discriminatory programs are helping ***272** which members of which races—and whether those benefits outweigh the burdens thrust onto other racial groups.

As the Court's opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school's entering class—aptly demonstrates the point. *Ante*, at 2168 – 2169.[9] Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race. Yet, Asian Americans can hardly be described as the beneficiaries of historical racial advantages. To the contrary, our Nation's first immigration ban targeted the Chinese, in part, based on "worker resentment of the low wage rates accepted by Chinese workers." U. S. Commission on Civil Rights, Civil Rights Issues Facing Asian Americans in the 1990s, p. 3 (1992) (Civil Rights Issues); Act of May 6, 1882, ch. 126, 22 Stat. 58–59.

In subsequent years, "strong anti-Asian sentiments in the Western States led to the adoption of many discriminatory laws at the State and local levels, similar to those aimed at blacks in the South," and "segregation in public facilities, including schools, was quite common until after the Second World War." Civil Rights Issues 7; see also S. Hinnershitz, A Different Shade of Justice: Asian American Civil Rights ***273** in the South 21 (2017) (explaining that while both

Asians and blacks have at times fought "against similar forms of discrimination," "[t]he issues of citizenship and **2200 immigrant status often defined Asian American battles for civil rights and separated them from African American legal battles"). Indeed, this Court even sanctioned this segregation —in the context of schools, no less. In *Gong Lum v. Rice*, 275 U.S. 78, 81–82, 85–87, 48 S.Ct. 91, 72 L.Ed. 172 (1927), the Court held that a 9-year-old Chinese-American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race."

Also, following the Japanese attack on the U. S. Navy base at Pearl Harbor, Japanese Americans in the American West were evacuated and interned in relocation camps. See Exec. Order No. 9066, 3 C.F.R. 1092 (1943). Over 120,000 were removed to camps beginning in 1942, and the last camp that held Japanese Americans did not close until 1948. National Park Service, Japanese American Life During Internment, www.nps.gov/articles/japanese-american-internment-archeology.htm. In the interim, this Court endorsed the practice. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants.[10] But this problem is not limited to Asian Americans; more broadly, universities' discriminatory policies burden millions *274 of applicants who are not responsible for the racial discrimination that sullied our Nation's past. That is why, "[i]n the absence of special circumstances, the remedy for *de jure* segregation ordinarily should not include educational programs for students who were not in school (or even alive) during the period of segregation." *Jenkins*, 515 U.S. at 137, 115 S.Ct. 2038 (THOMAS, J., concurring). Today's 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today's youth for the sins of the past.

IV

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and *amici* in these cases report that, in the nearly 50 years since *Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since *Grutter*. See *ante*, at 2165 – 2166. Rather, the legacy of *Grutter* appears to be ever increasing and strident demands for *yet more* racially oriented solutions.

A

It has become clear that sorting by race does not stop at the admissions office. In **2201 his *Grutter* opinion, Justice Scalia criticized universities for "talk[ing] of multiculturalism and racial diversity," but supporting "tribalism and racial segregation on their campuses," including through "minority only *275 student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies." 539 U.S. at 349, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). This trend has hardly abated with time, and today, such programs are commonplace. See Brief for Gail Heriot et al. as *Amici Curiae* 9. In fact, a recent study considering 173 schools found that 43% of colleges offered segregated housing to students of different races, 46% offered segregated orientation programs, and 72% sponsored segregated graduation ceremonies. D. Pierre & P. Wood, Neo-Segregation at Yale 16–17 (2019); see also D. Pierre, Demands for Segregated Housing at Williams College Are Not News, Nat. Rev., May 8, 2019. In addition to contradicting the universities' claims regarding the need for interracial interaction, see Brief for National Association of Scholars as *Amicus Curiae* 4–12, these trends increasingly encourage our Nation's youth to view racial differences as important and segregation as routine.

Meanwhile, these discriminatory policies risk creating new prejudices and allowing old ones to fester. I previously observed that "[t]here can be no doubt" that discriminatory affirmative action policies "injur[e] white and Asian applicants who are denied admission because of their race." *Fisher I*, 570 U.S. at 331, 133 S.Ct. 2411 (concurring opinion). Petitioner here clearly demonstrates this fact.

Moreover, "no social science has disproved the notion that this discrimination 'engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.' " *Grutter*, 539 U.S. at 373, 123 S.Ct. 2325 (opinion of THOMAS, J.) (quoting *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.) (alterations omitted)). Applicants denied admission to certain colleges may come to believe—accurately or not—that their race was responsible for their failure to attain a life-long dream. These individuals, and ***276** others who wished for their success, may resent members of what they perceive to be favored races, believing that the successes of those individuals are unearned.

What, then, would be the endpoint of these affirmative action policies? Not racial harmony, integration, or equality under the law. Rather, these policies appear to be leading to a world in which everyone is defined by their skin color, demanding ever-increasing entitlements and preferences on that basis. Not only is that *exactly* the kind of factionalism that the Constitution was meant to safeguard against, see The Federalist No. 10 (J. Madison), but it is a factionalism based on ever-shifting sands.

That is because race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," ****2202** "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? See *post*, at 2209 – 2211 (GORSUCH, J., concurring). Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics ***277** somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. See *ante*, at 2169 – 2171 (noting that the Court's Equal Protection Clause jurisprudence forbids such stereotyping). Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." J. Barzun, Race: A Study in Modern Superstition 114 (1937). That is the same naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. This kind of reductionist logic leads directly to the "disregard for what does not jibe with preconceived theory," providing a "cloa[k] to conceal complexity, argumen[t] to the crown for praising or damning without the trouble of going into details"—such as details about an individual's ideas or unique background. *Ibid.* Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

***278** B

Justice JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. *Post*, at 2263 – 2277 (dissenting opinion). The panacea, she counsels, is to unquestioningly accede to the view of elite experts and

reallocate society's riches by racial means as necessary to "level the playing field," all as judged by racial metrics. *Post*, at 2277. I strongly disagree.

First, as stated above, any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind. *Post*, at 2263 – 2264 (JACKSON, J., dissenting); see also *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting). People ****2203** discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

> "[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Ibid*.

With the passage of the Fourteenth Amendment, the people of our Nation proclaimed that the law may not sort citizens based on race. It is this principle that the Framers of ***279** the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law. And it is this principle that has guaranteed a Nation of equal citizens the privileges or immunities of citizenship and the equal protection of the laws. To now dismiss it as "two-dimensional flatness," *post*, at 2276 (JACKSON, J., dissenting), is to abdicate a sacred trust to ensure that our "honored dead ... shall not have died in vain." A. Lincoln, Gettysburg Address (1863).

Yet, Justice JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. *Post*, at 2276 – 2277. This is so, she writes, because of statistical disparities among different racial groups. See *post*, at 2268 – 2270. Even if some whites have a lower household net worth than some blacks, what matters to Justice JACKSON is that the *average* white household has more wealth than the *average* black household. *Post*, at 2268 – 2269.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, "the fate of abstract categories of wealth statistics is not the same as the fate of a given set of flesh-and-blood human beings." T. Sowell, Wealth, Poverty and Politics 333 (2016). Worse still, Justice JACKSON uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me. I cannot deny the great accomplishments of black Americans, including those who succeeded despite long odds.

Nor do Justice JACKSON's statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal ***280** link between race—rather than socioeconomic status or any other factor—and individual outcomes. So Justice JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account. If an applicant has medical struggles or a family member with medical concerns, a university may consider that too. ****2204** What it cannot do is use the applicant's skin color as a heuristic, assuming that because the applicant checks the box for "black" he therefore conforms to the university's monolithic and reductionist view of an abstract, average black person.

Accordingly, Justice JACKSON's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism.

Justice JACKSON then builds from her faulty premise to call for action, arguing that courts should defer to "experts" and allow institutions to discriminate on the basis of race. Make

no mistake: Her dissent is not a vanguard of the innocent and helpless. It is instead a call to empower privileged elites, who will "tell us [what] is required to level the playing field" among castes and classifications that they alone can divine. *Post*, at 2277; see also *post*, at 2209 – 2211 (GORSUCH, J., concurring) (explaining the arbitrariness of these classifications). Then, after siloing us all into racial castes and pitting those ***281** castes against each other, the dissent somehow believes that we will be able—at some undefined point—to "march forward together" into some utopian vision. *Post*, at 2277 (opinion of JACKSON, J.). Social movements that invoke these sorts of rallying cries, historically, have ended disastrously.

Unsurprisingly, this tried-and-failed system defies both law and reason. Start with the obvious: If social reorganization in the name of equality may be justified by the mere fact of statistical disparities among racial groups, then that reorganization must continue until these disparities are fully eliminated, regardless of the reasons for the disparities and the cost of their elimination. If blacks fail a test at higher rates than their white counterparts (regardless of whether the reason for the disparity has anything at all to do with race), the only solution will be race-focused measures. If those measures were to result in blacks failing at yet higher rates, the only solution would be to double down. In fact, there would seem to be no logical limit to what the government may do to level the racial playing field—outright wealth transfers, quota systems, and racial preferences would all seem permissible. In such a system, it would not matter how many innocents suffer race-based injuries; all that would matter is reaching the race-based goal.

Worse, the classifications that Justice JACKSON draws are themselves race-based stereotypes. She focuses on two hypothetical applicants, John and James, competing for admission to UNC. John is a white, seventh-generation legacy at the school, while James is black and would be the first in his family to attend UNC. *Post*, at 2264. Justice JACKSON argues that race-conscious admission programs are necessary to adequately compare the two applicants. As an initial matter, it is not clear why James's race is the only factor that could encourage UNC to admit him; his status as a first-generation college applicant seems to contextualize his application. But, setting that aside, why is it that John should be judged based on the actions of his great-great-great-grandparents? ***282** And what would Justice JACKSON say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ****2205** ago, and you have inherited their incurable sin?

Nor should we accept that John or James represent all members of their respective races. All racial groups are heterogeneous, and blacks are no exception—encompassing northerners and southerners, rich and poor, and recent immigrants and descendants of slaves. See, *e.g.*, T. Sowell, Ethnic America 220 (1981) (noting that the great success of West Indian immigrants to the United States—disproportionate among blacks more broadly—"seriously undermines the proposition that color is a fatal handicap in the American economy"). Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.[11]

To further illustrate, let's expand the applicant pool beyond John and James. Consider Jack, a black applicant and the son of a multimillionaire industrialist. In a world of race-based preferences, James' seat could very well go to Jack rather than John—both are black, after all. And what about members of the numerous other racial and ethnic groups in our Nation? What about Anne, the child of Chinese immigrants? Jacob, the grandchild of Holocaust survivors who escaped to this Nation with nothing and faced discrimination upon arrival? Or Thomas, the great-grandchild of Irish immigrants escaping famine? While articulating her black and white world (literally), Justice JACKSON ignores the experiences of other immigrant groups (like ***283** Asians, see *supra*, at 2199 – 2200) and white communities that have faced historic barriers.

Though Justice JACKSON seems to think that her race-based theory can somehow benefit everyone, it is an immutable fact that "every time the government uses racial criteria to 'bring the races together,' someone gets excluded, and the person excluded suffers an injury solely because of his or her race." *Parents Involved*, 551 U.S. at 759, 127 S.Ct. 2738 (THOMAS, J., concurring) (citation omitted). Indeed, Justice JACKSON seems to have no response—no explanation at all—for the people who will shoulder that burden. How, for example, would Justice JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color? If such a burden would seem difficult to impose on a bright-eyed young person, that's because it should be. History has taught us to abhor theories

that call for elites to pick racial winners and losers in the name of sociological experimentation.

Nor is it clear what another few generations of race-conscious college admissions may be expected to accomplish. Even today, affirmative action programs that offer an admissions boost to black and Hispanic students discriminate against those who identify themselves as members of other races that do not receive such preferential treatment. Must others in the future make sacrifices to re-level the playing field for this new phase of racial subordination? And then, out of whose lives should the debt owed to those further victims be repaid? This vision of meeting social racism with government-imposed racism is thus self-defeating, resulting in a never-ending cycle of victimization. There is no reason to ****2206** continue down that path. In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.

***284** C

Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. T. Watanabe, UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted, L. A. Times, July 20, 2021, p. A1. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color." S. Dodge, Largest Ever Student Body at University of Michigan This Fall, Officials Say, MLive.com (Oct. 22, 2021), https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html. In fact, at least one set of studies suggests that, "when we consider the higher education system as a whole, it is clear that the vast majority of schools would be as racially integrated, or more racially integrated, under a system of no preferences than under a system of large preferences." Brief for Richard Sander as *Amicus Curiae* 26. Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.

In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. I have always viewed "higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, credentialing process." *Grutter*, 539 U.S. at 371–372, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part). And, I continue to strongly believe (and have never doubted) that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Id.*, at 350, 123 S.Ct. 2325. Meritocratic systems, with objective grading ***285** scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others.

Schools' successes, like students' grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. To this day, they have proved "to be extremely effective in educating Black students, particularly in STEM," where "HBCUs represent seven of the top eight institutions that graduate the highest number of Black undergraduate students who go on to earn [science and engineering] doctorates." W. Wondwossen, The Science Behind HBCU Success, Nat. Science Foundation (Sept. 24, 2020), https://beta.nsf.gov/science-matters/science-behind-hbcu-success. "HBCUs have produced 40% of all Black engineers." Presidential Proclamation No. 10451, 87 Fed. Reg. 57567 (2022). And, they "account for 80% of Black judges, 50% of Black doctors, and 50% of Black lawyers." M. Hammond, L. ****2207** Owens, & B. Gulko, Social Mobility Outcomes for HBCU Alumni, United Negro College Fund 4 (2021) (Hammond), https://cdn.uncf.org/wp-content/uploads/Social-Mobility-Report-FINAL.pdf; see also 87 Fed. Reg. 57567 (placing the percentage of black doctors even higher, at 70%). In fact, Xavier University, an HBCU with only a small percentage of white students, has had better success at helping its low-income students move into the middle class than Harvard has. See Hammond 14; see also Brief for Oklahoma et al. as *Amici Curiae* 18. And, each of the top 10 HBCUs have a success rate above the national average. Hammond 14.[12]

***286** Why, then, would this Court need to allow other universities to racially discriminate? Not for the betterment of those black students, it would seem. The hard work of HBCUs and their students demonstrate that "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins*, 515 U.S. at 122, 115 S.Ct. 2038 (THOMAS, J., concurring) (citing *Fordice*, 505 U.S. at 748, 112 S.Ct. 2727 (THOMAS, J., concurring)). And, because race-conscious college admissions are plainly not necessary to serve even the interests of blacks, there is no justification to compel such programs more broadly. See *Parents Involved*, 551 U.S. at 765, 127 S.Ct. 2738 (THOMAS, J., concurring).

* * *

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

***287** The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional. See *Brown II*, 349 U.S. at 298, 75 S.Ct. 753 (noting that the *Brown* case one year earlier had "declare[d] the fundamental principle that racial discrimination in public education is unconstitutional").

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country ****2208** will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

Justice GORSUCH, with whom Justice THOMAS joins, concurring.

For many students, an acceptance letter from Harvard or the University of North Carolina is a ticket to a brighter future. Tens of thousands of applicants compete for a small number of coveted spots. For some time, both universities have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

I

"[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1737, 207 L.Ed.2d 218 (2020). Title VI of that law contains terms as powerful as they are easy to understand: "No ***288** person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

A

When a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them. "After all, only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1738.

The key phrases in Title VI at issue here are "subjected to discrimination" and "on the ground of." Begin with the first. To "discriminate" against a person meant in 1964 what it means today: to "trea[t] that individual worse than others who are similarly situated." *Id.*, at ——, 140 S.Ct., at 1740; see also Webster's New International Dictionary 745 (2d ed. 1954) ("[t]o make a distinction" or "[t]o make a difference in treatment or favor (of one as compared with others)"); Webster's Third New International Dictionary 648 (1961) ("to make a difference in treatment or favor on a class or categorical basis"). The provision of Title VI before us, this Court has also held, "prohibits only intentional

discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

***289** What does the statute's second critical phrase—"on the ground of "—mean? Again, the answer is uncomplicated: It means "because of." See, *e.g.,* Webster's New World Dictionary 640 (1960) ("because of "); Webster's Third New International Dictionary, at 1002 (defining "grounds" as "a logical condition, physical ****2209** cause, or metaphysical basis"). "Because of " is a familiar phrase in the law, one we often apply in cases arising under the Civil Rights Act of 1964, and one that we usually understand to invoke "the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1739 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346, 360, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013); some internal quotation marks omitted). The but-for-causation standard is a "sweeping" one too. *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1739–1740. A defendant's actions need not be the primary or proximate cause of the plaintiff 's injury to qualify. Nor may a defendant avoid liability "just by citing some *other* factor that contributed to" the plaintiff 's loss. *Id*., at ——, 140 S.Ct., at 1739. All that matters is that the plaintiff 's injury would not have happened *but for* the defendant's conduct. *Ibid.*

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to "some other ... factor" that contributed to its decision to disfavor that individual. *Id.,* at —— – ——, 140 S.Ct., at 1743–1745. It does not matter if the recipient discriminates in order to advance some further benign "intention" or "motivation." *Id.,* at ——, 140 S.Ct., at 1743; see also *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect" or "alter [its] intentionally discriminatory character"). Nor does it matter if the recipient discriminates against an individual member of a protected class with the idea that doing so might "favor" the interests ***290** of that "class" as a whole or otherwise "promot[e] equality at the group level." *Bostock*, 590 U. S., at ——, ——, 140 S.Ct., at 1743, 1744. Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in various directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never discriminate based on race, color, or national origin —period.

If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it "unlawful ... for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. See *Bostock*, 590 U. S., at —— – ——, 140 S.Ct., at 1738–1741. This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416, n. 19, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion concurring in judgment in part and dissenting in part) (emphasis deleted).

B

Applying Title VI to the cases now before us, the result is plain. The parties ****2210** debate certain details of Harvard's and UNC's admissions practices. But no one disputes that both universities operate "program[s] or activit[ies] receiving Federal financial assistance." § 2000d. No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally ***291** treat some applicants worse than others at least in part because of their race.

1

Start with how Harvard and UNC use race. Like many colleges and universities, those schools invite interested students to complete the Common Application. As part of

that process, the trial records show, applicants are prompted to tick one or more boxes to explain "how you identify yourself." 4 App. in No. 21–707, p. 1732. The available choices are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White. Applicants can write in further details if they choose. *Ibid.*; see also 397 F.Supp.3d 126, 137 (Mass. 2019); 567 F.Supp.3d 580, 596 (MDNC 2021).

Where do these boxes come from? Bureaucrats. A federal interagency commission devised this scheme of classifications in the 1970s to facilitate data collection. See D. Bernstein, The Modern American Law of Race, 94 S. Cal. L. Rev. 171, 196–202 (2021); see also 43 Fed. Reg. 19269 (1978). That commission acted "without any input from anthropologists, sociologists, ethnologists, or other experts." Brief for David E. Bernstein as *Amicus Curiae* 3 (Bernstein *Amicus* Brief). Recognizing the limitations of their work, federal regulators cautioned that their classifications "should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility for participation in any Federal program*." 43 Fed. Reg. 19269 (emphasis added). Despite that warning, others eventually used this classification system for that very purpose—to "sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs ... and university admissions." H. Graham, The Origins of Official Minority Designation, in The New Race Question: How the Census Counts Multiracial Individuals 289 (J. Perlmann & M. Waters eds. 2002).

These classifications rest on incoherent stereotypes. Take the "Asian" category. It sweeps into one pile East ***292** Asians (*e.g.,* Chinese, Korean, Japanese) and South Asians (*e.g.,* Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. Bernstein *Amicus* Brief 2, 5. This agglomeration of so many peoples paves over countless differences in "language," "culture," and historical experience. *Id.*, at 5–6. It does so even though few would suggest that all such persons share "similar backgrounds and similar ideas and experiences." *Fisher v. University of Tex. at Austin*, 579 U.S. 365, 414, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (ALITO, J., dissenting). Consider, as well, the development of a separate category for "Native Hawaiian or Other Pacific Islander." It seems federal officials disaggregated these groups from the "Asian" category only in the 1990s and only "in response to political lobbying." Bernstein *Amicus* Brief 9–10. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as "Asian" rather than "Other Pacific Islander." See 4 App. in No. 21–707, at 1732.

The remaining classifications depend just as much on irrational stereotypes. The "Hispanic" category covers those whose ancestral language is Spanish, Basque, or ****2211** Catalan—but it also covers individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. See Bernstein *Amicus* Brief 10–11. The "White" category sweeps in anyone from "Europe, Asia west of India, and North Africa." *Id.*, at 14. That includes those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family. Meanwhile, "Black or African American" covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb. See *id.,* at 15–16.

***293** If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group. There are decisions denying Hispanic status to someone of Italian-Argentine descent, *Marinelli Constr. Corp. v. New York*, 200 App.Div.2d 294, 296–297, 613 N.Y.S.2d 1000, 1002 (1994), as well as someone with one Mexican grandparent, *Major Concrete Constr., Inc. v. Erie County*, 134 App.Div.2d 872, 873, 521 N.Y.S.2d 959, 960 (1987). Yet there are also decisions granting Hispanic status to a Sephardic Jew whose ancestors fled Spain centuries ago, *In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. 499, 1995 WL 542398, *2–*4 (Apr. 12, 1995), and bestowing a "sort of Hispanic" status on a person with one Cuban grandparent, Bernstein, 94 S. Cal. L. Rev., at 232 (discussing *In re Kist Corp.*, 99 F. C. C. 2d 173, 193 (1984)).

Given all this, is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity? Or that a cottage industry has sprung up to help college applicants do so? We are told, for example, that one effect of lumping so many people of so many disparate backgrounds into the "Asian" category is that many colleges consider "Asians" to be "overrepresented" in their admission pools. Brief for Asian

American Coalition for Education et al. as *Amici Curiae* 12–14, 18–19. Paid advisors, in turn, tell high school students of Asian descent to downplay their heritage to maximize their odds of admission. " 'We will make them appear less Asian when they apply,' " one promises. *Id.,* at 16. " 'If you're given an option, don't attach a photograph to your application,' " another instructs. *Ibid.*[1] It is difficult ***294** to imagine those who receive this advice would find comfort in a bald (and mistaken) assurance that "race-conscious admissions benefit ... the Asian American community," *post*, at 2258 (SOTOMAYOR, J., dissenting). See 397 F.Supp.3d at 178 (district court finding that "overall" Harvard's race-conscious admissions policy "results in fewer Asian American[s]" being admitted). And it is hard not to wonder whether those left paying the steepest price are those least able to afford it—children of families with no chance of hiring ****2212** the kind of consultants who know how to play this game.[2]

2

Just as there is no question Harvard and UNC consider race in their admissions processes, there is no question both schools intentionally treat some applicants worse than others because of their race. Both schools frequently choose to award a "tip" or a "plus" to applicants from certain racial groups but not others. These tips or plusses are just what they sound like—"factors that might tip an applicant into [an] admitted class." 980 F.3d 157, 170 (CA1 2020). And in a process where applicants compete for a limited pool of spots, "[a] tip for one race" necessarily works as "a penalty against other races." Brief for Economists as *Amici Curiae* 20. As the trial court in the Harvard case put it: "Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process." 397 F.Supp.3d at 202–203.

***295** Consider how this plays out at Harvard. In a given year, the university's undergraduate program may receive 60,000 applications for roughly 1,600 spots. Tr. of Oral Arg. in No. 20–1199, p. 60. Admissions officers read each application and rate students across several categories: academic, extracurricular, athletic, school support, personal, and overall. 980 F.3d at 167. Harvard says its admissions officers "should not" consider race or ethnicity when assigning the "personal" rating. *Id.,* at 169 (internal quotation marks omitted). But Harvard did not make this instruction explicit until *after* SFFA filed this suit. *Ibid.* And, in any event, Harvard concedes that its admissions officers "*can* and *do* take an applicant's race into account when assigning an *overall* rating." *Ibid.* (emphasis added). At that stage, the lower courts found, applicants of certain races may receive a "tip" in their favor. *Ibid.*

The next step in the process is committee review. Regional subcommittees may consider an applicant's race when deciding whether to recommend admission. *Id.*, at 169–170. So, too, may the full admissions committee. *Ibid.* As the Court explains, that latter committee "discusses the relative breakdown of applicants by race." *Ante*, at 2147 – 2149. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group." 397 F.Supp.3d at 146.

The last step is "lopping," where the admissions committee trims the list of "prospective admits" before settling on a final class. *Id.,* at 144 (internal quotation marks omitted). At this stage, again, the committee considers the "characteristics of the admitted class," including its "racial composition." *Ibid.* Once more, too, the committee may consider each applicant's race in deciding whom to "lop off." *Ibid.*

All told, the district court made a number of findings about Harvard's use of race-based tips. For example: "[T]he tip[s] ***296** given for race impac[t] who among the highly-qualified students in the applicant pool will be selected for admission." *Id.*, at 178. "At least 10% of Harvard's admitted class ... would most likely not be admitted ****2213** in the absence of Harvard's race-conscious admissions process." *Ibid.* Race-based tips are "determinative" in securing favorable decisions for a significant percentage of "African American and Hispanic applicants," the "primary beneficiaries" of this system. *Ibid.* There are clear losers too. "[W]hite and Asian American applicants are unlikely to receive a meaningful race-based tip," *id.,* at 190, n. 56, and "overall" the school's race-based practices "resul[t] in fewer Asian American and white students being admitted," *id.*, at 178. For these reasons and others still, the district court concluded that "Harvard's admissions process is not facially neutral" with respect to race. *Id.,* at 189–190; see also *id.*, at 190, n. 56 ("The policy cannot ... be considered facially neutral from a Title VI perspective.").

Things work similarly at UNC. In a typical year, about 44,000 applicants vie for 4,200 spots. 567 F.Supp.3d at 595. Admissions officers read each application and rate prospective students along eight dimensions: academic

programming, academic performance, standardized tests, extracurriculars, special talents, essays, background, and personal. *Id.,* at 600. The district court found that "UNC's admissions policies mandate that race is taken into consideration" in this process as a " 'plus' facto[r]." *Id.,* at 594–595. It is a plus that is "sometimes" awarded to "underrepresented minority" or "URM" candidates—a group UNC defines to include " 'those students identifying themselves as African American or [B]lack; American Indian or Alaska Native; or Hispanic, Latino, or Latina,' " but not Asian or white students. *Id*., at 591–592, n. 7, 601.

At UNC, the admissions officers' decisions to admit or deny are " 'provisionally final.' " *Ante*, at 2155 – 2156 (opinion for the Court). The decisions become truly final only after a ***297** committee approves or rejects them. 567 F.Supp.3d at 599. That committee may consider an applicant's race too. *Id.*, at 607. In the end, the district court found that "race plays a role"—perhaps even "a determinative role"—in the decision to admit or deny some "URM students." *Id.,* at 634; see also *id.,* at 662 ("race may tip the scale"). Nor is this an accident. As at Harvard, officials at UNC have made a "deliberate decision" to employ race-conscious admissions practices. *Id.,* at 588–589.

While the district courts' findings tell the full story, one can also get a glimpse from aggregate statistics. Consider the chart in the Court's opinion collecting Harvard's data for the period 2009 to 2018. *Ante,* at 2171. The racial composition of each incoming class remained steady over that time—remarkably so. The proportion of African Americans hovered between 10% and 12%; the proportion of Hispanics between 8% and 12%; and the proportion of Asian Americans between 17% and 20%. *Ibid.* Might this merely reflect the demographics of the school's applicant pool? Cf. *post*, at 2244 (opinion of SOTOMAYOR, J.). Perhaps—at least assuming the applicant pool looks much the same each year and the school rather mechanically admits applicants based on objective criteria. But the possibility that it instead betrays the school's persistent focus on numbers of this race and numbers of that race is entirely consistent with the findings recounted above. See, *e.g.,* 397 F.Supp.3d at 146 ("if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the [committee] may decide to give additional attention to applications from students within that group"); cf. *ante,* at 2171, n.7 (opinion for the Court).

C

Throughout this litigation, the parties have spent less time contesting these facts than debating other matters.

***298** ****2214** For example, the parties debate *how much* of a role race plays in admissions at Harvard and UNC. Both schools insist that they consider race as just one of many factors when making admissions decisions in their self-described "holistic" review of each applicant. SFFA responds with trial evidence showing that, whatever label the universities use to describe their processes, they intentionally consult race and, by design, their race-based tips and plusses benefit applicants of certain groups to the detriment of others. See Brief for Petitioner 20–35, 40–45.

The parties also debate the *reasons* both schools consult race. SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." *Id.*, at 12–13 (internal quotation marks omitted). Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without " 'stat[ing] frankly' " that they were " 'directly excluding all [Jews] beyond a certain percentage.' " *Id.,* at 12; see also 3 App. in No. 20–1199, pp. 1131–1133. SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits. Brief for Petitioner 12–14, 25–32. For its part, Harvard expresses regret for its past practices while denying that they resemble its current ones. Tr. of Oral Arg. in No. 20–1199, at 51. And both schools insist that their student bodies would lack sufficient diversity without race-conscious admissions. Brief for Respondent in No. 20–1199, pp. 52–54; Brief for University Respondents in No. 21–707, pp. 54–59.

When it comes to defining and measuring diversity, the parties spar too. SFFA observes that the racial categories ***299** the universities employ in the name of diversity do not begin to reflect the differences that exist within each group. See Part I–B–1, *supra*. Instead, they lump together white and Asian students from privileged backgrounds with "Jewish, Irish, Polish, or other 'white' ethnic groups whose ancestors faced discrimination" and "descendants of those Japanese-

American citizens interned during World War II." *Ante*, at 2200, n. 10 (THOMAS, J., concurring). Even putting all that aside, SFFA stresses that neither Harvard nor UNC is willing to quantify how much racial and ethnic diversity they think sufficient. And, SFFA contends, the universities may not wish to do so because their stated goal implies a desire to admit some fixed number (or quota) of students from each racial group. See Brief for Petitioner 77, 80; Tr. of Oral Arg. in No. 21–707, p. 180. Besides, SFFA asks, if it is diversity the schools are after, why do they exhibit so little interest in other (non-racial) markers of it? See Brief for Petitioner 78, 83–86. While Harvard professes interest in socioeconomic diversity, for example, SFFA points to trial testimony that there are "23 times as many rich kids on campus as poor kids." 2 App. in No. 20–1199, p. 756.[3]

**2215 Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like. Brief for Petitioner 85–86; see also Brief for *300 Oklahoma et al. as *Amici Curiae* 9–19.[4] As part of its affirmative case, SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty. Brief for Petitioner 33–34, 81; see 2 App. in No. 20–1199, at 763–765, 774–775. Doing these two things would barely affect the academic credentials of each incoming class. Brief for Petitioner 33–34. And it would not require Harvard to end tips for recruited athletes, who as a group are much weaker academically than non-athletes.[5]

*301 At trial, however, Harvard resisted this proposal. Its preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune or trips to the alumni tent all their lives. While race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy applicants the most. See 980 F.3d at 171. Still, Harvard stands by them. See Brief for Respondent in No. 20–1199, at 52–54; Tr. of Oral Arg. in No. 21–1199, at 48–49. As a result, athletes and the children of donors, alumni, and faculty—groups that together "make up less than 5% of applicants to Harvard"—constitute "around 30% of the applicants admitted each year." 980 F.3d at 171.

To be sure, the parties' debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities' race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask how much a recipient of federal funds discriminates. It does not scrutinize a recipient's reasons or motives **2216 for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. So yes, of course, the universities consider many non-racial factors in their admissions processes too. And perhaps they mean well when they favor certain candidates over others based on the color of their skin. But even if all that is true, their conduct violates Title VI just the same. See Part I–A, *supra*; see also *Bostock*, 590 U. S., at ——, —— – ——, 140 S.Ct., at 1739–1740, 1742–1745.

D

The principal dissent contends that this understanding of Title VI is contrary to precedent. *Post*, at 2239, n. 21 (opinion of SOTOMAYOR, J.). But the dissent does not dispute that everything said here about the meaning of Title VI tracks *302 this Court's precedent in *Bostock* interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? Apparently, the federal government takes the latter view. The Solicitor General insists that there is "ambiguity in the term 'discrimination' " in Title VI but no ambiguity in the term "discriminate" in Title VII. Tr. of Oral Arg. in No. 21–707, at 164. Respectfully, I do not see it. The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next.

Rather than engage with the statutory text or our precedent in *Bostock*, the principal dissent seeks to sow confusion about the facts. It insists that all applicants to Harvard and UNC are "eligible" to receive a race-based tip. *Post*, at 2243, n. 27 (opinion of SOTOMAYOR, J.); cf. *post*, at 2272 (JACKSON, J., dissenting). But the question in these cases is not who could *hypothetically* receive a race-based tip. It is who *actually* receives one. And on that score the lower courts left no doubt. The district court in the Harvard

case found that the school's admissions policy "cannot ... be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip." 397 F.Supp.3d at 190, n. 56; see also *id.,* at 189–190 ("Harvard's admissions process is not facially neutral."). Likewise, the district court in the UNC case found that admissions officers "sometimes" award race-based plusses to URM candidates—a category that excludes Asian American and white students. 567 F.Supp.3d at 591–592, n. 7, 601.[6]

***303** Nor could anyone doubt that these cases are about intentional discrimination just because Harvard in particular " 'does not *explicitly* prioritize any particular racial group over any other.' " *Post,* at 2243, n. 27 (opinion of SOTOMAYOR, J.) (emphasis ****2217** added). Forget for a moment the universities' concessions about how they deliberately consult race when deciding whom to admit. See *supra,* at 2213 – 2214.[7] Look past the lower courts' findings recounted above about how the universities intentionally give tips to students of some races and not others. See *supra,* at 2211 – 2214, 2215 – 2217. Put to the side telling evidence that came out in discovery.[8] Ignore, too, our many precedents holding that it does not matter how a defendant "label[s]" its practices, *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1743–1744; that intentional discrimination between individuals is unlawful whether "motivated by a wish to achieve classwide equality" or any other purpose, *id.*, at ——, 140 S.Ct., at 1743; and that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a [merely] discriminatory effect," *Johnson Controls*, 499 U.S. at 199, 111 S.Ct. 1196. ***304** Consider just the dissents in these cases. From start to finish and over the course of nearly 100 pages, they defend the universities' purposeful discrimination between applicants based on race. "[N]eutrality," they insist, is not enough. *Post,* at 2231, 2262 – 2263 (opinion of SOTOMAYOR, J.); cf. *post*, at 2274 – 2275 (opinion of JACKSON, J.). "[T]he use of race," they stress, "is critical." *Post,* at 2257 – 2258 (opinion of SOTOMAYOR, J.); see *id.,* at 2225 – 2226, 2243, 2246 – 2247, 2248 – 2250; cf. *post,* at 2263 – 2264, 2277 (opinion of JACKSON, J.). Plainly, Harvard and UNC choose to treat some students worse than others in part because of race. To suggest otherwise—or to cling to the fact that the schools do not always say the quiet part aloud—is to deny reality.[9]

II

So far, we have seen that Title VI prohibits a recipient of federal funds from discriminating against individuals even in part because of race. We have seen, too, that Harvard and UNC do just what the law forbids. One might wonder, then, why the parties have devoted years and fortunes litigating other matters, like how much the universities discriminate and why they do so. The answer lies in *Bakke*.

A

Bakke concerned admissions to the medical school at the University of California, ****2218** Davis. That school set aside a certain ***305** number of spots in each class for minority applicants. See 438 U.S. at 272–276, 98 S.Ct. 2733 (opinion of Powell, J.). Allan Bakke argued that the school's policy violated Title VI and the Equal Protection Clause of the Fourteenth Amendment. *Id.,* at 270, 98 S.Ct. 2733. The Court agreed with Mr. Bakke. In a fractured decision that yielded six opinions, a majority of the Court held that the school's set-aside system went too far. At the same time, however, a different coalition of five Justices ventured beyond the facts of the case to suggest that, in other circumstances not at issue, universities may sometimes permissibly use race in their admissions processes. See *ante*, at 2162 – 2164 (opinion for the Court).

As important as these conclusions were some of the interpretive moves made along the way. Justice Powell (writing only for himself) and Justice Brennan (writing for himself and three others) argued that Title VI is coterminous with the Equal Protection Clause. Put differently, they read Title VI to prohibit recipients of federal funds from doing whatever the Equal Protection Clause prohibits States from doing. Justice Powell and Justice Brennan then proceeded to evaluate racial preferences in higher education directly under the Equal Protection Clause. From there, however, their paths diverged. Justice Powell thought some racial preferences might be permissible but that the admissions program at issue violated the promise of equal protection. 438 U.S. at 315–320, 98 S.Ct. 2733. Justice Brennan would have given a wider berth to racial preferences and allowed the challenged program to proceed. *Id.*, at 355–379, 98 S.Ct. 2733.

Justice Stevens (also writing for himself and three others) took an altogether different approach. He began by noting

the Court's "settled practice" of "avoid[ing] the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.,* at 411, 98 S.Ct. 2733. He then turned to the "broad prohibition" of Title VI, *id.,* at 413, 98 S.Ct. 2733, and summarized his views this way: "The University ... excluded Bakke from participation in its program of medical education because of ***306** his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires" finding a Title VI violation. *Id.,* at 412, 98 S.Ct. 2733 (footnote omitted).

In the years following *Bakke*, this Court hewed to Justice Powell's and Justice Brennan's shared premise that Title VI and the Equal Protection Clause mean the same thing. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Justice Stevens's statute-focused approach receded from view. As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment.

And what a confused body of constitutional law followed. For years, this Court has said that the Equal Protection Clause requires any consideration of race to satisfy "strict scrutiny," meaning it must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325 (internal quotation marks omitted). Outside the context of higher education, "our precedents have identified only two" interests that meet this demanding standard: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons." ****2219** *Ante,* at 2161 – 2162 (opinion for the Court).

Within higher education, however, an entirely distinct set of rules emerged. Following *Bakke*, this Court declared that judges may simply "defer" to a school's assertion that "diversity is essential" to its "educational mission." *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325. Not all schools, though—elementary and secondary schools apparently do not qualify for this deference. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 724–725, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Only colleges and universities, the Court explained, "occupy a special niche in our constitutional tradition." ***307** *Grutter*, 539 U.S. at 329, 123 S.Ct. 2325. Yet even they (wielding their "special niche" authority) cannot simply assert an interest in diversity and discriminate as they please. *Fisher*, 579 U.S. at 381, 136 S.Ct. 2198. Instead, they may consider race only as a "plus" factor for the purpose of "attaining a critical mass of underrepresented minority students" or "a diverse student body." *Grutter*, 539 U.S. at 335–336, 123 S.Ct. 2325 (internal quotation marks omitted). At the same time, the Court cautioned, this practice "must have a logical end point." *Id.,* at 342, 123 S.Ct. 2325. And in the meantime, "outright racial balancing" and "quota system[s]" remain "patently unconstitutional." *Id.*, at 330, 334, 123 S.Ct. 2325. Nor may a college or university ever provide "mechanical, predetermined diversity bonuses." *Id.*, at 337, 123 S.Ct. 2325 (internal quotation marks omitted). Only a "tip" or "plus" is constitutionally tolerable, and only for a limited time. *Id.*, at 338–339, 341, 123 S.Ct. 2325.

If you cannot follow all these twists and turns, you are not alone. See, *e.g., Fisher*, 579 U.S. at 401–437, 136 S.Ct. 2198 (Alito, J., dissenting); *Grutter*, 539 U.S. at 346–349, 123 S.Ct. 2325 (Scalia, J., joined by THOMAS, J., concurring in part and dissenting in part); 1 App. in No. 21–707, pp. 401–402 (testimony from UNC administrator: "[M]y understanding of the term 'critical mass' is that it's a ... I'm trying to decide if it's an analogy or a metaphor[.] I think it's an analogy.... I'm not even sure we would know what it is."); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from a Harvard administrator). If the Court's post-*Bakke* higher-education precedents ever made sense, they are by now incoherent.

Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny's demanding standards can be met. In that way, today's decision wakes the echoes of Justice John Marshall Harlan: "The law regards man as man, and takes no account of his surroundings or of his color when ***308** his civil rights as guaranteed by the supreme law of the land are involved." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion).

B

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is "more than a simple paraphrasing" of the Equal Protection Clause. 438 U.S. at

416, 98 S.Ct. 2733 (opinion of Stevens, J.). Title VI has "independent force, with language and emphasis in addition to that found in the Constitution." *Ibid.* That law deserves our respect and its terms provide us with all the direction we need.

Put the two provisions side by side. Title VI says: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation ****2220** in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d. The Equal Protection Clause reads: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. That such differently worded provisions should mean the same thing is implausible on its face.

Consider just some of the obvious differences. The Equal Protection Clause operates on States. It does not purport to regulate the conduct of private parties. By contrast, Title VI applies to recipients of federal funds—covering not just many state actors, but many private actors too. In this way, Title VI reaches entities and organizations that the Equal Protection Clause does not.

In other respects, however, the relative scope of the two provisions is inverted. The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. So, for example, courts apply strict scrutiny for classifications based on race, color, and national origin; intermediate scrutiny for ***309** classifications based on sex; and rational-basis review for classifications based on more prosaic grounds. See, *e.g.*, *Fisher*, 579 U.S. at 376, 136 S.Ct. 2198; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion); *United States v. Virginia*, 518 U.S. 515, 555–556, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

In truth, neither Justice Powell's nor Justice Brennan's opinion in *Bakke* focused on the text of Title VI. Instead, both leapt almost immediately to its "voluminous legislative history," from which they proceeded to divine an implicit "congressional intent" to link the statute with the Equal Protection Clause. 438 U.S. at 284–285, 98 S.Ct. 2733 (opinion of Powell, J.); *id.*, at 328–336, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Along the way, as Justice Stevens documented, both opinions did more than a little cherry-picking from the legislative record. See *id.*, at 413–417, 98 S.Ct. 2733. Justice Brennan went so far as to declare that "any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history." *Id.*, at 340, 98 S.Ct. 2733. And once liberated from the statute's firm rule against discrimination based on race, both opinions proceeded to devise their own and very different arrangements in the name of the Equal Protection Clause.

The moves made in *Bakke* were not statutory interpretation. They were judicial improvisation. Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always ***310** been this Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883), and of the Constitution itself, see *Knowlton v. Moore*, 178 U.S. 41, 87, 20 S.Ct. 747, 44 L.Ed. 969 (1900). In this ****2221** country, "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock*, 590 U. S., at ——, 140 S.Ct., at 1737. When judges disregard these principles and enforce rules "inspired only by extratextual sources and [their] own imaginations," they usurp a lawmaking function "reserved for the people's representatives." *Id.*, at ——, 140 S.Ct., at 1738.

Today, the Court corrects course in its reading of the Equal Protection Clause. With that, courts should now also correct course in their treatment of Title VI. For years, they have read a solo opinion in *Bakke* like a statute while reading Title VI as a mere suggestion. A proper respect for the law demands the opposite. Title VI bears independent force beyond the Equal Protection Clause. Nothing in it grants special deference to university administrators. Nothing in it endorses racial discrimination to any degree or for any purpose. Title VI is more consequential than that.

*

In the aftermath of the Civil War, Congress took vital steps toward realizing the promise of equality under the law. As important as those initial efforts were, much work remained to be done—and much remains today. But by any measure, the Civil Rights Act of 1964 stands as a landmark on this journey and one of the Nation's great triumphs. We have no right to make a blank sheet of any of its provisions. And when we look to the clear and powerful command Congress set forth in that law, these cases all but resolve themselves. Under Title VI, it is never permissible " 'to say "yes" to one person ... but to say "no" to another person' " even in part " 'because of the color of his skin.' " *Bakke*, 438 U.S. at 418, 98 S.Ct. 2733 (opinion of Stevens, J.).

Justice KAVANAUGH, concurring.

***311** I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education.

Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. In accord with the Fourteenth Amendment's text and history, this Court considers all racial classifications to be constitutionally suspect. See *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Strauder v. West Virginia*, 100 U.S. 303, 306–308, 25 L.Ed. 664 (1880). As a result, the Court has long held that racial classifications by the government, including race-based affirmative action programs, are subject to strict judicial scrutiny.

Under strict scrutiny, racial classifications are constitutionally prohibited unless they are narrowly tailored to further a compelling governmental interest. *Grutter*, 539 U.S. at 326–327, 123 S.Ct. 2325. Narrow tailoring requires courts to examine, among other things, whether a racial classification is "necessary"—in other words, whether race-neutral alternatives could adequately achieve the governmental interest. *Id.,* at 327, 339–340, 123 S.Ct. 2325; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

Importantly, even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a "deviation from the norm of equal treatment of all racial and ethnic groups" must be "a temporary matter"—or stated otherwise, ****2222** must be "limited in time." *Id.,* at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.); *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

In 1978, five Members of this Court held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI of the Civil Rights Act, ***312** so long as universities used race only as a factor in admissions decisions and did not employ quotas. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 325–326, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.,* at 287, 315–320, 98 S.Ct. 2733 (opinion of Powell, J.). One Member of the Court's five-Justice majority, Justice Blackmun, added that race-based affirmative action should exist only as a temporary measure. He expressed hope that such programs would be "unnecessary" and a "relic of the past" by 1988—within 10 years "at the most," in his words—although he doubted that the goal could be achieved by then. *Id.,* at 403, 98 S.Ct. 2733 (opinion of Blackmun, J.).

In 2003, 25 years after *Bakke*, five Members of this Court again held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. This time, however, the Court also specifically indicated—despite the reservations of Justice Ginsburg and Justice Breyer—that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not "expect[ed]." *Ibid.* And various Members of the Court wrote separate opinions explicitly referencing the Court's 25-year limit.

- Justice O'Connor's opinion for the Court stated: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Ibid.*
- Justice THOMAS expressly concurred in "the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years." *Id.,* at 351, 123 S.Ct. 2325 (opinion concurring in part and dissenting in part).
- Justice THOMAS, joined here by Justice Scalia, reiterated "the Court's holding" that race-based affirmative action in higher education "will be unconstitutional in 25 years" and "that in 25 years the practices of the Law ***313** School will be illegal," while also stating that "they are,

for the reasons I have given, illegal now." *Id.,* at 375–376, 123 S.Ct. 2325.

- Justice Kennedy referred to "the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Id.,* at 394, 123 S.Ct. 2325 (dissenting opinion).

- Justice Ginsburg, joined by Justice Breyer, acknowledged the Court's 25-year limit but questioned it, writing that "one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.,* at 346, 123 S.Ct. 2325 (concurring opinion).

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003, notwithstanding the progress made since *Bakke*. See *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. The Court stressed, however, that "there are serious problems of justice connected with the idea of preference ****2223** itself." *Id.,* at 341, 123 S.Ct. 2325 (internal quotation marks omitted). And the Court added that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Ibid.* (internal quotation marks omitted).

The *Grutter* Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a " 'temporary matter,' " and "must be limited in time." *Id.,* at 342, 123 S.Ct. 2325 (quoting *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.)). The requirement of a time limit "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. ***314** Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

Importantly, the *Grutter* Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." *Ibid.* The Court reasoned that the "requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Ibid.* (internal quotation marks and alteration omitted). The Court therefore concluded that race-based affirmative action programs in higher education, like other racial classifications, must be "limited in time." *Ibid.*

The *Grutter* Court's conclusion that race-based affirmative action in higher education must be limited in time followed not only from fundamental equal protection principles, but also from this Court's equal protection precedents applying those principles. Under those precedents, racial classifications may not continue indefinitely. For example, in the elementary and secondary school context after *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court authorized race-based student assignments for several decades—but not indefinitely into the future. See, *e.g.,* *Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247–248, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 433–434, 436, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31–32, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); cf. *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971).

In those decisions, this Court ruled that the race-based "injunctions entered in school desegregation cases" could not "operate in perpetuity." *Dowell*, 498 U.S. at 248, 111 S.Ct. 630. Consistent with those decisions, the *Grutter* Court ruled that race-based affirmative action in higher education likewise could not operate in perpetuity.

***315** As of 2003, when *Grutter* was decided, many race-based affirmative action programs in higher education had been operating for about 25 to 35 years. Pointing to the Court's precedents requiring that racial classifications be "temporary," *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.), the petitioner in *Grutter*, joined by the United States, argued that race-based affirmative action in higher education could continue no longer. See Brief for Petitioner 21–22, 30–31, 33, 42, Brief for United States 26–27, in *Grutter* v. *Bollinger*, O. T. 2002, No. 02–241.

The *Grutter* Court rejected those arguments for ending race-based affirmative ****2224** action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation. But the Court also explicitly rejected any "permanent justification for racial preferences," and therefore

ruled that race-based affirmative action in higher education could continue *only* for another generation. 539 U.S. at 342–343, 123 S.Ct. 2325.

Harvard and North Carolina would prefer that the Court now ignore or discard *Grutter*'s 25-year limit on race-based affirmative action in higher education, or treat it as a mere aspiration. But the 25-year limit constituted an important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*. Indeed, four of the separate opinions in *Grutter* discussed the majority opinion's 25-year limit, which belies any suggestion that the Court's reference to it was insignificant or not carefully considered.

In short, the Court in *Grutter* expressly recognized the serious issues raised by racial classifications—particularly permanent or long-term racial classifications. And the Court "assure[d] all citizens" throughout America that "the deviation from the norm of equal treatment" in higher education could continue for another generation, and only for another generation. *Ibid.* (internal quotation marks omitted).

***316** A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke* and *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974), when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.[1]

Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON disagree with the Court's decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, cf. *Bakke*, 438 U.S. at 395–402, 98 S.Ct. 2733 (opinion of Marshall, J.), as well as the continuing effects of that history on African Americans today. And they are of course correct that for the last five decades, *Bakke* and *Grutter* have allowed narrowly tailored race-based affirmative action in higher education.

But I respectfully part ways with my dissenting colleagues on the question of whether, under this Court's precedents, race-based affirmative action in higher education may extend indefinitely into the future. The dissents suggest that the answer is yes. But this Court's precedents make clear that the answer is no. See *Grutter*, 539 U.S. at 342–343, 123 S.Ct. 2325; *Dowell*, 498 U.S. at 247–248, 111 S.Ct. 630; *Croson*, 488 U.S. at 510, 109 S.Ct. 706 (plurality opinion of O'Connor, J.).

To reiterate: For about 50 years, many institutions of higher education have employed race-based affirmative action ***317** programs. ****2225** In the abstract, it might have been debatable how long those race-based admissions programs could continue under the "temporary matter"/"limited in time" equal protection principle recognized and applied by this Court. *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325 (internal quotation marks omitted); cf. *Dowell*, 498 U.S. at 247–248, 111 S.Ct. 630. But in 2003, the *Grutter* Court applied that temporal equal protection principle and resolved the debate: The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. As I have explained, the Court's pronouncement of a 25-year period—as both an extension of *and* an outer limit to race-based affirmative action in higher education—formed an important part of the carefully constructed *Grutter* decision. I would abide by that temporal limit rather than discarding it, as today's dissents would do.

To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race." *Croson*, 488 U.S. at 526, 109 S.Ct. 706 (Scalia, J., concurring in judgment) (internal quotation marks omitted); see *id.*, at 509, 109 S.Ct. 706 (plurality opinion of O'Connor, J.) ("the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"); *ante,* at 2175 – 2176; Brief for Petitioner 80–86; Reply Brief in No. 20–1199, pp. 25–26; Reply Brief in No. 21–707, pp. 23–26.

In sum, the Court's opinion today is consistent with and follows from the Court's equal protection precedents, and I join the Court's opinion in full.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join,[*] dissenting.

***318** The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society." *Id.*, at 492–495, 74 S.Ct. 686. For 45 years, the Court extended *Brown*'s transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous ****2226** progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic ***319** society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. The Constitution initially limited the power of Congress to restrict the slave trade, Art. I, § 9, cl. 1, accorded Southern States additional electoral power by counting three-fifths of their enslaved population in apportioning congressional seats, § 2, cl. 3, and gave enslavers the right to retrieve enslaved people who escaped to free States, Art. IV, § 2, cl. 3. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. See H. Williams, Self-Taught: African American Education in Slavery and Freedom 7, 203–213 (2005) (Self-Taught). Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which abolished "slavery" and "involuntary servitude, except as a punishment for crime." § 1. "Like all great historical transformations," emancipation was a movement, "not a single event" owed to any single individual, institution, ***320** or political party. E. Foner, The Second Founding 21, 51–54 (2019) (The Second Founding).

The fight for equal educational opportunity, however, was a key driver. Literacy was an "instrument of resistance and liberation." Self-Taught 8. Education "provided the means to write a pass to freedom" and "to learn of abolitionist activities." *Id.*, at 7, 91 S.Ct. 1267. It allowed enslaved Black people "to disturb the power relations between master and slave," which "fused their desire for literacy with their desire for freedom." *Ibid*. Put simply, "[t]he very feeling of inferiority which slavery forced upon [Black people] fathered an intense desire to rise out of their condition by means of education." W. E. B. Du Bois, Black Reconstruction in America 1860–1880, 111 S.Ct. 1196, p. 638 (1935); see J. Anderson, The Education of Blacks in the South 1860–1935, p. 7 (1988). Black Americans thus insisted, in the words of Frederick Douglass, "that in a country governed by the people, like ours, education of the youth of all classes is vital to its welfare, prosperity, and to its existence." Address to the People of the United States (1883), in 4 P. Foner, The Life and Writings of Frederick Douglass 386 (1955). Black people's yearning for freedom of thought, and ****2227** for a more perfect Union with educational opportunity for all, played a crucial role during the Reconstruction era.

Yet emancipation marked the beginning, not the end, of that era. Abolition alone could not repair centuries of racial subjugation. Following the Thirteenth Amendment's ratification, the Southern States replaced slavery with "a system of 'laws which imposed upon [Black people] onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.' " *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 390, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Marshall, J.) (quoting *Slaughter-House Cases*, 16 Wall. 36, 70, 83 U.S. 36, 21 L.Ed. 394 (1873)). Those so-called "Black Codes" discriminated against Black people on ***321** the basis of race, regardless of whether they had been previously enslaved. See, *e.g.*, 1866 N. C. Sess. Laws pp. 99, 102.

Moreover, the criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South. Southern States expanded their criminal laws, which in turn "permitted involuntary servitude as a punishment" for convicted Black persons. D. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans From the Civil War to World War II, pp. 7, 53 (2009) (Slavery by Another Name). States required, for example, that Black people "sign a labor contract to work for a white employer or face prosecution for vagrancy." The Second Founding 48. State laws then forced Black convicted persons to labor in "plantations, mines, and industries in the South." *Id.*, at 50. This system of free forced labor provided tremendous benefits to Southern whites and was designed to intimidate, subjugate, and control newly emancipated Black people. See Slavery by Another Name 5–6, 53. The Thirteenth Amendment, without more, failed to equalize society.

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws. Those efforts included the appointment of a Committee, the Joint Committee on Reconstruction, "to inquire into the condition of the Confederate States." Report of the Joint Committee on Reconstruction, S. Rep. No. 112, 39th Cong., 1st Sess., 1 (1866) (hereinafter Joint Comm. Rep.). Among other things, the Committee's Report to Congress documented the "deep-seated prejudice" against emancipated Black people in the Southern States and the lack of a "general disposition to place the colored race, constituting at least two-fifths of the population, upon terms even of civil equality." *Id.*, at 11. In light of its findings, the Committee proposed amending the Constitution to secure the equality of "rights, civil and political." *Id.*, at 7.

***322** Congress acted on that recommendation and adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (Cong. Globe) (statement of Sen. Howard). That is, the Amendment sought "to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy." *Plessy v. Ferguson*, 163 U.S. 537, 555–556, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (internal quotation marks omitted).

To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. That Clause commands that "[n]o State shall ... deny to any person ****2228** within its jurisdiction the equal protection of the laws." Amdt. 14, § 1. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." A. Kull, The Color-Blind Constitution 69 (1992); see also, *e.g.*, Cong. Globe 1287 (rejecting proposed language providing that "no State ... shall ... recognize any distinction between citizens ... on account of race or color"). This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment's promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen's Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16, 1866, ch. 200, 14 Stat. 173. For the Bureau, education "was ***323** the foundation upon which all efforts to assist the freedmen rested." E. Foner, Reconstruction: America's Unfinished Revolution 1863–1877, p. 144 (1988). Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction." *Id.*, at 97.

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau

"educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." E. Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 781 (1985). The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). *Ibid.*; see also Brief for HBCU Leaders et al. as *Amici Curiae* 13 (HBCU Brief). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. 2 O. Howard, Autobiography 397–401 (1907). Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been their previous condition." Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen 60 (July 1, 1868).[1] The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870. Schnapper, 71 Va. L. Rev., at 798, n. 149.

***324** Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. See, *e.g.*, Cong. Globe 632 (statement of Rep. Moulton) ("[T]he true object of this bill is the amelioration of the condition of the colored people"); Joint Comm. Rep. 11 (reporting that "the Union men of the south" declared "with one voice" that the Bureau's efforts "protect[ed] the colored people"). Opponents argued that the Act ****2229** created harmful racial classifications that favored Black people and disfavored white Americans. See, *e.g.*, Cong. Globe 397 (statement of Sen. Willey) (the Act makes "a distinction on account of color between the two races"), 544 (statement of Rep. Taylor) (the Act is "legislation for a particular class of the blacks to the exclusion of all whites"), App. to Cong. Globe, 39th Cong., 1st Sess., 69–70 (statement of Rep. Rousseau) ("You raise a spirit of antagonism between the black race and the white race in our country, and the law-abiding will be powerless to control it"). President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," 6 Messages and Papers of the Presidents 1789–1897, p. 425 (J. Richardson ed. 1897) (Messages & Papers) (A. Johnson to House of Rep. July 16, 1866), but Congress overrode his veto. Cong. Globe 3849–3850. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. The goal of that Act was to eradicate the Black Codes enacted by Southern States following ratification of the Thirteenth Amendment. See *id.*, at 474. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. Section 1 of the Act provided that all persons "of every race and ***325** color ... shall have the same right[s]" as those "enjoyed by white citizens." Act of Apr. 9, 1866, 14 Stat. 27. Similarly, Section 2 established criminal penalties for subjecting racial minorities to "different punishment ... by reason of ... color or race, than is prescribed for the punishment of white persons." *Ibid.* In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. As he did with the Freedmen's Bureau Act, President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. See Messages and Papers 408, 413 (the Act is designed "to afford discriminating protection to colored persons," and its "distinction of race and color ... operate[s] in favor of the colored and against the white race"). Again, Congress overrode his veto. Cong. Globe 1861. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, see Act of May 31, 1870, § 16, 16 Stat. 144, where it remains today, see 42 U.S.C. §§ 1981(a) and 1982 (Rev. Stat. §§ 1972, 1978).

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for " 'the relief of destitute colored women and children,' " without regard to prior enslavement. Act of July 28, 1866, 14 Stat. 317. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. 14 Stat. 357, Res. No. 46, June 15, 1866; Act of Mar. 3, 1869, ch. 122, 15 Stat. 301; Act of Mar. 3, 1873, 17 Stat. 528. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not ... to the white people." Cong. Globe, 40th Cong., 1st Sess., 79 (1867) (statement of Sen. Grimes). This history makes it "inconceivable" that race-conscious ***326** college admissions are unconstitutional.

**2230 *Bakke*, 438 U.S. at 398, 98 S.Ct. 2733 (opinion of Marshall, J.).[2]

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." *Id.*, at 391, 98 S.Ct. 2733. In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. *Id.*, at 391–392, 98 S.Ct. 2733 (collecting cases). That endeavor culminated with the Court's shameful decision in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), which established that "equality of treatment" exists "when the races are provided substantially equal facilities, even though these facilities be separate." *Brown*, 347 U.S. at 488, 74 S.Ct. 686. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society, from bathrooms to military units and, crucially, schools. See *Bakke*, 438 U.S. at 393–394, 98 S.Ct. 2733 (opinion of Marshall, J.); see also generally R. Rothstein, The Color of Law 17–176 (2017) (discussing various federal policies that promoted racial segregation).

In a powerful dissent, Justice Harlan explained in *Plessy* that the Louisiana law at issue, which authorized segregation in railway carriages, perpetuated a "caste" system. 163 U.S. at 559–560, 16 S.Ct. 1138. Although the State argued that the law *327 "prescribe[d] a rule applicable alike to white and colored citizens," all knew that the law's purpose was not "to exclude white persons from railroad cars occupied by blacks," but "to exclude colored people from coaches occupied by or assigned to white persons." *Id.*, at 557, 16 S.Ct. 1138. That is, the law "proceed[ed] on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560, 16 S.Ct. 1138. Although "[t]he white race deems itself to be the dominant race ... in prestige, in achievements, in education, in wealth, and in power," Justice Harlan explained, there is "no superior, dominant, ruling class of citizens" in the eyes of the law. *Id.*, at 559, 16 S.Ct. 1138. In that context, Justice Harlan thus announced his view that "[o]ur constitution is color-blind." *Ibid.*

It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens." *Ibid.* Considering the "effect[s] of segregation" and the role of education "in the light of its full development and its present place in American life throughout the Nation," *Brown* overruled *Plessy*. 347 U.S. at 492–495, 74 S.Ct. 686. The *Brown* Court held that "[s]eparate educational facilities are inherently unequal," and that such racial segregation deprives Black students "of the equal protection of the laws guaranteed by the Fourteenth Amendment." **2231 *Id.*, at 494–495, 74 S.Ct. 686. The Court thus ordered segregated schools to transition to a racially integrated system of public education "with all deliberate speed," "ordering the immediate admission of [Black children] to schools previously attended only by white children." *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities *328 "solely because of their race," denoting "inferiority as to their status in the community." 347 U.S. at 494, and n. 10, 74 S.Ct. 686. Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. *Id.*, at 493, 74 S.Ct. 686. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms." *Ibid.*

The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. In *Green v. School Bd. of New Kent Cty.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), for example, the Court held that the New Kent County School Board's "freedom of choice" plan, which allegedly allowed "every student, regardless of race, ... 'freely' [to] choose the school he [would] attend," was insufficient to effectuate "the command of [*Brown*]." *Id.*, at 437, 441–442, 88 S.Ct. 1689. That command, the Court explained, was that schools dismantle

"well-entrenched dual systems" and transition "to a unitary, nonracial system of public education." *Id.*, at 435–436, 88 S.Ct. 1689. That the board "opened the doors of the former 'white' school to [Black] children and the ['Black'] school to white children" on a race-blind basis was not enough. *Id.*, at 437, 88 S.Ct. 1689. Passively eliminating race classifications did not suffice when *de facto* segregation persisted. *Id.*, at 440–442, 88 S.Ct. 1689 (noting that 85% of Black children in the school system were still attending an all-Black school). Instead, the board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437–438, 88 S.Ct. 1689. Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*'s promise of racial equality. See ***329** *Green*, 391 U.S. at 440–442, 88 S.Ct. 1689; see also *North Carolina Bd. of Ed. v. Swann*, 402 U.S. 43, 45–46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) (holding that North Carolina statute that forbade the use of race in school busing "exploits an apparently neutral form to control school assignment plans by directing that they be 'colorblind'; that requirement, against the background of segregation, would render illusory the promise of *Brown*"); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 538, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (school board "had to do more than abandon its prior discriminatory purpose"; it "had an affirmative responsibility" to integrate); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 200, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) ("[T]he State automatically assumes an affirmative duty" under *Brown* to eliminate ****2232** the vestiges of segregation).[3]

In so holding, this Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with "the *Brown* decisions." Brief for Respondents in *Green* v. *School Bd. of New Kent Cty.*, O. T. 1967, No. 695, p. 6 (*Green* Brief). Those opponents argued that *Brown* only required the admission of Black students "to public schools on a racially nondiscriminatory basis." *Id.*, at 11 (emphasis deleted). Relying on Justice Harlan's dissent in *Plessy*, they argued that the use of race "is improper" because the " 'Constitution is colorblind.' " *Green* Brief 6, n. 6 (quoting *Plessy*, 163 U.S. at 559, 16 S.Ct. 1138 (Harlan, J., dissenting)). They also incorrectly claimed that their views aligned with those of the *Brown* litigators, arguing that the *Brown* plaintiffs "understood" that *Brown*'s "mandate" ***330** was colorblindness. *Green* Brief 17. This Court rejected that characterization of "the thrust of *Brown*." *Green*, 391 U.S. at 437, 88 S.Ct. 1689. It made clear that indifference to race "is not an end in itself " under that watershed decision. *Id.*, at 440, 88 S.Ct. 1689. The ultimate goal is racial equality of opportunity.

Those rejected arguments mirror the Court's opinion today. The Court claims that *Brown* requires that students be admitted " 'on a racially nondiscriminatory basis.' " *Ante*, at 2160. It distorts the dissent in *Plessy* to advance a colorblindness theory. *Ante*, at 2175 – 2176; see also *ante*, at 2219 (GORSUCH, J., concurring) ("[T]oday's decision wakes the echoes of Justice John Marshall Harlan [in *Plessy*]"); *ante*, at 2177 (THOMAS, J., concurring) (same). The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued." *Ante*, at 2160; *ante*, at 2194 - 2196, 2197, n. 7 (opinion of THOMAS, J.).

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as *Amici Curiae* 9. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." 438 U.S. at 400, 98 S.Ct. 2733. In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. See *id.*, at 396–402, 98 S.Ct. 2733 (arguing that "a class-based remedy" should be constitutionally permissible in light of the hundreds of "years of class-based discrimination against [Black Americans]"). The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice ***331** Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

****2233** C

Two decades after *Brown*, in *Bakke*, a plurality of the Court held that "the attainment of a diverse student body" is a "compelling" and "constitutionally permissible goal for an institution of higher education." 438 U.S. at 311–315, 98 S.Ct. 2733. Race could be considered in the college admissions

process in pursuit of this goal, the plurality explained, if it is one factor of many in an applicant's file, and each applicant receives individualized review as part of a holistic admissions process. *Id.*, at 316–318, 98 S.Ct. 2733.

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," 539 U.S. at 325, 123 S.Ct. 2325, and held that race may be used in a narrowly tailored manner to achieve this interest, *id.*, at 333–344, 123 S.Ct. 2325; see also *Gratz v. Bollinger*, 539 U.S. 244, 268, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("for the reasons set forth [the same day] in *Grutter*," rejecting petitioners' arguments that race can only be considered in college admissions "to remedy identified discrimination" and that diversity is " 'too open-ended, ill-defined, and indefinite to constitute a compelling interest' ").

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny. In *Fisher v. University of Texas at Austin*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*), seven Members of the Court concluded that the use of race in college admissions comports with the Fourteenth Amendment if it "is narrowly tailored to obtain the educational benefits of diversity." *Id.*, at 314, 337, 133 S.Ct. 2411. Several years later, in ***332** *Fisher v. University of Texas at Austin*, 579 U.S. 365, 376, 136 S.Ct. 2198, 195 L.Ed.2d 511 (2016) (*Fisher II*), the Court upheld the admissions program at the University of Texas under this framework. *Id.*, at 380–388, 136 S.Ct. 2198.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Those decisions recognize that " 'experience lend[s] support to the view that the contribution of diversity is substantial.' " *Grutter*, 539 U.S. at 324, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 313, 98 S.Ct. 2733). Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace ... through exposure to widely diverse people, cultures, ideas, and viewpoints." 539 U.S. at 330, 123 S.Ct. 2325. More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. *Id.*, at 332, 123 S.Ct. 2325. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." *Id.*, at 331–332, 123 S.Ct. 2325. It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races. *Id.*, at 328–333, 123 S.Ct. 2325.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but ****2234** also in principles of "academic freedom," which " 'long [have] been viewed as a special concern of the First Amendment.' " *Id.*, at 324, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733). In light of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," this Court's precedents recognize the imperative nature of diverse student bodies on American college campuses. 539 U.S. at 329, 123 S.Ct. 2325. Consistent ***333** with the First Amendment, student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection. " *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (internal quotation marks omitted). Indeed, as the Court recently reaffirmed in another school case, "learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society' " under our constitutional tradition. *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ——, ——, 142 S.Ct. 2407, 2430–2431, 213 L.Ed.2d 755 (2022); cf. *Khorrami* v. *Arizona*, 598 U. S. ——, ——, 143 S.Ct. 22, 26–27, 214 L.Ed.2d 224 (2022) (GORSUCH, J., dissenting from denial of certiorari) (collecting research showing that larger juries are more likely to be racially diverse and "deliberate longer, recall information better, and pay greater attention to dissenting voices").

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially

integrated schools guarantee students of all races the equal protection of the laws.

D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, see *supra*, at 2225 - 2234, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University ***334** of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment.[4] The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased. ****2235** [5] To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."[6]

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty.[7] When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. See ***335** *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 72–86, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting) (noting school funding disparities that result from local property taxation).[8] In turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses.[9] It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.[10]

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system.[11] Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process.[12] Further, low-income children of color are less likely to attend ***336** preschool and other early childhood education programs that increase educational attainment.[13] All of these interlocked factors ****2236** place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. See, *e.g.*, *Hoke Cty. Bd. of Ed. v. State*, 2020 WL 13310241, *6, *13 (N. C. Super. Ct., Jan. 21, 2020); *Hoke Cty. Bd. of Ed. v. State*, 382 N.C. 386, 388–390, 879 S.E.2d 193, 197–198 (2022).

These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 32. "Because talent lives everywhere, but opportunity does not, there are undoubtedly talented students with great academic potential who have simply not had the opportunity to attain the traditional indicia of merit that provide a competitive edge in the admissions process." Brief for Harvard Student and Alumni Organizations as *Amici Curiae* 16. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.[14]

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce ***337** other forms of inequality in communities of color. See E. Wilson, Monopolizing Whiteness, 134 Harv. L. Rev. 2382, 2416 (2021) ("[E]ducational opportunities ... allow for social mobility, better life outcomes, and the ability to participate

equally in the social and economic life of the democracy"). Stark racial disparities exist, for example, in unemployment rates,[15] income levels,[16] wealth and homeownership,[17] and healthcare access.[18] See also *Schuette v. BAMN*, 572 U.S. 291, 380–381, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting) (noting the "persistent racial inequality in society"); *Gratz*, 539 U.S. at 299–301, 123 S.Ct. 2411 (Ginsburg, J., dissenting) (cataloging racial disparities in employment, poverty, healthcare, housing, consumer transactions, and education).

Put simply, society remains "inherently unequal." *Brown*, 347 U.S. at 495, 74 S.Ct. 686. Racial inequality runs deep to this very day. That is particularly true in education, the " 'most vital civic institution for the preservation of a democratic system of government.' " *Plyler v. Doe*, 457 U.S. 202, 221, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). As I have explained before, only with eyes open to this reality can the Court "carry out the guarantee of equal ****2237** protection." *Schuette*, 572 U.S. at 381, 134 S.Ct. 1623 (dissenting opinion).

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, *Grutter*, 539 U.S. at 327, 123 S.Ct. 2325, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

***338** i

For much of its history, UNC was a bastion of white supremacy. Its leadership included "slaveholders, the leaders of the Ku Klux Klan, the central figures in the white supremacy campaigns of 1898 and 1900, and many of the State's most ardent defenders of Jim Crow and race-based Social Darwinism in the twentieth century." 3 App. 1680. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. *Id.*, at 1681–1683. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. 3 App. 1685. It took almost 10 more years for the first Black woman to enroll at the university in 1963. See Karen L. Parker Collection, 1963–1966, UNC Wilson Special Collections Library. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. 3 App. 1685. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born.[19] *Id.*, at 1688–1690. During that period, Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus. 2 *id.*, at 781–784; 3 *id.*, at 1689.

***339** To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. *Id.*, at 1683. Students of color also continue to experience racial harassment, isolation, and tokenism.[20] Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. *Id.*, at 1647. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population. *Id.*, at 1648.

****2238** ii

UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." C. Wilder, Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities 11 (2013). From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an elite, national institution. Harvard & the Legacy of Slavery, Report by the President and Fellows of Harvard College 7 (2022) (Harvard Report). ***340** Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus. *Id.*, at 7, 15.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted " 'race science,' " racist eugenics, and other theories rooted in racial hierarchy.

Id., at 11. Activities to advance these theories "took place on campus," including "intrusive physical examinations" and "photographing of unclothed" students. *Ibid.* The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." *Id.*, at 44. By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. *Id.*, at 45. Those Black students who managed to enroll at Harvard "excelled academically, earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus. *Ibid*. Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. *Id.*, at 51, 91 S.Ct. 1284. Women of color at Radcliffe were taught by Harvard professors, but "women did not receive Harvard degrees until 1963." *Ibid.*; see also S. Bradley, Upending the Ivory Tower: Civil Rights, Black Power, and the Ivy League 17 (2018) (noting that the historical discussion of racial integration at the Ivy League "is necessarily male-centric," given the historical exclusion of women of color from these institutions).

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the like." Harvard Report 11. Black and Latino applicants account for only 20% of domestic applicants to Harvard each ***341** year. App. to Pet. for Cert. in No. 20–1199, p. 112. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 30–31; 2 App. 823, 961. For years, the university has reported that inequities on campus remain. See, *e.g.*, 4 App. 1564–1601. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," 3 *id.*, at 1308, and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds," *id.*, at 1309.

* * *

****2239** These may be uncomfortable truths to some, but they are truths nonetheless. "Institutions can and do change," however, as societal and legal changes force them "to live up to [their] highest ideals." Harvard Report 56. It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedent, "content for now to disguise" its ruling as an application ***342** of "established law and move on." *Kennedy*, 597 U. S., at ——, 142 S.Ct., at 2450 (SOTOMAYOR, J., dissenting). As Justice THOMAS puts it, "*Grutter* is, for all intents and purposes, overruled." *Ante*, at 2207.

It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.[21]

***343** A

Answering the question whether Harvard's and UNC's policies survive strict scrutiny under settled law is straightforward, both because of the procedural posture ****2240** of these cases and because of the narrow scope of the issues presented by petitioner Students for Fair Admissions, Inc. (SFFA).[22]

These cases arrived at this Court after two lengthy trials. Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their

admissions programs. Brief for Petitioner 20, 40. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts. *Ibid*.

After making detailed findings of fact and conclusions of law, the District Courts entered judgment in favor of Harvard and UNC. See 397 F.Supp.3d 126, 133–206 (Mass. 2019) (*Harvard I*); 567 F.Supp.3d 580, 588–667 (MDNC 2021) (*UNC*). The First Circuit affirmed in the *Harvard* case, finding "no error" in the District Court's thorough opinion. 980 F.3d 157, 204 (2020) (*Harvard II*). SFFA then filed petitions for a writ of certiorari in both cases, which the Court granted. 595 U. S. ——, 142 S.Ct. 895, 211 L.Ed.2d 604 (2022).[23]

The Court granted certiorari on three questions: (1) whether the Court should overrule *Bakke*, *Grutter*, and *Fisher*; or, alternatively, (2) whether UNC's admissions program is narrowly tailored, and (3) whether Harvard's admissions ***344** program is narrowly tailored. See Brief for Petitioner in No. 20–1199, p. i; Brief for Respondent in No. 20–1199, p. i; Brief for University Respondents in No. 21–707, p. i. Answering the last two questions, which call for application of settled law to the facts of these cases, is simple: Deferring to the lower courts' careful findings of fact and credibility determinations, Harvard's and UNC's policies are narrowly tailored.

B

1

As to narrow tailoring, the only issue SFFA raises in the *UNC* case is that the university cannot use race in its admissions process because race-neutral alternatives would promote UNC's diversity objectives. That issue is so easily resolved in favor of UNC that SFFA devoted only three pages to it at the end of its 87-page brief. Brief for Petitioner 83–86.

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at " 'tolerable administrative expense.' " *Fisher I*, 570 U.S. at 312, 133 S.Ct. 2411 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion)). Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325. "Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.*

As the District Court found after considering extensive expert testimony, SFFA's ****2241** proposed race-neutral alternatives do not meet those criteria. *UNC*, 567 F.Supp.3d at 648. All of SFFA's proposals are methodologically flawed because they rest on " 'terribly unrealistic' " assumptions about the applicant pools. *Id.*, at 643–645, 647. For example, as to ***345** one set of proposals, SFFA's expert "unrealistically assumed" that "all of the top students in the candidate pools he use[d] would apply, be admitted, and enroll." *Id.*, at 647. In addition, some of SFFA's proposals force UNC to "abandon its holistic approach" to college admissions, *id.*, at 643–645, n. 43, a result "in deep tension with the goal of educational diversity as this Court's cases have defined it," *Fisher II*, 579 U.S. at 386–387, 136 S.Ct. 2198. Others are "largely impractical—not to mention unprecedented—in higher education." 567 F.Supp.3d at 647. SFFA's proposed top percentage plans,[24] for example, are based on a made-up and complicated admissions index that requires UNC to "access ... real-time data for all high school students." *Ibid.* UNC is then supposed to use that index, which "would change every time any student took a standardized test," to rank students based on grades and test scores. *Ibid.* One of SFFA's top percentage plans would even "nearly erase the Native American incoming class" at UNC. *Id.*, at 646. The courts below correctly concluded that UNC is not required to adopt SFFA's unrealistic proposals to satisfy strict scrutiny.[25]

***346** 2

Harvard's admissions program is also narrowly tailored under settled law. SFFA argues that Harvard's program is not narrowly tailored because the university "has workable race-neutral alternatives," "does not use race as a mere plus," and "engages in racial balancing." Brief for Petitioner 75–83. As the First Circuit concluded, there was "no error" in the District Court's findings on any of these issues. *Harvard II*, 980 F.3d at 204.[26]

****2242** Like UNC, Harvard has already implemented many of SFFA's proposals, such as increasing recruitment efforts

and financial aid for low-income students. *Id.*, at 193. Also like UNC, Harvard "carefully considered" other race-neutral ways to achieve its diversity goals, but none of them are "workable." *Id.*, at 193–194. SFFA's argument before this Court is that Harvard should adopt a plan designed by SFFA's expert for purposes of trial, which increases preferences for low-income applicants and eliminates the use of race and legacy preferences. *Id.*, at 193; Brief for Petitioner 81. Under SFFA's model, however, Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings. 980 F.3d at 194. SFFA's proposal, echoed by Justice GORSUCH, *ante*, at 2214 – 2215, requires Harvard to "make sacrifices on almost every dimension important to its admissions process," ***347** 980 F.3d at 194, and forces it "to choose between a diverse student body and a reputation for academic excellence," *Fisher II*, 579 U.S. at 385, 136 S.Ct. 2198. Neither this Court's precedents nor common sense impose that type of burden on colleges and universities.

The courts below also properly rejected SFFA's argument that Harvard does not use race in the limited way this Court's precedents allow. The Court has explained that a university can consider a student's race in its admissions process so long as that use is "contextual and does not operate as a mechanical plus factor." *Id.*, at 375, 136 S.Ct. 2198. The Court has also repeatedly held that race, when considered as one factor of many in the context of holistic review, "can make a difference to whether an application is accepted or rejected." *Ibid.* After all, race-conscious admissions seek to improve racial diversity. Race cannot, however, be " 'decisive' for virtually every minimally qualified underrepresented minority applicant." *Gratz*, 539 U.S. at 272, 123 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733).

That is precisely how Harvard's program operates. In recent years, Harvard has received about 35,000 applications for a class with about 1,600 seats. 980 F.3d at 165. The admissions process is exceedingly competitive; it involves six different application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. *Id.*, at 165–166. Consistent with that "individualized, holistic review process," admissions officers may, but need not, consider a student's self-reported racial identity when assigning overall ratings. *Id.*, at 166, 169, 180. Even after so many layers of competitive review, Harvard typically ends up with about 2,000 tentative admits, more students than the 1,600 or so that the university can admit. *Id.*, at 170. To choose among those highly qualified candidates, Harvard considers "plus factors," which ***348** can help "tip an applicant into Harvard's admitted class." *Id.*, at 170, 191. To diversify its class, Harvard awards "tips" for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. *Ibid.*

There is "no evidence of any mechanical use of tips." *Id.*, at 180. Consistent with the Court's precedents, Harvard properly "considers race as part of a holistic review process," "values all types of diversity," "does not consider race exclusively," and "does not award a fixed amount of points to applicants because of their race." ****2243** *Id.*, at 190.[27] Indeed, Harvard's admissions process is so competitive and the use of race is so limited and flexible that, as "SFFA's own expert's analysis" showed, "Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants." *Id.*, at 191.

The courts below correctly rejected SFFA's view that Harvard's use of race is unconstitutional because it impacts overall Hispanic and Black student representation by 45%. See Brief for Petitioner 79. That 45% figure shows that eliminating the use of race in admissions "would reduce African American representation ... from 14% to 6% and Hispanic representation from 14% to 9%." *Harvard II*, 980 F.3d at 180, 191. Such impact of Harvard's limited use of race on the makeup of the class is less than this Court has previously upheld as narrowly tailored. In *Grutter*, for example, eliminating the use of race would have reduced the underrepresented minority population by 72%, a much greater effect. ***349** 539 U.S. at 320, 123 S.Ct. 2325. And in *Fisher II*, the use of race helped increase Hispanic representation from 11% to 16.9% (a 54% increase) and African-American representation from 3.5% to 6.8% (a 94% increase). 579 U.S. at 384, 136 S.Ct. 2198.[28]

Finally, the courts below correctly concluded that Harvard complies with this Court's repeated admonition that colleges ****2244** and universities cannot define their diversity interest "as 'some specified percentage of a particular group merely because ***350** of its race or ethnic origin.' " *Fisher I*, 570 U.S. at 311, 133 S.Ct. 2411 (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733). Harvard does not specify its diversity objectives in terms of racial quotas, and "SFFA did not

offer expert testimony to support its racial balancing claim." *Harvard II*, 980 F.3d at 180, 186–187. Harvard's statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern "inconsistent with the imposition of a racial quota or racial balancing." *Harvard I*, 397 F.Supp.3d at 176–177; see *Harvard II*, 980 F.3d at 180, 188–189.

Similarly, Harvard's use of "one-pagers" containing "a snapshot of various demographic characteristics of Harvard's applicant pool" during the admissions review process is perfectly consistent with this Court's precedents. *Id.*, at 170–171, 189. Consultation of these reports, with no "specific number firmly in mind," "does not transform [Harvard's] program into a quota." *Grutter*, 539 U.S. at 335–336, 123 S.Ct. 2325. Rather, Harvard's ongoing review complies with the Court's command that universities periodically review the necessity of the use of race in their admissions programs. *Id.*, at 342, 123 S.Ct. 2325; *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198.

The Court ignores these careful findings and concludes that Harvard engages in racial balancing because its "focus on numbers is obvious." *Ante*, at 2171. Because SFFA failed to offer an expert and to prove its claim below, the majority is forced to reconstruct the record and conduct its own factual analysis. It thus relies on a single chart from SFFA's brief that truncates relevant data in the record. Compare *ibid.* (citing Brief for Petitioner in No. 201199, p. 23) with 4 App. in No. 20–1199, p. 1770. That chart cannot displace the careful factfinding by the District Court, which the First Circuit upheld on appeal under clear error review. See *Harvard II*, 980 F.3d at 180–182, 188–189.

In any event, the chart is misleading and ignores "the broader context" of the underlying data that it purports ***351** to summarize. *Id.*, at 188. As the First Circuit concluded, what the data actually show is that admissions have increased for all racial minorities, including Asian American students, whose admissions numbers have "increased roughly five-fold since 1980 and roughly two-fold since 1990." *Id.*, at 180, 188. The data also show that the racial shares of admitted applicants fluctuate more than the corresponding racial shares of total applicants, which is "the opposite of what one would expect if Harvard imposed a quota." *Id.*, at 188. Even looking at the Court's truncated period for the classes of 2009 to 2018, "the same pattern holds." *Ibid.* The fact that Harvard's racial shares of admitted applicants "varies relatively little in absolute terms for [those classes] is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Id.*, at 188–189. Thus, properly understood, the data show that Harvard "does not utilize quotas and does not engage in racial balancing." *Id.*, at 189.[29]

***352** ****2245** III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. *Ante*, at 2165 - 2173, 2175 - 2176. In reaching this conclusion, the Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. *Ante*, at 2166. In reality, however, "the Court today cuts through the kudzu" and overrules its "higher-education precedents" following *Bakke*. *Ante*, at 2219 (GORSUCH, J., concurring).

There is no better evidence that the Court is overruling the Court's precedents than those precedents themselves. "Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases" the majority now overrules. *Payne v. Tennessee*, 501 U.S. 808, 846, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Marshall, J., dissenting); see, *e.g.*, *Grutter*, 539 U.S. at 354, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part) ("Unlike the majority, I seek to define with precision the interest being asserted"); *Fisher II*, 579 U.S. at 389, 136 S.Ct. 2198 (THOMAS, J., dissenting) (race-conscious admissions programs "res[t] on pernicious assumptions about race"); *id.*, at 403, 136 S.Ct. 2198 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting) (diversity interests "are laudable goals, but they are not concrete or precise"); *id.*, at 413, 136 S.Ct. 2198 (race-conscious college admissions plan "discriminates against Asian-American students"); *id.*, at 414, 136 S.Ct. 2198 (race-conscious admissions plan is unconstitutional because it "does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian American,' 'Native American,' or 'White' "); *id.*, at 419, 136 S.Ct. 2198 (race-conscious college admissions policies rest on "pernicious stereotype[s]").

Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number ***353**

on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. It fosters the People's suspicions that "bedrock principles are founded ... in the proclivities of individuals" on this Court, not in the law, and it degrades "the integrity of our constitutional system of government." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Nowhere is the damage greater than in cases like these that touch upon matters of representation and institutional legitimacy.

The Court offers no justification, much less "a 'special justification,' " for its costly endeavor. *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ——, ——, 142 S.Ct. 2228, 2334, 213 L.Ed.2d 545 (2022) (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (quoting *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 1969, 204 L.Ed.2d 322 (2019)). Nor could it. There is no basis for overruling *Bakke*, *Grutter*, and ****2246** *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. See 597 U. S., at ——, 142 S.Ct., at 2334 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting); *id.*, at —— – ——, 142 S.Ct., at 2306–2308 (KAVANAUGH, J., concurring). At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

A

1

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. See *supra*, at 2225 - 2230. ***354** Consistent with that view, the Court has explicitly held that "race-based action" is sometimes "within constitutional constraints." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). The Court has thus upheld the use of race in a variety of contexts. See, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 737, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) ("[T]he obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect"); *Johnson v. California*, 543 U.S. 499, 512, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (use of race permissible to further prison's interest in " 'security' " and " 'discipline' "); *Cooper v. Harris*, 581 U.S. 285, 291–293, 137 S.Ct. 1455, 197 L.Ed.2d 837 (2017) (use of race permissible when drawing voting districts in some circumstances).[30]

Tellingly, in sharp contrast with today's decision, the Court has allowed the use of race when that use burdens minority populations. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), for example, the Court held that it is unconstitutional for border patrol agents to rely on a person's skin color as "a single factor" to justify a traffic stop based on reasonable suspicion, but it remarked that "Mexican appearance" could be "a relevant factor" out of many to justify such a stop "at the border and its functional equivalents." *Id.*, at 884–887, 95 S.Ct. 2574; see also *id.*, at 882, 95 S.Ct. 2574 (recognizing that "the border" includes entire metropolitan areas such as San Diego, El Paso, and the South Texas Rio Grande Valley).[31] The Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule. The ***355** Court later extended this reasoning to border patrol agents selectively referring motorists for secondary ****2247** inspection at a checkpoint, concluding that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [there is] no constitutional violation." *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–563, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (footnote omitted).

The result of today's decision is that a person's skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person's individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment's guarantee of equal protection.

2

The majority does not dispute that some uses of race are constitutionally permissible. See *ante*, at 2161 - 2162. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. In a footnote, the

Court exempts military academies from its ruling in light of "the potentially distinct interests" they may present. *Ante*, at 2166, n. 4. To the extent the Court suggests national security interests are "distinct," those interests cannot explain the Court's narrow exemption, as national security interests are also implicated at civilian universities. See *infra*, at 2260 – 2261, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46. The Court also attempts to justify its carveout based on the fact that "[n]o military academy is a party to these cases." *Ante*, at 2166, n. 4. Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion. See Brief for Georgetown University et al. as *Amici Curiae* 18–29 (Georgetown Brief) (Catholic colleges and universities noting that they rely on the use of race in their holistic admissions to further not just their academic goals, but also their religious missions); see also ***356** *Harvard II*, 980 F.3d at 187, n. 24 ("[S]chools that consider race are diverse on numerous dimensions, including in terms of religious affiliation, location, size, and courses of study offered"). The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.

The concurring opinions also agree that the Constitution tolerates some racial classifications. Justice GORSUCH agrees with the majority's conclusion that racial classifications are constitutionally permissible if they advance a compelling interest in a narrowly tailored way. *Ante*, at 2220. Justice KAVANAUGH, too, agrees that the Constitution permits the use of race if it survives strict scrutiny. *Ante*, at 2221 - 2222.[32]Justice THOMAS offers an "originalist defense of the colorblind Constitution," but his historical analysis leads to the inevitable conclusion that the Constitution is not, in fact, colorblind. *Ante*, at 2177. Like the majority opinion, Justice THOMAS agrees that race can be used to remedy past discrimination and "to equalize treatment against a concrete baseline of government-imposed inequality." ****2248** *Ante*, at 2187. He also argues that race can be used if it satisfies strict scrutiny more broadly, and he considers compelling interests those that prevent anarchy, curb violence, and segregate prisoners. *Ante*, at 2189 - 2190. Thus, although Justice THOMAS at times suggests that the Constitution only permits "directly remedial" measures that benefit "identified victims of discrimination," *ante*, at 2186, he agrees that the Constitution tolerates a much wider range of race-conscious measures.

***357** In the end, when the Court speaks of a "colorblind" Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes*, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action, *ante*, at 2167, even though respondents' objectives simply "mirror the 'compelling interest' this Court has approved" many times in the past. *Fisher II*, 579 U.S. at 382, 136 S.Ct. 2198; see, *e.g.*, *UNC*, 567 F.Supp.3d at 598 ("the [university's admissions policy] repeatedly cites Supreme Court precedent as guideposts").[33] At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level ***358** of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 447, 454, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (ROBERTS, C. J., for the Court); see also, *e.g.*, *Ramirez* v. *Collier*, 595 U. S. ——, ——, 142 S.Ct. 1264, 1281, 212 L.Ed.2d 262 (2022) (ROBERTS, C. J., for the Court) ("[M]aintaining solemnity and decorum in the execution chamber" is a "compelling" interest); *United States v. Alvarez*, 567 U.S. 709, 725, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion) ("[P]rotecting the integrity of the Medal of Honor" is a "compelling interes[t]"); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("[P]rotecting the physical and psychological well-being of minors" is a "compelling interest"). Thus, although the Members of this majority pay lip service to respondents' "commendable" ****2249** and "worthy" racial

diversity goals, *ante*, at 2166 – 2167, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them. "Today, the proclivities of individuals rule." *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2443 (dissenting opinion).

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. *Ante*, at 2172 – 2174. Yet as the majority acknowledges, while *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. 438 U.S. at 311–315, 98 S.Ct. 2733. It is that narrower interest, which the Court has reaffirmed numerous times since *Bakke* and as recently as 2016 in *Fisher II*, see *supra*, at 2232 – 2233, that the Court overrules today.

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been ***359** working. Lower courts have consistently applied them without issue, as exemplified by the opinions below and SFFA's and the Court's inability to identify any split of authority. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

The Court argues that Harvard's and UNC's programs must end because they unfairly disadvantage some racial groups. According to the Court, college admissions are a "zero-sum" game and respondents' use of race unfairly "advantages" underrepresented minority students "at the expense of" other students. *Ante*, at 2169.

That is not the role race plays in holistic admissions. Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, ***360** applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." *Harvard II*, 980 F.3d at 171 (noting also that "SFFA does not challenge the admission of this large group"). ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. *Ibid.* By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are ****2250** Black, and 12.6% are Latino. *Ibid.* Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." *Ibid.* Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, see *supra*, at 2234 – 2237, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. *Ante*, at 2169. Reduced to its simplest terms, the Court's conclusion is that an increase in the

representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate ***361** against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit." *Ante*, at 2175.

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. *Supra*, at 2225 – 2234. In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King "I Have a Dream" Speech (Aug. 28, 1963). It is "essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325.[34]

****2251** By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized ***362** consideration" of the whole person. *Id.*, at 334, 123 S.Ct. 2325. Yet, "by foreclosing racial considerations, colorblindness denies those who racially self-identify the full expression of their identity" and treats "racial identity as inferior" among all "other forms of social identity." E. Boddie, The Indignities of Colorblindness, 64 UCLA L. Rev. Discourse, 64, 67 (2016). The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own.

There is no question that minority students will bear the burden of today's decision. Students of color testified at trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves. For example, Rimel Mwamba, a Black UNC alumna, testified that it was "really important" that UNC see who she is "holistically and how the color of [her] skin and the texture of [her] hair impacted [her] upbringing." 2 App. in No. 21–707, p. 1033. Itzel Vasquez-Rodriguez, who identifies as Mexican-American of Cora descent, testified that her ethnoracial identity is a "core piece" of who she is and has impacted "every experience" she has had, such that she could not explain her "potential contributions to Harvard without any reference" to it. 2 App. in No. 20–1199, at 906, 908. Sally Chen, a Harvard alumna who identifies as Chinese American, explained that being the child of Chinese immigrants was "really fundamental to explaining who" she is. *Id.*, at 968–969. Thang Diep, a Harvard alumnus, testified that his Vietnamese identity was "such a big part" of himself that he needed to discuss it in his application. *Id.*, at 949. And Sarah Cole, a Black Harvard alumna, emphasized that "[t]o try to not see [her] race is to try to not see [her] simply because there is no part of [her] experience, no part of [her] journey, no part of [her] life that has been untouched by [her] race." *Id.*, at 932.

In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits ***363** universities from considering a student's essay that explains "how race affected [that student's] life." *Ante*, at 2176. This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. See *supra*, at 2247 – 2249. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." *Ante*, at 2170, 2175 - 2176; see also *ante*, at 2169, n. 6 (claiming without support that "race alone ... explains the admissions decisions for hundreds if not thousands of applicants"). The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor. *Grutter*, 539 U.S. at 334, 123 S.Ct. 2325; see Brief for Students and Alumni of Harvard College as *Amici Curiae* 15–17 (Harvard College Brief) (describing how ****2252** the dozens of application files in the record "uniformly show that, in line with Harvard's 'whole-person' admissions philosophy, Harvard's admissions officers engage in a highly nuanced assessment of each applicant's background and

qualifications"). After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

In the end, the Court merely imposes its preferred college application format on the Nation, not acting as a court of law ***364** applying precedent but taking on the role of college administrators to decide what is better for society. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a "stereotype." *Ante*, at 2169 - 2170.

It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Utah v. Strieff*, 579 U.S. 232, 254, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016) (SOTOMAYOR, J., dissenting). Those conversations occur regardless of socioeconomic background or any other aspect of a student's self-identification. They occur because of race. As Andrew Brennen, a UNC alumnus, testified, "running down the neighborhood ... people don't see [him] as someone that is relatively affluent; they see [him] as a black man." 2 App. in No. 21–707, at 951–952.

The absence of racial diversity, by contrast, actually contributes to stereotyping. "[D]iminishing the force of such stereotypes is both a crucial part of [respondents'] mission, and one that [they] cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325. When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority ***365** viewpoint' but rather a variety of viewpoints among minority students." *Id.*, at 319–320, 123 S.Ct. 2325. By preventing respondents from achieving their diversity objectives, it is the Court's opinion that facilitates stereotyping on American college campuses.

To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race. *UNC*, 567 F.Supp.3d at 643; see, *e.g.*, 2 App. in No. 21–707, at 975–976 (Laura Ornelas, a UNC alumna, testifying that her Latina identity, socioeconomic status, ****2253** and first-generation college status are all important but different "parts to getting a full picture" of who she is and how she "see[s] the world"). At SFFA's own urging, those efforts remain constitutionally permissible. See Brief for Petitioner 81–86 (emphasizing "race-neutral" alternatives that Harvard and UNC should implement, such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools); see also *ante*, at 2203 - 2204, 2204, 2205 - 2206 (THOMAS, J., concurring) (arguing universities can consider "[r]ace-neutral policies" similar to those adopted in States such as California and Michigan, and that universities can consider "status as a first-generation college applicant," "financial means," and "generational inheritance or otherwise"); *ante*, at 2225 (KAVANAUGH, J., concurring) (citing SFFA's briefs and concluding that universities can use "race-neutral" ***366** means); *ante*, at 2215, n. 4 (GORSUCH, J., concurring) ("recount[ing] what SFFA has argued every step of the way" as to "race-neutral tools").

The Court today also does not adopt SFFA's suggestion that college admissions should be a function of academic metrics alone. Using class rank or standardized test scores as the only admissions criteria would severely undermine multidimensional diversity in higher education. Such a system "would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on

track in her last three years of school, only to find herself just outside of the top decile of her class." *Fisher II*, 579 U.S. at 386, 136 S.Ct. 2198. A myopic focus on academic ratings "does not lead to a diverse student body." *Ibid.*[35]

2

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents' objectives are not sufficiently "measurable," "focused," "concrete," and "coherent." *Ante*, at 2166 - 2167, 2168, 2175 - 2176. How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. That is exactly the point. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious ***367** plans fail. Any increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-conscious admissions policies with no " 'specified percentage[s]' " and no "specific number[s] firmly in mind." *Grutter*, 539 U.S. at 324, 335, 123 S.Ct. 2325. Thus, the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render ****2254** strict scrutiny " 'fatal in fact.' " *Id.*, at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc.*, 515 U.S. at 237, 115 S.Ct. 2097). Indeed, the Court gives the game away when it holds that, to the extent respondents are actually measuring their diversity objectives with any level of specificity (for example, with a "focus on numbers" or specific "numerical commitment"), their plans are unconstitutional. *Ante*, at 2171; see also *ante*, at 2191 (THOMAS, J., concurring) ("I highly doubt any [university] will be able to" show a "measurable state interest").

3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." *Ante*, at 2167 - 2168. To start, the racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau. See, *e.g.*, 62 Fed. Reg. 58786–58790 (1997). Surely, not all " 'federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies' " that flow from census data collection, *Department of Commerce* v. *New York*, 588 U. S. ——, ——, 139 S.Ct. 2551, 2561, 204 L.Ed.2d 978 (2019), are constitutionally suspect.

The majority presumes that it knows better and appoints itself as an expert on data collection methods, calling for a ***368** higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. The record shows that it is up to students to choose whether to identify as one, multiple, or none of these categories. See *Harvard I*, 397 F.Supp.3d at 137; *UNC*, 567 F.Supp.3d at 596. To the extent students need to convey additional information, students can select subcategories or provide more detail in their personal statements or essays. See *Harvard I*, 397 F.Supp.3d at 137. Students often do so. See, *e.g.*, 2 App. in No. 20–1199, at 906–907 (student respondent discussing her Latina identity on her application); *id.*, at 949 (student respondent testifying he "wrote about [his] Vietnamese identity on [his] application"). Notwithstanding this Court's confusion about racial self-identification, neither students nor universities are confused. There is no evidence that the racial categories that respondents use are unworkable.[36]

4

Cherry-picking language from *Grutter*, the Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. *Ante*, at 2170 – 2173. This new durational requirement is also not grounded in law, facts, or common ****2255** sense. ***369** *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future. 539 U.S. at 343, 123 S.Ct. 2325. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court. Tr. of Oral Arg. in No. 21707, p. 56.

Yet this Court suggests that everyone, including the Court itself, has been misreading *Grutter* for 20 years. *Grutter*, according to the majority, requires that universities identify

a specific "end point" for the use of race. *Ante*, at 2172. Justice KAVANAUGH, for his part, suggests that *Grutter* itself automatically expires in 25 years, after either "the college class of 2028" or "the college class of 2032." *Ante*, at 2224, n. 1. A faithful reading of this Court's precedents reveals that *Grutter* held nothing of the sort.

True, *Grutter* referred to "25 years," but that arbitrary number simply reflected the time that had elapsed since the Court "first approved the use of race" in college admissions in *Bakke*. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. It is also true that *Grutter* remarked that "race-conscious admissions policies must be limited in time," but it did not do so in a vaccum, as the Court suggests. *Id.*, at 342, 123 S.Ct. 2325. Rather than impose a fixed expiration date, the Court tasked universities with the responsibility of periodically assessing whether their race-conscious programs "are still necessary." *Ibid.* *Grutter* offered as examples sunset provisions, periodic reviews, and experimenting with "race-neutral alternatives as they develop." *Ibid.* That is precisely how this Court has previously interpreted *Grutter*'s command. See *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198 ("It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies").

Grutter's requirement that universities engage in periodic reviews so the use of race can end "as soon as practicable" is well grounded in the need to ensure that race is "employed no more broadly than the interest demands." ***370** 539 U.S. at 343, 123 S.Ct. 2325. That is, it is grounded in strict scrutiny. By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. See *supra*, at 2234 – 2239. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future. Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.[37]

Harvard and UNC engage in the ongoing review that the Court's precedents demand. They "use [their] data to scrutinize ****2256** the fairness of [their] admissions program[s]; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures [they] dee[m] necessary." *Fisher II*, 579 U.S. at 388, 136 S.Ct. 2198. The Court holds, however, that respondents' attention to numbers amounts to unconstitutional racial balancing. *Ante*, at 2170 – 2172. But " '[s]ome attention to numbers' " is both necessary and permissible. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (quoting ***371** *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733). Universities cannot blindly operate their limited race-conscious programs without regard for any quantitative information. "Increasing minority enrollment [is] instrumental to th[e] educational benefits" that respondents seek to achieve, *Fisher II*, 579 U.S. at 381, 136 S.Ct. 2198, and statistics, data, and numbers "have some value as a gauge of [respondents'] ability to enroll students who can offer underrepresented perspectives." *Id.*, at 383–384, 136 S.Ct. 2198. By removing universities' ability to assess the success of their programs, the Court obstructs these institutions' ability to meet their diversity goals.

5

Justice THOMAS, for his part, offers a multitude of arguments for why race-conscious college admissions policies supposedly "burden" racial minorities. *Ante*, at 2197. None of them has any merit.

He first renews his argument that the use of race in holistic admissions leads to the "inevitable" "underperformance" by Black and Latino students at elite universities "because they are less academically prepared than the white and Asian students with whom they must compete." *Fisher I*, 570 U.S. at 332, 133 S.Ct. 2411 (concurring opinion). Justice THOMAS speaks only for himself. The Court previously declined to adopt this so-called "mismatch" hypothesis for good reason: It was debunked long ago. The decades-old "studies" advanced by the handful of authors upon whom Justice THOMAS relies, *ante*, at 2197 – 2198, have "major methodological flaws," are based on unreliable data, and do not "meet the basic tenets of rigorous social science research." Brief for Empirical Scholars as *Amici Curiae* 3, 9–25. By contrast, "[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students —conclusions directly contrary to mismatch." *Id.*, at 7–9 (collecting studies). ***372** This extensive body of research is supported by the most obvious data point available to this institution today: The three Justices of color on this

Court graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers. A discredited hypothesis that the Court previously rejected is no reason to overrule precedent.

Justice THOMAS claims that the weight of this evidence is overcome by a single more recent article published in 2016. *Ante*, at 2198, n. 8. That article, however, explains that studies supporting the mismatch hypothesis "yield misleading conclusions," "overstate the amount of mismatch," "preclude one from drawing any concrete conclusions," and rely on methodologically flawed assumptions that "lea[d] to an upwardly-biased estimate of mismatch." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Trade-off, 54 J. Econ. Lit. 3, 17, 20 (2016); see *id.*, at 6 ("economists should be very ****2257** skeptical of the mismatch hypothesis"). Notably, this refutation of the mismatch theory was coauthored by one of SFFA's experts, as Justice THOMAS seems to recognize.

Citing nothing but his own long-held belief, Justice THOMAS also equates affirmative action in higher education with segregation, arguing that "racial preferences in college admissions 'stamp [Black and Latino students] with a badge of inferiority.' " *Ante*, at 2198 (quoting *Adarand*, 515 U.S. at 241, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment)). Studies disprove this sentiment, which echoes "tropes of stigma" that "were employed to oppose Reconstruction policies." A. Onwuachi-Willig, E. Houh, & M. Campbell, Cracking the Egg: Which Came First—Stigma or Affirmative Action? 96 Cal. L. Rev. 1299, 1323 (2008); see, *e.g.*, *id.*, at 1343–1344 (study of seven law schools showing that stigma results from "racial stereotypes that have ***373** attached historically to different groups, regardless of affirmative action's existence"). Indeed, equating state-sponsored segregation with race-conscious admissions policies that promote racial integration trivializes the harms of segregation and offends *Brown*'s transformative legacy. School segregation "has a detrimental effect" on Black students by "denoting the inferiority" of "their status in the community" and by " 'depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.' " 347 U.S. at 494, 74 S.Ct. 686. In sharp contrast, race-conscious college admissions ensure that higher education is "visibly open to" and "inclusive of talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325. These two uses of race are not created equal. They are not "equally objectionable." *Id.*, at 327, 123 S.Ct. 2325.

Relatedly, Justice THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses. *Ante*, at 2201. Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but Justice THOMAS points to no evidence that affinity groups cause any harm. Affinity-based activities actually help racial minorities improve their visibility on college campuses and "decreas[e] racial stigma and vulnerability to stereotypes" caused by "conditions of racial isolation" and "tokenization." U. Jayakumar, Why Are All Black Students *Still* Sitting Together in the Proverbial College Cafeteria?, Higher Education Research Institute at UCLA (Oct. 2015); see also Brief for Respondent-Students in No. 21707, p. 42 (collecting student testimony demonstrating that "affinity groups beget important academic and social benefits" for racial minorities); 4 App. in No. 20–1199, at 1591 (Harvard Working Group on Diversity and Inclusion Report) (noting that concerns "that culturally specific spaces or affinity-themed housing will isolate" student minorities are ***374** misguided because those spaces allow students "to come together ... to deal with intellectual, emotional, and social challenges").

Citing no evidence, Justice THOMAS also suggests that race-conscious admissions programs discriminate against Asian American students. *Ante*, at 2199 – 2200. It is true that SFFA "allege[d]" that Harvard discriminates against Asian American students. *Ante*, at 2199. Specifically, SFFA argued that Harvard discriminates against Asian American applicants vis-à-vis white applicants through the use of the personal rating, an allegedly "highly subjective" component of the admissions process that is "susceptible to stereotyping and bias." *Harvard II*, 980 F.3d at 196; see Brief for ****2258** Professors of Economics as *Amici Curiae* 24. It is also true, however, that there was a lengthy trial to test those allegations, which SFFA lost. Justice THOMAS points to no legal or factual error below, precisely because there is none.

To begin, this part of SFFA's discrimination claim does not even fall under the strict scrutiny framework in *Grutter* and its progeny, which concerns the use of racial classifications. The personal rating is a facially race-*neutral* component of Harvard's admissions policy.[38] Therefore, even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no

connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process. In any event, after assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found "no discrimination against Asian Americans." *Harvard II*, 980 F.3d at 195, n. 34, 202; see *id.*, at 195–204.

***375** There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society. It is precisely because racial discrimination persists in our society, however, that the use of race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes. See *supra*, at 2233 - 2234. Indeed, the record shows that some Asian American applicants are actually "advantaged by Harvard's use of race," *Harvard II*, 980 F.3d at 191, and "eliminating consideration of race would significantly disadvantage at least some Asian American applicants," *Harvard I*, 397 F.Supp.3d at 194. Race-conscious holistic admissions that contextualize the racial identity of each individual allow Asian American applicants "who would be less likely to be admitted without a comprehensive understanding of their background" to explain "the value of their unique background, heritage, and perspective." *Id.*, at 195. Because the Asian American community is not a monolith, race-conscious holistic admissions allow colleges and universities to "consider the vast differences within [that] community." AALDEF Brief 4–14. Harvard's application files show that race-conscious holistic admissions allow Harvard to "valu[e] the diversity of Asian American applicants' experiences." Harvard College Brief 23.

Moreover, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades." *Harvard II*, 980 F.3d at 198.[39] By contrast, Asian American enrollment declined at elite universities that are prohibited by state law from considering race. See AALDEF Brief 27; Brief for 25 Diverse, California-Focused Bar Associations et al. as *Amici Curiae* 19–20, 23. At bottom, race-conscious ***376** admissions benefit all students, including racial minorities. That includes the Asian American community.

Finally, Justice THOMAS belies reality by suggesting that "experts and elites" ****2259** with views similar to those "that motivated *Dred Scott* and *Plessy*" are the ones who support race conscious admissions. *Ante*, at 2197. The plethora of young students of color who testified in favor of race-consciousness proves otherwise. See *supra*, at 2250 – 2251; see also *infra*, at 2260 – 2262 (discussing numerous *amici* from many sectors of society supporting respondents' policies). Not a single student—let alone any racial minority —affected by the Court's decision testified in favor of SFFA in these cases.

C

In its "radical claim to power," the Court does not even acknowledge the important reliance interests that this Court's precedents have generated. *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2346 (dissenting opinion). Significant rights and expectations will be affected by today's decision nonetheless. Those interests supply "added force" in favor of *stare decisis*. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991).

Students of all backgrounds have formed settled expectations that universities with race-conscious policies "will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world." Brief for Respondent-Students in No. 21–707, at 45; see Harvard College Brief 6–11 (collecting student testimony).

Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court's precedents. "Universities have designed courses that draw on the benefits of a diverse student body," "hired faculty whose research is enriched by the diversity of the student body," and "promoted their learning environments to prospective students ***377** who have enrolled based on the understanding that they could obtain the benefits of diversity of all kinds." Brief for Respondent in No. 20–1199, at 40–41 (internal quotation marks omitted). Universities also have "expended vast financial and other resources" in "training thousands of application readers on how to faithfully apply this Court's guardrails on the use of race in admissions." Brief for University Respondents in No. 21707, p. 44. Yet today's decision abruptly forces them "to fundamentally alter their admissions practices." *Id.*, at 45; see also Brief for Massachusetts Institute of Technology et al. as *Amici Curiae* 25–26; Brief for Amherst College et al. as *Amici Curiae* 23–

25 (Amherst Brief). As to Title VI in particular, colleges and universities have relied on *Grutter* for decades in accepting federal funds. See Brief for United States as *Amicus Curiae* in No. 20–1199, p. 25 (United States Brief); Georgetown Brief 16.

The Court's failure to weigh these reliance interests "is a stunning indictment of its decision." *Dobbs*, 597 U. S., at ——, 142 S.Ct., at 2347 (dissenting opinion).

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education "has worked and is continuing to work" is no reason to abandon the practice today. *Shelby County v. Holder*, 570 U.S. 529, 590, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting) ("[It] is like throwing away your umbrella in a rainstorm because you are not getting wet").

****2260** Experience teaches that the consequences of today's decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented ***378** minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. See *Schuette*, 572 U.S. at 384–390, 134 S.Ct. 1623 (SOTOMAYOR, J., dissenting) (collecting statistics from States that have banned the use of race in college admissions); see also Amherst Brief 13 (noting that eliminating the use of race in college admissions will take Black student enrollment at elite universities back to levels this country saw in the early 1960s).

After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, "freshmen enrollees from underrepresented minority groups dropped precipitously" in California public universities. Brief for President and Chancellors of the University of California as *Amici Curiae* 4, 9, 11–13. The decline was particularly devastating at California's most selective campuses, where the rates of admission of underrepresented groups "dropped by 50% or more." *Id.*, at 4, 12. At the University of California, Berkeley, a top public university not just in California but also nationally, the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. *Id.*, at 12–13. Latino representation similarly dropped from 15.57% to 7.28% during that period at Berkeley, even though Latinos represented 31% of California public high school graduates. *Id.*, at 13. To this day, the student population at California universities still "reflect[s] a persistent inability to increase opportunities" for all racial groups. *Id.*, at 23. For example, as of 2019, the proportion of Black freshmen at Berkeley was 2.76%, well below the pre-constitutional amendment level in 1996, which was 6.32%. *Ibid*. Latinos composed about 15% of freshmen students at Berkeley in 2019, despite making up 52% of all California public high school graduates. *Id.*, at 24; see also Brief for University of Michigan as *Amicus Curiae* 21–24 (noting similar trends at the University of Michigan from 2006, the last admissions cycle before Michigan's ban on race-conscious ***379** admissions took effect, through present); *id.*, at 24–25 (explaining that the university's "experience is largely consistent with other schools that do not consider race as a factor in admissions," including, for example, the University of Oklahoma's most prestigious campus).

The costly result of today's decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. Those *amici* include the United States, which emphasizes the need for diversity in the Nation's military, see United States Brief 12–18, and in the federal workforce more generally, *id.*, at 19–20 (discussing various federal agencies, including the Federal Bureau of Investigation and the Office of the Director of National Intelligence). The United States explains that "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse forces." *Id.*, at 12. That is true not just at the military service academies but "at civilian universities, including Harvard, that host Reserve Officers' Training ****2261** Corps (ROTC) programs and educate students who go on to become officers." *Ibid.* Top former military leaders agree. See Brief for Adm. Charles S. Abbot et al. as *Amici Curiae* 3 (noting that in *amici*'s "professional judgment, the status quo—

which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U. S. military").

Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity "threatened the integrity and performance of the Nation's military" because it fueled "perceptions ***380** of racial/ethnic minorities serving as 'cannon fodder' for white military leaders." Military Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military xvi, 15 (2011); see also, *e.g.*, R. Stillman, Racial Unrest in the Military: The Challenge and the Response, 34 Pub. Admin. Rev. 221, 221–222 (1974) (discussing other examples of racial unrest). Based on "lessons from decades of battlefield experience," it has been the "longstanding military judgment" across administrations that racial diversity "is essential to achieving a mission-ready" military and to ensuring the Nation's "ability to compete, deter, and win in today's increasingly complex global security environment." United States Brief 13 (internal quotation marks omitted). The majority recognizes the compelling need for diversity in the military and the national security implications at stake, see *ante*, at 2166, n. 4, but it ends race-conscious college admissions at civilian universities implicating those interests anyway.

Amici also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. State and local governments require public servants educated in diverse environments who can "identify, understand, and respond to perspectives" in "our increasingly diverse communities." Brief for Southern Governors as *Amici Curiae* 5–8 (Southern Governors Brief). Likewise, increasing the number of students from underrepresented backgrounds who join "the ranks of medical professionals" improves "healthcare access and health outcomes in medically underserved communities." Brief for Massachusetts et al. as *Amici Curiae* 10; see Brief for Association of American Medical Colleges et al. as *Amici Curiae* 5 (noting also that *all* physicians become better practitioners when they learn in a racially diverse environment). So too, greater diversity within the teacher workforce improves student academic achievement in primary public schools. Brief ***381** for Massachusetts et al. as *Amici Curiae* 15–17; see Brief for American Federation of Teachers as *Amicus Curiae* 8 ("[T]here are few professions with broader social impact than teaching"). A diverse pipeline of college graduates also ensures a diverse legal profession, which demonstrates that "the justice system serves the public in a fair and inclusive manner." Brief for American Bar Association as *Amicus Curiae* 18; see also Brief for Law Firm Antiracism Alliance as *Amicus Curiae* 1, 6 (more than 300 law firms in all 50 States supporting race-conscious college admissions in light of the "influence and power" that lawyers wield "in the American system of government").

Examples of other industries and professions that benefit from race-conscious college admissions abound. American businesses emphasize that a diverse workforce improves business performance, better serves a diverse consumer marketplace, and strengthens the overall American economy. Brief for Major American Business Enterprises as *Amici Curiae* 5–27. A ****2262** diverse pipeline of college graduates also improves research by reducing bias and increasing group collaboration. Brief for Individual Scientists as *Amici Curiae* 13–14. It creates a more equitable and inclusive media industry that communicates diverse viewpoints and perspectives. Brief for Multicultural Media, Telecom and Internet Council, Inc., et al. as *Amici Curiae* 6. It also drives innovation in an increasingly global science and technology industry. Brief for Applied Materials, Inc., et al. as *Amici Curiae* 11–20.

Today's decision further entrenches racial inequality by making these pipelines to leadership roles less diverse. A college degree, particularly from an elite institution, carries with it the benefit of powerful networks and the opportunity for socioeconomic mobility. Admission to college is therefore often the entry ticket to top jobs in workplaces where important decisions are made. The overwhelming majority ***382** of Members of Congress have a college degree.[40] So do most business leaders.[41] Indeed, many state and local leaders in North Carolina attended college in the UNC system. See Southern Governors Brief 8. More than half of judges on the North Carolina Supreme Court and Court of Appeals graduated from the UNC system, for example, and nearly a third of the Governor's cabinet attended UNC. *Ibid.* A less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path

to leadership open to every race cannot withstand scrutiny "in the eyes of the citizenry." *Grutter*, 539 U.S. at 332, 123 S.Ct. 2325. "[G]ross disparity in representation" leads the public to wonder whether they can ever belong in our Nation's institutions, including this one, and whether those institutions work for them. Tr. of Oral Arg. in No. 21–707, p. 171 ("The Court is going to hear from 27 advocates in this sitting of the oral argument calendar, and two are women, even though women today are 50 percent or more of law school graduates. And I think it would be reasonable for a woman to look at that and wonder, is that a path that's open to me, to be a Supreme Court advocate?" (remarks of Solicitor General Elizabeth Prelogar)).[42]

***383** By ending race-conscious college admissions, this Court closes the door of opportunity that the Court's precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, ****2263** reserving "positions of influence, affluence, and prestige in America" for a predominantly white pool of college graduates. *Bakke*, 438 U.S. at 401, 98 S.Ct. 2733 (opinion of Marshall, J.). At its core, today's decision exacerbates segregation and diminishes the inclusivity of our Nation's institutions in service of superficial neutrality that promotes indifference to inequality and ignores the reality of race.

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial ***384** segregation in higher education because racial inequality will persist so long as it is ignored.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

Justice JACKSON, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.[*]

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), are a problem with respect to achievement of that aspiration, rather than a viable solution ***385** (as has long been evident to historians, sociologists, and policymakers alike).

Justice SOTOMAYOR has persuasively established that nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education. I join her opinion without qualification. ****2264** I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants. See, *e.g.*, Tr. of Oral Arg. 19.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.[1]

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

I

A

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their ***386** State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?

To answer that question, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921). Many chapters of America's history appear necessary, given the opinions that my colleagues in the majority have issued in this case.

Justice Thurgood Marshall recounted the genesis:

> "Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–388, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

Slavery should have been (and was to many) self-evidently dissonant with our avowed founding principles. When the time came to resolve that dissonance, eleven States chose slavery. With the Union's survival at stake, Frederick Douglass noted, Black Americans in the South "were almost the only reliable friends the nation had," and "but for their help ... the Rebels might have succeeded in breaking up the Union."[2] After the war, Senator John Sherman defended the proposed Fourteenth ****2265** Amendment in a manner that encapsulated ***387** our Reconstruction Framers' highest sentiments: "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."[3]

To uphold that promise, the Framers repudiated this Court's holding in *Dred Scott v. Sandford*, 19 How. 393, 60 U.S. 393, 15 L.Ed. 691 (1857), by crafting Reconstruction Amendments (and associated legislation) that transformed our Constitution and society.[4] Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens "the same [civil] right[s]" as "enjoyed by white citizens," 14 Stat. 27, President Andrew Johnson vetoed it because it "discriminat[ed] ... in favor of the negro."[5]

That attitude, and the Nation's associated retreat from Reconstruction, made prophesy out of Congressman Thaddeus Stevens's fear that "those States will all ... keep up this discrimination, and crush to death the hated freedmen."[6] And this Court facilitated that retrenchment.[7] Not just in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), but "in almost every instance, the Court chose to restrict the scope of the second founding."[8] Thus, thirteen years pre-*Plessy*, in the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), our predecessors on this ***388** Court invalidated Congress's attempt to enforce the Reconstruction Amendments via the Civil Rights Act of 1875, lecturing that "there must be some stage ... when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws." *Id.*, at 25, 3 S.Ct.18. But Justice Harlan knew better. He responded: "What the nation, through Congress, has sought to accomplish in reference to [Black people] is—what had already been done in every State

of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61, 3 S.Ct. 18 (dissenting opinion).

Justice Harlan dissented alone. And the betrayal that this Court enabled had concrete effects. Enslaved Black people had built great wealth, but only for enslavers.[9] No surprise, then, that freedmen leapt at the chance to control their own labor and to build their own financial security.[10] Still, White southerners often "simply refused to sell land to blacks," even when not ****2266** selling was economically foolish.[11] To bolster private exclusion, States sometimes passed laws forbidding such sales.[12] The inability to build wealth through that most American of means forced Black people into sharecropping roles, where they somehow always tended to find themselves in debt to the landowner when the growing season closed, with no hope of recourse against the ever-present cooking of the books.[13]

Sharecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the ***389** progress and prosperity of Black people. Vagrancy laws criminalized free Black men who failed to work for White landlords.[14] Many States barred freedmen from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers.[15] A cornucopia of laws (*e.g.*, banning hitchhiking, prohibiting encouraging a laborer to leave his employer, and penalizing those who prompted Black southerners to migrate northward) ensured that Black people could not freely seek better lives elsewhere.[16] And when statutes did not ensure compliance, state-sanctioned (and private) violence did.[17]

Thus emerged Jim Crow—a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes, which themselves had replaced slavery's form of comprehensive economic exploitation.[18] Meanwhile, as Jim Crow ossified, the Federal Government was "giving away land" on the western frontier, and with it "the opportunity for upward mobility and a more secure future," over the 1862 Homestead Act's three-quarter-century tenure.[19] Black people were exceedingly unlikely to be allowed to share in those benefits, which by one calculation may have advantaged approximately 46 million Americans living today.[20]

***390** Despite these barriers, Black people persisted. Their so-called Great Migration northward accelerated during and after the First World War.[21] Like clockwork, American cities responded with racially exclusionary zoning (and similar policies).[22] As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing.[23] Nor did migration ****2267** make it more likely for Black people to access home ownership, as banks would not lend to Black people, and in the rare cases banks would fund home loans, exorbitant interest rates were charged.[24] With Black people still locked out of the Homestead Act giveaway, it is no surprise that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm.[25]

Federal and State Governments' selective intervention further exacerbated the disparities. Consider, for example, the federal Home Owners' Loan Corporation (HOLC), created in 1933.[26] HOLC purchased mortgages threatened with foreclosure and issued new, amortized mortgages in their place.[27] Not only did this mean that recipients of these mortgages could gain equity while paying off the loan, successful full payment would make the recipient a homeowner.[28] Ostensibly to identify (and avoid) the riskiest recipients, the HOLC "created color-coded maps of every metropolitan area in the nation."[29] Green meant safe; red ***391** meant risky. And, regardless of class, every neighborhood with Black people earned the red designation.[30]

Similarly, consider the Federal Housing Administration (FHA), created in 1934, which insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk.[31] But, nationwide, it was FHA's established policy to provide "no guarantees for mortgages to African Americans, or to whites who might lease to African Americans," irrespective of creditworthiness.[32] No surprise, then, that "[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans," with whole cities (ones that had a disproportionately large number of Black people due to housing segregation) sometimes being deemed ineligible for FHA intervention on racial grounds.[33] The Veterans Administration operated similarly.[34]

One more example: the Federal Home Loan Bank Board "chartered, insured, and regulated savings and loan

associations from the early years of the New Deal."[35] But it did "not oppose the denial of mortgages to African Americans until 1961" (and even then opposed discrimination ineffectively).[36]

The upshot of all this is that, due to government policy choices, "[i]n the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans."[37] Thus, based on their race, Black people were "[l]ocked out of the greatest **2268 mass-based *392 opportunity for wealth accumulation in American history."[38]

For present purposes, it is significant that, in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black. Those past preferences carried forward and are reinforced today by (among other things) the benefits that flow to homeowners and to the holders of other forms of capital that are hard to obtain unless one already has assets.[39]

This discussion of how the existing gaps were formed is merely illustrative, not exhaustive. I will pass over Congress's repeated crafting of family-, worker-, and retiree-protective legislation to channel benefits to White people, thereby excluding Black Americans from what was otherwise "a revolution in the status of most working Americans."[40] I will also skip how the G. I. Bill's "creation of ... middle-class America" (by giving $95 billion to veterans and their families between 1944 and 1971) was "deliberately designed to accommodate Jim Crow."[41] So, too, will I bypass how Black people were prevented from partaking in the consumer credit market—a market that helped White people who could access it build and protect wealth.[42] Nor will time and space permit my elaborating how local officials' racial hostility meant that even those benefits that Black people could formally obtain were unequally distributed along racial lines.[43] And I could not possibly discuss every way in *393 which, in light of this history, facially race-blind policies *still* work race-based harms today (*e.g.*, racially disparate tax-system treatment; the disproportionate location of toxic-waste facilities in Black communities; or the deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities).[44]

The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans' desire or ability to, in Frederick Douglass's words, "stand on [their] own legs."[45] Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of "what had already been done in every State of the Union for the white race." *Civil Rights Cases*, 109 U.S. at 61, 3 S.Ct. 18 (dissenting opinion).

B

History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families' median **2269 wealth was approximately $24,000.[46] For White families, that number was approximately eight times as much (about $188,000).[47] These wealth disparities "exis[t] at every income and education level," so, "[o]n average, white families with college degrees *394 have over $300,000 more wealth than black families with college degrees."[48] This disparity has also accelerated over time—from a roughly $40,000 gap between White and Black household median net worth in 1993 to a roughly $135,000 gap in 2019.[49] Median income numbers from 2019 tell the same story: $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households.[50]

These financial gaps are unsurprising in light of the link between home ownership and wealth. Today, as was true 50 years ago, Black home ownership trails White home ownership by approximately 25 percentage points.[51] Moreover, Black Americans' homes (relative to White Americans') constitute a greater percentage of household wealth, yet tend to be worth less, are subject to higher effective property taxes, and generally lost more value in the Great Recession.[52]

From those markers of social and financial unwellness flow others. In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State.[53]

Black Americans in their late twenties are about half as ***395** likely as their White counterparts to have college degrees.[54] And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.[55]

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers.[56] Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of ****2270** 2022, only six are Black).[57] Furthermore, as the COVID–19 pandemic raged, Black-owned small businesses failed at dramatically higher rates than White-owned small businesses, partly due to the disproportionate denial of the forgivable loans needed to survive the economic downturn.[58]

Health gaps track financial ones. When tested, Black children have blood lead levels that are twice the rate of White children —"irreversible" contamination working irremediable harm on developing brains.[59] Black (and Latino) children with heart conditions are more likely to die than their White counterparts.[60] Race-linked mortality-rate disparity has also persisted, and is highest among infants.[61]

***396** So, too, for adults: Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates.[62] Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of "any other racial or ethnic group."[63] Black mothers are up to four times more likely than White mothers to die as a result of childbirth.[64] And COVID killed Black Americans at higher rates than White Americans.[65]

"Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma."[66] These and other disparities —the predictable result of opportunity disparities—lead to at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans.[67] That is 80 million excess years of life lost from just 1999 through 2020.[68]

Amici tell us that "race-linked health inequities pervad[e] nearly every index of human health" resulting "in an overall reduced life expectancy for racial and ethnic minorities that cannot be explained by genetics."[69] Meanwhile—tying health and wealth together—while she lays dying, the typical Black American "pay[s] more for medical care and incur[s] more medical debt."[70]

C

We return to John and James now, with history in hand. It is hardly John's fault that he is the seventh generation to ***397** graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

****2271** Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship.[71] Five generations ago, the North Carolina Red Shirts finished the job.[72] Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC "enforced its own Jim Crow regulations."[73] Two generations ago, North Carolina's Governor still railed against " 'integration for integration's sake' "—and UNC Black enrollment was minuscule.[74] So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

These stories are not every student's story. But they are many students' stories. To demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters.[75] It also condemns our society to never escape the past that explains ***398** *how and why* race matters to the very concept of who "merits" admission.

Permitting (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the

Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

II

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information.[76] But applicants are *not* required to submit demographic information like gender and race.[77] UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: "academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria."[78]

Drawing on those 40 criteria, a UNC staff member evaluating John and James would consider, with respect to each, his "engagement outside the classroom; persistence of commitment; demonstrated capacity ****2272** for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests."[79] Relevant, too, would be his "relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of ***399** parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or step-child of Carolina alumni."[80] The list goes on. The process is holistic, through and through.

So where does race come in? According to UNC's admissions-policy document, reviewers may also consider "the race or ethnicity of any student" (if that information is provided) in light of UNC's interest in diversity.[81] And, yes, "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application."[82] Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, confirmed at trial (under oath) that UNC's admissions process operates in this fashion.[83]

Thus, to be crystal clear: *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. The record supports no intimation to the contrary. Eligibility is just that; a plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission.[84] There are no race-based ***400** quotas in UNC's holistic review process.[85] In fact, during the admissions cycle, the school prevents anyone who knows the overall racial makeup of the admitted-student pool from reading any applications.[86]

More than that, every applicant is also eligible for a diversity-linked plus (beyond race) more generally.[87] And, notably, UNC understands diversity broadly, including "socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents."[88]

A plus, by its nature, can certainly matter to an admissions case. But make no mistake: When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants' identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced).[89] ****2273** And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there.[90] A reader of today's majority opinion could be forgiven for misunderstanding how UNC's program really works, or for missing that, under UNC's holistic review process, a White student could receive a diversity plus while a Black student might not.[91]

***401** UNC does not do all this to provide handouts to either John or James. It does this to ascertain who among its tens of thousands of applicants has the capacity to take full advantage of the opportunity to attend, and contribute to, this prestigious institution, and thus merits admission.[92] And UNC has concluded that ferreting this out requires understanding the *full* person, which means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant's race-linked experience bears on his capacity and merit. In this way, UNC is able to value what it means for James, whose ancestors received no race-based advantages, to make himself competitive for admission to a flagship school nevertheless. Moreover, recognizing this

aspect of James's story does not preclude UNC from valuing John's legacy or any obstacles that his story reflects.

So, to repeat: UNC's program permits, but does not require, admissions officers to value both John's and James's love for their State, their high schools' rigor, and whether either has overcome obstacles that are indicative of their "persistence of commitment."[93] It permits, but does not require, them to value John's identity as a child of UNC alumni (or, perhaps, if things had turned out differently, as a first-generation ***402** White student from Appalachia whose family struggled to make ends meet during the Great Recession). And it permits, but does not require, them to value James's race—not in the abstract, but as an element of who he is, no less than his love for his State, his high school courses, and the obstacles he has overcome.

Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth ****2274** plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual's resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race).

Furthermore, and importantly, the fact that UNC's holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant. For example, as the District Court found, a higher percentage of the most academically excellent in-state Black candidates (as SFFA's expert defined academic excellence) were denied admission than similarly qualified White and Asian American applicants.[94] That, if ***403** nothing else, is indicative of a genuinely holistic process; it is evidence that, both in theory and in practice, UNC recognizes that race—like any other aspect of a person—may bear on where both John and James start the admissions relay, but will not fully determine whether either eventually crosses the finish line.

III

A

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

SFFA similarly asks us to consider how much longer UNC will be able to justify considering race in its admissions process. Whatever the answer to that question was yesterday, today's decision will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked gaps in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall).

***404** To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing better. ****2275** [95] But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA's complaint about the "indefinite" use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.

Accordingly, while there are many perversities of today's judgment, the majority's failure to recognize that programs like UNC's carry with them the seeds of their own destruction is surely one of them. The ultimate goal of recognizing James's full story and (potentially) admitting him to UNC is to give him the necessary tools to contribute to closing the equity gaps discussed in Part I, *supra*, so that he, his progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one.

In addition, and notably, that end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows that it matters for students' ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar

experiences related to that shared characteristic.[96] Equally critical, UNC's program ensures that students who don't share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand ***405** each other's stories, which *amici* tell us improves cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life.[97]

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients' pain tolerance and treat them accordingly (including, for example, prescribing them appropriate amounts of pain medication).[98] For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die.[99] Studies also confirm what common sense counsels: Closing wealth disparities through programs like UNC's—which, beyond diversifying the medical profession, open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well.[100]

Do not miss the point that ensuring a diverse student body in higher education helps *everyone*, not just those who, due to ****2276** their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being. *Amici* explain that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality. ***406** [101] The larger economy benefits, too: When it comes down to the brass tacks of dollars and cents, ensuring diversity will, if permitted to work, help save hundreds of billions of dollars annually (by conservative estimates).[102]

Thus, we should be celebrating the fact that UNC, once a stronghold of Jim Crow, has now come to understand this. The flagship educational institution of a former Confederate State has embraced its constitutional obligation to afford genuine equal protection to applicants, and, by extension, to the broader polity that its students will serve after graduation. Surely that is progress for a university that once engaged in the kind of patently offensive race-dominated admissions process that the majority decries.

With its holistic review process, UNC now treats race as merely one aspect of an applicant's life, when race played a totalizing, all-encompassing, and singularly determinative role for applicants like James for most of this country's history: No matter what else was true about him, being Black meant he had no shot at getting in (the ultimate race-linked uneven playing field). Holistic programs like UNC's reflect the reality that Black students have only relatively recently been permitted to get into the admissions game at all. Such programs also reflect universities' clear-eyed optimism that, one day, race *will* no longer matter.

So much upside. Universal benefits ensue from holistic admissions programs that allow consideration of *all* factors material to merit (including race), and that thereby facilitate diverse student populations. Once trained, those UNC students who have thrived in the university's diverse learning ***407** environment are well equipped to make lasting contributions in a variety of realms and with a variety of colleagues, which, in turn, will steadily decrease the salience of race for future generations. Fortunately, UNC and other institutions of higher learning are already on this beneficial path. In fact, all that they have needed to continue moving this country forward (toward full achievement of our Nation's founding promises) is for this Court to get out of the way and let them do their jobs. To our great detriment, the majority cannot bring itself to do so.

B

The overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. See, *e.g.*, *ante*, at 2159 - 2160. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define ****2277** our present reality—are strangely absent and do not seem to matter.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that

UNC and other institutions of higher learning are doing to solve America's real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of ***408** race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take *longer* for racism to leave us. And, ultimately, ignoring race just makes it matter more.[103]

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

***409**
* * *

As the Civil War neared its conclusion, General William T. Sherman and Secretary of War Edwin Stanton convened a meeting of Black leaders in Savannah, Georgia. During the meeting, someone asked Garrison Frazier, the group's spokesperson, what "freedom" meant to him. He answered, " 'placing us where we could reap the fruit of our own labor, and take care of ourselves ... to have land, and turn it and till it by our own labor.' "[104]

Today's gaps exist because that freedom was denied far longer than it was ever ****2278** afforded. Therefore, as Justice SOTOMAYOR correctly and amply explains, UNC's holistic review program pursues a righteous end—legitimate " 'because it is defined by the Constitution itself. The end is the maintenance of freedom.' " *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443–444, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 1118 (1866) (Rep. Wilson)).

Viewed from this perspective, beleaguered admissions programs such as UNC's are not pursuing a patently unfair, ends-justified ideal of a multiracial democracy at all. Instead, they are engaged in an earnest effort to secure a more functional one. The admissions rubrics they have constructed now recognize that an individual's "merit"—his ability to succeed in an institute of higher learning and ultimately contribute something to our society—cannot be fully determined without understanding that individual in full. There are no special favorites here.

UNC has thus built a review process that *more accurately* assesses merit than most of the admissions programs that have existed since this country's founding. Moreover, in so doing, universities like UNC create pathways to upward mobility for long excluded and historically disempowered racial groups. Our Nation's history more than justifies this course of action. And our present reality indisputably establishes ***410** that such programs are still needed—for the general public good—because after centuries of state-sanctioned (and enacted) race discrimination, the aforementioned intergenerational race-based gaps in health, wealth, and well-being stubbornly persist.

Rather than leaving well enough alone, today, the majority is having none of it. Turning back the clock (to a time before the legal arguments and evidence establishing the soundness of UNC's holistic admissions approach existed), the Court indulges those who either do not know our Nation's history or long to repeat it. Simply put, the race-blind admissions stance the Court mandates from this day forward is unmoored from critical real-life circumstances. Thus, the Court's meddling not only arrests the noble generational project that America's universities are attempting, it also launches, in effect, a dismally misinformed sociological experiment.

Time will reveal the results. Yet the Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—it drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own analytical dustbin. Also, by latching onto arbitrary timelines and professing insecurity about missing metrics, the Court sidesteps unrefuted proof of the compelling benefits of holistic admissions programs that factor in race (hard to do, for there is plenty), simply proceeding as if no such evidence exists. Then, ultimately, the Court surges to vindicate equality, but Don Quixote style—pitifully perceiving itself as the sole vanguard of legal high ground when, in reality, its perspective is not constitutionally compelled and will hamper the best judgments of our world-

class educational institutions about who they need to bring onto their campuses ***411** right now to benefit every American, no matter their race.[105]

****2279** The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom (a particularly awkward place to land, in light of the history the majority opts to ignore).[106] It would be deeply unfortunate if the Equal Protection Clause actually demanded this perverse, ahistorical, and counterproductive outcome. To impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.

All Citations

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Footnotes

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

1 Justice JACKSON attempts to minimize the role that race plays in UNC's admissions process by noting that, from 2016–2021, the school accepted a lower "percentage of the most academically excellent in-state Black candidates"—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%). *Post*, at 2274 (dissenting opinion); see also 3 App. in No. 21–707, pp. 1078–1080. It is not clear how the rejection of just two black applicants over five years could be "indicative of a genuinely holistic [admissions] process," as Justice JACKSON contends. *Post*, at 2274. And indeed it cannot be, as the *overall* acceptance rates of academically excellent applicants to UNC illustrates full well. According to SFFA's expert, over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted. 3 App. in No. 21–707, at 1078–1083. In the second highest academic decile, the disparity is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted. *Ibid.* And in the third highest decile, 77% of black applicants were admitted, compared to 48% of white applicants and 34% of Asian applicants. *Ibid.* The dissent does not dispute the accuracy of these figures. See *post*, at 2774, n. 94 (opinion of JACKSON, J.). And its contention that white and Asian students "receive a diversity plus" in UNC's race-based admissions system blinks reality. *Post*, at 2273.

The same is true at Harvard. See Brief for Petitioner 24 ("[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)." (emphasis added)); see also 4 App. in No. 20–1199, p. 1793 (black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles).

2 Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003). Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

3 The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), in the infamous case *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, the Court upheld the internment of "all persons of Japanese ancestry in prescribed West Coast ... areas" during World War II because "the military urgency of the situation demanded" it. *Id.*, at 217, 223, 65 S.Ct. 193. We have since overruled *Korematsu*, recognizing that it was "gravely wrong the day it was decided." *Trump* v. *Hawaii*, 585 U. S. ——, ——, 138 S.Ct. 2392, 2448, 201 L.Ed.2d

775 (2018). The Court's decision in *Korematsu* nevertheless "demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification" and that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 236, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (internal quotation marks omitted).

The principal dissent, for its part, claims that the Court has also permitted "the use of race when that use burdens minority populations." *Post*, at 2246 (opinion of SOTOMAYOR, J.). In support of that claim, the dissent cites two cases that have nothing to do with the Equal Protection Clause. See *ibid.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (Fourth Amendment case), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (another Fourth Amendment case)).

4 The United States as *amicus curiae*contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

5 For that reason, one dissent candidly advocates abandoning the demands of strict scrutiny. See *post*, at 2276, 2277 - 2278 (opinion of JACKSON, J.) (arguing the Court must "get out of the way," "leav[e] well enough alone," and defer to universities and "experts" in determining who should be discriminated against). An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach.

6 Justice JACKSON contends that race does not play a "determinative role for applicants" to UNC. *Post*, at 2276. But even the principal dissent acknowledges that race—and race alone—explains the admissions decisions for hundreds if not thousands of applicants to UNC each year. *Post*, at 2243, n. 28 (opinion of SOTOMAYOR, J.); see also *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Dec. 21, 2020), ECF Doc. 233, at 23–27 (UNC expert testifying that race explains 1.2% of in state and 5.1% of out of state admissions decisions); 3 App. in No. 21–707, at 1069 (observing that UNC evaluated 57,225 in state applicants and 105,632 out of state applicants from 2016–2021). The suggestion by the principal dissent that our analysis relies on extra-record materials, see *post*, at 2241,, n. 25 (opinion of SOTOMAYOR, J.), is simply mistaken.

7 The principal dissent claims that "[t]he fact that Harvard's racial shares of admitted applicants varies relatively little ... is unsurprising and reflects the fact that the racial makeup of Harvard's applicant pool also varies very little over this period." *Post*, at 2244 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). But that is exactly the point: Harvard must use precise racial preferences year in and year out to maintain the unyielding demographic composition of its class. The dissent is thus left to attack the numbers themselves, arguing they were "handpicked" "from a truncated period." *Ibid.*, n. 29 (opinion of SOTOMAYOR, J.). As supposed proof, the dissent notes that the share of Asian students at Harvard varied significantly from 1980 to 1994—a 14-year period that ended nearly three decades ago. 4 App. in No. 20–1199, at 1770. But the relevance of that observation—handpicked and truncated as it is—is lost on us. And the dissent does not and cannot dispute that the share of black and Hispanic students at Harvard—"the primary beneficiaries" of its race-based admissions policy—has remained consistent for decades. 397 F.Supp.3d at 178; 4 App. in No. 20–1199, at 1770. For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork.

8 Perhaps recognizing as much, the principal dissent at one point attempts to press a different remedial rationale altogether, stating that both respondents "have sordid legacies of racial exclusion." *Post*, at 2237 (opinion of SOTOMAYOR, J.). Such institutions should perhaps be the very *last* ones to be allowed to make race-based decisions, let alone be accorded deference in doing so. In any event, neither university defends its admissions system as a remedy for past discrimination—their own or anyone else's. See Tr. of Oral Arg. in No. 21–707, at 90 ("[W]e're not pursuing any sort of remedial justification for our policy."). Nor has any decision of ours permitted a remedial justification for race-based college admissions. Cf. *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.).

9 The principal dissent rebukes the Court for not considering adequately the reliance interests respondents and other universities had in *Grutter*. But as we have explained, *Grutter* itself limited the reliance that could be placed upon it by insisting, over and over again, that race-based admissions programs be limited in time. See *supra*, at 2164 - 2165. *Grutter* indeed went so far as to suggest a specific period of reliance—25 years—precluding the indefinite reliance interests that the dissent articulates. Cf. *post*, at 2221 - 2223 (KAVANAUGH, J., concurring). Those interests are, moreover, vastly

overstated on their own terms. Three out of every five American universities do *not* consider race in their admissions decisions. See Brief for Respondent in No. 201199, p. 40. And several States—including some of the most populous (California, Florida, and Michigan)—have prohibited race-based admissions outright. See Brief for Oklahoma et al. as *Amici Curiae* 9, n. 6.

1 In fact, Indians would not be considered citizens until several decades later. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (declaring that all Indians born in the United States are citizens).

2 There is "some support" in the history of enactment for at least "four interpretations of the first section of the proposed amendment, and in particular of its Privileges [or] Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the states." D. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 406 (2008) (citing sources). Notably, those four interpretations are all colorblind.

3 UNC asserts that the Freedmen's Bureau gave money to Berea College at a time when the school sought to achieve a 50–50 ratio of black to white students. Brief for University Respondents in No. 21707, p. 32. But, evidence suggests that, at the relevant time, Berea conducted its admissions without distinction by race. S. Wilson, Berea College: An Illustrated History 2 (2006) (quoting Berea's first president's statement that the school "would welcome 'all races of men, without distinction' ").

4 The Court has remarked that Title VI is coextensive with the Equal Protection Clause. See *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.) ("Title VI ... proscribe[s] only those racial classifications that would violate the Equal Protection Clause"). As Justice GORSUCH points out, the language of Title VI makes no allowance for racial considerations in university admissions. See *post*, at 2208 – 2209 (concurring opinion). Though I continue to adhere to my view in *Bostock* v. *Clayton County*, 590 U. S. ——, —— – ——, 140 S.Ct. 1731, 1754–1784, 207 L.Ed.2d 218 (2020) (ALITO, J., dissenting), I agree with Justice GORSUCH's concurrence in this case. The plain text of Title VI reinforces the colorblind view of the Fourteenth Amendment.

5 In fact, the Massachusetts Supreme Court in 1783 declared that slavery was abolished in Massachusetts by virtue of the newly enacted Constitution's provision of equality under the law. See *The Quock Walker Case*, in 1 H. Commager, Documents of American History 110 (9th ed. 1973) (Cushing, C. J.) ("[W]hatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty .... And upon this ground our Constitution of Government ... sets out with declaring that all men are born free and equal ... and in short is totally repugnant to the idea of being born slaves").

6 Briefing in a case consolidated with *Brown* stated the colorblind position forthrightly: Classifications "[b]ased [s]olely on [r]ace or [c]olor" "can never be" constitutional. Juris. Statement in *Briggs* v. *Elliott*, O. T. 1951, No. 273, pp. 20–21, 25, 29; see also Juris. Statement in *Davis* v. *County School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("Indeed, we take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action.... For this reason alone, we submit, the state separate school laws in this case must fall").

7 Indeed, the lawyers who litigated *Brown* were unwilling to take this bet, insisting on a colorblind legal rule. See, *e.g.*, Supp. Brief for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief "); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 1, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"). In fact, Justice Marshall viewed Justice Harlan's *Plessy* dissent as "a 'Bible' to which he turned during his most depressed moments"; no opinion "buoyed Marshall more in his pre-*Brown* days." In Memoriam: Honorable Thurgood Marshall, Proceedings of the Bar and Officers of the Supreme Court of the United States, p. X (1993) (remarks of Judge Motley).

8 Justice SOTOMAYOR rejects this mismatch theory as "debunked long ago," citing an *amicus* brief. *Post*, at 2256. But, in 2016, the Journal of Economic Literature published a review of mismatch literature—coauthored by a critic and a defender of affirmative action—which concluded that the evidence for mismatch was "fairly convincing." P. Arcidiacono & M. Lovenheim, Affirmative Action and the Quality-Fit Tradeoff, 54 J. Econ. Lit. 3, 20 (Arcidiacono & Lovenheim). And, of course, if universities wish to refute the mismatch theory, they need only release the data necessary to test its accuracy. See Brief for Richard Sander as *Amicus Curiae* 16–19 (noting that universities have been unwilling to provide the necessary data concerning student admissions and outcomes); accord, Arcidiacono & Lovenheim 20 ("Our hope is that better datasets soon will become available").

9 Justice SOTOMAYOR apparently believes that race-conscious admission programs can somehow increase the chances that members of certain races (blacks and Hispanics) are admitted without decreasing the chances of admission for members of other races (Asians). See *post*, at 2257 – 2258. This simply defies mathematics. In a zero-sum game like college admissions, any sorting mechanism that takes race into account in any way, see *post*, at 2277 – 2278 (opinion of JACKSON, J.) (defending such a system), has discriminated based on race to the benefit of some races and the detriment of others. And, the universities here admit that race is determinative in at least some of their admissions decisions. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d 580, 633 (MDNC 2021); see also 397 F.Supp.3d 126, 178 (Mass. 2019) (noting that, for Harvard, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants"); *ante*, at 2156, n. 1 (describing the role that race plays in the universities' admissions processes).

10 Even beyond Asian Americans, it is abundantly clear that the university respondents' racial categories are vastly oversimplistic, as the opinion of the Court and Justice GORSUCH's concurrence make clear. See *ante*, at 2167 – 2168; *post*, at 2209 – 2211 (opinion of GORSUCH, J.). Their "affirmative action" programs do not help Jewish, Irish, Polish, or other "white" ethnic groups whose ancestors faced discrimination upon arrival in America, any more than they help the descendants of those Japanese-American citizens interned during World War II.

11 Again, universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities may not, however, assume that all members of certain racial minorities are disadvantaged.

12 Such black achievement in "racially isolated" environments is neither new nor isolated to higher education. See T. Sowell, Education: Assumptions Versus History 7–38 (1986). As I have previously observed, in the years preceding *Brown*, the "most prominent example of an exemplary black school was Dunbar High School," America's first public high school for black students. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 763, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (concurring opinion). Known for its academics, the school attracted black students from across the Washington, D. C., area. "[I]n the period 1918–1923, Dunbar graduates earned fifteen degrees from Ivy League colleges, and ten degrees from Amherst, Williams, and Wesleyan." Sowell, Education: Assumptions Versus History, at 29. Dunbar produced the first black General in the U. S. Army, the first black Federal Court Judge, and the first black Presidential Cabinet member. A. Stewart, First Class: The Legacy of Dunbar 2 (2013). Indeed, efforts towards racial integration ultimately precipitated the school's decline. When the D. C. schools moved to a neighborhood-based admissions model, Dunbar was no longer able to maintain its prior admissions policies—and "[m]ore than 80 years of quality education came to an abrupt end." T. Sowell, Wealth, Poverty and Politics 194 (2016).

1 See also A. Qin, Aiming for an Ivy and Trying to Seem 'Less Asian,' N. Y. Times, Dec. 3, 2022, p. A18, col. 1 ("[T]he rumor that students can appear 'too Asian' has hardened into a kind of received wisdom within many Asian American communities," and "college admissions consultants [have] spoke[n] about trying to steer their Asian American clients away from so-called typically Asian activities such as Chinese language school, piano and Indian classical instruments.").

2 Though the matter did not receive much attention in the proceedings below, it appears that the Common Application has evolved in recent years to allow applicants to choose among more options to describe their backgrounds. The decisions below do not disclose how much Harvard or UNC made use of this further information (or whether they make use of it now). But neither does it make a difference. Title VI no more tolerates discrimination based on 60 racial categories than it does 6.

3 See also E. Bazelon, Why Is Affirmative Action in Peril? One Man's Decision, N. Y. Times Magazine, Feb. 15, 2023, p. 41 ("In the Ivy League, children whose parents are in the top 1 percent of the income distribution are 77 times as likely to attend as those whose parents are in the bottom 20 percent of the income bracket."); *ibid.* ("[A] common critique ... is that schools have made a bargain with economic elites of all races, with the exception of Asian Americans, who are underrepresented compared with their level of academic achievement.").

4 The principal dissent chides me for "reach[ing] beyond the factfinding below" by acknowledging SFFA's argument that other universities have employed various race-neutral tools. *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.). Contrary to the dissent's suggestion, however, I do not purport to find facts about those practices; all I do here is recount what SFFA has argued every step of the way. See, *e.g.,* Brief for Petitioner 55, 66–67; 1 App. in No. 20–1199, pp. 415–416, 440; 2 App. in No. 21–707, pp. 551–552. Nor, of course, is it somehow remarkable to acknowledge the parties' arguments. The principal dissent itself recites SFFA's arguments about Harvard's and other universities' practices too. See, *e.g., post,* at 2241 – 2242, 2252 – 2253 (opinion of SOTOMAYOR, J.). In truth, it is the dissent that reaches beyond the factfinding below when it argues from studies recited in a dissenting opinion in a different case decided almost a decade ago. *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.); see also *post,* at 2241 – 2242 (opinion of SOTOMAYOR, J.) (further venturing beyond the trial records to discuss data about employment, income, wealth, home ownership, and healthcare).

5 See Brief for Defense of Freedom Institute for Policy Studies as *Amicus Curiae* 11 (recruited athletes make up less than 1% of Harvard's applicant pool but represent more than 10% of the admitted class); P. Arcidiacono, J. Kinsler, & T. Ransom, Legacy and Athlete Preferences at Harvard, 40 J. Lab. Econ. 133, 141, n. 17 (2021) (recruited athletes were the only applicants admitted with the lowest possible academic rating and 79% of recruited athletes with the next lowest rating were admitted compared to 0.02% of other applicants with the same rating).

6 The principal dissent suggests "some Asian American applicants are actually advantaged by Harvard's use of race." *Post,* at 2258 (opinion of SOTOMAYOR, J.) (internal quotation marks omitted). What is the dissent's basis for that claim? The district court's finding that "considering applicants' race *may* improve the admission chances of *some* Asian Americans *who connect their racial identities with particularly compelling narratives*." 397 F.Supp.3d at 178 (emphasis added). The dissent neglects to mention those key qualifications. Worse, it ignores completely the district court's further finding that "*overall*" Harvard's race-conscious admissions policy "results in fewer Asian American[s] ... being admitted." *Ibid*. (emphasis added). So much for affording the district court's "careful factfinding" the "deference it [is] owe[d]." *Post,* at 2241, n. 25 (opinion of SOTOMAYOR, J.).

7 See also, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67, 84, 91; Tr. of Oral Arg. in No. 21–707, at 70–71, 81, 84, 91–92, 110.

8 Messages among UNC admissions officers included statements such as these: "[P]erfect 2400 SAT All 5 on AP one B in 11th [grade]." "Brown?!" "Heck no. Asian." "Of course. Still impressive."; "If it[']s brown and above a 1300 [SAT] put them in for [the] merit/Excel [scholarship]."; "I just opened a brown girl who's an 810 [SAT]."; "I'm going through this trouble because this is a bi-racial (black/white) male."; "[S]tellar academics for a Native Amer[ican]/African Amer[ican] kid." 3 App. in No. 21–707, pp. 1242–1251.

9 Left with no reply on the statute or its application to the facts, the principal dissent suggests that it violates "principles of party presentation" and abandons "judicial restraint" even to look at the text of Title VI. *Post*, at 2239, n. 21 (opinion of SOTOMAYOR, J.). It is a bewildering suggestion. SFFA sued Harvard and UNC under Title VI. And when a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them when Congress enacted them. *Bostock* v. *Clayton County*, 590 U. S. ——, ——, 140 S.Ct. 1731, 1738–1739, 207 L.Ed.2d 218 (2020). To be sure, parties are free to frame their arguments. But they are not free to stipulate to a statute's meaning and no party may "waiv[e]" the proper interpretation of the law by "fail[ing] to invoke it." *EEOC v. FLRA*, 476 U.S. 19, 23, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) (*per curiam*) (internal quotation marks omitted); see also *Young v. United States*, 315 U.S. 257, 258–259, 62 S.Ct. 510, 86 L.Ed. 832 (1942).

1 The Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted. Some might have debated how to calculate *Grutter*'s 25-year period—whether it ends with admissions for the college class of 2028 or instead for the college class of 2032. But neither Harvard nor North Carolina argued that *Grutter*'s 25-year period ends with the class of 2032 rather than the class of 2028. Indeed, notwithstanding the 25-year limit set

forth in *Grutter*, neither university embraced *any* temporal limit on race-based affirmative action in higher education, or identified any end date for its continued use of race in admissions. *Ante,* at 2170 – 2173.

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199 and joins this opinion only as it applies to the case in No. 21–707.

1 As Justice THOMAS acknowledges, the HBCUs, including Howard University, account for a high proportion of Black college graduates. *Ante*, at 2206 – 2207 (concurring opinion). That reality cannot be divorced from the history of anti-Black discrimination that gave rise to the HBCUs and the targeted work of the Freedmen's Bureau to help Black people obtain a higher education. See HBCU Brief 13–15.

2 By the time the Fourteenth Amendment was ratified by the States in 1868, "education had become a right of state citizenship in the constitution of every readmitted state," including in North Carolina. D. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1089 (2019); see also Brief for Black Women Scholars as *Amici Curiae* 9 ("The herculean efforts of Black reformers, activists, and lawmakers during the Reconstruction Era forever transformed State constitutional law; today, thanks to the impact of their work, every State constitution contains language guaranteeing the right to public education").

3 The majority suggests that "it required a Second Founding to undo" programs that help ensure racial integration and therefore greater equality in education. *Ante*, at 2175. At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system. Cf. *Dred Scott v. Sandford*, 19 How. 393, 405, 60 U.S. 393, 15 L.Ed. 691 (1857). *Brown* and its progeny recognized the need to take affirmative, race-conscious steps to eliminate that system.

4 See GAO, Report to the Chairman, Committee on Education and Labor, House of Representatives, K–12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines 13 (GAO–22–104737, June 2022) (hereinafter GAO Report).

5 G. Orfield, E. Frankenberg, & J. Ayscue, Harming Our Common Future: America's Segregated Schools 65 Years After *Brown* 21 (2019).

6 *E.g.*, *Bennett* v. *Madison Cty. Bd. of Ed.*, No. 5:63–CV–613 (ND Ala., July 5, 2022), ECF Doc. 199, p. 19; *id.*, at 6 (requiring school district to ensure "the participation of black students" in advanced courses).

7 GAO Report 6, 13 (noting that 80% of predominantly Black and Latino schools have at least 75% of their students eligible for free or reduced-price lunch—a proxy for poverty).

8 See also L. Clark, Barbed Wire Fences: The Structural Violence of Education Law, 89 U. Chi. L. Rev. 499, 502, 512–517 (2022); Albert Shanker Institute, B. Baker, M. DiCarlo, & P. Greene, Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity 17–19 (Apr. 2022).

9 See Brief for 25 Harvard Student and Alumni Organizations as *Amici Curiae* 6–15 (collecting sources).

10 GAO Report 7; see also Brief for Council of the Great City Schools as *Amicus Curiae* 11–14 (collecting sources).

11 See J. Okonofua & J. Eberhardt, Two Strikes: Race and the Disciplining of Young Students, 26 Psychol. Sci. 617 (2015) (a national survey showed that "Black students are more than three times as likely to be suspended or expelled as their White peers"); Brief for Youth Advocates and Experts on Educational Access as *Amici Curiae* 14–15 (describing investigation in North Carolina of a public school district, which found that Black students were 6.1 times more likely to be suspended than white students).

12 See, *e.g.*, Dept. of Education, National Center for Education Statistics, Digest of Education Statistics (2021) (Table 104.70) (showing that 59% of white students and 78% of Asian students have a parent with a bachelor's degree or higher, while the same is true for only 25% of Latino students and 33% of Black students).

13 R. Crosnoe, K. Purtell, P. Davis-Kean, A. Ansari, & A. Benner, The Selection of Children From Low-Income Families into Preschool, 52 J. Developmental Psychology 11 (2016); A. Kenly & A. Klein, Early Childhood Experiences of Black Children in a Diverse Midwestern Suburb, 24 J. African American Studies 130, 136 (2020).

14 Dept. of Education, National Center for Education, Institute of Educational Science, The Condition of Education 2022, p. 24 (2020) (fig. 16).

15 ProQuest Statistical Abstract of the United States: 2023, p. 402 (Table 622) (noting Black and Latino adults are more likely to be unemployed).

16 *Id.*, at 173 (Table 259).

17 A. McCargo & J. Choi, Closing the Gaps: Building Black Wealth Through Homeownership (2020) (fig. 1).

18 Dept. of Commerce, Census Bureau, Health Insurance Coverage in the United States: 2021, p. 9 (fig. 5); *id.*, at 29 (Table C–1), https://www.census.gov/library/publications/2022/demo/p60-278.html (noting racial minorities, particularly Latinos, are less likely to have health insurance coverage).

19 In 1979, prompted by lawsuits filed by civil rights lawyers under Title VI, the U. S. Department of Health, Education, and Welfare "revoked UNC's federal funding for its continued noncompliance" with *Brown*. 3 App. 1688; see *Adams v. Richardson*, 351 F.Supp. 636, 637 (DC 1972); *Adams v. Califano*, 430 F.Supp. 118, 121 (DC 1977). North Carolina sued the Federal Government in response, and North Carolina Senator Jesse Helms introduced legislation to block federal desegregation efforts. 3 App. 1688. UNC praised those actions by North Carolina public officials. *Ibid.* The litigation ended in 1981, after the Reagan administration settled with the State. See *North Carolina* v. *Department of Education*, No. 79–217–CIV–5 (EDNC, July 17, 1981) (Consent Decree).

20 See 1 App. 20–21 (campus climate survey showing *inter alia* that "91 percent of students heard insensitive or disparaging racial remarks made by other students"); 2 *id.*, at 1037 (Black student testifying that a white student called him "the N word" and, on a separate occasion at a fraternity party, he was "told that no slaves were allowed in"); *id.*, at 955 (student testifying that he was "the only African American student in the class," which discouraged him from speaking up about racially salient issues); *id.*, at 762–763 (student describing that being "the only Latina" made it "hard to speak up" and made her feel "foreign" and "an outsider").

21 The same standard that applies under the Equal Protection Clause guides the Court's review under Title VI, as the majority correctly recognizes. See *ante*, at 2156 - 2157, n. 2; see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 325, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (Brennan, J., concurring). Justice GORSUCH argues that "Title VI bears independent force" and holds universities to an even higher standard than the Equal Protection Clause. *Ante*, at 2221. Because no party advances Justice GORSUCH's argument, see *ante*, at 2156 - 2157, n. 2, the Court properly declines to address it under basic principles of party presentation. See *United States* v. *Sineneng-Smith*, 590 U. S. ——, ——, 140 S.Ct. 1575, 1578–1579, 206 L.Ed.2d 866 (2020). Indeed, Justice GORSUCH's approach calls for even more judicial restraint. If petitioner could prevail under Justice GORSUCH's statutory analysis, there would be no reason for this Court to reach the constitutional question. See *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*). In a statutory case, moreover, *stare decisis* carries "enhanced force," as it would be up to Congress to "correct any mistake it sees" with "our interpretive decisions." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015). Justice GORSUCH wonders why the dissent, like the majority, does not "engage" with his statutory arguments. *Ante*, at 2215 - 2216. The answer is simple: This Court plays "the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). Petitioner made a strategic litigation choice, and in our adversarial system, it is not up to this Court to come up with "wrongs to right" on behalf of litigants. *Id.*, at 244, 128 S.Ct. 2559 (internal quotation marks omitted).

22 SFFA is a 501(c)(3) nonprofit organization founded after this Court's decision in *Fisher I*, 570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013). App. to Pet. for Cert. in No. 20–1199, p. 10. Its original board of directors had three self-appointed members: Edward Blum, Abigail Fisher (the plaintiff in *Fisher*), and Richard Fisher. See *ibid.*

23 Bypassing the Fourth Circuit's opportunity to review the District Court's opinion in the *UNC* case, SFFA sought certiorari before judgment, urging that, "[p]aired with *Harvard*," the *UNC* case would "allow the Court to resolve the ongoing validity of race-based admissions under both Title VI and the Constitution." Pet. for Cert. in No. 21–707, p. 27.

24 Generally speaking, top percentage plans seek to enroll a percentage of the graduating high school students with the highest academic credentials. See, *e.g.*, *Fisher II*, 579 U.S. at 373, 136 S.Ct. 2198 (describing the University of Texas' Top Ten Percent Plan).

25 SFFA and Justice GORSUCH reach beyond the factfinding below and argue that universities in States that have banned the use of race in college admissions have achieved racial diversity through efforts such as increasing socioeconomic preferences, so UNC could do the same. Brief for Petitioner 85–86; *ante*, at 2214 - 2215. Data from those States disprove that theory. Institutions in those States experienced " 'an immediate and precipitous decline in the rates at which underrepresented-minority students applied ... were admitted ... and enrolled.' " *Schuette v. BAMN*, 572 U.S. 291, 384–390, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014) (SOTOMAYOR, J., dissenting); see *infra*, at 2260 – 2261, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46. In addition, UNC "already engages" in race-neutral efforts focused on socioeconomic status, including providing "exceptional levels of financial aid" and "increased and targeted recruiting." *UNC*, 567 F.Supp.3d at 665.

Justice GORSUCH argues that he is simply "recount[ing] what SFFA has argued." *Ante*, at 2215, n. 4. That is precisely the point: SFFA's arguments were not credited by the court below. "[W]e are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). Justice GORSUCH also suggests it is inappropriate for the dissent to respond to the majority by relying on materials beyond the findings of fact below. *Ante*, at 2215, n. 4. There would be no need for the dissent to do that if the majority stuck to reviewing the District Court's careful factfinding with the deference it owes to the trial court. Because the majority has made a different choice, the dissent responds.

26 SFFA also argues that Harvard discriminates against Asian American students. Brief for Petitioner 72–75. As explained below, this claim does not fit under *Grutter*'s strict scrutiny framework, and the courts below did not err in rejecting that claim. See *infra*, at 2257 – 2259, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

27 Justice GORSUCH suggests that only "applicants of certain races may receive a 'tip' in their favor." *Ante*, at 2212. To the extent Justice GORSUCH means that some races are not eligible to receive a tip based on their race, there is no evidence in the record to support this statement. Harvard "does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances." *Harvard I*, 397 F.Supp.3d 126, 190, n. 56 (Mass. 2019).

28 Relying on a single footnote in the First Circuit's opinion, the Court claims that Harvard's program is unconstitutional because it "has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard." *Ante*, at 2168. The Court of Appeals, however, merely noted that the United States, at the time represented by a different administration, argued that "absent the consideration of race, [Asian American] representation would increase from 24% to 27%," an 11% increase. *Harvard II*, 980 F.3d at 191, n. 29. Taking those calculations as correct, the Court of Appeals recognized that such an impact from the use of race on the overall makeup of the class is consistent with the impact that this Court's precedents have tolerated. *Ibid*.

The Court also notes that "race is determinative for at least some—if not many—of the students" admitted at UNC. *Ante*, at 2169. The District Court in the *UNC* case found that "race plays a role in a very small percentage of decisions: 1.2% for in-state students and 5.1% for out-of-state students." 567 F.Supp.3d 580, 634 (MDNC 2021). The limited use of race at UNC thus has a smaller effect than at Harvard and is also consistent with the Court's precedents. In addition, contrary to the majority's suggestion, such effect does not prove that "race alone ... explains the admissions decisions for hundreds if not thousands of applicants to UNC each year." *Ante,* at 2169, n. 6. As the District Court found, UNC (like Harvard) "engages a highly individualized, holistic review of each applicant's file, which considers race flexibly as a 'plus factor' as one among many factors in its individualized consideration of each and every applicant." 567 F.Supp.3d at 662; see *id.,* at 658 (finding that UNC "rewards different kinds of diversity, and evaluates a candidate within the context of their lived experience"); *id.,* at 659 ("The parties stipulated, and the evidence shows, that readers evaluate applicants by taking into consideration dozens of criteria," and even SFFA's expert "concede[d] that the University's admissions process is

individualized and holistic"). Stated simply, race is not "a defining feature of any individual application." *Id.,* at 662; see also *infra*, at 2251 - 2252.

29 The majority does not dispute that it has handpicked data from a truncated period, ignoring the broader context of that data and what the data reflect. Instead, the majority insists that its selected data prove that Harvard's "precise racial preferences" "operate like clockwork." *Ante*, at 2171, n. 7. The Court's conclusion that such racial preferences must be responsible for an "unyielding demographic composition of [the] class," *ibid.*, misunderstands basic principles of statistics. A number of factors (most notably, the demographic composition of the applicant pool) affect the demographic composition of the entering class. Assume, for example, that Harvard admitted students based solely on standardized test scores. If test scores followed a normal distribution (even with different averages by race) and were relatively constant over time, and if the racial shares of total applicants were also relatively constant over time, one would expect the same "unyielding demographic composition of [the] class." *Ibid.* That would be true even though, under that hypothetical scenario, Harvard does not consider race in admissions at all. In other words, the Court's inference that precise racial preferences must be the cause of relatively constant racial shares of admitted students is specious.

30 In the context of policies that "benefit rather than burden the minority," the Court has adhered to a strict scrutiny framework despite multiple Members of this Court urging that "the mandate of the Equal Protection Clause" favors applying a less exacting standard of review. *Schuette*, 572 U.S. at 373–374, 134 S.Ct. 1623 (SOTOMAYOR, J., dissenting) (collecting cases).

31 The Court's "dictum" that Mexican appearance can be one of many factors rested on now-outdated quantitative premises. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (CA9 2000).

32 Justice KAVANAUGH agrees that the effects from the legacy of slavery and Jim Crow continue today, citing Justice Marshall's opinion in *Bakke*. *Ante*, at 2224 - 2225 (citing 438 U.S. at 395–402, 98 S.Ct. 2733). As explained above, Justice Marshall's view was that *Bakke* covered only a portion of the Fourteenth Amendment's sweeping reach, such that the Court's higher education precedents must be expanded, not constricted. See 438 U.S. at 395–402, 98 S.Ct. 2733 (opinion dissenting in part). Justice Marshall's reading of the Fourteenth Amendment does not support Justice KAVANAUGH's and the majority's opinions.

33 There is no dispute that respondents' compelling diversity objectives are "substantial, long-standing, and well documented." *UNC*, 567 F.Supp.3d at 655; *Harvard II*, 980 F.3d at 186–187. SFFA did not dispute below that respondents have a compelling interest in diversity. See *id.*, at 185; *Harvard I*, 397 F.Supp.3d at 133; Tr. of Oral Arg. in No. 21–707, p. 121. And its expert agreed that valuable educational benefits flow from diversity, including richer and deeper learning, reduced bias, and more creative problem solving. 2 App. in No. 21–707, p. 546. SFFA's counsel also emphatically disclaimed the issue at trial. 2 App. in No. 20–1199, p. 548 ("Diversity and its benefits are not on trial here").

34 The Court suggests that promoting the Fourteenth Amendment's vision of equality is a "radical" claim of judicial power and the equivalent of "pick[ing] winners and losers based on the color of their skin." *Ante*, at 2175. The law sometimes requires consideration of race to achieve racial equality. Just like drawing district lines that comply with the Voting Rights Act may require consideration of race along with other demographic factors, achieving racial diversity in higher education requires consideration of race along with "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination"). Moreover, in ordering the admission of Black children to all-white schools "with all deliberate speed" in *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), this Court did not decide that the Black children should receive an "advantag[e] ... at the expense of" white children. *Ante*, at 2169. It simply enforced the Equal Protection Clause by leveling the playing field.

35 Today's decision is likely to generate a plethora of litigation by disappointed college applicants who think their credentials and personal qualities should have secured them admission. By inviting those challenges, the Court's opinion promotes chaos and incentivizes universities to convert their admissions programs into inflexible systems focused on mechanical factors, which will harm all students.

36 The Court suggests that the term "Asian American" was developed by respondents because they are "uninterested" in whether Asian American students "are adequately represented." *Ante*, at 2167; see also *ante*, at 2209 - 2210 (GORSUCH,

J., concurring) (suggesting that "[b]ureaucrats" devised a system that grouped all Asian Americans into a single racial category). That argument offends the history of that term. "The term 'Asian American' was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility." Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 9 (AALDEF Brief).

37 Justice KAVANAUGH's reading, in particular, is quite puzzling. Unlike the majority, which concludes that respondents' programs should have an end point, Justice KAVANAUGH suggests that *Grutter* itself has an expiration date. He agrees that racial inequality persists, *ante*, at 2224 - 2225, but at the same time suggests that race-conscious affirmative action was only necessary in "another generation," *ante*, at 2222. He attempts to analogize expiration dates of court-ordered injunctions in desegregation cases, *ante*, at 2223, but an expiring injunction does not eliminate the underlying constitutional principle. His musings about different college classes, *ante*, at 2224, n. 1, are also entirely beside the point. Nothing in *Grutter*'s analysis turned on whether someone was applying for the class of 2028 or 2032. That reading of *Grutter* trivializes the Court's precedent by reducing it to an exercise in managing academic calendars. *Grutter* is no such thing.

38 Before 2018, Harvard's admissions procedures were silent on the use of race in connection with the personal rating. *Harvard II*, 980 F.3d at 169. Harvard later modified its instructions to say explicitly that " 'an applicant's race or ethnicity should not be considered in assigning the personal rating.' " *Ibid.*

39 At Harvard, "Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes," even though "only about 6% of the United States population is Asian American." *Harvard I*, 397 F.Supp.3d at 203.

40 K. Schaeffer, Pew Research Center, The Changing Face of Congress in 8 Charts (Feb. 7, 2023).

41 See J. Martelli & P. Abels, The Education of a Leader: Educational Credentials and Other Characteristics of Chief Executive Officers, J. of Educ. for Bus. 216 (2010); see also J. Moody, Where the Top Fortune 500 CEOs Attended College, U. S. News & World Report (June 16, 2021).

42 Racial inequality in the pipeline to this institution, too, will deepen. See J. Fogel, M. Hoopes, & G. Liu, Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals 7–8 (2022) (noting that from 2005 to 2017, 85% of Supreme Court law clerks were white, 9% were Asian American, 4% were Black, and 1.5% were Latino, and about half of all clerks during that period graduated from two law schools: Harvard and Yale); Brief for American Bar Association as *Amicus Curiae* 25 (noting that more than 85% of lawyers, more than 70% of Article III judges, and more than 80% of state judges in the United States are white, even though white people represent about 60% of the population).

* Justice JACKSON did not participate in the consideration or decision of the case in No. 20–1199, and issues this opinion with respect to the case in No. 21–707.

1 M. Oliver & T. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 128 (1997) (Oliver & Shapiro) (emphasis deleted).

2 An Appeal to Congress for Impartial Suffrage, Atlantic Monthly (Jan. 1867), in 2 The Reconstruction Amendments: The Essential Documents 324 (K. Lash ed. 2021) (Lash).

3 Speech of Sen. John Sherman (Sept. 28, 1866) (Sherman), in *id.*, at 276; see also W. Du Bois, Black Reconstruction in America 162 (1998) (Du Bois).

4 See Sherman 276; M. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 48, 71–75, 91, 173 (1986).

5 Message Accompanying Veto of the Civil Rights Bill (Mar. 27, 1866), in Lash 145.

6 Speech Introducing the [Fourteenth] Amendment (May 8, 1866), in *id.*, at 159; see Du Bois 670–710.

7 E. Foner, The Second Founding 125–167 (2019) (Foner).

8 *Id*., at 128.

9 M. Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 9–11 (2017) (Baradaran).

10 Foner 179; see also Baradaran 15–16; I. Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration 37 (2010) (Wilkerson).

11 Baradaran 18.

12 *Ibid.*

13 R. Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 154 (2017) (Rothstein); Baradaran 33–34; Wilkerson 53–55.

14 Baradaran 20–21; Du Bois 173–179, 694–696, 698–699; R. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L. J. 1609, 1656–1659 (2001) (Goluboff); Wilkerson 152 (noting persistence of this practice "well into the 1940s").

15 Baradaran 20.

16 Goluboff 1656–1659 (recounting presence of these practices well into the 20th century); Wilkerson 162–163.

17 Rothstein 154.

18 C. Black, The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424 (1960); Foner 47–48; Du Bois 179, 696; Baradaran 38–39.

19 T. Shanks, The Homestead Act: A Major Asset-Building Policy in American History, in Inclusion in the American Dream: Assets, Poverty, and Public Policy 23–25 (M. Sherraden ed. 2005) (Shanks); see also Baradaran 18.

20 Shanks 32–37; Oliver & Shapiro 37–38.

21 Wilkerson 8–10; Rothstein 155.

22 *Id*., at 43–50; Baradaran 90–92.

23 *Ibid.*; Rothstein 172–173; Wilkerson 269–271.

24 Baradaran 90.

25 I. Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 29–35 (2005) (Katznelson).

26 D. Massey & N. Denton, American Apartheid: Segregation and the Making of the Underclass 51–53 (1993); Oliver & Shapiro 16–18.

27 Rothstein 63.

28 *Id*., at 63–64.

29 *Id.*, at 64; see Oliver & Shapiro 16–18; Baradaran 105.

30 Rothstein 64.

31 *Ibid.*

32 *Id.*, at 67.

33 Baradaran 108; see Rothstein 69–75.

34 *Id.*, at 9, 13, 70.

35 *Id.*, at 108.

36 *Ibid.*

37 R. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 411, n. 144 (2001); see also Rothstein 182–183.

38 Oliver & Shapiro 18.

39 *Id.*, at 43–44; Baradaran 109, 253–254; A. Dickerson, Shining a Bright Light on the Color of Wealth, 120 Mich. L. Rev. 1085, 1100 (2022) (Dickerson).

40 Katznelson 53; see *id.*, at 22, 29, 42–48, 53–61; Rothstein 31, 155–156.

41 Katznelson 113–114; see *id.*, at 113–141; see also, *e.g.*, *id.*, at 139–140 (Black veterans, North and South, were routinely denied loans that White veterans received); Rothstein 167.

42 Baradaran 112–113.

43 Katznelson 22–23; Rothstein 167.

44 *Id.*, at 54–56, 65, 127–131, 217; Stanford Institute for Economic Policy Research, Measuring and Mitigating Disparities in Tax Audits 1–7 (2023); Dickerson 1096–1097.

45 What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, in 4 The Frederick Douglass Papers 68 (J. Blassingame & J. McKivigan eds. 1991).

46 Dickerson 1086 (citing data from 2019 Federal Reserve Survey of Consumer Finances); see also Rothstein 184 (reporting, in 2017, even lower median-wealth number of $11,000).

47 Dickerson 1086; see also Rothstein 184 (reporting even larger relative gap in 2017 of $134,000 to $11,000).

48 Baradaran 249; see also Dickerson 1089–1090; Oliver & Shapiro 94–95, 100–101, 110–111, 197.

49 See Brief for National Academy of Education as *Amicus Curiae* 14–15 (citing U. S. Census Bureau statistics).

50 *Id.*, at 14 (citing U. S. Census Bureau statistics); Rothstein 184 (reporting similarly stark White/Black income gap numbers in 2017). Early returns suggest that the COVID–19 pandemic exacerbated these disparities. See E. Derenoncourt, C. Kim, M. Kuhn, & M. Schularick, Wealth of Two Nations: The U. S. Racial Wealth Gap, 1860–2020, p. 22 (Fed. Reserve Bank of Minneapolis, Opportunity & Inclusive Growth Inst., Working Paper No. 59, June 2022) (Wealth of Two Nations); L. Bollinger & G. Stone, A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action 103 (2023) (Bollinger & Stone).

51 *Id.*, at 87; Wealth of Two Nations 77–79.

52 *Id.*, at 78, 89; Bollinger & Stone 94–95; Dickerson 1101.

53 Bollinger & Stone 99–100.

54 *Id.*, at 99, and n. 58.

55 Dickerson 1088; Bollinger & Stone 100, and n. 63.

56 ABA, Profile of the Legal Profession 33 (2020).

57 Bollinger & Stone 106; Brief for HR Policy Association as *Amicus Curiae* 18–19.

58 Dickerson 1102.

59 Rothstein 230.

60 Brief for Association of American Medical Colleges et al. as *Amici Curiae* 8 (AMC Brief).

61 C. Caraballo et al., Excess Mortality and Years of Potential Life Lost Among the Black Population in the U. S., 1999–2020, 329 JAMA 1662, 1663, 1667 (May 16, 2023) (Caraballo).

62 Bollinger & Stone 101.

63 S. Whetstone et al., Health Disparities in Uterine Cancer: Report From the Uterine Cancer Evidence Review Conference, 139 Obstetrics & Gynecology 645, 647–648 (2022).

64 AMC Brief 8–9.

65 Bollinger & Stone 101; Caraballo 1663–1665, 1668.

66 Bollinger & Stone 101 (footnotes omitted).

67 Caraballo 1667.

68 *Ibid.*

69 AMC Brief 9.

70 Bollinger & Stone 100.

71 See Report on the Alleged Outrages in the Southern States, S. Rep. No. 1, 42d Cong., 1st Sess., I–XXXII (1871).

72 See D. Tokaji, Realizing the Right To Vote: The Story of *Thornburg v. Gingles*, in Election Law Stories 133–139 (J. Douglas & E. Mazo eds. 2016); see Foner xxii.

73 3 App. 1683.

74 *Id*., at 1687–1688.

75 See O. James, Valuing Identity, 102 Minn. L. Rev. 127, 162 (2017); P. Karlan & D. Levinson, Why Voting Is Different, 84 Cal. L. Rev. 1201, 1217 (1996).

76 567 F.Supp.3d 580, 595 (MDNC 2021).

77 *Id.*, at 596; 1 App. 348; Decl. of J. Rosenberg in No. 1:14–cv–954 (MDNC, Jan. 18, 2019), ECF Doc. 154–7, ¶10 (Rosenberg).

78 1 App. 350; see also 3 *id.*, at 1414–1415.

79 *Id.*, at 1414.

80 *Id*., at 1415.

81 *Id.*, at 1416; see also 2 *id.*, at 706; Rosenberg ¶22.

82 3 App. 1416 (emphasis added); see also 2 *id.*, at 631–639.

83 567 F.Supp.3d at 591, 595; 2 App. 638 (Farmer, when asked how race could "b[e] a potential plus" for "students other than underrepresented minority students," pointing to a North Carolinian applicant, originally from Vietnam, who identified as "Asian and Montagnard"); *id.*, at 639 (Farmer stating that "the whole of [that student's] background was appealing to us when we evaluated her applicatio[n]," and noting how her "story reveals sometimes how hard it is to separate race out from other things that we know about a student. That was integral to that student's story. It was part of our understanding of her, and it played a role in our deciding to admit her").

84 3 *id.*, at 1416; Rosenberg ¶25.

85 2 App. 631.

86 *Id.*, at 636–637, 713.

87 3 *id.*, at 1416; 2 *id.*, at 699–700.

88 *Id.*, at 699; see also Rosenberg ¶24.

89 2 App. 706, 708; 3 *id.*, at 1415–1416.

90 2 *id.*, at 706, 708; 3 *id.*, at 1415–1416.

91 A reader might miss this because the majority does not bother to drill down on how UNC's holistic admissions process operates. Perhaps that explains its failure to apprehend (by reviewing the evidence presented at trial) that everyone, no matter their race, is eligible for a diversity-linked plus. Compare *ante*, at 2156, and n. 1, with 3 App. 1416, and *supra*, at 2272. The majority also repeatedly mischaracterizes UNC's holistic admissions-review process as a "race-based admissions system," and insists that UNC's program involves "separating students on the basis of race" and "pick[ing only certain] races to benefit." *Ante*, at 2156, and n. 1, 2168, 2175. These claims would be concerning if they had any basis in the record. The majority appears to have misunderstood (or categorically rejected) the established fact that UNC treats race as merely one of the many aspects of an applicant that, in the real world, matter to understanding the whole person. Moreover, its holistic review process involves reviewing a wide variety of personal criteria, not just race. Every applicant competes against thousands of other applicants, each of whom has personal qualities that are taken into account and that other applicants do not—and could not—have. Thus, the elimination of the race-linked plus would *still* leave SFFA's members competing against thousands of other applicants to UNC, each of whom has potentially plus-conferring qualities that a given SFFA member does not.

92 See 3 App. 1409, 1414, 1416.

93 *Id.*, at 1414–1415.

94 See 567 F.Supp.3d at 617, 619; 3 App. 1078–1080. The majority cannot deny this factual finding. Instead, it conducts its own back-of-the-envelope calculations (its numbers appear nowhere in the District Court's opinion) regarding "the *overall* acceptance rates of academically excellent applicants to UNC," in an effort to trivialize the District Court's conclusion. *Ante*, at 2156, n. 1. I am inclined to stick with the District Court's findings over the majority's unauthenticated calculations. Even when the majority's ad hoc statistical analysis is taken at face value, it hardly supports what the majority wishes to intimate: that Black students are being admitted based on UNC's myopic focus on "race—and race alone." *Ante*, at 2169, n. 6. As the District Court observed, if these Black students "were largely defined in the admissions process by their race, one would expect to find that *every*" such student "demonstrating academic excellence ... would be admitted." 567 F.Supp.3d at 619 (emphasis added). Contrary to the majority's narrative, "race does not even act as a tipping point for some students with otherwise exceptional qualifications." *Ibid.* Moreover, as the District Court also found, UNC does not even use the bespoke "academic excellence" metric that SFFA's expert " 'invented' " for this litigation. *Id.*, at 617, 619; see also *id.*, at 624–625. The majority's calculations of overall acceptance rates by race on *that* metric bear scant relationship to, and thus are no indictment of, how UNC's admissions process actually works (a recurring theme in its opinion).

95 See Bollinger & Stone 86, 103.

96 See, *e.g.*, Brief for University of Michigan as *Amicus Curiae* 6, 24; Brief for President and Chancellors of University of California as *Amici Curiae* 20–29; Brief for American Psychological Association et al. as *Amici Curiae* 14–16, 21–23 (APA Brief).

97 *Id.*, at 14–20, 23–27.

98 AMC Brief 4, 14; see also Brief for American Federation of Teachers as *Amicus Curiae* 10 (AFT Brief) (collecting further studies on the "tangible benefits" of patients' access to doctors who look like them).

99 AMC Brief 4.

100 National Research Council, New Horizons in Health: An Integrative Approach 100–111 (2001); Pollack et al., Should Health Studies Measure Wealth? A Systematic Review, 33 Am. J. Preventative Med. 250, 252, 261–263 (2007); see also Part I–B, *supra*.

101 See APA Brief 14–20, 23–27 (collecting studies); AFT Brief 11–12 (same); Brief for National School Boards Association et al. as *Amici Curiae* 6–11 (same); see also 567 F.Supp.3d at 592–593, 655–656 (factual findings in this case with respect to these benefits).

102 LaVeist et al., The Economic Burden of Racial, Ethnic, and Educational Health Inequities in the U. S., 329 JAMA 1682, 1683–1684, 1689, 1691 (May 16, 2023).

103 Justice THOMAS's prolonged attack, *ante*, at 2202 – 2206 (concurring opinion), responds to a dissent I did not write in order to assail an admissions program that is not the one UNC has crafted. He does not dispute any historical or present fact about the origins and continued existence of race-based disparity (nor could he), yet is somehow persuaded that these realities have no bearing on a fair assessment of "individual achievement," *ante*, at 2203. Justice THOMAS's opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC's holistic understanding that race can be a factor that affects applicants' unique life experiences. How else can one explain his detection of "an organizing principle based on race," a claim that our society is "fundamentally racist," and a desire for Black "victimhood" or racial "silo[s]," *ante*, at 2202 – 2204, in this dissent's approval of an admissions program that advances all Americans' shared pursuit of true equality by treating race "on par with" other aspects of identity, *supra*, at 2272? Justice THOMAS ignites too many more straw men to list, or fully extinguish, here. The takeaway is that those who demand that no one think about race (a classic pink-elephant paradox) refuse to see, much less solve for, the elephant in the room—the race-linked disparities that continue to impede achievement of our great Nation's full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of "social racism" and "government-imposed racism," *ante*, at 2205 (THOMAS, J., concurring), thereby deterring our collective progression toward becoming a society where race no longer matters.

104 Foner 179.

105 Justice SOTOMAYOR has fully explained why the majority's analysis is legally erroneous and how UNC's holistic review program is entirely consistent with the Fourteenth Amendment. My goal here has been to highlight the interests at stake and to show that holistic admissions programs that factor in race are warranted, just, and universally beneficial. All told, the Court's myopic misunderstanding of what the Constitution permits will impede what experts and evidence tell us is required (as a matter of social science) to solve for pernicious race-based inequities that are themselves rooted in the persistent denial of equal protection. "[T]he potential consequences of the [majority's] approach, as measured against the Constitution's objectives ... provides further reason to believe that the [majority's] approach is legally unsound." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 858, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Breyer, J., dissenting). I fear that the Court's folly brings our Nation to the brink of coming "full circle" once again. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 402, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Marshall, J.).

106 Compare *ante*, at 2166, n. 4, with *ante*, at 2166 – 2171, and *supra*, at 2264 – 2265, and nn. 2–3.

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91 N.Y.2d 860, 690 N.E.2d 1259, 668
N.Y.S.2d 153, 1997 N.Y. Slip Op. 11115

T.D. et al., Appellants,

v.

New York State Office of Mental Health et al., Respondents.

Court of Appeals of New York
252
Argued November 19, 1997;

Decided December 22, 1997

CITE TITLE AS: T.D. v New York State Off. of Mental Health

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 5, 1996, which modified, and, as modified, affirmed an order and judgment (one paper) of the Supreme Court (Edward J. Greenfield, J.; opn 165 Misc 2d 62), entered in New York County, (1) granting a motion by plaintiffs for summary judgment to the extent of declaring that the regulations codified at 14 NYCRR 527.10 were promulgated by the Commissioner of the Office of Mental Health (OMH) beyond his authority and without the consent of the Commissioner of Health and are, thus, invalid and unenforceable in their entirety and for all purposes, declaring that non-Federally funded human subject research carried out at OMH-operated and licensed facilities and involving more than minimal risk and subjects who are minors or adults lacking the capacity to give informed consent to such research is subject to the provisions of Public Health Law article 24-A and is in violation of those provisions because it has not been consented to by the Commissioner of Health, declaring that Federally funded human subject research carried out at OMH-operated and licensed facilities that is subject to and in compliance with the Federal regulations promulgated by the United States Department of Health and Human Services as 45 CFR part 46 is exempt from the provisions of ***861** Public Health Law article 24-A and, therefore, does not require the consent of the Commissioner of Health, and ordering that the Commissioner of Health must advise plaintiffs at least five days prior to the effective date of any promulgated regulations to which consent is to be given by the Commissioner of Health concerning human subject research carried out at OMH-licensed or operated facilities involving more than minimal risk and subjects who are minors or adults lacking the capacity to give informed consent to such research, and (2) denying a cross motion by defendants for summary judgment. The modification consisted of declaring that the following provisions of the regulations promulgated by the Office of Mental Health and codified at 14 NYCRR 527.10 (e) (2) (ii), (iii), (iv), (viii), (ix); (3) (i), (iii), (v) fail to provide for adequate notice and review procedures and, therefore, violate the Due Process Clause of the New York State Constitution (art I, § 6), and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and violate this State's common law as well as Public Health Law article 24-A and Social Services Law, article 6, title 1.

T.D. v New York State Off. of Mental Health, 228 AD2d 95, appeal dismissed.

HEADNOTES

Appeal
Parties Aggrieved
Inappropriate Advisory Opinion

(1) In an action in which plaintiffs sought to have declared invalid regulations promulgated by defendant New York State Office of Mental Health (OMH), pertaining to experimental medical research on patients or residents of OMH facilities deemed incapable of giving consent, plaintiffs have received the complete relief sought in this litigation. A successful party who has obtained the full relief sought is not aggrieved, and therefore has no grounds for appeal (CPLR 5511). Moreover, once the Appellate Division in its decision below had concluded that the challenged regulations were invalid because OMH lacked statutory authority to promulgate them, it was unnecessary under the circumstances here presented to prospectively declare the regulations invalid on additional common-law, statutory, and constitutional grounds. In doing so, the Appellate Division issued an inappropriate advisory opinion. Since plaintiffs are not aggrieved, and defendants have not cross-appealed, the appeal must be dismissed.

APPEARANCES OF COUNSEL

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Lori R. Levinson, New York City, for Greater New York Hospital Association, *amicus curiae.*

OPINION OF THE COURT

Memorandum.

The appeal should be dismissed, without costs.

In bringing this action, plaintiffs sought to have declared invalid regulations promulgated by defendant New York State Office of Mental Health (OMH), pertaining to experimental medical research on patients or residents of OMH facilities deemed incapable of giving consent. Plaintiffs have received the complete relief sought in this litigation. A successful party who has obtained the full relief sought is not aggrieved, and therefore has no grounds for appeal (CPLR 5511; *Parochial Bus Sys. v Board of Educ.,* 60 NY2d 539, 544-545; *Matter of Bayswater Health Related Facility v Karagheuzoff,* 37 NY2d 408, 412-413).

We note moreover that, once the Appellate Division in its decision below had concluded that the challenged regulations were invalid because OMH lacked statutory authority to promulgate them, it was unnecessary under the circumstances here presented to prospectively declare the regulations invalid on additional common-law, statutory, and constitutional grounds. In doing so, the Appellate Division issued an inappropriate advisory opinion (*see,* ***863** *Cuomo v Long Is. Light. Co.,* 71 NY2d 349; *New York Pub. Interest Research Group v Carey,* 42 NY2d 527; *Matter of State Indus. Commn.,* 224 NY 13).

Since plaintiffs are not aggrieved, and defendants have not cross-appealed, the appeal must be dismissed.

Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine, Ciparick and Wesley concur.
Appeal dismissed, without costs, in a memorandum.

135 S.Ct. 2507
Supreme Court of the United States

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, et al., Petitioners

v.

The INCLUSIVE COMMUNITIES PROJECT, INC., et al.

No. 13–1371
|
Argued Jan. 21, 2015.
|
Decided June 25, 2015.

Synopsis

Background: Non-profit organization brought housing-discrimination action under Fair Housing Act (FHA) against Texas Department of Housing and Community Affairs (TDHCA) and its officers, alleging their allocation of low income housing tax credits resulted in a disparate impact on African–American residents. The United States District Court for the Northern District of Texas, Sidney A. Fitzwater, Chief Judge, 749 F.Supp.2d 486, granted partial summary judgment to organization, and, after bench trial, 860 F.Supp.2d 312, found discriminatory impact, and, 2012 WL 3201401, adopted remedial plan and awarded attorney fees to organization, which ruling it later amended in part, 2012 WL 5458208, and 2013 WL 598390. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, James E. Graves, Jr., Circuit Judge, 747 F.3d 275, held that disparate-impact claims were cognizable under the FHA, but reversed and remanded. Certiorari was granted.

[Holding:] The Supreme Court, Justice Kennedy, held that disparate-impact claims are cognizable under the FHA.

Affirmed and remanded.

Justice Thomas filed a dissenting opinion.

Justice Alito filed a dissenting opinion in which Chief Justice Roberts, Justice Scalia, and Justice Thomas joined.

West Headnotes (25)

[1] **Civil Rights** Discrimination in General

In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate-impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.

149 Cases that cite this headnote

[2] **Civil Rights** Discrimination in General

Antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.

7 Cases that cite this headnote

[3] **Civil Rights** Discrimination in General
Civil Rights Disparate impact

Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.

6 Cases that cite this headnote

[4] **Civil Rights** Discrimination in General
Civil Rights Public Services, Programs, and Benefits

Before rejecting a business justification in a discrimination case brought under disparate-impact theory, or, in the case of a governmental entity, an analogous public interest, a court must determine that a plaintiff has shown that there is an available alternative practice that

has less disparate impact and serves the entity's legitimate needs.

34 Cases that cite this headnote

[5] **Civil Rights** Housing

Disparate-impact claims are cognizable under the Fair Housing Act (FHA). Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

137 Cases that cite this headnote

[6] **Statutes** Legislative Construction

If a word or phrase in a statute has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.

19 Cases that cite this headnote

[7] **Civil Rights** Housing

The Fair Housing Act (FHA), like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the nation's economy. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Civil Rights Act of 1968, § 801, 42 U.S.C.A. § 3601.

28 Cases that cite this headnote

[8] **Civil Rights** Public regulation; zoning

Unlawful practices under the Fair Housing Act (FHA) include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

20 Cases that cite this headnote

[9] **Civil Rights** Public Services, Programs, and Benefits

Disparate-impact liability mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies.

18 Cases that cite this headnote

[10] **Civil Rights** Public regulation; zoning

The Fair Housing Act (FHA) is not an instrument to force housing authorities to reorder their priorities; rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

7 Cases that cite this headnote

[11] **Civil Rights** Housing

Civil Rights Public regulation; zoning

An important and appropriate means of ensuring that disparate-impact liability under the Fair Housing Act (FHA) is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

14 Cases that cite this headnote

[12] **Civil Rights** Housing

Civil Rights Public regulation; zoning

Housing authorities and private developers must be allowed under the Fair Housing Act (FHA) to maintain a policy if they can prove it is necessary to achieve a valid interest. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

4 Cases that cite this headnote

[13] **Civil Rights** Public regulation; zoning

Objective factors such as cost and traffic patterns and, at least to some extent, subjective factors such as preserving historic architecture contribute to a community's quality of life and are legitimate concerns for housing authorities

under the Fair Housing Act (FHA). Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

4 Cases that cite this headnote

[14] **Civil Rights** Public regulation; zoning

The Fair Housing Act (FHA) does not decree a particular vision of urban development. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

[15] **Civil Rights** Discrimination in General

Civil Rights Weight and Sufficiency of Evidence

A disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.

102 Cases that cite this headnote

[16] **Civil Rights** Discrimination in General

A robust causality requirement for disparate-impact claims ensures that racial imbalance does not, without more, establish a prima facie case of disparate impact and thus protects defendants from being held liable for racial disparities they did not create.

166 Cases that cite this headnote

[17] **Civil Rights** Discrimination in General

Courts must examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important.

93 Cases that cite this headnote

[18] **Civil Rights** Complaint in general

Civil Rights Weight and Sufficiency of Evidence

A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.

125 Cases that cite this headnote

[19] **Civil Rights** Housing

Civil Rights Public regulation; zoning

Governmental or private policies are not contrary to the Fair Housing Act's (FHA) disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

30 Cases that cite this headnote

[20] **Civil Rights** Housing

Courts should avoid interpreting disparate-impact liability under the Fair Housing Act (FHA) to be so expansive as to inject racial considerations into every housing decision. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

47 Cases that cite this headnote

[21] **Civil Rights** Public regulation; zoning

Governmental entities must not be prevented, through disparate-impact liability under the Fair Housing Act (FHA), from achieving legitimate objectives, such as ensuring compliance with health and safety codes. Civil Rights Act of 1968, §§ 804(a), 805(a), 42 U.S.C.A. §§ 3604(a), 3605(a).

18 Cases that cite this headnote

[22] **Civil Rights** Judgment and relief in general

Even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution.

22 Cases that cite this headnote

[23] **Civil Rights** Judgment and relief in general

Remedial orders in disparate-impact cases should concentrate on the elimination of the

offending practice that arbitrarily operates invidiously to discriminate on the basis of race; if additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means.

7 Cases that cite this headnote

[24] **Civil Rights** Housing

In public and private transactions covered by the Fair Housing Act (FHA), race may be considered in certain circumstances and in a proper fashion. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

4 Cases that cite this headnote

[25] **Civil Rights** Public regulation; zoning

When setting their larger goals, local housing authorities may, consistent with the Fair Housing Act (FHA), choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

8 Cases that cite this headnote

****2510** *Syllabus*[*]

***519** The Federal Government provides low-income housing tax credits that are distributed to developers by designated state agencies. In Texas, the Department of Housing and Community Affairs (Department) distributes the credits. The Inclusive Communities Project, Inc. (ICP), a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing, brought a disparate-impact claim under §§ 804(a) and 805(a) of the Fair Housing Act (FHA), alleging that the Department and its officers had caused continued segregated housing patterns by allocating too many tax credits to housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. Relying on statistical evidence, the District Court concluded that the ICP had established a prima facie showing of disparate impact. After assuming the Department's proffered non-discriminatory interests were valid, it found that the Department failed to meet its burden to show that there were no less discriminatory alternatives for allocating the tax credits. While the Department's appeal was pending, the Secretary of Housing and Urban Development issued a regulation interpreting the FHA to encompass disparate-impact liability and establishing a burden-shifting framework for adjudicating such claims. The Fifth Circuit held that disparate-impact claims are cognizable under the FHA, but reversed and remanded on the merits, concluding that, in light of the new regulation, the District Court had improperly required the Department to prove less discriminatory alternatives.

The FHA was adopted shortly after the assassination of Dr. Martin Luther King, Jr. Recognizing that persistent racial segregation had left predominantly black inner cities surrounded by mostly white suburbs, the Act addresses the denial of housing opportunities on the basis of "race, color, religion, or national origin." In 1988, Congress amended the FHA, and, as relevant here, created certain exemptions from liability.

Held : Disparate-impact claims are cognizable under the Fair Housing Act. Pp. 2516 – 2526.

***520** (a) Two antidiscrimination statutes that preceded the FHA are relevant to its interpretation. Both § 703(a)(2) of Title VII of the Civil Rights Act of 1964 and § 4(a)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) authorize disparate-impact claims. Under ****2511** *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410, the cases announcing the rule for Title VII and for the ADEA, respectively, antidiscrimination laws should be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. Disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain the free-enterprise system. Before rejecting a business justification—or a governmental entity's analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci v. DeStefano,* 557 U.S. 557, 578, 129 S.Ct. 2658, 174 L.Ed.2d 490. These cases provide essential

background and instruction in the case at issue. Pp. 2516 – 2518.

(b) Under the FHA it is unlawful to "refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to a person because of race" or other protected characteristic, § 804(a), or "to discriminate against any person in" making certain real-estate transactions "because of race" or other protected characteristic, § 805(a). The logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. The results-oriented phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States v. Giles,* 300 U.S. 41, 48, 57 S.Ct. 340, 81 L.Ed. 493. And this phrase is equivalent in function and purpose to Title VII's and the ADEA's "otherwise adversely affect" language. In all three statutes the operative text looks to results and plays an identical role: as a catchall phrase, located at the end of a lengthy sentence that begins with prohibitions on disparate treatment. The introductory word "otherwise" also signals a shift in emphasis from an actor's intent to the consequences of his actions. This similarity in text and structure is even more compelling because Congress passed the FHA only four years after Title VII and four months after the ADEA. Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives. The FHA contains the phrase "because of race," but Title VII and the ADEA also contain that wording and this Court nonetheless held that those statutes impose disparate-impact liability.

***521** The 1988 amendments signal that Congress ratified such liability. Congress knew that all nine Courts of Appeals to have addressed the question had concluded the FHA encompassed disparate-impact claims, and three exemptions from liability in the 1988 amendments would have been superfluous had Congress assumed that disparate-impact liability did not exist under the FHA.

Recognition of disparate-impact claims is also consistent with the central purpose of the FHA, which, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of the Nation's economy. Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability. See, *e.g., Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 16–18, 109 S.Ct. 276, 102 L.Ed.2d 180. Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory ****2512** intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.

But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, *e.g.,* if such liability were imposed based solely on a showing of a statistical disparity. Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing. An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve, an analysis that is analogous to Title VII's business necessity standard. It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation's cities merely because some other priority might seem preferable. A disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas. Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U.S., at 431, 91 S.Ct. 849. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. ***522** These limitations are also necessary to protect defendants against abusive disparate-impact claims.

And when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies. Remedial orders that impose racial targets or quotas might raise difficult constitutional questions.

While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special

dangers, race may be considered in certain circumstances and in a proper fashion. This Court does not impugn local housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. These authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset. Pp. 2518 – 2525.

747 F.3d 275, affirmed and remanded.

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

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Opinion

Justice KENNEDY delivered the opinion of the Court.

[1] ***524** The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a "plaintiff must establish that the defendant had a discriminatory intent or motive," a plaintiff bringing a disparate-impact claim challenges practices that have a "disproportionately adverse effect on minorities" and are otherwise unjustified by a legitimate rationale. ***525** *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (internal quotation marks omitted). The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act (or FHA), 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et seq.*

I

A

Before turning to the question presented, it is necessary to discuss a different federal statute that gives rise to this dispute. The Federal Government provides low-income housing tax credits that are distributed to developers through designated state agencies. 26 U.S.C. § 42. Congress has directed States to develop plans identifying selection criteria for distributing the credits. § 42(m)(1). Those plans must include certain criteria, such as public housing waiting lists, § 42(m)(1)(C), as well as certain preferences, including that low-income housing units "contribut[e] to a concerted community revitalization plan" and be built in census tracts populated predominantly by low-income residents. §§ 42(m)(1)(B)(ii)(III), 42(d)(5)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas.

In the State of Texas these federal credits are distributed by the Texas Department of Housing and Community Affairs (Department). Under Texas law, a developer's application for the tax credits is scored under a point system that gives priority to statutory criteria, such as the financial feasibility of the development project and the income level of tenants. ****2514** Tex. Govt.Code Ann. §§ 2306.6710(a)-(b) (West 2008). The Texas Attorney General has interpreted state law to permit the consideration of additional criteria, such as whether the housing units will be built in a neighborhood with good schools. Those criteria cannot be awarded more points

than statutorily mandated criteria. Tex. Op. Atty. Gen. No. GA–0208, pp. 2–6 (2004), 2004 WL 1434796, *4–*6.

***526** The Inclusive Communities Project, Inc. (ICP), is a Texas-based nonprofit corporation that assists low-income families in obtaining affordable housing. In 2008, the ICP brought this suit against the Department and its officers in the United States District Court for the Northern District of Texas. As relevant here, it brought a disparate-impact claim under §§ 804(a) and 805(a) of the FHA. The ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods. The ICP contended that the Department must modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.

The District Court concluded that the ICP had established a prima facie case of disparate impact. It relied on two pieces of statistical evidence. First, it found "from 1999–2008, [the Department] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas." 749 F.Supp.2d 486, 499 (N.D.Tex.2010) (footnote omitted). Second, it found "92.29% of [low-income housing tax credit] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents." *Ibid.*

The District Court then placed the burden on the Department to rebut the ICP's prima facie showing of disparate impact. 860 F.Supp.2d 312, 322–323 (2012). After assuming the Department's proffered interests were legitimate, *id.,* at 326, the District Court held that a defendant—here the Department—must prove "that there are no other less discriminatory alternatives to advancing their proffered interests," *ibid.* Because, in its view, the Department "failed to meet [its] burden of proving that there are no less discriminatory alternatives," the District Court ruled for the ICP. *Id.,* at 331.

***527** The District Court's remedial order required the addition of new selection criteria for the tax credits. For instance, it awarded points for units built in neighborhoods with good schools and disqualified sites that are located adjacent to or near hazardous conditions, such as high crime areas or landfills. See 2012 WL 3201401 (Aug. 7, 2012). The remedial order contained no explicit racial targets or quotas.

While the Department's appeal was pending, the Secretary of Housing and Urban Development (HUD) issued a regulation interpreting the FHA to encompass disparate-impact liability. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed.Reg. 11460 (2013). The regulation also established a burden-shifting framework for adjudicating disparate-impact claims. Under the regulation, a plaintiff first must make a prima facie showing of disparate impact. That is, the plaintiff "has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect." 24 CFR § 100.500(c)(1) (2014). If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing ****2515** of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." § 100.500(c)(2). HUD has clarified that this step of the analysis "is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related." 78 Fed.Reg. 11470. Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." § 100.500(c)(3).

The Court of Appeals for the Fifth Circuit held, consistent with its precedent, that disparate-impact claims are cognizable ***528** under the FHA. 747 F.3d 275, 280 (2014). On the merits, however, the Court of Appeals reversed and remanded. Relying on HUD's regulation, the Court of Appeals held that it was improper for the District Court to have placed the burden on the Department to prove there were no less discriminatory alternatives for allocating low-income housing tax credits. *Id.*, at 282–283. In a concurring opinion, Judge Jones stated that on remand the District Court should reexamine whether the ICP had made out a prima facie case of disparate impact. She suggested the District Court incorrectly relied on bare statistical evidence without engaging in any analysis about causation. She further observed that, if the federal law providing for the distribution of low-income housing tax credits ties the Department's hands to such an extent that it lacks a meaningful choice, then there is no disparate-impact liability. See *id.,* at 283–284 (specially concurring opinion).

The Department filed a petition for a writ of certiorari on the question whether disparate-impact claims are cognizable under the FHA. The question was one of first impression, see *Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988) (*per curiam*), and certiorari followed, 573 U.S. ——, 135 S.Ct. 46, 189 L.Ed.2d 896 (2014). It is now appropriate to provide a brief history of the FHA's enactment and its later amendment.

B

De jure residential segregation by race was declared unconstitutional almost a century ago, *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), but its vestiges remain today, intertwined with the country's economic and social life. Some segregated housing patterns can be traced to conditions that arose in the mid–20th century. Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, ***529** sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities, see *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas. See, *e.g.,* M. Klarman, Unfinished Business: Racial Equality in American History 140–141 (2007); Brief for Housing Scholars as *Amici Curiae* 22–23. By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs. ****2516** See K. Clark, Dark Ghetto: Dilemmas of Social Power 11, 21–26 (1965).

The mid–1960's was a period of considerable social unrest; and, in response, President Lyndon Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 CFR 674 (1966–1970 Comp.). After extensive factfinding the Commission identified residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest. See Report of the National Advisory Commission on Civil Disorders 91 (1968) (Kerner Commission Report). The Commission found that "[n]early two-thirds of all nonwhite families living in the central cities today live in neighborhoods marked by substandard housing and general urban blight." *Id.,* at 13. The Commission further found that both open and covert racial discrimination prevented black families from obtaining better housing and moving to integrated communities. *Ibid.* The Commission concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." *Id.,* at 1. To reverse "[t]his deepening racial division," *ibid.,* it recommended enactment of "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing ... ***530** on the basis of race, creed, color, or national origin." *Id.,* at 263.

In April 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis, Tennessee, and the Nation faced a new urgency to resolve the social unrest in the inner cities. Congress responded by adopting the Kerner Commission's recommendation and passing the Fair Housing Act. The statute addressed the denial of housing opportunities on the basis of "race, color, religion, or national origin." Civil Rights Act of 1968, § 804, 82 Stat. 83. Then, in 1988, Congress amended the FHA. Among other provisions, it created certain exemptions from liability and added "familial status" as a protected characteristic. See Fair Housing Amendments Act of 1988, 102 Stat. 1619.

II

The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited. Before turning to the FHA, however, it is necessary to consider two other antidiscrimination statutes that preceded it.

The first relevant statute is § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255. The Court addressed the concept of disparate impact under this statute in *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). There, the employer had a policy requiring its manual laborers to possess a high school diploma and to obtain satisfactory scores on two intelligence tests. The Court of Appeals held the employer had not adopted these job requirements for a racially discriminatory purpose, and the plaintiffs did not challenge that holding in this Court. Instead, the plaintiffs argued § 703(a)(2) covers the discriminatory

effect of a practice as well as the motivation behind the practice. Section 703(a), as amended, provides as follows:

> "It shall be an unlawful employer practice for an employer —
>
> ***531** "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment ****2517** in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a).

The Court did not quote or cite the full statute, but rather relied solely on § 703(a)(2). *Griggs,* 401 U.S., at 426, n. 1, 91 S.Ct. 849.

In interpreting § 703(a)(2), the Court reasoned that disparate-impact liability furthered the purpose and design of the statute. The Court explained that, in § 703(a)(2), Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.,* at 431, 91 S.Ct. 849. For that reason, as the Court noted, "Congress directed the thrust of [§ 703(a)(2)] to the consequences of employment practices, not simply the motivation." *Id.,* at 432, 91 S.Ct. 849. In light of the statute's goal of achieving "equality of employment opportunities and remov[ing] barriers that have operated in the past" to favor some races over others, the Court held § 703(a)(2) of Title VII must be interpreted to allow disparate-impact claims. *Id.,* at 429–430, 91 S.Ct. 849.

The Court put important limits on its holding: namely, not all employment practices causing a disparate impact impose liability under § 703(a)(2). In this respect, the Court held that "business necessity" constitutes a defense to disparate-impact claims. *Id.,* at 431, 91 S.Ct. 849. This rule provides, for example, that in a disparate-impact case, § 703(a)(2) does not prohibit hiring criteria with a "manifest relationship" to job performance. *Id.,* at 432, 91 S.Ct. 849; see also *Ricci,* 557 U.S., at 587–589, 129 S.Ct. 2658 (emphasizing the importance of the business necessity defense ***532** to disparate-impact liability). On the facts before it, the Court in *Griggs* found a violation of Title VII because the employer could not establish that high school diplomas and general intelligence tests were related to the job performance of its manual laborers. See 401 U.S., at 431–432, 91 S.Ct. 849.

The second relevant statute that bears on the proper interpretation of the FHA is the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.,* as amended. Section 4(a) of the ADEA provides:

> "It shall be unlawful for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> "(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U.S.C. § 623(a).

The Court first addressed whether this provision allows disparate-impact claims in *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). There, a group of older employees challenged their employer's decision to give proportionately greater raises to employees with less than five years of experience.

Explaining that *Griggs* "represented the better reading of [Title VII's] statutory text," 544 U.S., at 235, 125 S.Ct. 1536 a plurality of the Court concluded that the same reasoning pertained to § 4(a)(2) of the ADEA. The *Smith* plurality emphasized that both § 703(a)(2) of Title VII and § 4(a)(2) of the ADEA contain language ****2518** "prohibit[ing] such actions that 'deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's' ***533** race or age." 544 U.S., at 235, 125 S.Ct. 1536. As the plurality observed, the text of these provisions "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer" and therefore compels recognition of disparate-impact liability. *Id.,* at 236, 125 S.Ct. 1536. In a separate opinion, Justice SCALIA found the ADEA's text ambiguous and thus deferred under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to an Equal Employment Opportunity Commission regulation interpreting the ADEA

to impose disparate-impact liability, see 544 U.S., at 243–247, 125 S.Ct. 1536 (opinion concurring in part and concurring in judgment).

[2] [3] [4] Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is "an available alternative ... practice that has less disparate impact and serves the [entity's] legitimate needs." *Ricci, supra,* at 578, 129 S.Ct. 2658. The cases interpreting Title VII and the ADEA provide essential background and instruction in the case now before the Court.

[5] Turning to the FHA, the ICP relies on two provisions. Section 804(a) provides that it shall be unlawful:

> "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

***534** Here, the phrase "otherwise make unavailable" is of central importance to the analysis that follows.
Section 805(a), in turn, provides:

> "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." § 3605(a).

Applied here, the logic of *Griggs* and *Smith* provides strong support for the conclusion that the FHA encompasses disparate-impact claims. Congress' use of the phrase "otherwise make unavailable" refers to the consequences of an action rather than the actor's intent. See *United States v. Giles,* 300 U.S. 41, 48, 57 S.Ct. 340, 81 L.Ed. 493 (1937) (explaining that the "word 'make' has many meanings, among them '[t]o cause to exist, appear or occur' " (quoting Webster's New International Dictionary 1485 (2d ed. 1934))). This results-oriented language counsels in favor of recognizing disparate-impact liability. See *Smith, supra,* at 236, 125 S.Ct. 1536. The Court has construed statutory language similar to § 805(a) to include disparate-impact liability. See, *e.g.,* ****2519** *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 140–141, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979) (holding the term "discriminat[e]" encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure).

A comparison to the antidiscrimination statutes examined in *Griggs* and *Smith* is useful. Title VII's and the ADEA's "otherwise adversely affect" language is equivalent in function and purpose to the FHA's "otherwise make unavailable" language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with ***535** prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word "otherwise" to introduce the results-oriented phrase. " Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971). This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII and only four months after enacting the ADEA.

It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to "refuse to sell [,] ... or otherwise [adversely affect], a dwelling to any person" because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.

Emphasizing that the FHA uses the phrase "because of race," the Department argues this language forecloses disparate-impact liability since "[a]n action is not taken 'because of race' unless race is a *reason* for the action." Brief for Petitioners 26. *Griggs* and *Smith,* however, dispose of this argument. Both Title VII and the ADEA contain identical

"because of" language, see 42 U.S.C. § 2000e–2(a)(2); 29 U.S.C. § 623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability.

In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims. See ***536** *Huntington Branch, NAACP v. Huntington,* 844 F.2d 926, 935–936 (C.A.2 1988); *Resident Advisory Bd. v. Rizzo,* 564 F.2d 126, 146 (C.A.3 1977); *Smith v. Clarkton,* 682 F.2d 1055, 1065 (C.A.4 1982); *Hanson v. Veterans Administration,* 800 F.2d 1381, 1386 (C.A.5 1986); *Arthur v. Toledo,* 782 F.2d 565, 574–575 (C.A.6 1986); *Metropolitan Housing Development Corp. v. Arlington Heights,* 558 F.2d 1283, 1290 (C.A.7 1977); *United States v. Black Jack,* 508 F.2d 1179, 1184–1185 (C.A.8 1974); *Halet v. Wend Investment Co.,* 672 F.2d 1305, 1311 (C.A.9 1982); *United States v. Marengo Cty. Comm'n,* 731 F.2d 1546, 1559, n. 20 (C.A.11 1984).

When it amended the FHA, Congress was aware of this unanimous precedent. And with that understanding, it made a considered judgment to retain the relevant statutory text. See H.R.Rep. No. 100–711, p. 21, n. 52 (1988), 1988 U.S.C.C.A.N. 2173 (H.R. Rep.) (discussing suits premised on ****2520** disparate-impact claims and related judicial precedent); 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy) (noting unanimity of Federal Courts of Appeals concerning disparate impact); Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 529 (1987) (testimony of Professor Robert Schwemm) (describing consensus judicial view that the FHA imposed disparate-impact liability). Indeed, Congress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions. See H.R. Rep., at 89–93.

[6] Against this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability. "If a word or phrase has been ... given a uniform interpretation by inferior courts ..., a later version of that act perpetuating the wording is presumed to carry forward that interpretation." A. Scalia & B. Garner, Reading Law: The ***537** Interpretation of Legal Texts 322 (2012); see also *Forest Grove School Dist. v. T.A.,* 557 U.S. 230, 244, n. 11, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute"); *Manhattan Properties, Inc. v. Irving Trust Co.,* 291 U.S. 320, 336, 54 S.Ct. 385, 78 L.Ed. 824 (1934) (explaining, where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had amended the Act without changing the relevant provision, "[t]his is persuasive that the construction adopted by the [lower federal] courts has been acceptable to the legislative arm of the government").

Further and convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA is revealed by the substance of the 1988 amendments. The amendments included three exemptions from liability that assume the existence of disparate-impact claims. The most logical conclusion is that the three amendments were deemed necessary because Congress presupposed disparate impact under the FHA as it had been enacted in 1968.

The relevant 1988 amendments were as follows. First, Congress added a clarifying provision: "Nothing in [the FHA] prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." 42 U.S.C. § 3605(c). Second, Congress provided: "Nothing in [the FHA] prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance." § 3607(b)(4). And finally, Congress specified: "Nothing in [the FHA] limits the applicability of any reasonable ... restrictions regarding the maximum number of occupants permitted to occupy a dwelling." § 3607(b)(1).

The exemptions embodied in these amendments would be superfluous if Congress had assumed that disparate-impact ***538** liability did not exist under the FHA. See *Gustafson v. Alloyd Co.,* 513 U.S. 561, 574, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) ("[T]he Court will avoid a reading which renders some words altogether redundant"). Indeed, none of these amendments would make sense if the FHA encompassed only disparate-treatment ****2521** claims. If that were the sole ground for liability, the amendments merely restate black-letter law. If an actor makes a decision based on reasons other than a protected category, there is no disparate-treatment

liability. See, *e.g., Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). But the amendments do constrain disparate-impact liability. For instance, certain criminal convictions are correlated with sex and race. See, *e.g., Kimbrough v. United States,* 552 U.S. 85, 98, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007) (discussing the racial disparity in convictions for crack cocaine offenses). By adding an exemption from liability for exclusionary practices aimed at individuals with drug convictions, Congress ensured disparate-impact liability would not lie if a landlord excluded tenants with such convictions. The same is true of the provision allowing for reasonable restrictions on occupancy. And the exemption from liability for real-estate appraisers is in the same section as § 805(a)'s prohibition of discriminatory practices in real-estate transactions, thus indicating Congress' recognition that disparate-impact liability arose under § 805(a). In short, the 1988 amendments signal that Congress ratified disparate-impact liability.

A comparison to *Smith* 's discussion of the ADEA further demonstrates why the Department's interpretation would render the 1988 amendments superfluous. Under the ADEA's reasonable-factor-other-than-age (RFOA) provision, an employer is permitted to take an otherwise prohibited action where "the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). In other words, if an employer makes a decision based on a reasonable factor other than age, it cannot be said to have made a decision on the basis of an employee's age. According to the ***539** *Smith* plurality, the RFOA provision "plays its principal role" "in cases involving disparate-impact claims" "by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' " 544 U.S., at 239, 125 S.Ct. 1536. The plurality thus reasoned that the RFOA provision would be "simply unnecessary to avoid liability under the ADEA" if liability were limited to disparate-treatment claims. *Id.,* at 238, 125 S.Ct. 1536.

A similar logic applies here. If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding 42 U.S.C. § 3605(c)'s exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either. Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, see § 4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability.

[7] Recognition of disparate-impact claims is consistent with the FHA's central purpose. See *Smith, supra,* at 235, 125 S.Ct. 1536 (plurality opinion); *Griggs,* 401 U.S., at 432, 91 S.Ct. 849. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy. See 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"); H.R. Rep., at 15 (explaining the FHA "provides a clear national policy against discrimination in housing").

[8] These unlawful practices include zoning laws and other housing restrictions ****2522** that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. See, *e.g., Huntington,* 488 U.S., at 16–18, 109 S.Ct. 276 (invalidating zoning law preventing construction ***540** of multifamily rental units); *Black Jack,* 508 F.2d, at 1182–1188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish,* 641 F.Supp.2d 563, 569, 577–578 (E.D.La.2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only " 'blood relative[s]' " in an area of the city that was 88.3% white and 7.6% black); see also Tr. of Oral Arg. 52–53 (discussing these cases). The availability of disparate-impact liability, furthermore, has allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units. See, *e.g., Huntington, supra,* at 18, 109 S.Ct. 276. Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.

[9] **[10]** But disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary,

and unnecessary barriers," not the displacement of valid governmental policies. *Griggs, supra,* at 431, 91 S.Ct. 849. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.

Unlike the heartland of disparate-impact suits targeting artificial barriers to housing, the underlying dispute in this ***541** case involves a novel theory of liability. See Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360–363 (2013) (noting the rarity of this type of claim). This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.

[11] **[12]** An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability. See 78 Fed.Reg. 11470 (explaining that HUD did not use the phrase "business necessity" because that "phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities"). As the Court explained in *Ricci,* an entity "could be liable for disparate-impact discrimination only if the [challenged practices] were not job related and consistent with business necessity." ****2523** 557 U.S., at 587, 129 S.Ct. 2658. Just as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a "reasonable measure[ment] of job performance," *Griggs, supra,* at 436, 91 S.Ct. 849 so too must housing authorities and private developers be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest. To be sure, the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.

[13] **[14]** It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must ***542** be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic." 78 Fed.Reg. 11476.

[15] **[16]** In a similar vein, a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 653, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and "would almost inexorably lead" governmental or private entities to use "numerical quotas," and serious constitutional questions then could arise. 490 U.S., at 653, 109 S.Ct. 2115.

The litigation at issue here provides an example. From the standpoint of determining advantage or disadvantage to racial minorities, it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa. If those sorts of judgments are subject to challenge ***543** without adequate safeguards, then there is a danger that potential defendants may adopt racial quotas—a circumstance that itself raises serious constitutional concerns.

[17] **[18]** Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another

will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all. It may also be difficult to establish causation because **2524 of the multiple factors that go into investment decisions about where to construct or renovate housing units. And as Judge Jones observed below, if the ICP cannot show a causal connection between the Department's policy and a disparate impact—for instance, because federal law substantially limits the Department's discretion—that should result in dismissal of this case. 747 F.3d, at 283–284 (specially concurring opinion).

[19] [20] The FHA imposes a command with respect to disparate-impact liability. Here, that command goes to a state entity. In other cases, the command will go to a private person or entity. Governmental or private policies are not contrary to the disparate-impact requirement unless they are "artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U.S., at 431, 91 S.Ct. 849. Difficult questions might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner to justify governmental or private actions that, in fact, tend to perpetuate race-based considerations rather than move beyond them. Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.

[21] *544 The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system. And as to governmental entities, they must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes. The Department's *amici,* in addition to the well-stated principal dissenting opinion in this case, see *post,* at 2532 – 2533, 2548 – 2549 (opinion of ALITO, J.), call attention to the decision by the Court of Appeals for the Eighth Circuit in *Gallagher v. Magner,* 619 F.3d 823 (2010). Although the Court is reluctant to approve or disapprove a case that is not pending, it should be noted that *Magner* was decided without the cautionary standards announced in this opinion and, in all events, the case was settled by the parties before an ultimate determination of disparate-impact liability.

Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely "remov[ing] ... artificial, arbitrary, and unnecessary barriers." *Griggs,* 401 U.S., at 431, 91 S.Ct. 849. And that, in turn, would set our Nation back in its quest to reduce the salience of race in our social and economic system.

[22] [23] It must be noted further that, even when courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice that "arbitrar [ily] ... operate[s] invidiously to discriminate on the basis of rac[e]." *Ibid.* If additional measures are adopted, courts should *545 strive to design them to eliminate racial disparities through race-neutral means. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 510, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races"). Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.

**2525 [24] [25] While the automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers, it is also true that race may be considered in certain circumstances and in a proper fashion. Cf. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 789, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (KENNEDY, J., concurring in part and concurring in judgment) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; [and] drawing attendance zones with general recognition of the demographics of neighborhoods"). Just as this Court has not "question[ed] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the [promotion] process," *Ricci,* 557 U.S., at 585, 129 S.Ct. 2658 it likewise does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns. When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.

The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of ***546** disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.

III

In light of the longstanding judicial interpretation of the FHA to encompass disparate-impact claims and congressional reaffirmation of that result, residents and policymakers have come to rely on the availability of disparate-impact claims. See Brief for Massachusetts et al. as *Amici Curiae* 2 ("Without disparate impact claims, States and others will be left with fewer crucial tools to combat the kinds of systemic discrimination that the FHA was intended to address"). Indeed, many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA. See Brief for City of San Francisco et al. as *Amici Curiae* 3–6. The existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades "has not given rise to ... dire consequences." *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 710, 181 L.Ed.2d 650 (2012).

Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," *Parents Involved, supra,* at 797, 127 S.Ct. 2738 (KENNEDY, J., concurring in part and concurring in judgment), we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." Kerner Commission Report 1. The ***547** Court acknowledges the Fair ****2526** Housing Act's continuing role in moving the Nation toward a more integrated society.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, dissenting.

I join Justice ALITO's dissent in full. I write separately to point out that the foundation on which the Court builds its latest disparate-impact regime—*Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims, *id.,* at 429–431, 91 S.Ct. 849 represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis,* I would not amplify its error by importing its disparate-impact scheme into yet another statute.

I

A

We should drop the pretense that *Griggs* ' interpretation of Title VII was legitimate. "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). It did not include an implicit one either. Instead, Title VII's operative provision, 42 U.S.C. § 2000e–2(a) (1964 ed.), addressed only employer decisions motivated by a protected characteristic. That provision made it "an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
>
> ***548** "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such

individual's race, color, religion, sex, or national origin." § 703, 78 Stat. 255 (emphasis added).[1]

Each paragraph in § 2000e–2(a) is limited to actions taken "because of" a protected trait, and "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,' " *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2527, 186 L.Ed.2d 503 (2013) (some internal quotation marks omitted). Section 2000e–2(a) thus applies only when a protected characteristic "was the 'reason' that the employer decided to act." *Id.,* at ——, 133 S.Ct., at 2527 (some internal quotation marks omitted).[2] In ****2527** other words, "to take action against an individual *because of*" a protected trait "plainly requires discriminatory intent." See *Smith v. City of Jackson,* 544 U.S. 228, 249, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment) (internal quotation marks omitted); accord, *e.g., Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

***549** No one disputes that understanding of § 2000e–2(a)(1). We have repeatedly explained that a plaintiff bringing an action under this provision " must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci, supra,* at 577, 129 S.Ct. 2658 (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). The only dispute is whether the same language—"because of"—means something different in § 2000e–2(a)(2) than it does in § 2000e–2(a)(1).

The answer to that question *should* be obvious. We ordinarily presume that "identical words used in different parts of the same act are intended to have the same meaning," *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 101, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (internal quotation marks omitted), and § 2000e–2(a)(2) contains nothing to warrant a departure from that presumption. That paragraph "uses the phrase 'because of ... [a protected characteristic]' in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's [protected characteristic]." *Smith, supra,* at 249, 125 S.Ct. 1536 (opinion of O'Connor, J.) (interpreting nearly identical provision of the Age Discrimination in Employment Act of 1967 (ADEA)).

The only difference between § 2000e–2(a)(1) and § 2000e–2(a)(2) is the type of employment decisions they address. See *Smith, supra,* at 249, 125 S.Ct. 1536 (opinion of O'Connor, J.). Section 2000e–2(a)(1) addresses hiring, firing, and setting the terms of employment, whereas § 2000e–2(a)(2) generally addresses limiting, segregating, or classifying employees. But *no* decision is an unlawful employment practice under these paragraphs unless it occurs "*because of* such individual's race, color, religion, sex, or national origin." §§ 2000e–2(a)(1), (2) (emphasis added).

Contrary to the majority's assumption, see *ante,* at 2517 – 2520, the fact that § 2000e–2(a)(2) uses the phrase "otherwise adversely affect" in defining the employment decisions targeted ***550** by that paragraph does not eliminate its mandate that the prohibited decision be made "because of" a protected characteristic. Section 2000e–2(a)(2) does not make unlawful all employment decisions that "limit, segregate, or classify ... employees ... in any way which would ... otherwise adversely affect [an individual's] status as an employee," but those that "otherwise adversely affect [an individual's] status as an employee, *because of such individual's race, color, religion, sex, or national origin*." (Emphasis added); accord, 78 Stat. 255. Reading § 2000e–2(a)(2) to sanction employers solely on the basis of the effects of their decisions would delete an entire clause of this provision, a result we generally try to avoid. Under any fair reading of the text, there can be no doubt that the ****2528** Title VII enacted by Congress did not permit disparate-impact claims.[3]

B

The author of disparate-impact liability under Title VII was not Congress, but the Equal Employment Opportunity Commission (EEOC). EEOC's "own official history of these early years records with unusual candor the commission's fundamental disagreement with its founding charter, especially Title VII's literal requirement that the discrimination be intentional." H. Graham, The Civil Rights Era: Origins and Development of National Policy 1960–1972, p. 248 (1990). The Commissioners and their legal staff thought that "discrimination" had become "less often an individual act of disparate treatment flowing from an evil state of mind" and "more institutionalized." Jackson, ***551** EEOC vs. Discrimination, Inc., 75 The Crisis 16 (1968). They consequently decided they should target employment practices "which prove to have a demonstrable racial effect without a clear and convincing business motive." *Id.,* at 16–17 (emphasis deleted). EEOC's "legal staff was aware from the beginning that a normal, traditional, and literal interpretation

of Title VII could blunt their efforts" to penalize employers for practices that had a disparate impact, yet chose "to defy Title VII's restrictions and attempt to build a body of case law that would justify [their] focus on effects and [their] disregard of intent." Graham, *supra,* at 248, 250.

The lack of legal authority for their agenda apparently did not trouble them much. For example, Alfred Blumrosen, one of the principal creators of disparate-impact liability at EEOC, rejected what he described as a "defeatist view of Title VII" that saw the statute as a "compromise" with a limited scope. A. Blumrosen, Black Employment and the Law 57–58 (1971). Blumrosen "felt that most of the problems confronting the EEOC could be solved by creative interpretation of Title VII which would be upheld by the courts, partly out of deference to the administrators." *Id.,* at 59.

EEOC's guidelines from those years are a case study in Blumrosen's "creative interpretation." Although EEOC lacked substantive rulemaking authority, see *Faragher v. Boca Raton,* 524 U.S. 775, 811, n. 1, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (THOMAS, J., dissenting), it repeatedly issued guidelines on the subject of disparate impact. In 1966, for example, EEOC issued guidelines suggesting that the use of employment tests in hiring decisions could violate Title VII based on disparate impact, notwithstanding the statute's express statement that "it shall not be an unlawful employment practice ... to give and to act upon the results of any professionally developed ability test provided that such test ... is not *designed, intended, or used* to discriminate because of race, color, religion, sex, or national origin," § 2000e–2(h) (emphasis added). See EEOC, Guidelines on Employment Testing Procedures 2–4 (Aug. 24, ***552** 1966). EEOC followed this up with a 1970 guideline that was even more explicit, declaring that, unless certain criteria were met, "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment ****2529** or membership opportunity of classes protected by title VII constitutes discrimination." 35 Fed.Reg. 12334 (1970).

EEOC was initially hesitant to take its approach to this Court, but the *Griggs* plaintiffs forced its hand. After they lost on their disparate-impact argument in the Court of Appeals, EEOC's deputy general counsel urged the plaintiffs not to seek review because he believed " 'that the record in the case present[ed] a most unappealing situation for finding tests unlawful,' " even though he found the lower court's adherence to an intent requirement to be " 'tragic.' " Graham, *supra,* at 385. The plaintiffs ignored his advice. Perhaps realizing that a ruling on its disparate-impact theory was inevitable, EEOC filed an *amicus* brief in this Court seeking deference for its position.[4]

EEOC's strategy paid off. The Court embraced EEOC's theory of disparate impact, concluding that the agency's position ***553** was "entitled to great deference." See *Griggs,* 401 U.S., at 433–434, 91 S.Ct. 849. With only a brief nod to the text of § 2000e–2(a)(2) in a footnote, *id.,* at 426, n. 1, 91 S.Ct. 849 the Court tied this novel theory of discrimination to "the statute's perceived *purpose* " and EEOC's view of the best way of effectuating it, *Smith,* 544 U.S., at 262, 125 S.Ct. 1536 (opinion of O'Connor, J.); see *id.,* at 235, 125 S.Ct. 1536 (plurality opinion). But statutory provisions —not purposes—go through the process of bicameralism and presentment mandated by our Constitution. We should not replace the former with the latter, see *Wyeth v. Levine,* 555 U.S. 555, 586, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (THOMAS, J., concurring in judgment), nor should we transfer our responsibility for interpreting those provisions to administrative agencies, let alone ones lacking substantive rulemaking authority, see *Perez v. Mortgage Bankers Assn.,* 575 U.S. ——, ——–——, 135 S.Ct. 1199, 1216–1220, 191 L.Ed.2d 186 (2015) (THOMAS, J., concurring in judgment).

II

Griggs ' disparate-impact doctrine defies not only the statutory text, but reality itself. In their quest to eradicate what they view as institutionalized discrimination, disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it. See T. Sowell, Intellectuals and Race 132 (2013) (Sowell). That might be true, or it might not. Standing alone, the fact that a practice has a disparate impact is not conclusive evidence, as the *Griggs* Court appeared to ****2530** believe, that a practice is "discriminatory," 401 U.S., at 431, 91 S.Ct. 849. "Although presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions." *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 750, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (THOMAS, J., concurring) (emphasis added).[5] ***554** We should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.

As best I can tell, the reason for this wholesale inversion of our law's usual approach is the unstated—and unsubstantiated—assumption that, in the absence of discrimination, an institution's racial makeup would mirror that of society. But the absence of racial disparities in multi-ethnic societies has been the exception, not the rule. When it comes to "proportiona[l] represent [ation]" of ethnic groups, "few, if any, societies have ever approximated this description." D. Horowitz, Ethnic Groups in Conflict 677 (1985). "All multi-ethnic societies exhibit a tendency for ethnic groups to engage in different occupations, have different levels (and, often, types) of education, receive different incomes, and occupy a different place in the social hierarchy." Weiner, The Pursuit of Ethnic Equality Through Preferential Policies: A Comparative Public Policy Perspective, in From Independence to Statehood 64 (R. Goldmann & A. Wilson eds. 1984).

Racial imbalances do not always disfavor minorities. At various times in history, "racial or ethnic minorities ... have owned or directed more than half of whole industries in particular nations." Sowell 8. These minorities "have included the Chinese in Malaysia, the Lebanese in West Africa, Greeks in the Ottoman Empire, Britons in Argentina, Belgians in Russia, Jews in Poland, and Spaniards in Chile—among many others." *Ibid.* (footnotes omitted). "In the seventeenth century Ottoman Empire," this phenomenon was seen in the palace itself, where the "medical staff consisted of 41 Jews and 21 Muslims." *Ibid*. And in our own ***555** country, for roughly a quarter-century now, over 70 percent of National Basketball Association players have been black. R. Lapchick, D. Donovan, E. Loomer, & L. Martinez, Institute for Diversity and Ethics in Sport, U. of Central Fla., The 2014 Racial and Gender Report Card: National Basketball Association 21 (June 24, 2014). To presume that these and all other measurable disparities are products of racial discrimination is to ignore the complexities of human existence.

Yet, if disparate-impact liability is not based on this assumption and is instead simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaffirmed that " 'racial balancing' " by state actors is " 'patently unconstitutional,' " even when it supposedly springs from good intentions. ****2531** *Fisher v. University of Tex. at Austin,* 570 U.S. ——, ——, 133 S.Ct. 2411, 2419, 186 L.Ed.2d 474 (2013). And if that "racial balancing" is achieved through disparate-impact claims limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a Court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color. A problem with doing so should be obvious: "Government action that classifies individuals on the basis of race is inherently suspect." *Schuette v. BAMN,* 572 U.S. ——, ——, 134 S.Ct. 1623, 1634–1635, 188 L.Ed.2d 613 (2014) (plurality opinion); accord, *id.,* at ——, 134 S.Ct., at 1643–1644 (SCALIA, J., concurring in judgment). That is no less true when judges are the ones doing the classifying. See *id.,* at ——, 134 S.Ct., at 1634–1635 (plurality opinion); *id.,* at ——, 134 S.Ct., at 1643–1644 (SCALIA, J., concurring in judgment). Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.

III

The decision in *Griggs* was bad enough, but this Court's subsequent decisions have allowed it to move to other areas of the law. In ***556** *Smith,* for example, a plurality of this Court relied on *Griggs* to include disparate-impact liability in the ADEA. See 544 U.S., at 236, 125 S.Ct. 1536. As both I and the author of today's majority opinion recognized at the time, that decision was as incorrect as it was regrettable. See *id.,* at 248–249, 125 S.Ct. 1536 (O'Connor, J., joined by KENNEDY and THOMAS, JJ., concurring in judgment). Because we knew that Congress did not create disparate-impact liability under Title VII, we explained that "there [wa]s no reason to suppose that Congress in 1967"—four years before *Griggs*—"could have foreseen the interpretation of Title VII that was to come." *Smith, supra,* at 260, 125 S.Ct. 1536 (opinion of O'Connor, J.). It made little sense to repeat *Griggs* ' error in a new context.

My position remains the same. Whatever deference is due *Griggs* as a matter of *stare decisis,* we should at the very least confine it to Title VII. We should not incorporate it into statutes such as the Fair Housing Act and the ADEA, which were passed years before Congress had any reason to suppose that this Court would take the position it did in *Griggs*. See *Smith, supra,* at 260, 125 S.Ct. 1536 (opinion of O'Connor, J.). And we should certainly not allow it to spread to statutes like the Fair Housing Act, whose operative text, unlike that of the ADEA's, does not even mirror Title VII's.

Today, however, the majority inexplicably declares that "the logic of *Griggs* and *Smith* " leads to the conclusion that "the FHA encompasses disparate-impact claims." *Ante,* at 2518. Justice ALITO ably dismantles this argument. *Post,* at

2543 – 2547 (dissenting opinion). But, even if the majority were correct, I would not join it in following that "logic" here. "[E]rroneous precedents need not be extended to their logical end, even when dealing with related provisions that normally would be interpreted in lockstep. Otherwise, *stare decisis,* designed to be a principle of stability and repose, would become a vehicle of change ... distorting the law." *CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 469–470, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008) (THOMAS, J., dissenting) (footnote omitted). Making the same mistake in different areas of the law furthers neither certainty nor judicial economy. It furthers error.

***557** That error will take its toll. The recent experience of the Houston Housing Authority (HHA) illustrates some of the many costs of disparate-impact liability. ****2532** HHA, which provides affordable housing developments to low-income residents of Houston, has over 43,000 families on its waiting lists. The overwhelming majority of those families are black. Because Houston is a majority-minority city with minority concentrations in all but the more affluent areas, any HHA developments built outside of those areas will increase the concentration of racial minorities. Unsurprisingly, the threat of disparate-impact suits based on those concentrations has hindered HHA's efforts to provide affordable housing. State and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability. Brief for Houston Housing Authority as *Amicus Curiae* 8–12. That the majority believes that these are not " 'dire consequences,' " see *ante,* at 2525, is cold comfort for those who actually need a home.

* * *

I agree with the majority that *Griggs* "provide[s] essential background" in this case, *ante,* at 2517: It shows that our disparate-impact jurisprudence was erroneous from its inception. Divorced from text and reality, driven by an agency with its own policy preferences, *Griggs* bears little relationship to the statutory interpretation we should expect from a court of law. Today, the majority repeats that error.

I respectfully dissent.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

No one wants to live in a rat's nest. Yet in *Gallagher v. Magner,* 619 F.3d 823 (2010), a case that we agreed to review several Terms ago, the Eighth Circuit held that the Fair Housing Act (or FHA), 42 U.S.C. § 3601 *et seq.,* could be ***558** used to attack St. Paul, Minnesota's efforts to combat "rodent infestation" and other violations of the city's housing code. 619 F.3d, at 830. The court agreed that there was no basis to "infer discriminatory intent" on the part of St. Paul. *Id.,* at 833. Even so, it concluded that the city's "aggressive enforcement of the Housing Code" was actionable because making landlords respond to "rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors," and the like increased the price of rent. *Id.,* at 830, 835. Since minorities were statistically more likely to fall into "the bottom bracket for household adjusted median family income," they were disproportionately affected by those rent increases, *i.e.,* there was a "disparate impact." *Id.,* at 834. The upshot was that even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit.

Today, the Court embraces the same theory that drove the decision in *Magner*.[1] This is a serious mistake. The Fair Housing Act does not create disparate-impact liability, nor do this Court's precedents. And today's decision will have unfortunate consequences for local government, private enterprise, and those living in poverty. Something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit. Because Congress did not authorize any of this, I respectfully dissent.

****2533** I

Everyone agrees that the FHA punishes intentional discrimination. Treating someone "less favorably than others because of a protected trait" is " 'the most easily understood type of discrimination.' " ***559** *Ricci v. DeStefano,* 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (quoting *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); some internal quotation marks omitted). Indeed, this classic form of discrimination —called disparate treatment—is the only one prohibited by the Constitution itself. See, *e.g., Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264–265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). It is obvious that Congress intended the FHA to cover disparate treatment.

The question presented here, however, is whether the FHA also punishes "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci, supra,* at 577, 129 S.Ct. 2658. The answer is equally clear. The FHA does not authorize disparate-impact claims. No such liability was created when the law was enacted in 1968. And nothing has happened since then to change the law's meaning.

A

I begin with the text. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). Similarly, § 805(a) prohibits any party "whose business includes engaging in residential real estate-related transactions" from "discriminat[ing] against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of* race, color, religion, sex, handicap, familial status, or national origin." § 3605(a) (emphasis added).

In both sections, the key phrase is "because of." These provisions list covered actions ("refus[ing] to sell or rent ... a dwelling," "refus[ing] to negotiate for the sale or rental of ... a dwelling," "discriminat[ing]" in a residential real estate transaction, etc.) and protected characteristics ("race," "religion," ***560** etc.). The link between the actions and the protected characteristics is "because of."

What "because of" means is no mystery. Two Terms ago, we held that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2527, 186 L.Ed.2d 503 (2013) (quoting *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); some internal quotation marks omitted). A person acts "because of" something else, we explained, if that something else " 'was the "reason" that the [person] decided to act.' " 570 U.S., at ——, 133 S.Ct., at 2527.

Indeed, just weeks ago, the Court made this same point in interpreting a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(m), that makes it unlawful for an employer to take a variety of adverse employment actions (such as failing or refusing to hire a job applicant or discharging an employee) "because of" religion. See *EEOC v. Abercrombie & Fitch Stores, Inc.,* 575 U.S. ——, ——, 135 S.Ct. 2028, 2032–2033, ——L.Ed.2d —— (2015). The Court wrote: " 'Because of' in § 2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it." *Ibid.*

****2534** Nor is this understanding of "because of" an arcane feature of legal usage. When English speakers say that someone did something "because of" a factor, what they mean is that the factor was a reason for what was done. For example, on the day this case was argued, January 21, 2015, Westlaw and Lexis searches reveal that the phrase "because of" appeared in 14 Washington Post print articles. In every single one, the phrase linked an action and a reason for the action.[2]

***561** Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions "because of"—meaning "by reason of" or "on account of," *Nassar, supra,* at 2530, 133 S.Ct., at 2527—race, religion, etc. Put another way, "the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts ... that the Act makes unlawful." *American Ins. Assn. v. Department of Housing and Urban Development,* —— F.Supp.3d ——, —— n. 20, 2014 WL 5802283, at *8, n. 20 (D.D.C.2014). Congress accordingly outlawed the covered actions only when they are motivated by race or one of the other protected characteristics.

It follows that the FHA does not authorize disparate-impact suits. Under a statute like the FHA that prohibits ***562** actions taken "because of" protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on " 'subjective intent.' " *Raytheon Co. v. Hernandez,* 540 U.S. 44, 53, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003). Instead, " 'treat[ing] [a] particular person less favorably than others *because of*' a protected trait" is " 'disparate treatment,' " *not disparate impact. Ricci,* 557 U.S., at 577, 129 S.Ct. 2658 (emphasis added). See ****2535** also, *e.g., Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (explaining the difference between "because of" and "in spite of"); *Hernandez v. New York,* 500 U.S. 352, 359–360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion) (same); *Alexander v. Sandoval,* 532 U.S. 275, 278, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (holding that it is "beyond dispute" that banning

discrimination " 'on the ground of race' " "prohibits only intentional discrimination").

This is precisely how Congress used the phrase "because of" elsewhere in the FHA. The FHA makes it a crime to willfully "interfere with ... any person because of his race" (or other protected characteristic) who is engaging in a variety of real-estate-related activities, such as "selling, purchasing, [or] renting" a dwelling. 42 U.S.C. § 3631(a). No one thinks a defendant could be convicted of this crime without proof that he acted "because of," *i.e.,* on account of or by reason of, one of the protected characteristics. But the critical language in this section—"because of"—is identical to the critical language in the sections at issue in this case. "One ordinarily assumes" Congress means the same words in the same statute to mean the same thing. *Utility Air Regulatory Group v. EPA,* 573 U.S. ——, ——, 134 S.Ct. 2427, 2441–2442, 189 L.Ed.2d 372 (2014). There is no reason to doubt that ordinary assumption here.

Like the FHA, many other federal statutes use the phrase "because of" to signify what that phrase means in ordinary speech. For instance, the federal hate crime statute, 18 U.S.C. § 249, authorizes enhanced sentences for defendants convicted of committing certain crimes "because of" race, color, religion, or other listed characteristics. Hate crimes require bad intent—indeed, that is the whole point of these ***563** laws. See, *e.g., Wisconsin v. Mitchell,* 508 U.S. 476, 484–485, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) ("[T]he same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status"). All of this confirms that "because of" in the FHA should be read to mean what it says.

B

In an effort to find at least a sliver of support for disparate-impact liability in the text of the FHA, the principal respondent, the Solicitor General, and the Court pounce on the phrase "make unavailable." Under § 804(a), it is unlawful "[t]o ... make unavailable ... a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). See also § 3605(a) (barring "discriminat[ion] against any person in making available such a [housing] transaction ... because of race, color, religion, sex, handicap, familial status, or national origin"). The Solicitor General argues that "[t]he plain meaning of the phrase 'make unavailable' includes actions that *have the result* of making housing or transactions unavailable, regardless of whether the actions were intended to have that result." Brief for United States as *Amicus Curiae* 18 (emphasis added). This argument is not consistent with ordinary English usage.

It is doubtful that the Solicitor General's argument accurately captures the "plain meaning" of the phrase "make unavailable" even when that phrase is not linked to the phrase "because of." "[M]ake unavailable" must be viewed together with the rest of the actions covered by § 804(a), which applies when a party "*refuse[s]* to sell or rent" a dwelling, "*refuse[s]* to negotiate for the sale or rental" of a dwelling, "*den[ies]* a dwelling to any person," "or otherwise *make[s] unavailable* " a dwelling. ****2536** § 3604(a) (emphasis added). When a statute contains a list like this, we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to ***564** the Acts of Congress.' " *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (quoting *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)). See also, *e.g., Yates v. United States,* 574 U.S. ——, ——, 135 S.Ct. 1074, 1085–1086, 191 L.Ed.2d 64 (2015) (plurality opinion); *id.*, at ——, 135 S.Ct., at 1089 (ALITO, J., concurring in judgment). Here, the phrases that precede "make unavailable" unmistakably describe *intentional* deprivations of equal treatment, not merely actions that happen to have a disparate effect. See *American Ins. Assn.,* —— F.Supp.3d, at ——, 2014 WL 5802283, at *8 (citing Webster's Third New International Dictionary 603, 848, 1363, 1910 (1966)). Section 804(a), moreover, prefaces "make unavailable" with "or otherwise," thus creating a catchall. Catchalls must be read "restrictively" to be "like" the listed terms. *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384–385, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). The result of these ordinary rules of interpretation is that even without "because of," the phrase "make unavailable" likely would require intentionality.

The FHA's inclusion of "because of," however, removes any doubt. Sections 804(a) and 805(a) apply only when a party makes a dwelling or transaction unavailable "because of" race or another protected characteristic. In ordinary English usage, when a person makes something unavailable "because of" some factor, that factor must be a reason for the act.

Here is an example. Suppose that Congress increases the minimum wage. Some economists believe that such legislation reduces the number of jobs available for "unskilled

workers," Fuller & Geide–Stevenson, Consensus Among Economists: Revisited, 34 J. Econ. Educ. 369, 378 (2003), and minorities tend to be disproportionately represented in this group, see, *e.g.,* Dept. of Commerce, Bureau of Census, Detailed Years of School Completed by People 25 Years and Over by Sex, Age Groups, Race and Hispanic Origin: 2014, online at http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables. html (all Internet materials as visited ***565** June 23, 2015, and available in Clerk of Court's case file). Assuming for the sake of argument that these economists are correct, would it be fair to say that Congress made jobs unavailable to African–Americans or Latinos "because of" their race or ethnicity?

A second example. Of the 32 college players selected by National Football League (NFL) teams in the first round of the 2015 draft, it appears that the overwhelming majority were members of racial minorities. See Draft 2015, http://www.nfl.com/draft/2015. See also Miller, Powerful Sports Agents Representing Color, Los Angeles Sentinel, Feb. 6, 2014, p. B3 (noting "there are 96 players (76 of whom are African–American) chosen in the first rounds of the 2009, 2010, and 2011 NFL drafts"). Teams presumably chose the players they think are most likely to help them win games. Would anyone say the NFL teams made draft slots unavailable to white players "because of" their race?

A third example. During the present Court Term, of the 21 attorneys from the Solicitor General's Office who argued cases in this Court, it appears that all but 5(76%) were under the age of 45. Would the Solicitor General say he made argument opportunities unavailable to older attorneys "because of" their age?

****2537** The text of the FHA simply cannot be twisted to authorize disparate-impact claims. It is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done "because of race, color, religion, sex, familial status, or national origin."

II

The circumstances in which the FHA was enacted only confirm what the text says. In 1968, "the predominant focus of antidiscrimination law was on intentional discrimination." *Smith v. City of Jackson,* 544 U.S. 228, 258, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005) (O'Connor, J., concurring in judgment). The very "concept of disparate impact liability, by contrast, was quite novel." *Ibid.* (collecting ***566** citations). See also Tr. of Oral Arg. 15 ("JUSTICE GINSBURG: ... If we're going to be realistic about this, ... in 1968, when the Fair Housing Act passed, nobody knew anything about disparate impact"). It is anachronistic to think that Congress authorized disparate-impact claims in 1968 but packaged that striking innovation so imperceptibly in the FHA's text.

Eradicating intentional discrimination was and is the FHA's strategy for providing fair housing opportunities for all. The Court recalls the country's shameful history of segregation and *de jure* housing discrimination and then jumps to the conclusion that the FHA authorized disparate-impact claims as a method of combatting that evil. *Ante,* at 2534 – 2536. But the fact that the 1968 Congress sought to end housing discrimination says nothing about the means it devised to achieve that end. The FHA's text plainly identifies the weapon Congress chose—outlawing disparate treatment "because of race" or another protected characteristic. 42 U.S.C. §§ 3604(a), 3605(a). Accordingly, in any FHA claim, "[p]roof of discriminatory motive is critical." *Teamsters,* 431 U.S., at 335, n. 15, 97 S.Ct. 1843.

III

Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done "because of" protected characteristics. Today, they still forbid certain housing practices if done "because of" protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved.

Rather than confronting the plain text of §§ 804(a) and 805(a), the Solicitor General and the Court place heavy reliance on certain amendments enacted in 1988, but those amendments did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, 102 Stat. 1619, Congress expanded the list of protected characteristics. See 42 U.S.C. §§ 3604(a), (f)(1). Congress ***567** also gave the Department of Housing and Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. See §§ 3612, 3614a. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that "[n]othing in [the FHA]" prohibits (a) certain actions taken by real property appraisers, (b) certain occupancy requirements, and (c) the treatment

of persons convicted of manufacturing or distributing illegal drugs.[3]

**2538 According to the Solicitor General and the Court, these amendments show that the FHA authorizes disparate-impact claims. Indeed, the Court says that they are "of crucial importance." *Ante,* at 2519. This "crucial" argument, however, cannot stand.

A

The Solicitor General and the Court contend that the 1988 Congress implicitly authorized disparate-impact liability by adopting the amendments just noted while leaving the operative provisions of the FHA untouched. Congress knew at that time, they maintain, that the Courts of Appeals had held that the FHA sanctions disparate-impact claims, but Congress failed to enact bills that would have rejected that theory of liability. Based on this, they submit that Congress *568 silently ratified those decisions. See *ante,* at 2519 – 2520; Brief for United States as *Amicus Curiae* 23–24. This argument is deeply flawed.

Not the greatest of its defects is its assessment of what Congress must have known about the judiciary's interpretation of the FHA. The Court writes that by 1988, "all nine *Courts of Appeals* to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims." *Ante,* at 2519 (emphasis added). See also Brief for United States as *Amicus Curiae* 12. But *this Court* had not addressed that question. While we always give respectful consideration to interpretations of statutes that garner wide acceptance in other courts, this Court has "no warrant to ignore clear statutory language on the ground that other courts have done so," even if they have " 'consistently' " done so for " '30 years.' " *Milner v. Department of Navy,* 562 U.S. 562, 575–576, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). See also, *e.g., CSX Transp., Inc. v. McBride,* 564 U.S. ——, ——, 131 S.Ct. 2630, 2650, 180 L.Ed.2d 637 (2011) (ROBERTS, C.J., dissenting) (explaining that this Court does not interpret statutes by asking for "a show of hands" (citing *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001); *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987))).

In any event, there is no need to ponder whether it would have been reasonable for the 1988 Congress, without considering the clear meaning of §§ 804(a) and 805(a), to assume that the decisions of the lower courts effectively settled the matter. While the Court highlights the decisions of the Courts of Appeals, it fails to mention something that is of at least equal importance: the official view of the United States in 1988.

Shortly *before* the 1988 amendments were adopted, the United States formally argued in this Court that the FHA prohibits only intentional discrimination. See Brief for United States as *Amicus Curiae* in *Huntington v. Huntington Branch, NAACP,* O.T. 1988, No. 87–1961, p. 15 ("An action taken because of some factor other than race, *i.e.,* financial *569 means, even if it causes a discriminatory effect, is not **2539 an example of the intentional discrimination outlawed by the statute"); *id.,* at 14 ("The words 'because of' plainly connote a causal connection between the housing-related action and the person's race or color").[4] This was the same position that the United States had taken in lower courts for years. See, *e.g.*, *United States v. Birmingham,* 538 F.Supp. 819, 827, n. 9 (E.D.Mich.1982) (noting positional change), aff'd, 727 F.2d 560, 565–566 (C.A.6 1984) (adopting United States' "concession" that there must be a " 'discriminatory motive' "). It is implausible that the 1988 Congress was aware of certain lower court decisions but oblivious to the United States' considered and public view that those decisions were wrong.

This fact is fatal to any notion that Congress implicitly ratified disparate impact in 1988. The canon of interpretation on which the Court and the Solicitor General purport to rely—the so-called "prior-construction canon"—does not apply where lawyers cannot "justifiably regard the point as settled" or when "other sound rules of interpretation" are implicated. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 324, 325 (2012). That was the case here. Especially after the United States began repudiating disparate impact, no one could have reasonably thought that the question was settled.

Nor can such a faulty argument be salvaged by pointing to Congress' failure in 1988 to enact language that would have made it clear that the FHA does not authorize disparate-impact suits based on zoning decisions. See *ante,* at 2519 – 2520.[5] To change the meaning of language in an already *570 enacted law, Congress must pass a new law amending that language. See, *e.g., West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 100, 101, and n. 7, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Intent that finds no expression in a statute is irrelevant. See, *e.g., New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519, 544–545, 99

S.Ct. 1328, 59 L.Ed.2d 553 (1979); Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 538–540 (1983). Hence, "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock,* 309 U.S. 106, 121, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

Unsurprisingly, we have rejected *identical* arguments about implicit ratification in other cases. For example, in ****2540** *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.,* 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), a party argued that § 10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because "Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret § 10(b) to cover aiding and abetting, but ha[d] done so without providing that aiding and abetting liability is not available under § 10(b)." *Id.,* at 186, 114 S.Ct. 1439. "From that," a party asked the Court to "infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of § 10(b)." *Ibid.* The Court dismissed this argument in words that apply almost verbatim here:

> " 'It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of assurance ***571** that congressional failure to act represents" affirmative congressional approval of the courts' statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.' *Patterson v. McLean Credit Union,* 491 U.S. 164, 175, n. 1 [109 S.Ct. 2363, 105 L.Ed.2d 132] (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 672 [107 S.Ct. 1442, 94 L.Ed.2d 615] (1987) (SCALIA, J., dissenting))." *Ibid.* (alterations omitted).

We made the same point again in *Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517. There it was argued that amendments to Title VI of the Civil Rights Act of 1964 implicitly ratified lower court decisions upholding a private right of action. We rejected that argument out of hand. See *id.,* at 292–293, 121 S.Ct. 1511.

Without explanation, the Court ignores these cases.

B

The Court contends that the 1988 amendments provide "convincing confirmation of Congress' understanding that disparate-impact liability exists under the FHA" because the three safe-harbor provisions included in those amendments "would be superfluous if Congress had assumed that disparate-impact liability did not exist under the FHA." *Ante,* at 2520, 2521. As just explained, however, what matters is what Congress *did,* not what it might have "assumed." And although the Court characterizes these provisions as "exemptions," that characterization is inaccurate. They make no reference to § 804(a) or § 805(a) or any other provision of the FHA; nor do they state that they apply to conduct that would otherwise be prohibited. Instead, they simply make clear that certain conduct is not forbidden by the Act. *E.g.,* 42 U.S.C. § 3607(b)(4) ("Nothing in this subchapter prohibits ..."). The Court should read these amendments to mean what they say.

***572** In 1988, policymakers were not of one mind about disparate-impact housing suits. Some favored the theory and presumably would have been happy to have it enshrined in the FHA. See *ante,* at 2519 – 2520; 134 Cong. Rec. 23711 (1988) (statement of Sen. Kennedy). Others worried about disparate-impact liability and recognized that this Court had not decided whether disparate-impact claims were authorized under the 1968 Act. See H.R.Rep. No. 100–711, pp. 89–93 (1988). Still others disapproved of disparate-impact liability and believed that the 1968 Act did not authorize it. That was the view of President Reagan when he signed the amendments. See Remarks on Signing the Fair Housing Amendments Act of ****2541** 1988, 24 Weekly Comp. of Pres. Doc. 1140, 1141 (1988) (explaining that the amendments did "not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that [FHA] violations may be established by a showing of disparate impact" because the FHA "speaks only to intentional discrimination").[6]

The 1988 safe-harbor provisions have all the hallmarks of a compromise among these factions. These provisions neither authorize nor bar disparate-impact claims, but they do provide ***573** additional protection for persons and entities engaging in certain practices that Congress especially wished to shield. We "must respect and give effect to these sorts of compromises." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002).

It is not hard to see why such a compromise was attractive. For Members of Congress who supported disparate impact, the safe harbors left the favorable lower court decisions in place. And for those who hoped that this Court would ultimately agree with the position being urged by the United States, those provisions were not surplusage. In the Circuits in which disparate-impact FHA liability had been accepted, the safe-harbor provisions furnished a measure of interim protection until the question was resolved by this Court. They also provided partial protection in the event that this Court ultimately rejected the United States' argument. Neither the Court, the principal respondent, nor the Solicitor General has cited any case in which the canon against surplusage has been applied in circumstances like these.[7]

**2542 *574 On the contrary, we have previously refused to interpret enactments like the 1988 safe-harbor provisions in such a way. Our decision in *O'Gilvie v. United States,* 519 U.S. 79, 117 S.Ct. 452, 136 L.Ed.2d 454 (1996)—also ignored by the Court today—is instructive. In that case, the question was whether a provision of the Internal Revenue Code excluding a recovery for personal injury from gross income applied to punitive damages. Well after the critical provision was enacted, Congress adopted an amendment providing that punitive damages for nonphysical injuries were not excluded. Pointing to this amendment, a taxpayer argued: "Why ... would Congress have enacted this amendment removing punitive damages (in nonphysical injury cases) unless Congress believed that, in the amendment's absence, punitive damages did fall within the provision's coverage?" *Id.,* at 89, 117 S.Ct. 452. This argument, of course, is precisely the same as the argument made in this case. To paraphrase *O'Gilvie,* the Court today asks: Why would Congress have enacted the 1988 amendments, providing safe harbors from three types of disparate-impact claims, unless Congress believed that, in the amendments' absence, disparate-impact claims did fall within the FHA's coverage?

The Court rejected the argument in *O'Gilvie*. "The short answer," the Court wrote, is that Congress might have simply wanted to "clarify the matter in respect to nonphysical injuries" while otherwise "leav[ing] the law where it found it." *Ibid.* Although other aspects of *O'Gilvie* triggered a dissent, see *id.,* at 94–101, 117 S.Ct. 452 (opinion of SCALIA, J.), no one quarreled with this self-evident piece of the Court's analysis. Nor was the *O'Gilvie* Court troubled that Congress' amendment regarding nonphysical injuries turned out to have been unnecessary because punitive damages for any injuries were not excluded all along.

*575 The Court saw the flaw in the argument in *O'Gilvie,* and the same argument is no better here. It is true that *O'Gilvie* involved a dry question of tax law while this case involves a controversial civil rights issue. But how we read statutes should not turn on such distinctions.

In sum, as the principal respondent's attorney candidly admitted, the 1988 amendments did not create disparate-impact liability. See Tr. of Oral Arg. 36 ("[D]id the things that [Congress] actually did in 1988 expand the coverage of the Act? MR. DANIEL: No, Justice").

C

The principal respondent and the Solicitor General—but not the Court—have one final argument regarding the text of the FHA. They maintain that even if the FHA does not unequivocally authorize disparate-impact suits, it is at least ambiguous enough to permit HUD to adopt that interpretation. Even if the FHA were ambiguous, however, we do not defer "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.' " *Christopher v. SmithKline Beecham Corp.,* 567 U.S. ——, ——, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012).

Here, 43 years after the FHA was enacted and nine days after the Court granted certiorari in *Magner* (the "rodent infestation" case), HUD proposed "to prohibit **2543 housing practices with a discriminatory effect, even where there has been no intent to discriminate." Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed.Reg. 70921 (2011). After *Magner* settled, the Court called for the views of the Solicitor General in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* 568 U.S. ——, 133 S.Ct. 569, 184 L.Ed.2d 336 (2012), another case raising the same question. Before the Solicitor General filed his brief, however, HUD adopted disparate-impact regulations. See Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed.Reg. 11460 (2013). The Solicitor General then urged HUD's *576 rule as a reason to deny certiorari. We granted certiorari anyway, 570 U.S. ——, 133 S.Ct. 2824, 186 L.Ed.2d 883 (2013), and shortly thereafter *Mount Holly* also unexpectedly settled. Given this unusual pattern, there is an argument that deference

may be unwarranted. Cf. *Young v. United Parcel Service, Inc.*, 575 U.S. ——, ——, 135 S.Ct. 1338, 1352, 191 L.Ed.2d 279 (2015) (refusing to defer where "[t]he EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari" (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))).[8]

There is no need to dwell on these circumstances, however, because deference is inapt for a more familiar reason: The FHA is not ambiguous. The FHA prohibits only disparate treatment, not disparate impact. It is a bedrock rule that an agency can never "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group,* 573 U.S., at ——, 134 S.Ct., at 2446. This rule makes even more sense where the agency's view would open up a deeply disruptive avenue of liability that Congress never contemplated.

IV

Not only does disparate-impact liability run headlong into the text of the FHA, it also is irreconcilable with our precedents. The Court's decision today reads far too much into *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and far too little into *Smith v. City of Jackson,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). In *Smith,* the Court explained that the statutory justification for the decision in *Griggs* depends on language that has no parallel in the FHA. And when the *Smith* Court addressed a provision that does have such a parallel in the FHA, the Court concluded —*unanimously*—that it does not authorize disparate-impact liability. The same result should apply here.

***577** A

Rather than focusing on the text of the FHA, much of the Court's reasoning today turns on *Griggs*. In *Griggs,* the Court held that black employees who sued their employer under § 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(2), could recover without proving that the employer's conduct—requiring a high school diploma or a qualifying grade on a standardized test as a condition for certain jobs—was motivated by a discriminatory intent. Instead, the Court held that, unless it was proved that the requirements were "job related," the plaintiffs could recover by showing that ****2544** the requirements "operated to render ineligible a markedly disproportionate number of Negroes." 401 U.S., at 429, 91 S.Ct. 849.

Griggs was a case in which an intent to discriminate might well have been inferred. The company had "openly discriminated on the basis of race" prior to the date on which the 1964 Civil Rights Act took effect. *Id.*, at 427, 91 S.Ct. 849. Once that date arrived, the company imposed new educational requirements for those wishing to transfer into jobs that were then being performed by white workers who did not meet those requirements. *Id.*, at 427–428, 91 S.Ct. 849. These new hurdles disproportionately burdened African–Americans, who had "long received inferior education in segregated schools." *Id.*, at 430, 91 S.Ct. 849. Despite all this, the lower courts found that the company lacked discriminatory intent. See *id.*, at 428, 91 S.Ct. 849. By convention, we do not overturn a finding of fact accepted by two lower courts, see, *e.g., Rogers v. Lodge,* 458 U.S. 613, 623, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982); *Blau v. Lehman,* 368 U.S. 403, 408–409, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949), so the Court was confronted with the question whether Title VII always demands intentional discrimination.

Although *Griggs* involved a question of statutory interpretation, the body of the Court's opinion—quite remarkably—does not even cite the provision of Title VII on which ***578** the plaintiffs' claims were based. The only reference to § 703(a)(2) of the 1964 Civil Rights Act appears in a single footnote that reproduces the statutory text but makes no effort to explain how it encompasses a disparate-impact claim. See 401 U.S., at 426, n. 1, 91 S.Ct. 849. Instead, the Court based its decision on the "objective" of Title VII, which the Court described as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*, at 429–430, 91 S.Ct. 849.

That text-free reasoning caused confusion, see, *e.g., Smith, supra,* at 261–262, 125 S.Ct. 1536 (O'Connor, J., concurring in judgment), and undoubtedly led to the pattern of Court of Appeals decisions in FHA cases upon which the majority now relies. Those lower courts, like the *Griggs* Court, often made little effort to ground their decisions in the statutory text. For example, in one of the earliest cases in this line, *United States v. Black Jack,* 508 F.2d 1179 (C.A.8 1974), the heart of the court's analysis was this: "Just as Congress

requires 'the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such barriers must also give way in the field of housing." *Id.,* at 1184 (quoting *Griggs, supra,* at 430–431, 91 S.Ct. 849; citation omitted).

Unlike these lower courts, however, this Court has never interpreted *Griggs* as imposing a rule that applies to all antidiscrimination statutes. See, *e.g., Guardians Assn. v. Civil Serv. Comm'n of New York City,* 463 U.S. 582, 607, n. 27, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (holding that Title VI, 42 U.S.C. § 2000d *et seq.,* does "not allow compensatory relief in the absence of proof of discriminatory intent"); *Sandoval,* 532 U.S., at 280, 121 S.Ct. 1511 (similar). Indeed, we have never held that *Griggs* even establishes a rule for all *employment* discrimination statutes. In *Teamsters,* the Court rejected "the *Griggs* rationale" in evaluating a company's seniority rules. 431 U.S., at 349–350, 97 S.Ct. 1843. And because *Griggs* was focused ****2545** on a particular problem, the Court ***579** had held that its rule does not apply where, as here, the context is different. In *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), for instance, the Court refused to apply *Griggs* to pensions under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), or Title VII, even if a plan has a "disproportionately heavy impact on male employees." 435 U.S. at 711, n. 20, 98 S.Ct. 1370. We explained that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Ibid.*

B

Although the opinion in *Griggs* did not grapple with the text of the provision at issue, the Court was finally required to face that task in *Smith,* 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410, which addressed whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.,* authorizes disparate-impact suits. The Court considered two provisions of the ADEA, §§ 4(a)(1) and 4(a)(2), 29 U.S.C. §§ 623(a)(1) and (a)(2).

The Court unanimously agreed that the first of these provisions, § 4(a)(1), does not authorize disparate-impact claims. See 544 U.S., at 236, n. 6, 125 S.Ct. 1536 (plurality opinion); *id.,* at 243, 125 S.Ct. 1536 (SCALIA, J., concurring in part and concurring in judgment) (agreeing with the plurality's reasoning); *id.,* at 249, 125 S.Ct. 1536 (O'Connor, J., concurring in judgment) (reasoning that this provision "obvious[ly]" does not allow disparate-impact claims).

By contrast, a majority of the Justices found that the terms of § 4(a)(2) either clearly authorize disparate-impact claims (the position of the plurality) or at least are ambiguous enough to provide a basis for deferring to such an interpretation by the Equal Employment Opportunity Commission (the position of Justice SCALIA). See 544 U.S., at 233–240, 125 S.Ct. 1536 (plurality opinion); *id.,* at 243–247, 125 S.Ct. 1536 (opinion of SCALIA, J.).

In reaching this conclusion, these Justices reasoned that § 4(a)(2) of the ADEA was modeled on and is virtually identical ***580** to the provision in *Griggs,* 42 U.S.C. § 2000e–2(a)(2). Section 4(a)(2) provides as follows:

> "It shall be unlawful for an employer—
>
> . . .
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *age*." 29 U.S.C. § 623(a) (emphasis added).

The provision of Title VII at issue in *Griggs* says this:

> "It shall be an unlawful employment practice for an employer—
>
> . . .
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color, religion, sex, or national origin*." 42 U.S.C. § 2000e–2(a)(2) (emphasis added).

For purposes here, the only relevant difference between these provisions is that the ADEA provision refers to "age" and the Title VII provision refers to "race, color, religion, or national origin." Because identical language in two statutes ****2546** having similar purposes should generally be presumed to have the same meaning, the plurality in *Smith,* echoed by

Justice SCALIA, saw *Griggs* as "compelling" support for the conclusion that § 4(a)(2) of the ADEA authorizes disparate-impact claims. 544 U.S., at 233–234, 125 S.Ct. 1536 (plurality opinion) (citing *Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (*per curiam*)).

When it came to the other ADEA provision addressed in *Smith,* namely, § 4(a)(1), the Court unanimously reached the opposite conclusion. Section 4(a)(1) states:

> "It shall be unlawful for an employer—
>
> ***581** "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*." 29 U.S.C. § 623(a)(1) (emphasis added).

The plurality opinion's reasoning, with which Justice SCALIA agreed, can be summarized as follows. Under § 4(a)(1), *the employer* must act because of age, and thus must have discriminatory intent. See 544 U.S., at 236, n. 6, 125 S.Ct. 1536.[9] Under § 4(a)(2), on the other hand, it is enough if the *employer's actions* "adversely affect" an individual "because of ... age." 29 U.S.C. § 623(a).

This analysis of §§ 4(a)(1) and (a)(2) of the ADEA confirms that the FHA does not allow disparate-impact claims. Sections 804(a) and 805(a) of the FHA resemble § 4(a)(1) of the ADEA, which the *Smith* Court unanimously agreed does not encompass disparate-impact liability. Under these provisions of the FHA, like § 4(a)(1) of the ADEA, a defendant must act "because of" race or one of the other prohibited grounds. That is, it is unlawful for a person or entity to "[t]o refuse to sell or rent," "refuse to negotiate," " otherwise ***582** make unavailable," etc. for a forbidden reason. These provisions of the FHA, unlike the Title VII provision in *Griggs* or § 4(a)(2) of the ADEA, do not make it unlawful to take an action that happens to adversely affect a person because of race, religion, etc.

The *Smith* plurality's analysis, moreover, also depended on other language, unique to the ADEA, declaring that "it shall not be unlawful for an employer 'to take any action *otherwise prohibited* ... where the differentiation is based on reasonable factors other than age.' " 544 U.S., at 238, 125 S.Ct. 1536 (quoting 81 Stat. 603; emphasis added). This "otherwise prohibited" language was key to the plurality opinion's reading of the statute because it arguably suggested disparate-impact liability. See 544 U.S., at 238, 125 S.Ct. 1536. This language, moreover, was *essential* to Justice SCALIA's controlling ****2547** opinion. Without it, Justice SCALIA would have agreed with Justices O'Connor, KENNEDY, and THOMAS that *nothing* in the ADEA authorizes disparate-impact suits. See *id.,* at 245–246, 125 S.Ct. 1536. In fact, even with this "otherwise prohibited" language, Justice SCALIA merely concluded that § 4(a)(2) was ambiguous—*not* that disparate-impacts suits are required. *Id.,* at 243, 125 S.Ct. 1536.

The FHA does not contain any phrase like "otherwise prohibited." Such language certainly is nowhere to be found in §§ 804(a) and 805(a). And for all the reasons already explained, the 1988 amendments do not presuppose disparate-impact liability. To the contrary, legislative enactments declaring only that certain actions are *not* grounds for liability do not implicitly create a new theory of liability that all other facets of the statute foreclose.

C

This discussion of our cases refutes any notion that "[t]ogether, *Griggs* holds[10] and the plurality in *Smith* instructs ***583** that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Ante,* at 2517. The Court stumbles in concluding that § 804(a) of the FHA is more like § 4(a)(2) of the ADEA than § 4(a)(1). The operative language in § 4(a)(1) of the ADEA—which, per *Smith,* does not authorize disparate-impact claims—is materially indistinguishable from the operative language in § 804(a) of the FHA.

Even more baffling, neither alone nor in combination do *Griggs* and *Smith* support the Court's conclusion that § 805(a) of the FHA allows disparate-impact suits. The action forbidden by that provision is "*discriminat[ion]* ... because of" race, religion, etc. 42 U.S.C. § 3605(a) (emphasis added). This is precisely the formulation used in § 4(a)(1) of the ADEA, which prohibits "*discriminat[ion]* ... because of such individual's age," 29 U.S.C. § 623(a)(1) (emphasis added), and which *Smith* holds *does not* authorize disparate-impact claims.

In an effort to explain why § 805(a)'s reference to "discrimination" allows disparate-impact suits, the Court argues that in *Board of Ed. of City School Dist. of New York v. Harris,* 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979), "statutory language similar to § 805(a) [was construed] to include disparate-impact liability." *Ante,* at 2518. In fact, the statutory language in *Harris* was quite different. The law there was § 706(d)(1)(B) of the 1972 Emergency School Aid Act, which barred assisting education agencies that " 'had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation ... *or* otherwise engaged in discrimination based upon race, color, or national ***584** origin in the hiring, promotion, or assignment of employees.' " 444 U.S., at 132–133, 142, 100 S.Ct. 363 (emphasis added).

After stating that the first clause in that unusual statute referred to a "disparate-impact ****2548** test," the *Harris* Court concluded that "a similar standard" should apply to the textually "closely connected" second clause. *Id.,* at 143, 100 S.Ct. 363. This was so, the Court thought, even though the second clause, standing alone, may very well have required discriminatory "intent." *Id.,* at 139, 100 S.Ct. 363. The Court explained that the Act's "less than careful draftsmanship" regarding the relationship between the clauses made the "wording of the statute ... ambiguous" about teacher assignments, thus forcing the Court to "look closely at the structure and context of the statute and to review its legislative history." *Id.,* at 138–140, 100 S.Ct. 363. It was the combined force of all those markers that persuaded the Court that disparate impact applied to the second clause too.

Harris, in other words, has nothing to do with § 805(a) of the FHA. The "wording" is different; the "structure" is different; the "context" is different; and the "legislative history" is different. *Id.,* at 140, 100 S.Ct. 363. Rather than digging up a 36–year–old case that Justices of this Court have cited all of twice, and never once for the proposition offered today, the Court would do well to recall our many cases explaining what the phase "because of" means.

V

Not only is the decision of the Court inconsistent with what the FHA says and our precedents, it will have unfortunate consequences. Disparate-impact liability has very different implications in housing and employment cases.

Disparate impact puts housing authorities in a very difficult position because programs that are designed and implemented to help the poor can provide the grounds for a disparate-impact claim. As *Magner* shows, when disparate impact is on the table, even a city's good-faith attempt to remedy deplorable housing conditions can be branded "discriminatory." ***585** 619 F.3d, at 834. Disparate-impact claims thus threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Washington v. Davis,* 426 U.S. 229, 248, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

This case illustrates the point. The Texas Department of Housing and Community Affairs (the Department) has only so many tax credits to distribute. If it gives credits for housing in lower income areas, many families—including many minority families—will obtain better housing. That is a good thing. But if the Department gives credits for housing in higher income areas, some of those families will be able to afford to move into more desirable neighborhoods. That is also a good thing. Either path, however, might trigger a disparate-impact suit.[11]

This is not mere speculation. Here, one respondent has sued the Department for not allocating enough credits to higher income areas. See Brief for Respondent Inclusive Communities Project, Inc., 23. But *another* respondent argues that giving credits to wealthy neighborhoods violates "the moral imperative to improve the substandard and inadequate affordable housing in many of our inner cities." Reply Brief for Respondent Frazier Revitalization Inc. 1. This latter argument has special force because a city can build more housing where property is least expensive, thus benefiting more people. In fact, federal ****2549** law often favors projects that revitalize low-income communities. See *ante,* at 2513.

No matter what the Department decides, one of these respondents will be able to bring a disparate-impact case. And if the Department opts to compromise by dividing the credits, both respondents might be able to sue. Congress ***586** surely did not mean to put local governments in such a position.

The Solicitor General's answer to such problems is that HUD will come to the rescue. In particular, HUD regulations provide a defense against disparate-impact liability if a defendant can show that its actions serve "substantial, legitimate, nondiscriminatory interests" that "necessar[ily]"

cannot be met by "another practice that has a less discriminatory effect." 24 CFR § 100.500(b) (2014). (There is, of course, no hint of anything like this defense in the text of the FHA. But then, there is no hint of disparate-impact liability in the text of the FHA either.)

The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a "substantial" interest? Is there a difference between a "legitimate" interest and a "nondiscriminatory" interest? To what degree must an interest be met for a practice to be "necessary"? How are parties and courts to measure "discriminatory effect"?

These questions are not answered by the Court's assurance that the FHA's disparate-impact "analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.' " *Ante,* at 2514 (quoting 78 Fed.Reg. 11470). See also *ante,* at 2522 (likening the defense to "the business necessity standard"). The business-necessity defense is complicated enough in employment cases; what it means when plopped into the housing context is anybody's guess. What is the FHA analogue of "job related"? Is it "housing related"? But a vast array of municipal decisions affect property values and thus relate (at least indirectly) to housing. And what is the FHA analogue of "business necessity"? "Housing-policy necessity"? What does that mean?

Compounding the problem, the Court proclaims that "governmental entities ... must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes." *Ante,* at 2524. But what does the ***587** Court mean by a "legitimate" objective? And does the Court mean to say that there can be no disparate-impact lawsuit if the objective is " legitimate"? That is certainly not the view of the Government, which takes the position that a disparate-impact claim may be brought to challenge actions taken with such worthy objectives as improving housing in poor neighborhoods and making financially sound lending decisions. See Brief for United States as *Amicus Curiae* 30, n. 7.

Because HUD's regulations and the Court's pronouncements are so "hazy," *Central Bank,* 511 U.S., at 188–189, 114 S.Ct. 1439 courts—lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help. Local governments make countless decisions that may have some disparate impact related to housing. See *ante,* at 2522 – 2523. Certainly Congress did not intend to "engage the federal courts in an endless exercise of second-guessing" local programs. *Canton v. Harris,* 489 U.S. 378, 392, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

Even if a city or private entity named in a disparate-impact suit believes that it is likely to prevail if a disparate-impact suit ****2550** is fully litigated, the costs of litigation, including the expense of discovery and experts, may "push cost-conscious defendants to settle even anemic cases." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 559, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Defendants may feel compelled to "abandon substantial defenses and ... pay settlements in order to avoid the expense and risk of going to trial." *Central Bank, supra,* at 189, 114 S.Ct. 1439. And parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether. Cf. *Ricci,* 557 U.S., at 563, 129 S.Ct. 2658. All the while, similar dynamics may drive litigation against private actors. *Ante,* at 2522.

This is not the Fair Housing Act that Congress enacted.

VI

Against all of this, the Court offers several additional counterarguments. None is persuasive.

***588** A

The Court is understandably worried about pretext. No one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses. Disparate-treatment liability, however, is attuned to this difficulty. Disparate impact can be *evidence* of disparate treatment. *E.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 541–542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (opinion of KENNEDY, J.); *Hunter v. Underwood,* 471 U.S. 222, 233, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). As noted, the facially neutral requirements in *Griggs* created a strong inference of discriminatory intent. Nearly a half century later, federal judges have decades of experience sniffing out pretext.

B

The Court also stresses that "many of our Nation's largest cities—entities that are potential defendants in disparate-impact suits—have submitted an *amicus* brief in this case supporting disparate-impact liability under the FHA." *Ante,* at 2525 – 2526.

This nod to federalism is puzzling. Only a minority of the States and only a small fraction of the Nation's municipalities have urged us to hold that the FHA allows disparate-impact suits. And even if a majority supported the Court's position, that would not be a relevant consideration for a court. In any event, nothing prevents States and local government from enacting their own fair housing laws, including laws creating disparate-impact liability. See 42 U.S.C. § 3615 (recognizing local authority).

The Court also claims that "[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades" has not created " 'dire consequences.' " *Ante,* at 2526. But the Court concedes that disparate impact can be dangerous. See *ante,* at 2522 – 2525. Compare *Magner,* 619 F.3d, at 833–838 (holding that efforts to prevent violations of the housing code may violate the ***589** FHA), with 114 Cong. Rec. 2528 (1968) (remarks of Sen. Tydings) (urging enactment of the FHA to help combat violations of the housing code, including "rat problem[s]"). In the Court's words, it is "paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing." *Ante,* at 2522. Our say-so, however, will not stop such costly cases from being filed—or from getting past a motion to dismiss (and so into settlement).

C

At last I come to the "purpose" driving the Court's analysis: the desire to eliminate ****2551** the "vestiges" of "residential segregation by race." *Ante,* at 2515, 2525. We agree that all Americans should be able "to buy decent houses without discrimination ... *because of* the color of their skin." 114 Cong. Rec. 2533 (remarks of Sen. Tydings) (emphasis added). See 42 U.S.C. §§ 3604(a), 3605(a) ("because of race"). But this Court has no license to expand the scope of the FHA to beyond what Congress enacted.

When interpreting statutes, " '[w]hat the legislative intention was, can be derived only from the words ... used; and we cannot speculate beyond the reasonable import of these words.' " *Nassar,* 570 U.S., at ——, 133 S.Ct., at 2528–2529 (quoting *Gardner v. Collins,* 2 Pet. 58, 93, 7 L.Ed. 347 (1829)). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States,* 480 U.S. 522, 526, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (*per curiam*). See also, *e.g., Board of Governors, FRS v. Dimension Financial Corp.,* 474 U.S. 361, 373–374, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986) (explaining that " 'broad purposes' " arguments "ignor[e] the complexity of the problems Congress is called upon to address").

Here, privileging purpose over text also creates constitutional uncertainty. The Court acknowledges the risk that disparate impact may be used to "perpetuate race-based considerations rather than move beyond them." *Ante,* at 2524. ***590** And it agrees that "racial quotas ... rais[e] serious constitutional concerns." *Ante,* at 2523. Yet it still reads the FHA to authorize disparate-impact claims. We should avoid, rather than invite, such " difficult constitutional questions." *Ante,* at 2524. By any measure, the Court today makes a serious mistake.

* * *

I would interpret the Fair Housing Act as written and so would reverse the judgment of the Court of Appeals.

All Citations

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Footnotes

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

1 The current version of § 2000e–2(a) is almost identical, except that § 2000e–2(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (Emphasis added.) This change, which does not impact my analysis, was made in 1972. 86 Stat. 109.

2 In 1991, Congress added § 2000e–2(m) to Title VII, which permits a plaintiff to establish that an employer acted "because of" a protected characteristic by showing that the characteristic was "a motivating factor" in the employer's decision. Civil Rights Act of 1991, § 107(a), 105 Stat. 1075. That amended definition obviously does not legitimize disparate-impact liability, which is distinguished from disparate-treatment liability precisely because the former does not require any discriminatory motive.

3 Even "[f]ans ... of *Griggs [v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971),] tend to agree that the decision is difficult to square with the available indications of congressional intent." Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363, 399, n. 155 (2010). In the words of one of the decision's defenders, *Griggs* "was poorly reasoned and vulnerable to the charge that it represented a significant leap away from the expectations of the enacting Congress." W. Eskridge, Dynamic Statutory Interpretation 78 (1994).

4 Efforts by Executive Branch officials to influence this Court's disparate-impact jurisprudence may not be a thing of the past. According to a joint congressional staff report, after we granted a writ of certiorari in *Magner v. Gallagher,* 564 U.S. ——, 132 S.Ct. 548, 181 L.Ed.2d 395 (2011), to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez—now Secretary of Labor—entered into a secret deal with the petitioners in that case, various officials of St. Paul, Minnesota, to prevent this Court from answering the question. Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case. See House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, DOJ's *Quid Pro Quo* With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law, Joint Staff Report, 113th Cong., 1st Sess., pp. 1–2 (2013). Additionally, just nine days after we granted a writ of certiorari in *Magner,* and before its dismissal, the Department of Housing and Urban Development proposed the disparate-impact regulation at issue in this case. See 76 Fed.Reg. 70921 (2011).

5 It takes considerable audacity for today's majority to describe the origins of racial imbalances in housing, *ante,* at 2515 – 2516, without acknowledging this Court's role in the development of this phenomenon. In the past, we have admitted that the sweeping desegregation remedies of the federal courts contributed to " 'white flight' " from our Nation's cities, see *Missouri v. Jenkins,* 515 U.S. 70, 95, n. 8, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995); *id.,* at 114, 115 S.Ct. 2038 (THOMAS, J., concurring), in turn causing the racial imbalances that make it difficult to avoid disparate impact from housing development decisions. Today's majority, however, apparently is as content to rewrite history as it is to rewrite statutes.

1 We granted certiorari in *Magner v. Gallagher,* 565 U.S. ——, 132 S.Ct. 548, 181 L.Ed.2d 395 (2011). Before oral argument, however, the parties settled. 565 U.S. ——, 132 S.Ct. 994, 1306, 181 L.Ed.2d 1035, 725 (2012). The same thing happened again in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.,* 571 U.S. ——, 133 S.Ct. 2824, 186 L.Ed.2d 883 (2013).

2 See al-Mujahed & Naylor, Rebels Assault Key Sites in Yemen, pp. A1, A12 ("A government official ... spoke on the condition of anonymity because of concern for his safety"); Berman, Jury Selection Starts in Colo. Shooting Trial, p. A2 ("Jury selection is expected to last four to five months because of a massive pool of potential jurors"); Davidson, Some VA Whistleblowers Get Relief From Retaliation, p. A18 ("In April, they moved to fire her because of an alleged 'lack of collegiality' "); Hicks, Post Office Proposes Hikes in Postage Rates, p. A19 ("The Postal Service lost $5.5 billion in 2014, in large part because of continuing declines in first-class mail volume"); Editorial, Last Responders, p. A20 ("Metro's initial emergency call mentioned only smoke but no stuck train [in part] ... because of the firefighters' uncertainty that power had been shut off to the third rail"); Letter to the Editor, Metro's Safety Flaws, p. A20 ("[A] circuit breaker automatically opened because of electrical arcing"); Bernstein, He Formed Swingle Singers and Made Bach Swing, p. B6 ("The group retained freshness because of the 'stunning musicianship of these singers' "); Schudel, TV Producer, Director Invented Instant Replay, p. B7 ("[The 1963 Army–Navy football game was] [d]elayed one week because of the assassination of President John F. Kennedy"); Contrera & Thompson, 50 Years On, Cheering a Civil Rights Matriarch, pp. C1, C5 ("[T]he first 1965

protest march from Selma to Montgomery ... became known as 'Bloody Sunday' because of state troopers' violent assault on the marchers"); Pressley, 'Life Sucks': Aaron Posner's Latest Raging Riff on Chekhov, pp. C1, C9 (" 'The Seagull' gave Posner ample license to experiment because of its writer and actress characters and its pronouncements on art"); A Rumpus on 'The Bachelor,' p. C2 ("Anderson has stood out from the pack ... mostly because of that post-production censoring of her nether regions" (ellipsis in original)); Steinberg, KD2DC, Keeping Hype Alive, pp. D1, D4 (explaining that a commenter "asked that his name not be used because of his real job"); Boren, Former FSU Boss Bowden Wants 12 Wins to Be Restored, p. D2 ("[T]he NCAA restored the 111 victories that were taken from the late Joe Paterno because of the Jerry Sandusky child sex-abuse scandal"); Oklahoma City Finally Moves Past .500 Mark, p. D4 ("Trail Blazers all-star LaMarcus Aldridge won't play in Wednesday night's game against the Phoenix Suns because of a left thumb injury").

3 These new provisions state:

"Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status." § 3605(c).

"Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." § 3607(b)(1).

"Nothing in this subchapter prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 802 of title 21." § 3607(b)(4).

4 In response to the United States' argument, we reserved decision on the question. See *Huntington v. Huntington Branch, NAACP,* 488 U.S. 15, 18, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988) (*per curiam*) ("Since appellants conceded the applicability of the disparate-impact test ... we do not reach the question whether that test is the appropriate one").

5 In any event, the Court overstates the importance of that failed amendment. The amendment's sponsor disavowed that it had anything to do with the broader question whether the FHA authorizes disparate-impact suits. Rather, it "left to caselaw and eventual Supreme Court resolution whether a discriminatory intent or discriminatory effects standard is appropriate ... [in] all situations but zoning." H.R.Rep. No. 100–711, p. 89 (1988), 1988 U.S.C.C.A.N. 2173, 2224. Some in Congress, moreover, supported the amendment *and* the House bill. Compare *ibid.* with 134 Cong. Rec. 16511 (1988). It is hard to believe they thought the bill—which was silent on disparate impact—nonetheless decided the broader question. It is for such reasons that failed amendments tell us "little" about what a statute means. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994). Footnotes in House Reports and law professor testimony tell us even less. *Ante,* at 2519 – 2520.

6 At the same hearings to which the Court refers, *ante,* at 2519, Senator Hatch stated that if the "intent test versus the effects test" were to "becom[e] an issue," a "fair housing law" might not be enacted at all, and he noted that failed legislation in the past had gotten "bogged down" because of that "battle." Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 100th Cong., 1st Sess., 5 (1987). He also noted that the bill under consideration did "not really go one way or the other" on disparate impact since the sponsors were content to "rely" on the lower court opinions. *Ibid*. And he emphasized that "the issue of intent versus effect—I am afraid that is going to have to be decided by the Supreme Court." *Ibid*. See also *id.,* at 2517 ("It is not always a violation to refuse to sell, but only to refuse to sell 'because of' another's race. This language made clear that the 90th Congress meant only to outlaw acts taken with the intent to discriminate.... To use any standard other than discriminatory intent ... would jeopardize many kinds of beneficial zoning and local ordinances" (statement of Sen. Hatch)).

7 In any event, even in disparate-treatment suits, the safe harbors are not superfluous. For instance, they affect "the burden-shifting framework" in disparate-treatment cases. *American Ins. Assn. v. Department of Housing and Urban Development,* —— F.Supp.3d ——, 2014 WL 5802283, *10 (D.D.C.2014). Under the second step of the burden-shifting scheme from *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), which some courts have applied in disparate-treatment housing cases, see, *e.g., 2922 Sherman Avenue Tenants' Assn. v. District of Columbia,* 444 F.3d 673, 682 (C.A.D.C.2006) (collecting cases), a defendant must proffer a legitimate reason for the challenged conduct, and the safe-harbor provisions set out reasons that are necessarily legitimate. Moreover, while a factfinder in a disparate-

treatment case can sometimes infer bad intent based on facially neutral conduct, these safe harbors protect against such inferences. Without more, conduct within a safe harbor is insufficient to support such an inference as a matter of law. And finally, even if there is additional evidence, these safe harbors make it harder to show pretext. See *Fair Housing Advocates Assn., Inc. v. Richmond Heights,* 209 F.3d 626, 636–637, and n. 7 (C.A.6 2000).

Even if they were superfluous, moreover, our "preference for avoiding surplusage constructions is not absolute." *Lamie v. United States Trustee,* 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). We "presume that a legislature says in a statute what it means," notwithstanding "[r]edundanc[y]." *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

8 At argument, the Government assured the Court that HUD did not promulgate its proposed rule because of *Magner*. See Tr. of Oral Arg. 46 ("[I]t overestimates the efficiency of the government to think that you could get, you know, a supposed rule-making on an issue like this out within seven days"). The Government also argued that HUD had recognized disparate-impact liability in adjudications for years. *Ibid.*

9 The plurality stated:

"Paragraph (a)(1) makes it unlawful for an employer 'to fail or refuse to hire ... *any individual* ... because of *such individual* 's age.' (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer 'to limit ... his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual* 's age.' (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact." 544 U.S., at 236, n. 6, 125 S.Ct. 1536.

10 *Griggs,* of course, "holds" nothing of the sort. Indeed, even the plurality opinion in *Smith* (to say nothing of Justice SCALIA's controlling opinion or Justice O'Connor's opinion concurring in the judgment) did not understand *Griggs* to create such a rule. See 544 U.S., at 240, 125 S.Ct. 1536 (plurality opinion) (relying on multiple considerations). If *Griggs* already answered the question for all statutes (even those that do not use effects language), *Smith* is inexplicable.

11 Tr. of Oral Arg. 44–45 ("Community A wants the development to be in the suburbs. And the next state, the community wants it to be in the poor neighborhood. Is it your position ... that in either case, step one has been satisfied[?] GENERAL VERRILLI: That may be right").

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106 S.Ct. 2752
Supreme Court of the United States

Lacy H. THORNBURG, et al., Appellants

v.

Ralph GINGLES et al.

No. 83–1968
|
Argued Dec. 4, 1985.
|
Decided June 30, 1986.

Synopsis

Action was brought challenging use of multimember districts in North Carolina legislative apportionment. The United States District Court for the Eastern District of North Carolina, 590 F.Supp. 345, found the plan to violate the Voting Rights Act and state officials appealed. The Supreme Court, Justice Brennan, J., held that: (1) plaintiffs claiming impermissive vote dilution must demonstrate that voting devices resulted in unequal access to electoral process; (2) use of multimember districts does not impede the ability of minority voters to elect representatives of their choice unless a bloc voting majority will usually be able to defeat candidates supported by a politically cohesive, geographically insular minority; (3) District Court applied proper standard in determining whether there was racial polarization and voting; (4) legal concept of racially polarized voting incorporates neither causation nor intent; (5) some electoral success by minority group does not foreclose successful section 2 claim; (6) finding of impermissible dilution was supported by the evidence; but (7) claim of dilution with respect to one multimember district was defeated by evidence that last six elections resulted in proportional representation for black residents.

Affirmed in part and reversed in part.

Justice White filed a concurring opinion.

Justice O'Connor filed an opinion concurring in the judgment in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

Justice Stevens filed an opinion concurring in part and dissenting in part in which Justice Marshall and Justice Blackmun joined.

West Headnotes (26)

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

Election Law Dilution of voting power in general

Subsection 2(a) of the Voting Rights Act prohibits all state and political subdivisions from imposing any voting qualifications or prerequisites to voting or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Voting Rights Act of 1965, § 2(a), as amended, 42 U.S.C.A. § 1973(a).

84 Cases that cite this headnote

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

Section 2 of the Voting Rights Act prohibits all forms of voting discrimination, not just vote dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

31 Cases that cite this headnote

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

Electoral devices such as at-large elections may not be considered per se violative of section 2 of the Voting Rights Act; parties challenging electoral devices must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

12 Cases that cite this headnote

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

The conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation of a minority does not, alone, establish a violation of section 2 of the Voting Rights Act. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

47 Cases that cite this headnote

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

The results test under section 2 of the Voting Rights Act does not assume the existence of racial bloc voting; plaintiffs must prove it. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

14 Cases that cite this headnote

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

Essence of a claim under section 2 of the Voting Rights Act is that a certain electoral law, practice, or structure interacts with social and historial conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

123 Cases that cite this headnote

[7] **States** Political subdivisions; multi-member districts

Factors bearing on challenges under section 2 of the Voting Rights Act to multimember legislative districts are the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the state or political subdivision is racially polarized; other factors such as the lingering effects of past discrimination, use of appeals to racial bias in election campaigns, and use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists are supportive of, but not essential to, a minority voter's claim of dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

197 Cases that cite this headnote

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

Bloc voting majority must be able to usually defeat candidates supported by politically cohesive, geographically insular minority group in order for there to be a showing of vote dilution through the use of multimember districts. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

431 Cases that cite this headnote

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

If minority group claiming dilution of its vote in violation of section 2 of the Voting Rights Act through use of multimember district is not sufficiently large and geographically compact to constitute a majority in a single-member district, the multimember form of the district cannot be responsible for minority voters' inability to elect their candidates. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

346 Cases that cite this headnote

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

If minority group claiming dilution of its voting strength in violation of section 2 of the Voting Rights Act through use of multimember district is not able to show that it is politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

41 Cases that cite this headnote

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

If minority voting group claiming dilution of its voting strength in violation of section 2 of the Voting Rights Act through use of multimember districts is not able to demonstrate that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate, it has not shown that the multimember district impedes the minority group's ability to elect its chosen representatives. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

505 Cases that cite this headnote

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

Election Law Racially polarized or bloc voting

Question whether multimember district experiences legally significant racially polarized voting, so that use of multimember district dilutes minority voting strength in violation of section 2, requires discrete inquiries into minority and white voting practices, showing that significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim; white bloc vote that normally will defeat combined strength of minority plus white crossover votes rises to the level of legally significant white voting bloc. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

340 Cases that cite this headnote

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

Pattern of racial bloc voting which extends over period of time is more probative of a claim that use of multimember district impermissibly dilutes minority voting strength in violation of section 2 than are the results of a single election. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

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

In a district where elections are shown to usually be polarized along racial lines, fact that facially polarized voting is not present in one or few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting so that use of multimember district can be shown to impermissibly dilute minority voting strength in violation of section 2. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

[15] **States** Evidence in general

Finding of political cohesiveness of black voters and existence of a white voting bloc, supporting claim that use of multimember districts impermissibly diluted black voting strength in violation of section 2, was supported by evidence of black support for black candidates in excess of 70% in both primary and general elections, that an average of 81.7% of white voters would not vote for any black candidate in the primary elections, and that two-thirds of the white voters would not vote for a black candidate even after he won the Democratic primary. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

38 Cases that cite this headnote

[16] **States** Judicial Review and Enforcement

District court's approach which tested election data from three years in each multimember district and revealed that blacks strongly supported black candidates while, to the usual detriment of black candidates, whites rarely did support black candidates satisfactorily addressed each facet of the proper legal standard for determining claim of vote dilution under section 2. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

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

For purposes of section 2, the legal concept of "racially polarized voting" incorporates neither causation nor intent but, rather, simply means that the race of voters correlates with the selection of certain candidates; it refers to the situation where different races or minority language groups vote in blocs for different candidates. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

8 Cases that cite this headnote

[18] **Election Law** Vote Dilution

It is the difference between the choices made by blacks and whites, and not the reason for that difference, which results in blacks having less opportunity than whites to elect their preferred representatives when there is dilution of black vote in violation of section 2 through use of multimember districts. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

30 Cases that cite this headnote

[19] **Election Law** Vote Dilution

Fact that race of voter and race of candidate is often correlated is not directly pertinent to inquiry as to whether there has been impermissible dilution of minority vote through use of multimember districts in violation of section 2; it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

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

Concept of racially polarized voting as it refers to dilution of minority group voting strength through use of multimember districts in violation of section 2 does not refer only to white bloc voting which is caused by white voters' racial hostility toward the black candidate. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

39 Cases that cite this headnote

[21] **Election Law** Evidence

Minority voters claiming vote dilution in violation of section 2 through use of electoral devices such as multimember districts need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut a prima facie case with evidence of causation or intent. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

21 Cases that cite this headnote

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

Proof that some minority candidates have been elected does not foreclose a claim under section 2 for impermissible dilution of minority voting strength. (Per Justice Brennan, with three Justices concurring and one Justice concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[23] **States** Judicial Review and Enforcement

District court could take account of circumstances surrounding recent black electoral success in determining its significance to claim of impermissible dilution of minority voting strength and could properly notice fact that electoral success increased after filing of lawsuit challenging multimember districts on the grounds of vote dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

[24] **States** Political subdivisions; multi-member districts

Persistent proportional representation in particular multimember district over the last six elections showed that multimember district did not impermissibly dilute black voting strength in violation of section 2, in the absence of any explanation for success of black candidates in three of the six elections. (Per Justice Brennan with one Justice concurring and four Justices concurring in part and concurring in the judgment.) Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[25] **Federal Courts** Elections, voting, and political rights

Clearly erroneous test of Rule 52(a) is appropriate standard for appellate review of a finding of impermissible vote dilution. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973; Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

14 Cases that cite this headnote

[26] **States** Evidence in general

Finding of impermissible dilution of black voting strength through use of multimember legislative districts was supported by evidence of racially polarized voting, legacy of official discrimination in voting matters, education, housing, employment, and health services, and persistence of campaign appeals to racial prejudice. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

9 Cases that cite this headnote

****2755** ***30** *Syllabus*[*]

In 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, brought suit in Federal District Court, challenging one single-member district and six multimember districts on the ground, *inter alia,* that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of § 2 of the Voting Rights Act of 1965. After appellees brought suit, but before trial, § 2 was amended, largely in response to *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, to make clear that a violation of § 2 could be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2(a), as amended, prohibits a State or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2(b), as amended, provides that § 2(a) is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and that the extent to which members of a protected class have been elected to office is one circumstance that may be considered. The District Court applied the "totality of circumstances" test set forth in § 2(b) and held that the redistricting plan violated § 2(a) because it resulted in the dilution of black citizens' votes in all of the ****2756** disputed districts. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court with respect to five of the multimember districts.

Held: The judgment is affirmed in part and reversed in part.

590 F.Supp. 345, affirmed in part and reversed in part.

Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, concluding that:

***31** 1. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting. Pp. 2762–2772.

2. The language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. Thus, the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have ***32** succeeded as dispositive of appellees' § 2 claims. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters. Pp. 2779–2780.

3. The clearly-erroneous test of Federal Rule of Civil Procedure 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based upon a practical evaluation of the past and ****2757** present realities, whether the political process is equally open to minority voters. In this case, the District Court carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. Pp. 2780–2782.

Justice BRENNAN, joined by Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS, concluded in Part III–C that for purposes of § 2, the legal concept of racially polarized voting, as it relates to claims of vote dilution—that is, when it is used to prove that the minority group is politically cohesive and that white voters will usually be able to defeat the minority's preferred candidates—refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting, and defendants may not rebut that case with evidence of causation or intent. Pp. 2772–2779.

Justice BRENNAN, joined by Justice WHITE, concluded in Part IV–B, that the District Court erred, as a matter of law, in ignoring the significance of the sustained success

black voters have experienced in House District 23. The persistent proportional representation for black residents in that district in the last six elections is inconsistent with appellees' allegation that black voters' ability in that district to elect representatives of their choice is not equal to that enjoyed by the white majority. Pp. 2780–2781.

Justice O'CONNOR, joined by THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST, concluded that:

1. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, such a showing cannot be rebutted by evidence that the divergent voting patterns may ***33** be explained by causes other than race. However, evidence of the reasons for divergent voting patterns can in some circumstances be relevant to the overall vote dilution inquiry, and there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Pp. 2766–2767.

2. Consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. The District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23. Except in House District 23, despite these errors the District Court's ultimate conclusion of vote dilution is not clearly erroneous. But in House District 23 appellees failed to establish a violation of § 2. Pp. 2766–2769.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, an opinion with respect to Part III–C, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B, in which WHITE, J., joined. WHITE, J., filed a concurring opinion, *post,* p. ——. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C.J., and POWELL and REHNQUIST, JJ., joined, *post,* p. ——. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Lacy H. Thornburg, Attorney General of North Carolina, pro se, argued the cause for appellants. With him on the briefs were Jerris Leonard, Kathleen Heenan McGuan, James Wallace, Jr., Deputy Attorney General for Legal Affairs, and Tiare B. Smiley and Norma S. Harrell, Assistant Attorneys General.

Solicitor General Fried argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Assistant Attorney General Reynolds and Deputy Assistant Attorney General Cooper.

Julius LeVonne Chambers argued the cause for appellees. With him on the briefs for appellees Gingles et al. were Eric Schnapper, C. Lani Guinier, and Leslie J. Winner. C. Allen Foster, Kenneth J. Gumbiner, Robert N. ***34** Hunter, Jr., and Arthur J. Donaldson filed briefs for appellees Eaglin et al.*

* Daniel J. Popeo and George C. Smith filed a brief for the Washington Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the American Civil Liberties Union Foundation, Inc., et al. by Cynthia Hill, Maureen T. Thornton, Laughlin McDonald, and Neil Bradley; for Common Cause by William T. Lake; for the Lawyer's Committee for Civil Rights Under Law et al. by James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Frank R. Parker, Samuel Rabinove, and Richard T. Foltin; for James G. Martin, Governor of North Carolina, by Victor S. Friedman; for Legal Services of North Carolina by David H. Harris, Jr., Susan M. Perry, Richard Taylor, and Julian Pierce; for the Republican National Committee by Roger Allan Moore and Michael A. Hess; and for Senator Dennis DeConcini et al. by Walter J. Rockler.

Opinion

****2758** Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, and an opinion with respect to Part III–C, in which Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, and an opinion with respect to Part IV–B, in which Justice WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U.S.C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the

Eastern District of North Carolina pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate ***35** and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act.[3]

After appellees brought suit, but before trial, Congress amended § 2. The amendment was largely a response to this Court's plurality opinion in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and by other federal courts before *Bolden, supra.* S.Rep. No. 97–417, 97th Cong.2nd Sess. 28 (1982), U.S.Code Cong. & Admin.News 1982, pp. 177, 205 (hereinafter S.Rep.).

***36** Section 2, as amended, 96 Stat. 134, reads as follows:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the ****2759** guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U.S.C. § 1973.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2, elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":[4]

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of ***37** the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S.Rep., at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate ***38** Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims. *Gingles v. Edmisten,* 590 F.Supp. 345 (EDNC 1984).

Preliminarily, the court found that black citizens constituted a distinct population and registered-voter minority in each challenged ****2760** district. The court noted that at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

First, the court found that North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting[5] ***39** and designated seat plans[6] for multimember districts. The court observed that even after the removal of direct barriers to black voter registration, such as the poll tax and literacy test, black voter registration remained relatively depressed; in 1982 only 52.7% of age-qualified blacks statewide were registered to vote, whereas 66.7% of whites were registered. The District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination.

Second, the court found that historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites. The court concluded that this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice.

Third, the court considered other voting procedures that may operate to lessen the opportunity of black voters to elect candidates of their choice. It noted that North Carolina has a majority vote requirement for primary elections and, while acknowledging that no black candidate for election to the State General Assembly had failed to win solely because of this requirement, the court concluded that it nonetheless presents a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice. The court also remarked on the fact that North Carolina does not have a subdistrict residency requirement for members of the General Assembly elected from multimember ***40** districts, a requirement which the court found could offset to some extent the disadvantages minority voters often experience in multimember districts.

Fourth, the court found that white candidates in North Carolina have encouraged ****2761** voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

Fifth, the court examined the extent to which blacks have been elected to office in North Carolina, both statewide and

in the challenged districts. It found, among other things, that prior to World War II, only one black had been elected to public office in this century. While recognizing that "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina," 590 F.Supp., at 367, the court found that, in comparison to white candidates running for the same office, black candidates are at a disadvantage in terms of relative probability of success. It also found that the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population. For example, the court noted, from 1971 to 1982 there were at any given time only two-to-four blacks in the 120-member House of Representatives—that is, only 1.6% to 3.3% of House members were black. From 1975 to 1983 there were at any one time only one or two blacks in the 50-member State Senate—that is, only 2% to 4% of State Senators were black. By contrast, at the time of the District Court's opinion, blacks constituted about 22.4% of the total state population.

***41** With respect to the success in this century of black candidates in the contested districts, see also Appendix B to opinion, *post,* p. ——, the court found that only one black had been elected to House District 36—after this lawsuit began. Similarly, only one black had served in the Senate from District 22, from 1975–1980. Before the 1982 election, a black was elected only twice to the House from District 39 (part of Forsyth County); in the 1982 contest two blacks were elected. Since 1973 a black citizen had been elected each 2-year term to the House from District 23 (Durham County), but no black had been elected to the Senate from Durham County. In House District 21 (Wake County), a black had been elected twice to the House, and another black served two terms in the State Senate. No black had ever been elected to the House or Senate from the area covered by House District No. 8, and no black person had ever been elected to the Senate from the area covered by Senate District No. 2.

The court did acknowledge the improved success of black candidates in the 1982 elections, in which 11 blacks were elected to the State House of Representatives, including 5 blacks from the multimember districts at issue here. However, the court pointed out that the 1982 election was conducted after the commencement of this litigation. The court found the circumstances of the 1982 election sufficiently aberrational and the success by black candidates too minimal and too recent in relation to the long history of complete denial of elective opportunities to support the conclusion that black voters' opportunities to elect representatives of their choice were not impaired.

Finally, the court considered the extent to which voting in the challenged districts was racially polarized. Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the court found that all of the challenged districts exhibit severe and persistent racially polarized voting.

***42** Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to ****2762** this Court, pursuant to 28 U.S.C. § 1253, with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22. Appellants argue, first, that the District Court utilized a legally incorrect standard in determining whether the contested districts exhibit racial bloc voting to an extent that is cognizable under § 2. Second, they contend that the court used an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of polarized voting. Third, they maintain that the court assigned the wrong weight to evidence of some black candidates' electoral success. Finally, they argue that the trial court erred in concluding that these multimember districts result in black citizens having less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. We noted probable jurisdiction, 471 U.S. 1064, 105 S.Ct. 2137, 85 L.Ed.2d 495 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

***43** A

SECTION 2 AND ITS LEGISLATIVE HISTORY

[1] Subsection 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the "totality of the circumstances" reveal that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." While explaining that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in evaluating an alleged violation, § 2(b) cautions that "nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations.[7] First and foremost, the Report dispositively rejects the position of the plurality in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which ***44** required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority ****2763** voters.[8] See, *e.g.,* S.Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." *Id.,* at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[9] *Id.,* at 28, U.S.Code Cong. & Admin.News 1982, p. 206. See also *id.,* at 2, 27, 29, n. 118, 36.

[2] In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." *Id.,* at 27, U.S.Code Cong. & Admin.News 1982, p. 205. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political ***45** subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.,* at 28–29; see also *supra,* at ——. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.,* at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims,[10] other factors may also be relevant and may be considered. *Id.,* at 29–30. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.,* at 29, U.S.Code Cong. & Admin.News 1982, p. 207. Rather, ****2764** the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' " *id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), and on a "functional" view of the political process. *Id.,* at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208.

***46** **[3]** **[4]** **[5]** Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.,* at

16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.,* at 33.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority,[11] thus impairing their ability to elect representatives of their choice.[12]

***47** **[6]** The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may " 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' "[13] ****2765** ***48** *Burns v. Richardson,* 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376 (1966) (quoting *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965)). See also *Rogers v. Lodge,* 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982); *White v. Regester,* 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb v. Chavis,* 403 U.S. 124, 143, 91 S.Ct. 1858, 1869, 29 L.Ed.2d 363 (1971). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.[14] See, *e.g.,* Grofman, Alternatives, in Representation and Redistricting Issues 113–114. Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. S.Rep., at 16. Cf. *Rogers v. Lodge, supra,* 458 U.S., at 617, 102 S.Ct., at 3275; *Regester, supra,* 412 U.S., at 765, 93 S.Ct., at 2339; *Whitcomb, supra,* 403 U.S., at 142, 91 S.Ct., at 1868. Minority voters who contend that the multimember form of districting violates § 2, must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. See, *e.g.,* S.Rep., at 16.

[7] **[8]** **[9]** **[10]** **[11]** While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.[15] Stated succinctly, ***49** a ****2766** bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. Bonapfel 355; Blacksher & Menefee 34; Butler 903; Carpeneti 696–699; Davidson, Minority Vote Dilution: An Overview (hereinafter Davidson), in Minority Vote Dilution 4; Grofman, Alternatives 117. Cf. *Bolden,* 446 U.S., at 105, n. 3, 100 S.Ct., at 1520, n. 3 (MARSHALL, J., dissenting) ("It is obvious ***50** that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting"). These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[16] If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[17] Cf. ***51** *Rogers,* 458 U.S., at 616, 102 S.Ct., at 3275. See also, Blacksher & Menefee 51–56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51–55, 58–60, and n. 344; Carpeneti 696–697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, see, *infra,* at ——, and n. 26—usually ****2767** to defeat the minority's preferred candidate. See, *e.g.,* Blacksher & Menefee 51, 53, 56–57, 60. Cf. *Rogers, supra,* at 616–617, 102 S.Ct., at 3274–3275; *Whitcomb,* 403 U.S., at 158–159, 91 S.Ct., at 1877; *McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1043 (CA5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. *Davis v. Bandemer,* 478 U.S. 109, 131–133, 139–140, 106 S.Ct. 2797, ——, 92 L.Ed.2d 85 (1986) (opinion of WHITE, J.); *Bolden, supra,* 446 U.S., at 111, n. 7, 100 S.Ct., at 1523, n. 7 (MARSHALL, J., dissenting); *Whitcomb, supra,* 403 U.S., at 153, 91 S.Ct., at 1874. See also Blacksher & Menefee 57, n. 333; Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L.J. 189, 200, n. 66 (1984) (hereinafter Note, Geometry and Geography).

***52** III

RACIALLY POLARIZED VOTING

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as *amicus curiae* addressing racially polarized voting.[18] First, we describe the District Court's treatment of racially polarized voting. Next, we consider appellants' claim that the District Court used an incorrect legal standard to determine whether racial bloc voting in the contested districts was sufficiently severe to be cognizable as an element of a § 2 claim. Finally, we consider appellants' contention that the trial court employed an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of racial bloc voting.

A

THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING

The investigation conducted by the District Court into the question of racial bloc voting credited some testimony of lay witnesses, but relied principally on statistical evidence presented by appellees' expert witnesses, in particular that offered by Dr. Bernard Grofman. Dr. Grofman collected and evaluated data from 53 General Assembly primary and general elections involving black candidacies. These elections were held over a period of three different election years in the six originally challenged multimember districts.[19] Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate ecological ***53** regression analysis[20] —in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.

The court's initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between ****2768** the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns "substantively significant"? The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated.[21] The court accepted Dr. Grofman's expert opinion that the correlation between the race of the voter and the voter's choice of certain candidates was statistically significant.[22] Finally, adopting Dr. Grofman's terminology, see ***54** Tr. 195, the court found that in all but 2 of the 53 elections[23] the degree of racial bloc voting was "so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters." 590 F.Supp., at 368.

The court also reported its findings, both in tabulated numerical form and in written form, that a high percentage of black voters regularly supported black candidates and that most white voters were extremely reluctant to vote for black candidates. The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice. Based on all of the evidence before it, the trial court concluded that each of the districts experienced racially polarized voting "in a persistent and severe degree." *Id.,* at 367.

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

1

Appellants' Arguments

North Carolina and the United States argue that the test used by the District Court to determine whether voting patterns in the disputed districts are racially polarized to an extent cognizable under § 2 will lead to results that are inconsistent with congressional intent. North Carolina maintains ***55** that the court considered legally significant racially polarized voting to occur whenever "less than 50% of the white voters cast a ballot for the black candidate." Brief for Appellants 36. Appellants also argue that racially polarized voting is legally significant only when it always results in the defeat of black candidates. *Id.,* at 39–40.

The United States, on the other hand, isolates a single line in the court's opinion and identifies it as the court's complete test. According to the United States, the District Court adopted a standard under which legally significant racial bloc voting is deemed to exist whenever " 'the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election.' " ****2769** Brief for United States as *Amicus Curiae* 29 (quoting 590 F.Supp., at 368). We read the District Court opinion differently.

2

The Standard for Legally Significant Racial Bloc Voting

The Senate Report states that the "extent to which voting in the elections of the state or political subdivision is racially polarized," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206, is relevant to a vote dilution claim. Further, courts and commentators agree that racial bloc voting is a key element of a vote dilution claim. See, *e.g., Escambia County, Fla.,* 748 F.2d, at 1043; *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Nevett v. Sides,* 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Johnson v. Halifax County,* 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen, 465, 469; Parker 107; Note, Geometry and Geography 199. Because, as we explain below, the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary ***56** from district to district. Nonetheless, it is possible to state some general principles and we proceed to do so.

[12] The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. See *supra,* at ——. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, Blacksher & Menefee 59–60, and n. 344, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. *Id.,* at 60. The amount of white bloc voting that can generally "minimize or cancel," S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 205; *Regester,* 412 U.S., at 765, 93 S.Ct., at 2339, black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.[24] See, *e.g.,* Butler 874–876; Davidson 5; Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb.Aff.Q. 345 (1976); United States Commission ***57** on Civil Rights, The Voting Rights Act: Unfulfilled Goals 38–41 (1981).

[13] **[14]** Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, *Whitcomb,* 403 U.S., at 153, 91 S.Ct., at 1874, a pattern of racial bloc voting that extends over a period of

time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.[25] Blacksher & Menefee 61; Note, Geometry and Geography **2770 200, n. 66 ("Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests"). Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.[26]

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will *58 vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina—legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. Brief for Appellants 36. And, although the District Court did utilize the measure of " 'substantive significance" that the United States ascribes to it—" 'the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,' " Brief for United States as *Amicus Curiae* 29 (quoting 590 F.Supp., at 368)—the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is *legally* significant through mechanical reliance on this standard.[27] While the court did not phrase the standard for legally significant racial bloc voting exactly as we do, a fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard.

[15] The District Court's findings concerning black support for black candidates in the five multimember districts at issue *59 here clearly establish the political cohesiveness of black voters. As is apparent from the District Court's tabulated findings, reproduced in Appendix A to opinion, *post,* p. ——, black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%.

**2771 In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See *ibid.* The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one.[28]

*60 While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see *infra,* at ——, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, *post,* p. ——. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these blacks did not negate other evidence, derived

from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates,[29] as well as of the ***61** very different order of preference blacks and whites assigned black candidates,[30] in ****2772** reaching its conclusion that legally significant racial polarization exists in each district.

[16] We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

C

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the *principal cause* is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a *correlation* between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income [,] incumbency, education, campaign expenditures," Brief for ***62** Appellants 42, "media use measured by cost, ... name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as *Amicus Curiae* 30, n. 57, can prove that race was the primary determinant of voter behavior.[31]

[17] Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both.[32] Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate *infra,* appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process, S.Rep., at 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and the "searching practical evaluation of the 'past ***63** and present reality,' " *id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers ****2773** to voting patterns that are in some way *caused by race,* rather than to voting patterns that are merely *correlated with the race of the voter,* is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

[18] Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, *e.g.,* S.Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, *supra,* at ——, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently

as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws ***64** that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely *correlated with the voter's race,* but to voting patterns that are *determined primarily by the voter's race,* rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, *e.g.,* Butler 902 (Minority group "members' shared concerns, including political ones, are ... a function of group status, and as such are largely involuntary.... As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group"); S. Verba & N. Nie, Participation in America 151–152 (1972) ("Socioeconomic status ... is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes"). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which ***65** holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes ****2774** and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality, S.Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. *Id.,* at 5, 40.

Furthermore, under appellants' theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are *always* defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is $10,465, and 47.8% of the black community lives in poverty. More than half—51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of $19,042. White residents are better educated than blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex–44. As is the case in Senate District 2, blacks in this ***66** hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc voting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended § 2 and with the Senate Report's admonition that courts take a "functional" view of the political process, S.Rep. 30, n. 119, U.S.Code Cong. & Admin.News 1982, p. 208, and conduct a searching and practical evaluation of reality. *Id.,* at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical ***67** element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, *id.,* at 33, U.S.Code Cong. & Admin.News ****2775** 1982, p. 211, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health" may be relevant to a § 2 claim. *Id.,* at 29, U.S.Code Cong. & Admin.News 1982, p. 206. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates *principally* on the basis of the *candidate's race* is also misplaced.

[19] First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to ... elect representatives *of their choice.*" ***68** Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect

were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, *supra,* the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, *e.g.,* Blacksher & Menefee 59–60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207.

***69** ****2776** Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S.Rep., at 5, 40; H.R.Rep. No. 97–227, p. 31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, *e.g., White v. Regester,* 412 U.S., at 768–769, 93 S.Ct., at 2340–2341; *Kirksey v. Board of Supervisors of Hinds County, Miss.,* 554 F.2d 139, 145–146 (CA5) (en banc), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group ... bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 206 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win ***70** election in a multimember district than in a single-member district. See, *e.g., Graves v. Barnes,* 343 F.Supp. 704, 720–721 (WD Tex.1972), aff'd in part and rev'd in part *sub nom. White v. Regester, supra.* Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122–123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb.Aff.Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, *Escambia County,* 748 F.2d, at 1043 (" '[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination' ") (quoting *United States v. Dallas County Comm'n,* 739 F.2d 1529, 1536 (CA11 1984)); *United States v. Marengo County Comm'n,* 731 F.2d, at 1567.

5

Racial Animosity as Primary Determinant of Voter Behavior

[20] Finally, we reject the suggestion that racially polarized voting refers only to ****2777** white bloc voting which is caused by ***71** white voters' *racial hostility* toward black candidates.[33] To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47

(1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in *Bolden, supra,* that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.[34] Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L.J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee ... heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. The Committee found the testimony of Dr. Arthur S. ***72** Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

> " '[Under an intent test] [l]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.' " *Ibid.* (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on § 2 plaintiffs. *Ibid.* The new intent test would be equally, if not more, burdensome. In order to prove that a *specific factor*—racial hostility—*determined* white voters' ballots, it would be necessary to demonstrate that other potentially relevant ****2778** *causal factors,* such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained:

> ***73** "Many of the[se] independent variables ... would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.
>
> "Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L.J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S.Rep., at 36, U.S.Code Cong. & Admin.News 1982, p. 214. Amended § 2 asks instead "whether minorities have equal access to the process of electing their representatives." *Ibid.*

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, *supra,* requiring proof that racial considerations actually *caused* voter behavior will result—contrary to congressional intent—in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a § 2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court ... make a separate ... finding of intent, after accepting the proof of the factors involved in the *White* [*v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314] analysis ... [would] seriously clou[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." *Id.,* at 37,

U.S.Code Cong. & Admin.News 1982, p. 215. We therefore decline to adopt such a requirement.

***74** 6

Summary

[21] In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

[22] North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election.[35] They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly ****2779** proportional representation.[36] This electoral ***75** success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S.Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.,* at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207, quoting *Zimmer v. McKeithen,* 485 F.2d 1297, 1307 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (*per curiam*). The Senate Committee decided, instead, to " 'require an independent consideration of the record.' " S.Rep., at 29, n. 115, U.S.Code Cong. & Admin.News 1982, p. 207. The Senate Report also emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.' " *Id.,* at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

[23] Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the 'past ***76** and present reality,' " the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, *id.,* at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."[37] 590 F.Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as ****2780** a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claim. Where multimember districting generally works to dilute the minority vote, it

cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

***77** B

[24] The District Court did err, however, in ignoring the significance of the *sustained* success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives,[38] but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court's ultimate conclusion that the challenged multimember districts operate to dilute ***78** black citizens' votes is a mixed question of law and fact subject to *de novo* review on appeal. In support of their proposed standard of review, they rely primarily on *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of "actual malice" in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended § 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as *Amicus Curiae* 18–19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, *e.g., Rogers v. Lodge,* 458 U.S., at 622–627, 102 S.Ct., at 3278–3281; *City of Rome v. United States,* 446 U.S. 156, 183, 100 S.Ct. 1548, 1564, 64 L.Ed.2d 119 (1980); *White v. Regester,* 412 U.S., at 765–770, 93 S.Ct., at 2339–2341. Cf. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

In *Regester, supra,* we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

> ****2781** "we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the ... multimember district in the light of past and present reality, political and otherwise." *Id.,* 412 U.S., at 769–770, 93 S.Ct., at 2341.

Quoting this passage from *Regester* with approval, we expressly held in *Rogers v. Lodge, supra,* that the question whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s ***79** clearly-erroneous standard. 458 U.S., at 622–623, 102 S.Ct., at 3278–3279. Similarly, in *City of Rome v. United States,* we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U.S., at 183, 100 S.Ct., at 1565.

[25] We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past

and present reality,' " S.Rep., at 30, U.S.Code Cong. & Admin.News 1982, p. 208 (footnote omitted), whether the political process is equally open to minority voters. " 'This determination is peculiarly dependent upon the facts of each case,' " *Rogers, supra,* 458 U.S., at 621, 102 S.Ct., at 3277, quoting *Nevett v. Sides,* 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622, 102 S.Ct., at 3278. The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. As we explained in *Bose,* Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S., at 501, 104 S.Ct., at 1960, citing *Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855, n. 15, 102 S.Ct. 2182, 2189, n. 15, 72 L.Ed.2d 606 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

[26] The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, see *supra,* at ——, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 ****2782** to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

***80** B

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

	Primary		General	
	White	**Black**	**White**	**Black**
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a

1982 (Polk)	32	83	33	94

House District 21

	Primary		General	
	White	**Black**	**White**	**Black**
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

House District 23

	Primary		General	
	White	**Black**	**White**	**Black**
1978 Senate				
Barns (Repub.)	n/a	n/a	17	5
1978 House				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89

	Primary		General	
	White	**Black**	**White**	**Black**
1980 House				
Spaulding	n/a	n/a	49	90
1982 House				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

House District 36

	Primary		General	
	White	**Black**	**White**	**Black**
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

House District 39

	Primary		General	
	White	**Black**	**White**	**Black**
1978 House				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25
1980 House				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate				
Small	12	61	n/a	n/a
1982 House				

Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

590 F. Supp., at 369-371.

APPENDIX B TO OPINION OF BRENNAN, J.

Black Candidates Elected From 7 Originally Contested Districts

District	**Prior to**						
(No. Seats)	**1972**	**1972**	**1974**	**1976**	**1978**	**1980**	**1982**
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2 (2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0

See Brief for Appellees, table printed between pages 8 and 9; App. 93-94.

***82** ****2783** Justice WHITE, concurring.

I join Parts I, II, III–A, III–B, IV–A, and V of the Court's opinion and agree with Justice BRENNAN's opinion as to Part IV–B. I disagree with Part III–C of Justice BRENNAN's opinion.

***83** Justice BRENNAN states in Part III–C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis,* 403 U.S. 124, 149–160, 91 S.Ct. 1858, 1872–1878, 29 L.Ed.2d 363 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended

§ 2 is intended to codify the "results" test employed in *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), and *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and to reject the "intent" test propounded in the plurality opinion in ***84** *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S.Rep.). Whereas *Bolden* required members of a racial minority who ****2784** alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S.Rep., at 28, U.S.Code Cong. & Admin.News 1982, p. 206. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.,* at 193–194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See *id.,* at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when § 2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the ***85** level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White.*

I

In order to explain my disagreement with the Court's interpretation of § 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in *two* of which black voters constituted much narrower majorities of about 60%. The black ***86** voters in these districts would often be able to elect the representative of their choice in each of these two districts, ****2785** but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of

the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate. To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white voters ***87** backed a particular minority candidate, and black voters voted only for that candidate, the candidate would receive a total of 475 votes, which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see *ante,* at 2760, n. 5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." *White,* 412 U.S., at 765, 93 S.Ct., at 2339. See also *Fortson v. Dorsey,* 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely ***88** with reference to its ****2786** prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength *is* to be assessed solely in terms of the minority group's ability to elect candidates it prefers. *Ante,* at —— – ——. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 1012, 105 S.Ct. 416, 422, 83 L.Ed.2d 343 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted

30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% ***89** of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Ante,* at 2766. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired.[1] Second, "the minority group must ****2787** be able ***90** to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. *Ante,* at ——. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances ...—usually to defeat the minority's preferred candidate." *Ibid.* If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Ibid.* That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a ***91** majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.

****2788** To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the ***92** black voters who constitute 30% of the town's voting population do not usually succeed in electing one representative of their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates § 2.

Moreover, if the town had a black voting population of 40%, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately 80%.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Ante,* at 2770. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "*Zimmer* factors" that were developed by the Fifth Circuit to implement *White* 's results test and which were highlighted in the Senate Report. S.Rep., at 28–29; see ***93** *Zimmer v. Mc* Keithen, 485 F.2d 1297 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) *(per curiam)*. If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," *ante,* at ——, or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," *ante,* at —— or "the exclusion of members of the minority group from candidate slating processes," *ante,* at —— or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," *ibid.,* or "the use of overt or subtle racial appeals in political campaigns," *ibid.,* or that "elected officials are unresponsive to the particularized needs of the members of the minority group." *Ibid.*. Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and ****2789** that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

***94** II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2. It is not necessary or appropriate to decide in this case whether § 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.

In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

> "At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration." *Gingles v. Edmisten,* 590 F.Supp. 345, 358–359 (EDNC1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with § 2. In my view, we should refrain from deciding in this

case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable ***95** standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 *requires* this approach.

What appellants *do* contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that "[a]lthough blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them* (*i.e.,* in proportion to their presence in the population)," standing alone, constituted a violation of § 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes § 2's proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F.Supp., at 372.[2] The District Court attached ****2790** great weight ***96** to this circumstance as one part of its ultimate finding that "the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.,* at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other *Zimmer* factors, as the Court's thorough summary of the District Court's findings indicates. See *ante,* at —— – ——.

If the District Court had held that the challenged multi-member districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

> "The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, ***97** and is not dispositive." S.Rep., at 194, U.S.Code Cong. & Admin.News 1982, p. 364 (additional views of Sen. Dole).

On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it

follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation.

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*. The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport ****2791** to redefine or alter the ultimate showing of discriminatory effect required by *Whitcomb* and *White*. In my view, therefore, it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

***98** The "results" test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See *White,* 412 U.S., at 766, 93 S.Ct., at 2339–40. While electoral success is a central part of the vote dilution inquiry, *White* held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," *id.,* at 765–766, 93 S.Ct., at 2339–40, and *Whitcomb* flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." 403 U.S., at 156, 91 S.Ct., at 1875. To the contrary, the results test as described in *White* requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct., at 2339–40. By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Davis v. Bandemer,* 478 U.S. 109, 169–170, 106 S.Ct. 2797, ——, ——, 92 L.Ed.2d 85 (1986) (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by *Bolden.* The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in *Whitcomb* and *White.* The Court's test for vote dilution, combined with its standard for evaluating "voting potential," *White, supra,* 412 U.S., at 766, 93 S.Ct., at 2339–2340, means that any racial minority with distinctive interests must *usually* "be represented in legislative halls if ***99** it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." *Whitcomb,* 403 U.S., at 156, 91 S.Ct., at 1875. Nothing in *Whitcomb, White,* or the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in *Whitcomb* and *White* and followed, with some elaboration, in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden.* Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." *Davis v. Bandemer, supra,* 478 U.S., at 132, 106 S.Ct., at ——. Of course, the relative lack of minority electoral success under a challenged plan, when compared ****2792** with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. *Davis v. Bandemer, supra,* at 169–170, 106 S.Ct., at —— (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent ***100** under the challenged plan before

it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." *White, supra,* 412 U.S., at 765, 93 S.Ct., at 2339.

III

Only three Justices of the Court join Part III–C of Justice BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the ***101** Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 207. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics ... dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation. *Id.,* at 33–34. Similarly, I agree with Justice WHITE that Justice BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case. *Ante,* at 2783 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in *aggregating* data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate ****2793** in the primary elections selected for study. *Ante,* at 2771, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. *White* calls for "an intensely local appraisal of the design and impact of the ... multimember district," 412 U.S., at 769–770, 93 S.Ct., at 2341, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtuallyproportional ***102** minority electoral success, I would accordingly leave undisturbed the District Court's decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But Justice BRENNAN, joined by Justice WHITE, concludes that "persistent proportional representation" will foreclose a § 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." *Ante,* at 2780. I agree with Justice BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what

would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, *ante,* at ——, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each ***103** of these districts in three of the last five elections. Finally, in House District 23 a black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population." 590 F.Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, "[t]he inquiry into the existence of vote dilution ... is district-specific." *Ante,* at 2771, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide "on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections," *ante,* at 2790, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black ****2794** candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F.Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend *some* support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court's conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that "in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and ... in each district it presently operates to ***104** minimize the voting strength of black voters." *Id.,* at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court's findings concerning the other *Zimmer* factors, and hence that court's ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer's caveat against *necessarily* foreclosing a vote dilution claim on the basis of isolated black successes, 485 F.2d, at 1307; see S.Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in District 23. See, *e.g., Turner v. McKeithen,* 490 F.2d 191 (CA5 1973) (no black candidates elected); *Wallace v. House,* 515 F.2d 619 (CA5 1975) (one black candidate elected), vacated on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976).

I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice. With respect to House District 23, the District Court's failure to accord black electoral success such ***105** weight was clearly erroneous, and the

District Court identified no reason for not giving this degree of success preclusive effect. Accordingly, I agree with Justice BRENNAN that appellees failed to establish a violation of § 2 in District 23.

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred ****2795** candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. *White,* 412 U.S., at 765, 93 S.Ct., at 2339.

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

***106** Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante,* at ——— – ———; ——— – ———, and n. 23; ——— – ———, and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante,* at ——— – ——— is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies.[2]

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not ***107** inconsistent with the District Court's ultimate finding concerning House District 23.[3] The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, *ante,* at ———, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

> "The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically ****2796** cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." *Ante,* at 2782.

To paraphrase the Court's conclusion about the other districts, *ibid.,* I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice.[4] Accordingly,

I concurin ***108** the Court's opinion except Part IV–B and except insofar as it explains why it reverses the judgment respecting House District 23.

All Citations

478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25, 54 USLW 4877, 4 Fed.R.Serv.3d 1082

Footnotes

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

1 Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

2 Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—four members), House No. 36 (Mecklenburg County—eight members), House No. 39 (part of Forsyth County—five members), House No. 23 (Durham County—three members), House No. 21 (Wake County—six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties—four members).

3 Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, *Gingles v. Edmisten,* 590 F.Supp. 345, 350–358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.

4 These factors were derived from the analytical framework of *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen,* 485 F.2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (*per curiam*). S.Rep., at 28, n. 113.

5 Bullet (single-shot) voting has been described as follows:

" 'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.' " *City of Rome v. United States,* 446 U.S. 156, 184, n. 19, 100 S.Ct. 1548, 1565, n. 19, 64 L.Ed.2d 119 (1980), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

6 Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, *e.g., City of Rome, supra,* at 185, n. 21, 100 S.Ct., at 1566, n. 21.

7 The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n. 12, 24, n. 49. We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, *e.g., Garcia v. United States,* 469 U.S. 70, 76, and n. 3, 105 S.Ct. 479, 483, and n. 3, 83 L.Ed.2d 472 (1984); *Zuber v. Allen,* 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969).

8 The Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). S.Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37

L.Ed.2d 314 (1973), and *Zimmer v. McKeithen,* 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S.Rep., at 16, U.S.Code Cong. & Admin.News 1982, p. 193.

9 The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Id.,* at 40, U.S.Code Cong. & Admin.News 1982, p. 218 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was " 'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.' " *Id.,* 5, U.S.Code Cong. & Admin.News 1982, p. 182 (quoting 111 Cong.Rec. 8295 (1965) (remarks of Sen. Javits)).

10 Section 2 prohibits all forms of voting discrimination, not just vote dilution. S.Rep., at 30.

11 Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis.Stud.Q. 465, 465–466 (1977) (hereinafter Engstrom & Wildgen). See also Derfner, Racial Discrimination and the Right to Vote, 26 Vand.L.Rev. 523, 553 (1973) (hereinafter Derfner); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86–100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

12 The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

13 Commentators are in widespread agreement with this conclusion. See, *e.g.,* Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla.St.U.L.Rev. 85 (1979) (hereinafter Berry & Dye); Blacksher & Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden,* 34 Hastings L.J. 1 (1982) (hereinafter Blacksher & Menefee); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga.L.Rev. 353 (1976) (hereinafter Bonapfel); Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La.L.Rev. 851 (1982) (hereinafter Butler); Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U.Pa.L.Rev. 666 (1972) (hereinafter Carpeneti); Davidson & Korbel, At-Large Elections and Minority Group Representation, in Minority Vote Dilution 65; Derfner; B. Grofman, Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues (hereinafter Grofman, Alternatives), in Representation and Redistricting Issues 107 (B. Grofman, R. Lijphart, H. McKay, & H. Scarrow eds., 1982) (hereinafter Representation and Redistricting Issues); Hartman, Racial Vote Dilution and Separation of Powers, 50 Geo.Wash.L.Rev. 689 (1982); Jewell, The Consequences of Single-and Multimember Districting, in Representation and Redistricting Issues 129 (1982) (hereinafter Jewell); Jones, The Impact of Local Election Systems on Political Representation, 11 Urb.Aff.Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J.Pol. 134 (1979); Karnig, Black Representation on City Councils, 12 Urb.Aff.Q. 223 (1976); Parker 87–88.

14 Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," *Rogers v. Lodge,* 458 U.S.,

at 623, 102 S.Ct., at 3279, leaving the minority effectively unrepresented. See, *e.g.,* Grofman, Should Representatives be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

15 Under a "functional" view of the political process mandated by § 2, S.Rep., at 30, n. 120, U.S.Code Cong. & Admin.News 1982, p. 208, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.,* 28–29, U.S.Code Cong. & Admin.News 1982, p. 206. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but *not essential to,* a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, *e.g., McMillan v. Escambia County, Fla.,* 748 F.2d 1037, 1043 (CA5 1984); *United States v. Marengo County Comm'n,* 731 F.2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984); *Nevett v. Sides,* 571 F.2d 209, 223 (CA5 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Johnson v. Halifax County,* 594 F.Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

16 In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

17 The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

"To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates.... [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55–56 (footnotes omitted; emphasis added).

18 The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

19 The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.

20 The District Court found both methods standard in the literature for the analysis of racially polarized voting. 590 F.Supp., at 367–368, n. 28, n. 32. See also Engstrom & McDonald, Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting, 17 Urb.Law. 369 (Summer 1985); Grofman, Migalski, & Noviello, The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199 (Apr.1985) (hereinafter Grofman, Migalski, & Noviello).

21 The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition—"racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." *Id.,* at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See, *infra,* at ——.

22 The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F.Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical Evidence in Litigation 32–34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum.L.Rev. 702, 716–720 (1980); Grofman, Migalski, & Noviello 206.

23 The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F.Supp., at 368, n. 31.

24 This list of factors is illustrative, not comprehensive.

25 The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

26 This list of special circumstances is illustrative, not exclusive.

27 The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a § 2 claim.

28 In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2–10, that the court relied on data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

29 For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent—who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did *not* vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed

that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

30 The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

31 Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

32 The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See *Lee County Branch of NAACP v. Opelika,* 748 F.2d 1473, 1482 (1984); *Jones v. Lubbock,* 730 F.2d 233, 234 (1984) (Higginbotham, J., concurring).

33 It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. *United Jewish Organizations v. Carey,* 430 U.S. 144, 166, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977); *Rogers v. Lodge,* 458 U.S., at 623, 102 S.Ct., at 3278. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.

34 The Senate Report rejected the argument that the words "on account of race," contained in § 2(a), create any requirement of purposeful discrimination. "[I]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." S.Rep., at 27–28, n. 109, U.S.Code Cong. & Admin.News 1982, p. 205.

35 The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black, two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

36 The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, *supra,* House District 21 elected a black to its six-member delegation in 1980, House District 39 elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

37 See also *Zimmer v. McKeithen,* 485 F.2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

38 We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

1 I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether it is imposed by § 2. I note, however, the artificiality

of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante,* at 2765–2765, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute such a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

2 At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, *e.g.,* 590 F.Supp., at 367. Nowhere in its opinion, however, did the District Court state that § 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population.

1 See *ante,* at 2779 ("Section 2(b) provides that '[t]he extent to which members of a protected class have been elected to office ... is one circumstance which may be considered.' 42 U.S.C. § 1973(b).... However, the Senate Report expressly states that 'the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," ' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate.' ... The Senate Committee decided, instead, to ' "require an independent consideration of the record" ' ") (internal citations omitted).

2 See *ante,* at 46 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

3 See *ante,* at ——— – ———, and n. 23, ———, n. 29, ——— – ———.

4 Even under the Court's analysis, the decision simply to reverse—without a remand—is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. *ante,* at 2780, n. 38 ("We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," *ante,* at 2782, the Court's abrupt entry of judgment for appellants on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider.

109 S.Ct. 276
Supreme Court of the United States

TOWN OF HUNTINGTON, NEW YORK, et al., Appellants
v.
HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.

No. 87-1961.
|
Nov. 7, 1988.
|
Rehearing Denied Jan. 9, 1989.
|
See 488 U.S. 1023, 109 S.Ct. 824.

Synopsis

Action was brought under Fair Housing Act against town for refusing to amend ordinance restricting private multifamily housing projects to largely minority urban renewal area. The United States District Court for the Eastern District of New York, Israel Leo Glasser, J., 668 F.Supp. 762, found that town did not violate Act, and appeal was taken. The Court of Appeals for the Second Circuit, Kaufman, Circuit Judge, 844 F.2d 926, reversed. On appeal, the Supreme Court held that disparate impact of town's refusal to amend ordinance was shown, and sole justification proffered to rebut prima facie case under Title VIII-that ordinance encouraged developers to invest in deteriorated and needy section of town-was clearly inadequate.

Affirmed.

Justices White, Marshall, and Stevens would note probable jurisdiction and set case for oral argument.

West Headnotes (1)

[1] **Civil Rights** Property and Housing

Town's refusal to amend zoning ordinance restricting private multifamily housing projects to largely minority urban renewal area was shown to have disparate impact, and sole justification proffered to rebut prima facie case under Title VIII-that ordinance encouraged developers to invest in deteriorated and needy section of town-was inadequate. Civil Rights Act of 1968, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

130 Cases that cite this headnote

Opinion

***16** ****276** PER CURIAM.

The motion of New York Planning Federation for leave to file a brief as *amicus curiae* is granted.

The town of Huntington, N.Y., has about 200,000 residents, 95% of whom are white and less than 4% black. Almost three-fourths of the black population is clustered in six census tracts in the town's Huntington Station and South Greenlawn areas. Of the town's remaining 42 census tracts, 30 are at least 99% white.

As part of Huntington's urban renewal effort in the 1960's, the town created a zoning classification (R-3M Garden Apartment District) permitting construction of multifamily housing projects, but by § 198-20 of the Town Code, App. to Juris. Statement 94a, restricted private construction of such housing to the town's "urban renewal area"-the section of the town in and around Huntington Station, where 52% of the residents are minorities. Although § 198-20 permits the Huntington Housing Authority (HHA) to build multifamily housing townwide, the only existing HHA project is within the urban renewal area.

Housing Help, Inc. (HHI), a private developer interested in fostering residential integration, acquired an option to purchase a site in Greenlawn/East Northport, a 98% white section of town zoned for single-family residences. On February 26, 1980, HHI requested the town board to commit to amend § 198-20 of the Town Code to permit multifamily rental construction by a private developer. On January 6, 1981, the board formally rejected this request. On February 23, 1981, HHI, the Huntington Branch of the National Association for the Advancement of Colored

People (NAACP), and two black, low-income residents of Huntington (appellees) filed a complaint against the town and members of the town board (appellants) in the Federal District Court for the Eastern District of New ****277** York, alleging, *inter alia,* that they had violated Title VIII of the Civil Rights Act of 1968 by (1) refusing to amend the zoning code to allow for ***17** private construction of multifamily housing outside the urban renewal zone and (2) refusing to rezone the proposed site to R-3M. Appellees asserted that both of these claims should be adjudicated under a disparate-impact standard. Appellants agreed that the facial challenge to the ordinance should be evaluated on that basis, but maintained that the decision not to rezone the proposed project site should be analyzed under a discriminatory-intent standard.

Following a bench trial, the District Court rejected appellees' Title VIII claims. 668 F.Supp. 762 (EDNY 1987). The Court of Appeals for the Second Circuit reversed as to both claims. 844 F.2d 926 (1988). The Court of Appeals held that, in order to establish a prima facie case, a Title VIII plaintiff need only demonstrate that the action or rule challenged has a discriminatory impact. As to the failure to amend the zoning ordinance (which is all that concerns us here), the court found discriminatory impact because a disproportionately high percentage of households that use and that would be eligible for subsidized rental units are minorities, and because the ordinance restricts private construction of low-income housing to the largely minority urban renewal area, which "significantly perpetuated segregation in the Town." *Id.,* at 938. The court declared that in order to rebut this prima facie case, appellants had to put forth "bona fide and legitimate" reasons for their action and had to demonstrate that no "less discriminatory alternative can serve those ends." *Id.,* at 939. The court found appellants' rationale for refusal to amend the ordinance-that the restriction of multifamily projects to the urban renewal area would encourage developers to invest in a deteriorated and needy section of town-clearly inadequate. In the court's view, that restriction was more likely to cause developers to invest in towns other than Huntington than to invest in Huntington's depressed urban renewal area, and tax incentives would have been a more efficacious and less discriminatory means to the desired end.

***18** After concluding that appellants had violated Title VIII, the Court of Appeals directed Huntington to strike from § 198-20 the restriction of private multifamily housing projects to the urban renewal area and ordered the town to rezone the project site to R-3M.

Huntington seeks review pursuant to 28 U.S.C. § 1254(2) on the basis that, in striking the zoning limitation from the Town Code, the Court of Appeals invalidated "a State statute ... as repugnant to" Title VIII, a "la[w] of the United States." Viewing the case as involving two separate claims, as presented by the parties and analyzed by the courts below, we note jurisdiction, but limit our review to that portion of the case implicating our mandatory jurisdiction. Thus, we expressly decline to review the judgment of the Court of Appeals insofar as it relates to the refusal to rezone the project site.

Since appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one. Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate. The other points presented to challenge the court's holding with regard to the ordinance do not present substantial federal questions. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice WHITE, Justice MARSHALL, and Justice STEVENS would note probable jurisdiction and set the case for oral argument.

All Citations

488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180

New York Official Reports

61 A.D.2d 1030, 403 N.Y.S.2d 98

***1030** Town of Huntington et al., Appellants,

v.

Park Shore Country Day Camp of Dix Hills, Inc., Respondent

Supreme Court, Appellate Division,
Second Department, New York
March 20, 1978

CITE TITLE AS: Town of Huntington v Park Shore Country Day Camp of Dix Hills

In an action, *inter alia*, to enjoin defendant from operating commercial tennis courts on its residentially zoned property, in which defendant, by way of counterclaim, seeks a declaration that the zoning chapter of the Code of the Town of Huntington is unconstitutional as applied to its property, plaintiffs appeal from a judgment of the Supreme Court, Suffolk County, entered November 30, 1976, which, after a nonjury trial, denied the application for a permanent injunction.

HEADNOTE

MUNICIPAL CORPORATIONS
ZONING

(1) In action to enjoin defendant from operating commercial tennis courts on its residentially zoned property, judgment which denied permanent injunction reversed, on law, injunctive relief granted as sought in complaint, and it is declared that zoning ordinance is not illegal and unconstitutional as applied to defendant's property --- Special Term held that ordinance unconstitutional as applied to defendant's property because it permitted tennis courts operated as ancillary function of nonprofit private club or school but did not permit them as profit-making enterprises in residentially zoned area --- Zoning ordinances are presumed constitutional and questioner has burden of proving invalidity ‘‘beyond a reasonable doubt’‘ --- Defendant has not met this burden and, accordingly, injunction must be granted.

Judgment reversed, on the law, with costs; application for injunctive relief granted in accordance with the relief sought therefor in the complaint; and it is declared that the zoning ordinance in question is not illegal and unconstitutional as applied to defendant's property. Action remanded to Special Term for the entry of an appropriate amended judgment in accordance herewith. Special Term held that the ordinance in question was unconstitutional as applied because it permitted tennis courts operated as an ancillary function of a nonprofit private club or school, but did not permit them as profit-making enterprises in this residentially zoned area. Zoning ordinances are presumed constitutional and a questioner has the burden of proving invalidity “"beyond a reasonable doubt”" *(Marcus Assoc. v Town of Huntington*, 57 AD2d 116, 117). Defendant has not met this burden and, accordingly, the judgment must be reversed and an injunction granted (see *Matter of Tarolli v Howe*, 37 NY2d 865).

Titone, J. P., Gulotta, Shapiro and Cohalan, JJ., concur.

2019 WL 2647355
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

UNITED STATES of America, Plaintiff,

v.

CITY OF EASTPOINTE; Eastpointe City Council; Suzanne Pixley, in her official capacity as Mayor of Eastpointe; Cardi DeMonaco Jr., Michael Klinefelt, Sarah Lucido, and Monique Owens, in their official capacities as members of the Eastpointe City Council; and Joseph Sobota, in his official capacity as Eastpointe City Clerk, Defendants.

Civil Action No. 4:17-CV-10079 (TGB) (DRG)
|
Signed 06/26/2019

Attorneys and Law Firms

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For Defendants: ANGELA BULLOCK GABEL, ABG Law Office, 7710 Carondelet Ave., Suite 405, Clayton, MO 63105, SUZANNE PIXLEY, Mayor, 23200 Gratiot Avenue, Eastpointe, MI 48021, RICHARD S. ALBRIGHT, ROBERT D. IHRIE, Ihrie O'Brien, 24055 Jefferson Ave., Suite 2000, St. Clair Shores, MI 48080.

CONSENT JUDGMENT AND DECREE

HON. TERRENCE G. BERG, UNITED STATES DISTRICT JUDGE

***1** The Attorney General filed this action to enforce Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. The complaint alleges that the current at-large, multiple-vote method of electing the Eastpointe City Council results in black citizens of the City of Eastpointe having less opportunity than white citizens to participate in the political process and to elect candidates of their choice to the City Council, in violation of Section 2. The United States makes no claim that the City's at-large, multiple vote method of election is intentionally discriminatory. The parties have entered into this Consent Decree to avoid the risks, expense, and burdens of litigation and to resolve voluntarily the claims in the United States' Complaint.

The parties stipulate as follows:

1. This Court has original jurisdiction of this action under 28 U.S.C. §§ 1331, 1345, and 2201(a) and 52 U.S.C. § 10308(f).

2. Defendant City of Eastpointe is a political and geographical subdivision of the State of Michigan.

3. Defendant Eastpointe City Council is the legislative and governing body of the City of Eastpointe. Eastpointe Charter ch. III, §§ 1-2.

4. Defendant Suzanne Pixley is the mayor of the City of Eastpointe, the presiding officer and executive head of the City. Eastpointe Charter ch. III, § 7. As mayor, she also serves on the Eastpointe City Council. *Id.* §§ 1-2. She is named in her official capacity.

5. Defendants Cardi DeMonaco Jr., Michael Klinefelt, Sarah Lucido, and Monique Owens are elected members of the Eastpointe City Council. Eastpointe Charter ch. III, § 2. They are named in their official capacities.

6. Defendant Joseph Sobota is the Eastpointe City Clerk, the city official responsible for the administration of elections. Eastpointe Charter ch. III, § 23; Mich. Comp. Laws § 168.29. He is named in his official capacity.

7. The Eastpointe City Council has four council members and a mayor. Eastpointe Charter ch. III, § 2.

8. Members of the City Council are each elected at-large by all voters in Eastpointe and serve staggered, four-year terms. Eastpointe Charter ch. III, §§ 3-4; Eastpointe Code § 2-20.

9. Michigan law does not mandate the current at-large, multiple-vote method to elect the Eastpointe City Council. *See* Mich. Comp. Laws § 117.3(a).

10. According to the 2010 Census, Eastpointe had a population of 32,442, of whom 20,898 were white (64.4%), 9,837 were black (30.3%), and 1,707 were members of other racial groups (5.3%). The City of Eastpointe had a 2010 Census voting-age population of 24,103, of whom 16,885 were white (70.0%), 6,154 were black (25.5%), and 1,064 were members of other racial groups (4.4%).

11. The black community of Eastpointe has continued to grow since the 2010 Census. The 2013-2017 American Community Survey (ACS) estimated that black residents made up approximately 46% of the population of Eastpointe and approximately 42% of the citizen voting-age population.

12. While Defendants have not and do not concede the ultimate issue of Section 2 liability, Defendants nonetheless acknowledge that it would be reasonable for the Court to find that the three preconditions established by *Thornburg v. Gingles*, 478 U.S. 30 (1986), are present and that, under the totality of the circumstances, the United States would succeed should this matter proceed to trial.

***2** 13. Defendants will discontinue the current at-large, multiple-vote method of electing members of the Eastpointe City Council.

14. Defendants will implement a method of election that provides for election of the four councilmembers of the Eastpointe City Council using ranked choice voting.

15. Defendants will maintain staggered terms for members of the Eastpointe City Council, electing two councilmembers in each regularly scheduled election.

THEREFORE, with the consent of the parties, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The current at-large, multiple-vote method of electing members of the Eastpointe City Council results in a violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

2. The United States did not claim, nor has there been a finding, that the method of election for the Eastpointe City Council is intentionally discriminatory.

3. Defendants, their officers, agents, employees, successors, and all other persons acting in concert with any of them shall cease conducting elections for the Eastpointe City Council based on the current at-large, multiple-vote method of election.

4. The current at-large, multiple-vote method of electing members of the Eastpointe City Council shall be replaced with ranked choice voting.

5. With respect to Eastpointe City Council elections, "ranked choice voting" means the method of casting and tabulating votes in which voters rank candidates in order of choice and tabulation proceeds in rounds. Procedures for ranked choice voting shall substantially conform to the memorandum of understanding into which the parties separately entered on June 5, 2019.

6. Beginning with the first general municipal election on November 5, 2019, all elections for the Eastpointe City Council shall be conducted using ranked choice voting. To the extent that technical problems render it practically impossible to implement ranked choice voting in November 2019, the parties agree to advise the Court and to seek modification of this Decree or supplemental relief from the Court.

7. Defendants shall codify the ranked choice voting method of election for the Eastpointe City Council in the Eastpointe City Code.

8. To the extent this Decree conflicts with any provision of the Eastpointe City Charter, this Decree shall supersede such provision.

9. Defendants shall take all necessary steps to publicize the new method of election for the Eastpointe City Council and the election schedule (including the candidate qualifying period) and will conduct a robust program to educate Eastpointe voters, particularly concerning ranked choice voting.

10. Notwithstanding Section 736f of the Michigan Election Law, Mich. Comp. Laws § 168.736f, Defendants may provide ballot marking instructions compatible with ranked choice voting to electors.

11. The parties shall jointly endeavor to facilitate implementation of ranked choice voting in the City of Eastpointe.

12. This decree shall expire four years from its effective date, absent further action by this Court. The parties may seek to extend this decree by mutual consent.

13. This Court shall retain jurisdiction over this matter to enforce the provisions of the Decree and for such further relief as may be appropriate.

***3 SO ORDERED**.

All Citations

Not Reported in Fed. Supp., 2019 WL 2647355

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704 F.Supp.2d 411
United States District Court,
S.D. New York.

UNITED STATES of America,
Cesar Ruíz, Plaintiffs,
v.
VILLAGE OF PORT CHESTER, Defendant.

No. 06 Civ. 15173(SCR).
|
April 1, 2010.

Synopsis

Background: United States filed action against incorporated village, alleging that at-large system used to elect six members of village's board of trustees denied Hispanic population equal opportunity to participate in political process and elect representatives of their choice, in violation of Voting Rights Act. Following bench trial, District Court concluded that village's voting system violated Act, and directed parties to submit proposed remedial plans.

Holdings: The District Court, Stephen C. Robinson, J., held that:

[1] village's Hispanic population was sufficiently large and compact so as to constitute majority in single-member district;

[2] government's expert could disregard precinct boundaries when drawing proposed districts;

[3] Hispanic population was politically cohesive and voted as bloc;

[4] village's white majority voted sufficiency as bloc to enable it, in absence of special circumstances, to defeat Hispanic minority's preferred candidate;

[5] totality of circumstances indicated that village's method of electing board members violated Voting Rights Act; and

[6] it would adopt village's remedial cumulative voting plan.

So ordered.

West Headnotes (30)

[1] Election Law Dilution of voting power in general

No specific showing of discriminatory intent is required to prove violation of Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

[2] Election Law Dilution of voting power in general

Analysis of three factors set forth in Supreme Court case of *Thornburg v. Gingles* and whether each has been proven by preponderance of evidence is first step in two-part analysis of vote dilution claim under Voting Rights Act on behalf of minority voters. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

[3] Municipal Corporations Nature and constitution of body in general

District court, in analyzing, under Voting Rights Act, vote dilution claim on behalf of minority voters in village, was required to consider whether, under totality of circumstances, challenged practice of using at-large system to elect members of village's board of trustees impaired ability of minority voters to participate equally in political process. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

Judicial assessment of totality of circumstances in vote dilution claim under Voting Rights Act requires searching practical evaluation of past and present reality. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

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

List of factors for considering vote dilution claims set forth in Senate Judiciary Committee Report accompanying amendments to section of Voting Rights Act barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice is neither comprehensive nor exclusive; plaintiffs need not prove majority of these factors, nor even any particular number of them in order to sustain their claims, but instead, factors are simply guideposts in broad-based inquiry in which district judges are expected to roll up their sleeves and examine all aspects of past and present political environment in which challenged electoral practice is used. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

Best method to judge whether particular minority group would constitute an effective majority in single-member district, as precondition for challenge to at-large system under Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice, is to examine voting age population (VAP) and citizen voting age population (CVAP) data for that district. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

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

Proper measure of effective majority of minority voters in a single-member district, as precondition for challenge to at-large system under Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice, does not have to include consideration of voter turnout. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

Unless minority voters possess potential to elect representatives in absence of an at-large voting system, they cannot claim that their voting rights have been implicated by that system, in violation of Voting Rights Act; this requirement is designed to ensure that minority population in subject area will have real opportunity to elect candidates of its choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3 Cases that cite this headnote

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

Census data is presumptively accurate in determining whether minority group is sufficiently large and geographically compact to constitute majority in single-member district, as required to sustain vote dilution claim under Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

[10] **Municipal Corporations** Nature and constitution of body in general

Village's Hispanic population was sufficiently large and compact so as to constitute majority in single-member district, as supported government's claim that at-large system used

to elect six members of village's board of trustees denied Hispanic population equal opportunity to participate in political process and elect representatives of their choice, in violation of Voting Rights Act; proposed single-member districts were drawn in accordance with traditional districting principals of population balancing and compactness, there was no evidence that race was predominant factor in crafting proposed district boundaries, and Hispanics constituted slight citizen voting age population (CVAP) majority in one district under first plan, and even more substantial majority under modified plan. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[11] **Election Law** Political subdivision boundaries

While respect for existing political boundaries is valued traditional districting method, election precincts are not such important political boundaries that they should negate districting proposal, particularly where other key districting principles are obeyed.

2 Cases that cite this headnote

[12] **Municipal Corporations** Nature and constitution of body in general

Government's expert could disregard precinct boundaries when drawing proposed districts for purpose of determining, in vote dilution action under Voting Rights Act, whether village's Hispanic population was sufficiently large and compact so as to constitute majority in single-member district. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

[13] **Election Law** Population as basis and deviation therefrom

Election Law Compactness and cohesiveness of minority group

While traditional districting principles typically require use of total population in drawing district boundaries, in determining whether minority group is sufficiently large and compact so as to constitute majority in single-member district, as would support vote dilution claim under Voting Rights Act, district courts look to voting age population (VAP), and in particular to citizen voting age population (CVAP), as relevant population in district. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3 Cases that cite this headnote

[14] **Municipal Corporations** Nature and constitution of body in general

Village's Hispanic population was politically cohesive and voted as bloc, as supported government's claim that at-large system used to elect six members of village's board of trustees denied Hispanic population equal opportunity to participate in political process and elect representatives of their choice, in violation of Voting Rights Act; government's expert testified that in all 16 endogenous elections she looked at, Hispanics were cohesive. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

If minority group is not politically cohesive, it cannot be said that selection of multimember electoral structure thwarts distinctive minority group interests, in violation of Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

Proving that white majority votes sufficiently as bloc to enable it, in absence of special circumstances, to defeat minority group's preferred candidate, as would support vote dilution claim under Voting Rights Act, enables minority group to show that submergence in white multimember district impedes its ability to elect its chosen representatives and distinguishes

structural dilution from mere loss of occasional election. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[17] **Municipal Corporations** Nature and constitution of body in general

Village's white majority voted sufficiency as bloc to enable it, in absence of special circumstances, to defeat Hispanic minority's preferred candidate, as supported government's claim that at-large system used to elect six members of village's board of trustees denied Hispanic population equal opportunity to participate in political process and elect representatives of their choice, in violation of Voting Rights Act; in 12 of 16 endogenous elections examined, candidates of choice of Hispanic voters in village were defeated by candidates of choice of non-Hispanic voters. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4 Cases that cite this headnote

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

As part of analysis as to whether white majority votes sufficiently as bloc to enable it, in absence of special circumstances, to defeat minority group's preferred candidate, as would support vote dilution claim under Voting Rights Act, district courts in Second Circuit must consider "white versus white" elections. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

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

In district where elections are shown usually to be polarized, fact that racially polarized voting is not present in one or few individual elections does not necessarily negate conclusion that district experiences legally significant bloc voting, as would support vote dilution claim under Voting Rights Act. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[20] **Municipal Corporations** Nature and constitution of body in general

Totality of circumstances indicated that village's at-large system used to elect six members of incorporated village's board of trustees denied Hispanic population equal opportunity to participate in police process and elect representatives of their choice, in violation of Voting Rights Act; there was some history of official discrimination in village that continued to touch rights of Hispanics to participate in political process, racial polarization existed in village, electoral practices enhanced opportunities for discrimination, candidate selection process allowed limited access to outsiders or upstart candidates, village's most recent election for mayor was marred by racial appeal, and no member of Hispanic community in village had ever been elected to board. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

"Racial polarization" exists, as would support vote dilution claim under Voting Rights Act, where there is consistent relationship between race of voter and way in which voter votes. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

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

A district court must give defendant jurisdiction in vote dilution action under Voting Rights Act first opportunity to suggest legally acceptable remedial plan, based on theory that judiciary should not intrude on legislative policy any more than necessary; court must also defer to choice of governing legislative body so long as choice is consistent with federal statutes and Constitution.

Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

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

Degree of deference district court is required to give to a defendant jurisdiction's proposed remedial plan in vote dilution action under Voting Rights Act is quite strong; court may not substitute its own remedial plan for defendant's legally acceptable one, even if it believes another plan would be better. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

[24] **Municipal Corporations** Nature and constitution of body in general

District court would, in vote dilution action under Voting Rights Act, adopt village's proposed remedial plan, namely, at-large, cumulative voting scheme with elimination of staggered terms, pursuant to which each voter would be allotted same number of votes as there were seats up for election and would be free to allocate them however he or she chose; plan was legally acceptable, and plan would cleanse violation which resulted from prior plan, namely, that Hispanic voters in village did not have equal opportunity to participate in political process, by giving Hispanics genuine opportunity to elect representatives of their choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

[25] **Municipal Corporations** Nature and constitution of body in general

For village's proposed remedial plan to cleanse violation of Voting Rights Act provision which barred standard, practice, or procedure that impaired ability of minority voters to participate equally in political process and to elect candidates of their choice with respect to Hispanic population in village, plan was required to afford Hispanics equal opportunity to participate in political processes and to elect candidates of their choice; that did not mean that village was obligated to guarantee electoral success for Hispanics, but rather plan was required to provide genuine opportunity to exercise electoral power that was commensurate with its population. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2 Cases that cite this headnote

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

A defendant's plan to remedy violation of Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice should not create new violation of that section. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

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

A defendant's plan to remedy Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice must meet constitutional requirements of one-person, one vote and prohibition on improper use of race in districting. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

1 Case that cites this headnote

[28] **Election Law** Cumulative voting

In deciding whether to adopt a defendant's proposed cumulative voting plan to remedy violation of Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice, district courts evaluate whether cumulative voting will actually give minorities opportunity to elect candidates of their choosing using commonly-accepted and reliable political science concept called "threshold of exclusion," which is percentage of vote that will guarantee winning of seat even under most unfavorable circumstances. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3 Cases that cite this headnote

[29] **Election Law** Cumulative voting

Particularly when cumulative voting plan is proposed in jurisdiction where vote dilution is due in part to historical discrimination in education and socio-economic factors, it must contain plan to educate voters on new process or else it is counterproductive to correcting violation of Voting Rights Act provision barring standard, practice, or procedure that impairs ability of minority voters to participate equally in political process and to elect candidates of their choice. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

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

If race is predominant factor motivating districting plan such that legislature subordinated traditional race-neutral districting principles, district court, in analyzing whether plan violates Equal Protection Clause, should apply strict scrutiny, under which plan will only survive if it is narrowly tailored to serve compelling state interest. U.S.C.A. Const.Amend. 14.

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OPINION AND ORDER

STEPHEN C. ROBINSON, District Judge.

On January 17, 2008, the Court found that Plaintiffs had demonstrated that the Village of Port Chester's at-large voting system for electing its Board of Trustees violated Section 2 of the Voting Rights Act of 1965. After careful consideration of the parties' proposed remedial plans, the Court issued a summary order on November 6, 2009 concluding that Defendant, the Village, had proposed a legally acceptable remedy and ordered the implementation of at-large elections with cumulative voting. In furtherance of the implementation, the parties were ordered to submit to the Court a Consent Decree detailing the requisite education and outreach program. The Court also lifted the injunction on the Trustee elections, providing that the 2010 elections shall be held in June 2010 on a date agreed to by the parties to give sufficient time for the proper implementation of the new system. This opinion combines the Court's findings in both the liability and remedial phase of the litigation and is the final order in this matter.

I. Procedural Background

The United States of America (the "Government") filed a Complaint on December 15, 2006 against the Village of Port Chester ("Port Chester" or the "Village" or the "Defendant"), alleging a violation of Section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. The Government claimed that the at-large system used to elect the six members of the Port Chester Board of Trustees denied the Hispanic population of the Village an equal opportunity to participate in the political process and to elect representatives of their choice.

The Government sought a preliminary injunction pursuant to 42 U.S.C. § 1973j(d) to prevent the Village from holding its next election for the Board of Trustees, which was then scheduled for March 20, 2007. The Court issued a preliminary injunction on March 2, 2007, finding: (i) that there would be irreparable harm if the 2007 Trustee election were allowed to proceed under a structural framework that violated the Voting Rights Act; (ii) that the balance of the potential harms weighed in favor of granting an injunction; and (iii) that the Government had demonstrated that it was likely to succeed on the merits of its claim at trial. Accordingly, the Village was enjoined from holding its March 20, 2007 Trustee election pending a trial on the merits in this matter.[1]

***417** On March 1, 2007, Cesar Ruiz ("Ruiz"; Ruiz and the Government are collectively referred to herein as the "Plaintiffs") filed an Order to Show Cause why he should

not be permitted to intervene in this action pursuant to Fed.R.Civ.P. 24. Following an oral argument, this Court granted Ruiz's motion to intervene as a party plaintiff on April 6, 2007.

After settlement negotiations proved unsuccessful, the parties reconvened for a six-day bench trial that concluded on June 5, 2007.[2] In lieu of oral closing arguments, the parties were granted until July 9, 2007 to submit post-trial briefs in support of their respective positions. Further, an organization called FairVote—which describes itself as having a mission "to advocate for fair representation through voting systems changes"[3]—was given permission to submit an *amicus curiae* brief. The Court concluded that Plaintiffs have established that Port Chester's system for electing its Board of Trustees violates Section 2 of the Voting Rights Act, and directed the parties to submit proposed remedial plans.

The Court held hearings on the remedial plans on July 17, 28, 29, 2008 and September 22 and 23, 2008. Port Chester proposed a voting scheme called cumulative voting that would give Hispanics greater opportunities to participate meaningfully in elections while maintaining the at-large system. Plaintiffs presented the districting plan developed in the liability phase as its proposed remedial plan. The Court issued a Summary Order on November 6, 2009 announcing its decision to choose Port Chester's proposed plan, ordered the parties to develop an education and outreach program to ensure a thorough and non-discriminatory implementation of the new system, and lifted the injunction on the Trustee elections provided that the 2010 elections were delayed until June to give enough time to educate the community about cumulative voting.

II. Port Chester's Voting Rights Act Violation

A. Legal Framework

1. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, reads:

> (a) No voting qualification or pre-requisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives ***418** of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

There is no dispute here that Port Chester's at-large system for electing its Board of Trustees is an electoral practice or procedure that is subject to challenge under this statute.

2. *Gingles* preconditions and Senate Factors

[1] The Supreme Court construed this statute in its amended version for the first time in an action challenging a multi-member at-large districting scheme. *See Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In *Gingles,* 478 U.S. at 34, 106 S.Ct. 2752, the Supreme Court set out three "preconditions" that must be met for a challenge under Section 2 of the Voting Rights Act to be successful:

> (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;
>
> (2) the minority group must be politically cohesive and vote as a bloc; and
>
> (3) the White majority must vote sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate.

No specific showing of discriminatory intent is required to prove a Section 2 violation. *See id.* at 70–73, 106 S.Ct. 2752 (Brennan, J. plurality op.); *Coleman v. Bd. of Educ. of the City of Mt. Vernon,* 990 F.Supp. 221, 227 (S.D.N.Y.1997) (internal citation omitted); *cf. Goosby v. Bd. of the Town of Hempstead,*

180 F.3d 476, 498–504 (2d Cir.1999) (Leval, J. concurring) (hereinafter "*Goosby III* ").

[2] **[3]** An analysis of the three *Gingles* factors and whether each has been proven by a preponderance of the evidence is the first step in a two-part analysis of a vote dilution claim on behalf of minority voters. The Supreme Court has found, however, that the satisfactory establishment of the three *Gingles* preconditions alone is not sufficient for a Section 2 vote dilution claim to succeed. *See Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). Accordingly, this Court must "consider whether, under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process." *Goosby v. Bd. of the Town of Hempstead,* 956 F.Supp. 326, 329 (E.D.N.Y.1997) (hereinafter "*Goosby I* ") (*citing NAACP v. City of Niagara Falls,* 65 F.3d 1002, 1007 (2d Cir.1995)). Various Circuit courts have recognized that "it will only be the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of Section 2 under the totality of the circumstances." *Niagara Falls,* 65 F.3d at 1019, n. 21; *see also Thompson v. Glades County Bd. of County Comm'rs,* 493 F.3d 1253, 1261 (11th Cir.2007); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.,* 4 F.3d 1103, 1116 n. 6 (3d Cir.1993).

[4] Judicial assessment of the totality of the circumstances requires a "searching practical evaluation of the past and present reality." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752. The key to this inquiry is an examination of the seven principal factors set forth in the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act, the so called "Senate factors." *See* S.Rep. No. 97–417, 97th Cong. 2nd Sess. ***419** 28 (1982), U.S.Code Cong. & Admin.News 1982, p. 177 (the "Senate Report"). The additional factors listed in the Senate Report are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register, vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder the ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

In addition, the Senate Report adds two other considerations that may have probative value in vote dilution cases, specifically:

(1) whether there is a significant lack of responsiveness on the part of the elected officials to the particularized needs of the members of the minority group; and

(2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

[5] The list of factors is "neither comprehensive nor exclusive." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752. Plaintiffs need not prove a majority of these factors, nor even any particular number of them in order to sustain their claims. Instead, "these factors are simply guideposts in a broad-based inquiry in which district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used." *Goosby I,* 956 F.Supp. at 331.

B. Findings of fact

1. Overview of the Village of Port Chester

Port Chester is an incorporated village located within the Town of Rye, and is situated in southeastern Westchester

County, New York, adjacent to the Connecticut border. According to the 2000 United States Census, Port Chester's population was 27,867, an increase of 12.7 percent from the 1990 Census. From 1990 to 2000, the Hispanic population of the Village grew by 73 percent from 7,446 to 12,884; the Hispanic community now constitutes a plurality of Port Chester's residents. As of the 2000 Census, Port Chester's total population was 46.2 percent Hispanic, 42.8 percent non-Hispanic White, and 6.6 percent non-Hispanic black. Of Port Chester's voting age population ("VAP") of 21,585 in 2000, however, 45.7 percent were non-Hispanic White, 43.4 percent were Hispanic and 6.1 percent were non-Hispanic black. Meanwhile, as ***420** of 2000, the Village had a total citizen voting age population ("CVAP") of 13,990, of whom 65.5 percent (9,160) were non-Hispanic White, 21.9 percent (3,070) were Hispanic and 8.9 percent (1,245) were non-Hispanic black. Plaintiffs' expert Dr. Andrew Beveridge ("Dr. Beveridge") estimated that as of July 2006, Port Chester's CVAP totaled 14,259, of which Hispanics constituted 27.5 percent (3,928).

Port Chester is governed by a Mayor and a six-member Board of Trustees, and all of these Village officials are elected pursuant to an at-large voting scheme. The Trustees serve staggered three-year terms, with two Trustee positions open for election each calendar year; the Mayor, who presides over the Board of Trustees, serves a two-year term, and thus must stand for election every other year. Each resident of the Village who is registered to vote may cast up to two votes for Trustee candidates. A voter cannot select the same candidate twice, but a voter may opt to cast just one of his or her two votes and withhold the other, a practice known as "single shot" or "bullet" voting. Village elections for Mayor and Trustees are held "off cycle"—that is, they are not conducted in November alongside other county, state, and national elections, but instead are held in the spring, usually on the third Tuesday in March.

The Village is divided into 16 election districts for the purposes of voting administration. These districts determine at which polling place Port Chester's voters cast their ballots for both Village elections in March and "on-cycle" county, state, and national elections in November.[4] In addition, it has been the practice of the Republican and Democratic parties in Port Chester to choose "district leaders" for each election precinct. To be clear, however, these precincts in no way correspond to any type of elected representation—voters in each of the Village's election precincts choose from the same slate of candidates in local elections. The Town of Rye, which in addition to the Village of Port Chester also encompasses the incorporated village of Rye Brook as well as the Rye Neck section of Mamaroneck, consecutively numbered all of the election precincts within the Town; those that lie within Port Chester are precincts 5 through 19 and precinct 25.

2. First *Gingles* precondition: the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district

a. Criteria for drawing proposed districts

To demonstrate the existence of the first *Gingles* precondition in an at-large system, the Plaintiffs must be able to draw illustrative single-member districts following traditional districting principles to show that the Hispanic population is sufficiently large and compact so as to constitute a majority in a single-member district. Dr. Beveridge, an expert in the fields of demographics and redistricting, offered two alternative plans—Proposed Plan A ("Plan A") and Proposed Plan A as Modified ("Modified Plan A")—each of which divided the Village into six hypothetical single-member districts that would allow Port Chester to elect the six members of its Board of Trustees using a district-based, rather than an at-large, system. *See* Gov. Exs. 32 (Plan A) and 33 (Modified Plan A).

***421** To draw the proposed districts in each of the plans, Dr. Beveridge first sought to ensure equality in the total population of each district, and next endeavored to make each district "reasonably compact." *See* Hearing Tr. at 599. Dr. Beveridge testified that he opted to draw the districts on the basis of total population because in his view "total population is the accepted standard method"; he did not know of any districting process in the United States that has used a method other than total population for drawing district lines.[5] *See* Hearing Tr. at 600. Population equality and compactness are "two of the most relevant [re]districting principles" in smaller geographic areas—such as Port Chester—where districting experts need not be concerned about splitting towns and villages when drawing potential district boundaries. *Id.* Only after these principal criteria were met did Dr. Beveridge seek, to the extent possible, to keep together a portion of the Hispanic community of Port Chester within a single proposed district in a way that did not "pack" or "crack" the Hispanic population.[6]

Both of the proposed plans show very limited deviation in the total population among the six proposed districts based on data from the 2000 Census. Given a total Village population of 27,867, an equal division of the population for each district would yield approximately 4,645 individuals in each district. In Plan A, the district with the smallest population is District 5, which contains 4,528 people—117 less than the ideal—for a deviation of 2.51 percent. *See* Gov. Ex. 25 at Ex. F. The largest district by population in Plan A is District 3, which contains 4,793 people—149 more than the ideal—for a total deviation of 3.20 percent. *Id.* Thus the total population deviation in Plan A measured by the spread between the greatest downward deviation and greatest upward deviation within the districting plan is 5.71 percent, a figure that is comfortably within the bounds of acceptable 10 percent population deviation for state or local legislature districting purposes. *See, e.g., Brown v. Thomson,* 462 U.S. 835, 842–43, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983); *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Under Modified Plan A, the greatest downward deviation is again in District 5, though the difference in this model is only 1.50 percent; similarly, District 3 exhibited the greatest upward deviation in Modified Plan A, but with only a 1.84 percent departure from the ideal figure. *See* Gov. Ex. 26 at T. 2. Modified Plan A therefore has a total deviation of 3.34 percent, again well within acceptable population deviation parameters. Defendant's expert Dr. Peter Morrison ("Dr. Morrison"), ***422** an expert in the fields of demography and drawing and evaluating single-member districts, agreed that the total population balance of both Plan A and Modified Plan A falls within acceptable limits. *See* Def. Ex. LL at 34.

As to Dr. Beveridge's second criterion, both Plan A and Modified Plan A are reasonably compact. The only challenge that can be construed as relating to the compactness of the proposed districts is the Village's contention that the proposed districts for Trustee representation should have taken into account existing election precincts in the Village. Based on the current election precinct boundaries and the proposed district boundaries in Plan A and Modified Plan A, the district plans would create a system where the population of certain election precincts would be divided among one or more Trustee districts. For example, certain residents of election precinct 14 would be eligible to vote in Trustee District 1, while others would be eligible to vote in District 3, District 4, or District 5. In fact, 10 of the 16 current election precincts would experience these types of cleavages. *See* Def. Ex. X.

Such a scenario raises administrative and logistical concerns for the Village, as Port Chester would have to ensure that voters are presented with the proper electoral choices when they arrive at their polling places. Assuming that the precinct boundaries remained the same and that the proposed districts were implemented, the Village might, for example, be forced to use different practices and procedures for March elections (which, under the current electoral framework, would implicate the Trustee district boundaries) and November elections (which would not). Dr. Morrison admitted, however, that this issue is a "purely economic consideration"—his concern is that "it would be an expense imposed on the taxpayers of the Village to have to have a different set of geographies used for elections"—though he also acknowledged that he did not analyze any potential expenses or savings that might result. Trial Tr. at 478, 556. Dr. Beveridge did not place great emphasis on election precinct boundaries given that they are simply an administrative mechanism for localities, and given that such precinct lines, in his experience, are commonly redrawn during districting or re-districting processes. *See* Hearing Tr. at 613. There was no evidence presented at any point in this proceeding to explain why Port Chester's election precincts were drawn the way they were, or why it would be important to preserve those particular boundaries.

On balance, the decision not to give any particular weight to election precinct lines here was sensible; these purely administrative designations do not signify anything of overwhelming import in Port Chester, and do not represent the types of political boundaries that are particularly deserving of deference when crafting proposed district borders. In no way would it have been advisable to place greater emphasis on the maintenance of existing precincts than on the other criteria employed by Dr. Beveridge in crafting Plan A and Modified Plan A.

Finally, though he admits that he used race as part of his districting process, Hearing Tr. at 634, Dr. Beveridge did not, as Defendant suggests, use race as his only criterion, or even as his predominant criterion, in drawing either of the proposed plans. The proposed districts did not result in any impermissible packing or cracking of the Hispanic population of the Village. Indeed, the distribution of Hispanics across the proposed district lines under both Plan A and Modified Plan A results in four districts where Hispanics account for a greater percentage of the total population, VAP, and CVAP in those districts as ***423** compared with the Hispanic share of population, VAP, and CVAP in Port Chester as

a whole. By way of illustration, the Hispanic community constituted 46.23 percent of the population of the Village based on 2000 data, as well as 43.34 percent of the VAP and 21.87 percent of the CVAP. Under Plan A, the Hispanic population shares of the following four proposed districts exceed these thresholds on all three metrics: District 5 (48.43 percent Hispanic population; 44.31 percent Hispanic VAP 26.00 percent Hispanic CVAP); District 6 (54.37 percent Hispanic population; 51.80 percent Hispanic VAP; 28.13 percent Hispanic CVAP); District 3 (54.45 percent Hispanic population; 51.67 percent Hispanic VAP; 29.95 percent Hispanic CVAP); and District 4 (75.40 percent Hispanic population; 73.83 percent Hispanic VAP; 50.51 percent Hispanic CVAP). Under Modified Plan A, the Hispanic populations of District 6, District 3, and District 4 constitute a greater percentage of the total population, VAP, and CVAP in those districts as compared with the Hispanic population of Port Chester as a whole, while the Hispanic population of District 5 accounts for a greater percentage of CVAP, but slightly smaller percentages of total population and VAP as compared to the Village generally.

In addition to the favorable comparisons between intra-district ethnic compositions and the Village population as a whole, the inter-district distribution of the Village's Hispanic population in both Plan A and Modified Plan A is well-balanced. For example, in Modified Plan A, District 3, District 4, District 5, and District 6 contain 82.05 percent of the total Hispanic CVAP of the Village, with each of those Districts accounting for no less than 19.33 percent and no more than 22.79 percent of the Village-wide share based on 2000 Census data. Similarly, those four districts include 83.94 percent of the Hispanic VAP of Port Chester and 83.47 percent of the total Hispanic population of the Village; while District 4 contains the greatest share of Village-wide Hispanic VAP (28.54 percent) and total Hispanic population (28.10 percent), the remaining three Hispanic-heavy proposed districts contain between 16 and 21 percent of the Village-wide share of Hispanic VAP and total population.

Through cross-examination of Dr. Beveridge, Defendant attempted to demonstrate that the non-Hispanic White population of the Village was impermissibly packed under the proposed districting regime. Neither Dr. Beveridge's methodology nor the resulting data support this contention, and the Court therefore rejects the notion that either Plan A or Modified Plan A packed the non-Hispanic White population of the Village. The mere fact that there are greater concentrations of non-Hispanic Whites in certain areas and greater concentrations of Hispanics in other areas does not indicate any sort of nefarious effort; instead, this merely is a reflection of the reality of residential segregation in Port Chester.[7] Under Modified Plan A, 72.60 percent of the non-Hispanic White population of the Village is concentrated in District 1, District 2, and District 5, but the greatest proportion in any one district is the 30.18 percent of non-Hispanic Whites living in District 1. Similarly, those three districts also contain 72.18 percent of the non-Hispanic White VAP and 74.67 percent of the non-Hispanic White CVAP of the Village, but none of ***424** the districts contains more than a 30 percent share of the non-Hispanic White VAP or CVAP of the Village. These figures simply do not support a finding that the proposed districting plans create impermissible concentrations of the non-Hispanic White population in Port Chester.

In sum, it is clear that the proposed districts in Plan A and Modified Plan A were drawn in accordance with traditional districting principles of population balancing and compactness, and there is no evidence in the record to indicate that race—of Hispanics or non-Hispanics—was the predominant factor in crafting the proposed district boundaries.

b. Use of 2000 Census data and 2006 estimates

As noted above, Dr. Beveridge relied on data from the 2000 Census in drawing the proposed districts in Plan A and Modified Plan A, and data from the 2000 Census formed the basis of the majority of his expert conclusions. The 2000 figures represent the most recent set of comprehensive Census information for Port Chester—no new complete Census information will be available until sometime in 2011. Various exhibits—such as Gov. Ex. 34—show the 2000 Census data broken down by the block level, indicating the number of individuals counted for all of the blocks of the Village that appear on that particular map. Defendant attempted to call into question the accuracy and reliability of the Census figures, but the Village's efforts did not produce any clear, concrete, and comprehensive demonstration that the 2000 Census data for Port Chester is in any way significantly unreliable.[8]

As part of his analysis, Dr. Beveridge estimated the demographic changes that he believes have occurred in Port Chester since 2000 based on an extrapolation from the 2000 Census figures and the rate of change in voter registration in

the Village. This Court takes Dr. Beveridge's 2006 estimates for what they are: estimates provided by a demographics expert that, while not endowed with the same presumption of reliability as the decennial census, may nevertheless be used by this Court to understand relevant population trends in the Village. Nevertheless, there is no need to rely directly on the 2006 estimates in making any determinative findings of fact or conclusions of law with respect to the ultimate issues in this case.[9] Accordingly, to ***425** the extent that the Court has reviewed and considered the 2006 data, it has only been for background informational purposes. As set forth throughout this Decision and Order, the data on which the Court relies for its assessment of the *Gingles* preconditions and the Senate factors is the data from the 2000 Census.

c. Measuring the effective majority in a single-member district

[6] Within both Plan A and Modified Plan A, the proposed district that is meant to satisfy the first *Gingles* precondition for the Hispanic community is District 4. The best method to judge whether a particular minority group constitutes an effective majority in a single-member district is to examine the VAP and CVAP data for that district.[10] The Hispanic community comprises 73.83 percent of the VAP in proposed District 4 under the Plan A boundaries, and constitutes 50.51 percent of CVAP according to 2000 Census data. In Modified Plan A, the Hispanic VAP in District 4 is 77.27 percent of the population there, and the Hispanic CVAP makes up 56.27 percent of the district. Even Dr. Morrison conceded that even taking into account possible data errors, Hispanics would constitute a majority of CVAP in District 4 in Modified Plan A. *See* Hearing Tr. at 1390, 1429, 1430, 1456.

Port Chester challenged the use of VAP and CVAP for measuring whether Hispanics constituted an effective majority in proposed District 4 under any of Plaintiffs' plans by attacking the reliability of the VAP and CVAP figures and by offering alternative approaches to the effective majority question.[11] However, Port Chester failed to convince the Court that there are documented discrepancies in VAP and CVAP or that the other methods it proposed, such as using "corrected" Census numbers, voter registration, or voter turnout, were more reliable measures. In particular, the Court finds that voter registration and voter turnout methods have serious shortcomings that render them inappropriate for this analysis. Voter registration overstates the number of eligible voters in a given location because they are only scrutinized and updated from time to time. *See* Hearing Tr. at 1461–62. Records kept by the United States Election Assistance Commission ("EAC") illustrate this problem; according to EAC voter registration data for New York State from the 2004 general election, a highly implausible 99.3 percent of the CVAP in Westchester County[12] was registered to vote at ***426** the time of that election. *See* Gov. Ex. 92. In smaller counties, the 2004 data revealed complete mathematical impossibilities—according to those figures, 100.3 percent of the CVAP in Orleans County, New York was registered to vote, and 104.0 percent of the CVAP in Sullivan County, New York was on the registration rolls. *Id.*

[7] This Court also rejects the notion, offered in Dr. Morrison's expert report, that a proper measure of an effective majority must include a consideration of voter turnout. Using Spanish Surname Analysis of voter sign-in sheets in Port Chester,[13] Dr. Morrison calculated only between 9.4 and 11.8 percent of all people who cast votes in Village elections between 2001 and 2006 were Hispanic; the greatest percentage of Hispanic voters in any one year—11.8 percent of turnout—came in the March 2006 elections. *See* Def. Ex. LL at 23 (Table 5). Based on the borders of proposed District 4 in Plan A,[14] Dr. Morrison found that in those same elections, only between 2 1.0 and 28.2 percent of actual voters in the illustrative District were Hispanic, with the greatest percentage of Hispanic voters again occurring in March 2006. According to Dr. Morrison, these figures reveal that even if Hispanics constitute a majority of VAP and CVAP in District 4, they will not amount to an effective majority in that District because they do not turn out in sufficient numbers to elect candidates of their choice without assistance from other demographic groups.

What this turnout analysis fails to consider is that there may very well be a correlation between the subject matter of this lawsuit—the various circumstances and conditions that contribute to the inability of the Hispanic community to elect candidates of its choice—and the lower turnout by Hispanic citizens in Port Chester. Defendant's expert Dr. Ronald Keith Gaddie ("Dr. Gaddie"), an expert in the fields of elections and voter participation, acknowledged that a district-based system with a majority-minority district would likely increase the number of Hispanic candidates who would run for office (and the number who would win), and that such candidates would likely stimulate increased voter participation—both in terms of registration and turnout—among the Hispanic population. Hearing Tr. at 1289 (qualifications); 1344–48.

It is interesting to note that in the 2007 Mayoral election—held in the wake of this lawsuit, and less than two weeks after the issuance of the preliminary injunction halting the Trustee elections—Hispanic turnout both Village-wide and within the confines of proposed District 4 was the highest it had ever been for a Village election from the years 1995–2007 (15.3 percent Village-wide, and 44.5 percent within proposed District 4). *See* Def. Ex. LL at Table 5. Though these figures are subject to multiple interpretations, when they are combined with the testimony and other evidence presented in this case, it ***427** seems highly likely to this Court that a dramatic change in the electoral structure to give Hispanics a better opportunity to participate would likely result, for myriad reasons, in a marked change in voter turnout. Accordingly, it would be counterintuitive to determine that depressed turnout among Hispanics—a condition that may very well be a direct byproduct of the existing electoral regime—should be a reason to *preclude* the creation of a new electoral structure in Port Chester.

On balance, the most reliable measure of whether Hispanics constitute an effective majority in proposed District 4 in Plan A and Modified Plan A is the CVAP data for Port Chester. As discussed above, Hispanics constitute a slight CVAP majority in District 4 under Plan A, and an even more substantial majority under Modified Plan A; Plaintiffs, therefore, have made a sufficient showing to satisfy this component of the first *Gingles* factor.

3. Second *Gingles* precondition: the minority group must be politically cohesive and vote as a bloc

Plaintiffs' expert, Dr. Lisa Handley ("Dr. Handley"), is an expert in the fields of racially polarized voting, analyzing voting behavior, statistical analysis of voting, and the effect of electoral practices of minority participation and representation. Hearing Tr. at 461. Dr. Handley used three methods of statistical analysis—bivariate ecological regression analysis, ecological inference, and homogeneous precinct analysis—to review election data and to determine how voters cast their ballots in those contests. Hearing Tr. at 480, 500. In her initial report in this case, Dr. Handley used voter registration data to estimate voter behavior—this was the only data that was available to her at the time she prepared the initial expert report. *See* Gov. Ex. 12. In her subsequent reports, however, Dr. Handley used sign-in data, which reflects actual voter turnout, and therefore provides a more reliable basis for estimating voter preferences. *See* Gov. Ex. 13. Defendant's expert, Dr. Ronald Weber ("Dr. Weber"), is an expert in the fields of political science, state and local politics, quantitative analysis of voting behavior, and demography. Hearing Tr. at 894. In analyzing election data, Dr. Weber also used bivariate ecological regression analysis and ecological inference methodologies, and used voter sign-in data as the basis for his conclusions. Def. Ex. B; Hearing Tr. at 507.

Both experts analyzed "endogenous" and "exogenous" elections as part of their work for this matter. Endogenous elections are those involving the specific office at issue in the lawsuit (i.e. Port Chester Trustee elections). Hearing Tr. at 470. This Court also treats Mayoral elections in Port Chester as endogenous elections in this case—the Mayoral elections are conducted in precisely the same manner as the Trustee elections with precisely the same set of voters, and in the structure of the Village government, the Mayor presides over meetings of the Board of Trustees and votes along with the Trustees on legislative initiatives. Exogenous elections are contests for positions other than Trustee or Mayor in the Village—for example, county-wide races for judgeships or the office of the district attorney, and state-wide races for attorney general. Hearing Tr. at 471.

To determine whether minority voters vote cohesively, Dr. Handley considers the degree to which those voters support the same candidates, and will look to the gap between the percentage of votes for the minority-preferred candidate and the non-preferred candidate rather than using a particular bright-line threshold for determining cohesion.

For the years 2001–2007, Dr. Handley in her three reports analyzed 16 endogenous elections—12 of these were the Trustee ***428** contests in each of these six years (two positions were up for election each year), and the remaining four were the Mayoral races in 2001, 2003, 2005, and 2007.[15] Dr. Handley testified that "in all of the 16 contests that [she] looked at, Hispanics were cohesive." Trial Tr. at 13. According to Dr. Handley, this was especially true in 2001, when the Trustee election included Ruiz, a Hispanic candidate. Both Dr. Handley and Dr. Weber concluded that virtually 100 percent of Hispanics who voted in that election cast one of their votes for Ruiz, the Hispanic candidate. *See* Hearing Tr. at 483–84; Def. Ex. B at 29, 37. The data presented in Dr. Handley's reports indicate that Hispanics also voted cohesively in endogenous elections where there was no Hispanic candidate. *See* Gov. Ex. 13.

Dr. Weber testified that the Hispanic community is not cohesive, in his view, because with the exception of the 2001 Trustee election, the turnout of the Hispanic group is lower than the minimum threshold required to constitute cohesion.[16] Hearing Tr. at 982. Dr. Weber defines the "minimum threshold" for cohesion as 10 percent of the CVAP. Hearing Tr. at 926. The Court rejected this bright-line rule that Dr. Weber conceded was an arbitrary figure that no court has explicitly used and no other expert in the field has adopted.[17] Hearing Tr. at 981. Dr. Weber also conceded that if the Court rejected his 10 percent rule, then the Hispanic voters in Port Chester were cohesive in 13 of 15 Trustee and Mayoral elections and strongly cohesive in 10 of the 15 elections between 2001 and 2006.[18] Hearing Tr. at 977–79.

4. Third *Gingles* precondition: the White majority must vote sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate

a. Most probative election contests

The parties' experts offered substantially different views of which elections this Court should consider most important in analyzing the third *Gingles* precondition, though both sides agreed that the 2001 Trustee race in which Ruiz was a candidate was the most significant of the elections they studied. *See* Hearing Tr. at 469, 473–74; 984. The 2001 Trustee contest was the only endogenous election that involved a Hispanic candidate who was the candidate of choice of the Hispanic community; indeed, it was the only endogenous ***429** election from the 2001–2006 time period that involved a Hispanic candidate at all.

Dr. Handley posited that after the 2001 Trustee race, the next most significant elections were three exogenous elections that included Hispanic candidates who were the candidates of choice of the Village's Hispanic community. These included: (i) the 2001 and 2005 races for Westchester County District Attorney, in which Anthony Castro ("Castro"), a candidate of Portuguese ancestry, was defeated both times; and (ii) the 2000 race for Westchester County Family Court Judge, a contest in which Nilda Morales Horowitz ("Judge Morales Horowitz"), became the first person of Hispanic ancestry ever to win election to a countywide office in Westchester. Finally, Dr. Handley added that endogenous races that did not involve Hispanic candidates—so-called "White versus White" endogenous contests—were also of some probative value. Hearing Tr. at 476–77.

In addition to the 2001 Trustee election, Dr. Weber believed that the most important contests for consideration were the 2000 Westchester County Family Court Judge election, the 2005 District Attorney election, and the 2002 race for New York State Attorney General. Hearing Tr. at 901–03. This final example—the only one not listed by Dr. Handley—included a Hispanic candidate, though that candidate was clearly not the candidate of choice of the Hispanic community in Port Chester.

Dr. Handley would have included among her most important elections the exogenous contests for the Port Chester–Rye Brook Board of Education (the "School Board"). Several of these races involved minority candidates, and the electorate for School Board seats includes all of Port Chester and only a small contingent of Rye Brook voters who live outside of the Village. Hearing Tr. at 474–75. Because these elections take place in a single voting precinct, however, it is not possible to perform the same types of statistical analysis for the School Board elections as were performed for all other endogenous and exogenous elections studied in this case. Hearing Tr. at 475. Given these limitations, Dr. Handley could not consider the School Board elections as part of her analysis. Nevertheless, the Government did attempt to use the School Board elections as evidence of non-Hispanic bloc voting by presenting information regarding the outcomes of various School Board elections.

Testimony from various witnesses revealed difficulties with the exogenous elections described by these experts; specifically, in the three elections that involved Castro and Judge Morales Horowitz, there was considerable disagreement about whether voters perceived these candidates to be Hispanic. *See, e.g.,* Hearing Tr. 182–84 (Vega testimony regarding Judge Morales Horowitz campaign); 778–79, 785 (Judge Morales Horowitz testimony regarding her campaign); Gov. Ex. 35. It is clear that these examples only retain the level of relevance attributed to them by Dr. Handley and Dr. Weber if these candidates were thought to be Hispanic. Otherwise, the elections would be no more important than other "White versus White" exogenous races.

After careful consideration, this Court concentrated its examination on the endogenous elections—for Mayor and for various Trustee positions—that were held exclusively within

the Village of Port Chester. It is clear that the 2001 Trustee race took on special significance because of Ruiz's candidacy, but the "White versus White" Trustee and Mayoral races also provided important insights into the behavior of Port Chester voters.

While certain exogenous elections involving Hispanic candidates ordinarily would be of significant value—providing ***430** insight into how Hispanic voters in Port Chester behaved when presented with the option of a Hispanic candidate—the exogenous elections studied by the respective experts here do not allow for this type of understanding. There is insufficient evidence in the record for this Court to conclude confidently that Westchester voters viewed Castro and Judge Morales Horowitz as Hispanic candidates. Moreover, the inclusion of a Hispanic candidate in the 2002 Attorney General race does not make that contest probative for this Court, precisely because the Hispanic-preferred candidate was not the Hispanic candidate.

In sum, the evidence from all of the endogenous contests studied here was both more convincing and less fraught with factual disputes about, for example, whether candidates were or were not perceived to be Hispanic and how that may or may not have factored into the electoral outcomes. Further, it is clear to this Court that in general, countywide and statewide elections interject a host of different influences and variables into the electoral analysis, not the least of which is that those elections are held "on cycle" in November. In addition, this Court opted not to consider the Government's evidence about the School Board elections in support of the third *Gingles* precondition; because those elections could not be analyzed statistically, and because fact witnesses offered conflicting, and unverifiable, opinions about which candidates had the support of which communities in those elections, the Court does not find that evidence to be probative on this question. For all of these reasons, the Court concentrated its analysis on the endogenous elections in the Village.

b. Methodologies

Dr. Weber again proposed an arbitrarily assigned percentage for measuring non-Hispanic bloc voting: according to him, 60 percent or more of non-Hispanics have to coalesce or vote for a particular candidate to constitute bloc voting. Hearing Tr. at 926–28. Not only could he point to no court in the United States that has accepted his cohesion requirement for non-minority bloc voting, but he also admits that he knows of no other expert in the field who has adopted or agreed with his non-minority cohesion requirement. Hearing Tr. at 1005. The Court declines to be the first court to endorse a cut-off without any scientific or statistical basis other than it is "simply a number at which [Dr. Weber] feel[s] comfortable." Hearing Tr. at 1001.

Dr. Handley put forth a different analysis of the requirements of *Gingles* in this regard. She described a functional test that examines whether "the Whites [are] voting for the other candidates to such a degree that the Hispanic preferred candidate is losing." Hearing Tr. 467. It is not necessarily important that the non-Hispanic voters coalesce behind a particular candidate or that a particular percentage of non-Hispanic voters vote for any one candidate—what matters most is that those voters do not cast votes for the Hispanic candidate of choice, and those votes usually result in the defeat of the minority-preferred candidates. Even Dr. Weber agrees with this statement as long as there is reliable data to review. Hearing Tr. at 1004. This Court believes that a more flexible, functional test, like that proposed by Dr. Handley, is appropriate when considering whether there has been non-minority bloc voting.

c. Electoral outcomes

Dr. Handley testified that non-Hispanic voters voted as a bloc to defeat Hispanic candidates of choice in 12 of the 16 endogenous elections she reviewed—a total of 75 percent of the time. Trial Tr. at 13. In all 10 Trustee contests between 2001 and 2005, the Hispanic candidates of choice were different from the non-Hispanic candidates of choice; the candidates of choice of the non-Hispanic voters won 9 of those ***431** 10 elections. Gov. Ex. 13 at 1–2. The only year in which a Hispanic candidate of choice ran for a position as Trustee was 2001, the year in which Ruiz was a candidate; notably, Ruiz was the Hispanic community's top candidate of choice in that election according to Dr. Handley's data, but he still was defeated. That election also provided an illustration of Dr. Handley's functional approach to this issue; non-Hispanic votes were not concentrated on any one candidate, but rather were well distributed among the three White candidates who finished ahead of Ruiz in the balloting. *See* Gov. Ex. 13 at 1. The same pattern held true for the Mayoral elections in Port Chester in 2001, 2003, and 2005. In each of these endogenous contests, the Hispanic candidate of choice differed from the non-Hispanic candidate of choice; in each, the Hispanic candidate of choice was defeated.

In 2006, the only year in the past six in which Hispanic candidates of choice were elected in both Trustee races, it is no coincidence that those candidates were also the candidates of choice of non-Hispanic voters. Similarly, in the 2007 Mayoral election, the Hispanic candidate of choice emerged victorious because non-Hispanic voters did not vote cohesively, and instead split their votes between the two candidates. *See* Gov. Ex. 46. Of course, the 2007 Mayoral election must be viewed somewhat differently; the election took place just weeks after this Court enjoined the Trustee election that was supposed to take place simultaneously, and the voting rights issues raised by this lawsuit played a prominent role in the campaign itself. *See* Gov. Exs. 70, 71, 77.

5. Senate Report factors—totality of the circumstances

a. History of official discrimination

Professor Smith testified concerning the history of discrimination against Hispanics in New York State, Westchester County, and Port Chester. Some of that testimony was related to historical events that occurred 30 or 40 years ago—including evidence of New York State's literacy test for voting (abolished in 1966), *see* Hearing Tr. at 373–74, and a New York City lawsuit from the early 1970s concerning Spanish language assistance at polling places. *See* Hearing Tr. at 374. Of greater probative value to this Court were some of the more recent examples from Westchester County—including the 1985 Yonkers housing and education discrimination case, *see* Hearing Tr. at 377, a 2006 State Senate race in Yonkers, *see* Gov. Ex. 22 at ¶ 22, and the 2005 Consent Decree between the United States and Westchester County pertaining to language assistance at polling sites in the County, *see* Hearing Tr. at 378–87. Based on these data points and others, Professor Smith offered the general conclusion that there has been discrimination against Latinos in Westchester County. *See* Hearing Tr. at 376.

Professor Smith analyzed the Consent Decree entered in *United States v. Westchester County,* 05 Civ. 0650(CM), as a guidepost for what type of language assistance would be required at polling sites in Port Chester.[19] *See* Hearing Tr. at 386–87. Based on the county-wide standard established in the Consent Decree—requiring at least one bilingual poll worker[20] ***432** at each polling site located in an election precinct containing between 100 and 249 Spanish surnamed voters—Professor Smith concluded that Port Chester failed to provide sufficient Spanish language assistance at polling sites in the Village for the Trustee elections held between 2001 and 2006. *See* Hearing Tr. at 387–90.

The Port Chester Village Clerk's Office is responsible for conducting Village elections; those responsibilities include posting public notices, creating the official ballots, and assigning four election inspectors (two Democrats, two Republicans) to each of the 16 election precincts in the Village. *See* Trial Tr. at 79. Joan Marino ("Marino"), Port Chester's Deputy Village Clerk, testified that since she began working there in 1997, it has not been the specific practice of the Village Clerk's office to appoint Spanish-speaking poll workers for election precincts that contain a large number of Spanish speaking voters. *See* Trial Tr. at 80. Joanne Villanova, who is not a Spanish speaker, testified that she served as an election inspector for Village elections approximately 15 times over a period of approximately 25 years, and only once worked alongside a Spanish-speaking inspector. *See* Trial Tr. at 924–27.

From 2001–2004, the Town of Rye provided the Village with lists of qualified election inspectors for each major party; these lists, however, did not indicate which inspectors, if any, spoke Spanish, and the Village Clerk's Office made no independent effort to determine which inspectors spoke Spanish. *See* Trial Tr. at 80–86; Gov. Exs. 49–52. In 2005 and 2006, the lists of qualified election inspectors provided to the Village did denote which poll workers were Spanish speakers—a total of four eligible poll workers were indicated to be Spanish speakers in 2005, and six were listed as Spanish speakers in 2006. *See* Trial Tr. at 87, 91 and Gov. Ex. 53 (2005 election); Trial Tr. at 92–95 and Gov. Ex. 54 (2006 election). During the 2005 election, only two of the four eligible Spanish-speaking inspectors actually worked at polling places; and only three of the six eligible inspectors worked at polling places during the 2006 election. Trial Tr. at 92, 96. For the 2007 Mayoral election, the Village Clerk's Office obtained a list of bilingual inspectors from the Westchester County Board of Elections for the first time, *see* Gov. Ex. 56, and assigned 14 Spanish-speaking poll workers to various election precincts, a total higher than in any of Marino's previous years working for the Village. *See* Trial Tr. at 98–100.

Plaintiffs offered testimony from one Spanish-speaking poll worker—Luz Marina Chavista—who described several situations from her experiences as a poll worker in Port

Chester where she observed Hispanic voters being treated differently from White voters. *See, e.g.,* Trial Tr. at 844, 852. In addition, Richard Falanka, the former Village Clerk and Village Manager of Port Chester, testified that there are no Spanish-speaking employees at the Village Hall who would be able to take a complaint from a Spanish-speaking voter at the beginning of the polling day (from 7:00 a.m. until 9:00 a.m.) or at the end of the polling day (from 4:30 p.m. until 9:00 p.m.), though English-speaking employees are available to receive complaints during those times. *See* Hearing Tr. at 1272–73.

Plaintiffs offered other examples of official discrimination against Hispanics that occurred in Port Chester itself. During his Hearing testimony, Nelson Rodriguez described the events surrounding his 1991 campaign for a seat on the School Board. According to Rodriguez, more than 40 Hispanic voters were turned away from the polls during that election because of poll workers' inability to locate their names on voter lists. *See* Hearing Tr. at 295–301; Gov. Ex. 9 (affidavits of voters from 1991 School Board election). Rodriguez lost ***433** that election by 37 votes, Gov. Ex. 10 at 1, and subsequently challenged the election results by filing an appeal with the New York State Education Department. *See Appeal of Nelson Rodriguez,* Dec. No. 12,704 (May 26, 1992) (available at http://www.counsel.nysed.gov/Decisions/volume31/d12704. htm). The School Commissioner sustained the appeal and ordered a new election, finding that Rodriguez "amply demonstrated that there were irregularities in the conduct of respondent board's election," and that the "board's failure to locate approximately 39 names is unacceptable." *Id.* In 1992, the School Board scheduled a special "re-vote" election; Rodriguez ran again, and was defeated by 374 votes. *See* Gov. Ex. 10 at 2.

Finally, the Government offered in evidence audio-visual recordings of two public hearings held in Port Chester in 2006 regarding the Government's proposed districting plans. Gov. Exs. 101 and 102. The hearings mostly consisted of statements by various citizens of the Village either in support of or in opposition to the districting proposals, and therefore could not be viewed as evidence of *official* discrimination in the Village. However, there was a noteworthy comment at the first public hearing by Aldo Vitagliano, an attorney who would later be appointed by the Village to serve as special counsel to the newly-formed Voting Rights Commission created to study and evaluate the Government's districting proposals. He suggested that Port Chester's representatives in Congress should introduce an amendment to exempt the Village from the requirements of the Voting Rights Act.

b. Extent of racially polarized voting

Dr. Handley testified that "voting is polarized ... if Hispanics would have elected a different candidate or set of candidates than Whites, [and] it rises to the level of legal significance if, under these circumstances, the Hispanic preferred candidate usually loses." Hearing Tr. at 467. According to Dr. Handley's analysis, 13 of the 16 endogenous elections were polarized.[21] Trial Tr. at 13.

In many cases, the degree of polarization was significant; in the single-vote elections for Mayor, Hispanic preferred candidates received between 69.6 percent and 96.2 percent of the Hispanic vote in these two-candidate elections, according to Dr. Handley's bivariate ecological regression estimates.[22] Gov. Ex. 13 at 2; Gov. Ex. 46 at 1. It therefore follows that the candidates of choice of non-Hispanic voters received little support from Hispanic voters in these elections. In the "vote for two" Trustee elections—where 50 percent support would be the maximum achievable threshold absent "single shot" voting—10 of 12 Hispanic-preferred candidates received more than 40 percent of Hispanic voter support according to Dr. Handley's bivariate ecological regression estimates.[23] ***434** Gov. Ex. 13 at 1–2. Again it follows that the non-Hispanic candidates of choice received little support from Hispanic voters, with percentages often in single digits according to these estimates.

For the same reasons discussed above in connection with the third *Gingles* factor, this Court does not consider evidence presented about the School Board elections as part of this determination.

c. Electoral practices that enhance opportunities for discrimination

There is no dispute that Port Chester holds its Trustee elections in March, and it is also evident that the six Trustees are elected to staggered three-year terms. *See* Gov. Ex. 4. Experts on both sides agree that generally, voter turnout is lower in March elections than in November elections, and that this general principle is true of the off-cycle elections in Port Chester for both the Hispanic and the non-Hispanic

populations of the Village. Dr. Handley's data demonstrates that Hispanic turnout was markedly greater for November elections in 2004, 2005, and 2006 than it was for March elections those same years. *See* Gov. Ex. 13 at 6–7; *see also* Hearing Tr. at 1377 (Dr. Morrison noted that "the participation levels of Hispanics turning out to vote varies widely from a March Trustee election to a November general election"). Meanwhile, Dr. Gaddie agreed that holding local elections off cycle generally results in depressed voter participation, and observed that "every March election has lower turnout than the November elections." Hearing Tr. at 1343–44.

d. Access to the candidate slating process

Candidates for political office in Port Chester are selected through a caucus system organized and administered by the political parties in the Village. At each caucus, a majority of caucus attendees must vote in favor of a particular candidate for that candidate to formally receive the party's nomination for Trustee. Prior to the official party caucus, however, the major political parties invite prospective candidates to interview before the parties' respective nominating committees, which then select their two preferred individuals and forward those names to the parties' caucuses for ratification. Hearing Tr. at 823–25 (describing the Republican Party process); Trial Tr. at 337 (describing the Democratic Party process).

In theory, a candidate who did not win approval from the nominating committee could "storm" the caucus by bringing enough supporters to challenge the nominating committee selections—the formal rule is that the individuals who receive the most support at the caucus become the nominees. For both parties, however, the nod from the nominating committee is the critical step to getting onto the March ballot—no witness could identify a single instance where the nominating committee's selections were defeated by a "storming" of the caucus. *See, e.g.,* Trial Tr. at 163–64 (Pilla was not aware of any challenges at a caucus); 337 (former Village Democratic Party chairman testified that "the people nominated were always approved by the caucus"); Hearing Tr. at 828 (Village Republican Party chairman not aware of any candidate selected by nominating committee who did not become the nominee); 1166 (Rye Town Republican Chairman could not recall a contested caucus). Indeed, no witness could even identify a single *bona fide* attempt to storm the caucus.

In fact, Dr. Janusz Richards, the Chairman of Port Chester's Republican Committee, initially testified that he believed that candidates were required to interview with the nominating committee in order to receive the Republican nomination. Hearing Tr. at 841–42. Though he ultimately clarified this testimony to make clear that there was no party rule or regulation that ***435** required an appearance before the nominating committee, Hearing Tr. at 842, the fact that this political "insider" was not completely clear about the possibility of winning the nomination through the caucus alone makes this Court question whether the "storming" option is known to exist among the general population, much less the Hispanic community. It is worth noting that, as explained further in section III.E.7 below, even when the parties purported to have made outreach efforts to find Hispanic candidates, the evidence is clear that only two Hispanics made it through the nominating committee process and onto the ballot for Port Chester Trustee between 1992 and 2006.

Again, this system greatly favors those with existing political ties or other institutional support. Members of the Hispanic community have few positions of leadership within the major political parties in Port Chester, even at the entry-level district leader position that can often be a steppingstone to public office. *See* Hearing Tr. at 172. With the exception of a brief "renegade" effort led by Ruiz to seat Hispanic-preferred district leaders in the Democratic Party in 2004, very few Hispanics have served at even this entry level leadership position in either party. *See* Hearing Tr. at 56–57; 67–69 (Democratic Party); 832, 1169 (Republican Party).

e. Discrimination in other areas that hinders the ability of Hispanics to participate effectively in the political process

Professor Smith and Dr. Morrison acknowledged that Hispanics in Port Chester have lower levels of educational attainment on average and lower incomes on average than non-Hispanics. *See* Def. Ex. LL at 13 (Morrison Report); Gov. Ex. 22 at ¶ 24 (Smith Declaration). In addition, Hispanics in Port Chester were more likely than non-Hispanics to live in overcrowded housing, to rent their homes, and to have lived in their homes for less than five years. *See* Def. Ex. LL at 13; Gov. Ex. 22 at ¶ 25. According to Professor Smith, educational disparities in Port Chester are "stark"—approximately 55 percent of Hispanic men and 48 percent of Hispanic women aged 25 or older had attained less than a high school education, while only 14 percent of White men

and 16 percent of White women were limited to this level of education. Gov. Ex. 22 at ¶ 25. A total of 17 percent of Port Chester Hispanics lived below the poverty line in 1999, while the same was true of only 0.6 percent of the White population of the Village. *Id.* at ¶ 24. These economic disparities persist despite the fact that Hispanics have "comparable or higher rates of participation in the labor force compared to other groups." *Id.* at ¶ 25. Figures from the 2000 Census reveal that 75 percent of Hispanic men participate in the labor force, as compared with 71 percent of White men; meanwhile, 53 percent of Hispanic women participate in the labor force, as compared with 56 percent of White women. *Id.* In sum, it is clear that Hispanics and Whites in Port Chester "have significant differences in socioeconomic status." Hearing Tr. at 399.

Professor Smith testified that "lower socioeconomic status leads to lower levels of political participation." Hearing Tr. at 399 (Smith). Though he agreed that the fact that the Hispanic community is on average younger and more recently arrived in the United States than the non-Hispanic citizens of Port Chester could contribute to lower Hispanic voter turnout[24], Hearing ***436** Tr. at 445–48, there was no testimony to suggest that the presence of these factors negates the effects of socioeconomic status. Meanwhile, Dr. Gaddie agreed that socioeconomic status is the foundational influence on political participation. Hearing Tr. at 1342. Further, Dr. Gaddie noted that empirical studies have repeatedly shown that individuals who score lower on socioeconomic status criteria are less prone to participate in politics. Hearing Tr. at 1342.

Dr. Gaddie also testified, however, that socioeconomic status factors such as age, wealth, education and literacy alone are not enough to predict rates of political participation. Hearing Tr. at 1292–94. He offered the proposition that in addition to the socioeconomic status factors that contribute to one's "civics skills set," it is important to take into account mobilization efforts. Hearing Tr. at 1294. Political mobilization, he suggested, is not determined by socioeconomic status, but rather by the degree of in-person campaigning and other get-out-the-vote efforts in communities of lower socioeconomic status. *See* Hearing Tr. at 1302–06. Even Dr. Handley acknowledges that factors other than socioeconomic status must contribute to our understanding of participation rates in Port Chester, given that participation fluctuates greatly between March and November elections, even within the same calendar year. *See* Gov. Ex. 13 at 7.

f. Racial appeals in political campaigns

None of the evidence offered by the Government at the Hearing phase of these proceedings provided a clear indication that political campaigns in Port Chester have been marred by racial appeals. The Plaintiff attempted to demonstrate through the testimony of Dr. Maria Munoz Kantha ("Dr. Kantha") that the 2005 contest for Westchester County District Attorney between Janet DiFiore and Anthony Castro was characterized by subtle racial appeals in the form of a campaign flyer. *See* Gov. Ex. 11 (original campaign flyer); Hearing Tr. at 1218–24. Dr. Kantha's testimony made clear that there were some in the Hispanic community who viewed Gov. Ex. 11 as a racial appeal—as illustrated by Gov. Ex. 103, a number of individuals called a press conference to voice their displeasure with the flyer. *See* Hearing Tr. at 1124–28. This Court viewed Gov. Ex. 11 as nothing more than a piece of partisan political propaganda in the midst of a hard-fought campaign. The Court also heard testimony at the Hearing from Mr. John Reavis and Mrs. Doris J. Bailey–Reavis about racial epithets that were spoken or written at two points during Mr. Reavis's 1996 campaigning for a seat on the School Board. *See* Hearing Tr. at 333–34 (Mr. Reavis); 353–54 (Mrs. Bailey–Reavis).

At the trial, however, the Court received extensive testimony about a flyer—admitted in evidence as Gov. Ex. 63—that was used as part of the 2007 Mayoral election in the Village. Without question, this flyer must be considered a racial appeal. Bart Didden ("Didden"), who was slated to be a Republican candidate for Trustee in the March 2007 election before the election was enjoined, developed a first draft of this flyer approximately two or three weeks before the March 20 election[25]; ***437** thus, the flyer was first created after the conclusion of the hearing phase of this proceeding, and perhaps even after this Court issued the preliminary injunction on March 2, 2007. *See* Trial Tr. at 247–49.

Didden called the flyer a "hard-hitting, issues oriented" piece that was designed to convince voters not to vote for Pilla, who was at the time the Democratic candidate for Mayor of Port Chester. *See* Trial Tr. at 278. The flyer also includes personal attacks on two Hispanic leaders in the Village—Ruiz, and Blanca Lopez, who was Pilla's campaign manager. Ruiz is described in the flyer as a "hot dog vendor-turned-professional-consultant Ceaser (sic) Ruiz," while Lopez's

name appears many times in many different contexts. For example, the flyer states that "what Blanca cares about is only Hispanic," and accuses Lopez of being "not only a double agent" but "a super secret triple agent," apparently because Lopez submitted a declaration in support of the Government's motion for a preliminary injunction, and therefore "testified" "against Port Chester."

Pilla is attacked because of his apparent support of issues of importance to Hispanics in the Village. The flyer declares that Lopez is pushing for more affordable housing, more subsidized housing, and more Section 8 housing, and warns that "she is going to get if (sic) because Lopez and Pilla are in bed together on the Village affordable housing sub committee, the wolf is in the house thanks to Pilla!" Further, the flyer proclaims that "Blanca say's (sic) jump, fetch, beg or bark and Pilla does it. The Hispanics are running the show already."

The flyer also criticizes Pilla for his position with respect to this lawsuit, suggesting that Pilla changed his views on the lawsuit at the behest of Lopez; specifically, the flyer claims "flip flop Pilla sells out on command of campaign manager/ Hispanic leader Blanca Lopez." Pilla allegedly "abandon's (sic) the Village by reneging on his commitment to fight splitting the Village up into districts and pitting neighbor against neighbor," and "is selling you and me out to the Department of Justice." Language in the flyer also mischaracterizes the lawsuit as an attempt to portray the residents of the Village as racists, urging recipients not to "elect carpet baggers (sic)" but rather to "elect people who care about our history, heritage and what our kids will be told about us in the future, are we to be known as racists or law abiding free Americans."

According to Didden he mailed the flyer to approximately 1,000 households in the Village, asserting that he did so because of his "civic responsibility to the community that I live in." Trial Tr. at 278–79. Didden, however, did not sign the flyer or otherwise indicate that he was its primary author, and when he mailed the material he did so at a mailbox in Greenwich, Connecticut, because he "did not want to be observed in front of the Port Chester post office with a thousand envelopes putting them in the post box because that could lead to someone suspecting that I had something to do with the mailing." Trial Tr. at 280–81.

Various Village officials testified that they believed the flyer was a racist document. In response to a question from the Court, Domenick Cicatelli, currently a Trustee and, in March 2007, the Republican candidate for Mayor, testified that the flyer appears to be a racial appeal, and called the flyer "troubling." Trial Tr. at ***438** 761. Trustee Crane testified that the flyer was "racist, sexist, disgusting," and "highly inflammatory." Trial Tr. at 680. Bencivenga, in response to a question from the Court, indicated that he believed the flyer could fairly be characterized as racist. Trial Tr. at 384.

g. Election of Hispanics to public office in the jurisdiction

At the time of the liability phase of this case, no Hispanic candidate had ever been elected to public office in Port Chester-not Mayor, not to the Board of Trustees, and not to the School Board. On May 19, 2009, Blanca Lopez was elected to the Port Chester School Board, making her the first Hispanic to be elected to a jurisdiction sharing most of its precincts with the Village of Port Chester. This election was not included in the analysis because the parties' experts determined that it did not have sufficient probative value. *See, supra* II.B.4.a.

While the lack of statistical data from the School Board elections made it difficult to consider the results of those elections as part of the racial polarization analysis, this Court does consider the outcomes of those elections as additional evidence of this Senate factor. Ms. Lopez's victory is set against a bleak backdrop: between 1991 and 2006, three Hispanic candidates ran for the School Board a total of four times[26], and all were defeated. *See* Gov. Ex. 10.[27] Indeed, before Ms. Lopez's election only one member of the Hispanic community has ever been elected to any federal, state, county, or local office for any jurisdiction in which Port Chester is located—Judge Morales Horowitz, who, as discussed above, was elected Family Court Judge in 2000. *See* Hearing Tr. at 782.

In all of the Trustee elections studied by both sides in this case up to and including 2007, only two Hispanics have ever been on the ballot—Jose Santos ran as a Republican in 1992 and Cesar Ruiz ran as a Democrat in 2001—and both finished last in their respective fields. *See* Gov. Ex. 4 at 13 (Santos results) and 22 (Ruiz results). There is no indication from the evidence in this case that a Hispanic candidate has ever run for Mayor in Port Chester.

The Village attempted to elicit testimony concerning various theories for why no Hispanics have been elected, both through expert witnesses and from Village residents who offered their views as to which Hispanic candidates actually garnered the

support of the Hispanic community and why. This Court has already addressed the testimony from the various experts, and further concludes that the speculative testimony from the Village's other witnesses regarding the preferences of Hispanic voters is of no particular relevance to the issues presented in this case. Defendant also endeavored to show that both major political parties in Port Chester made concerted efforts to encourage Hispanic candidates to run for office. *See, e.g.,* Hearing Tr. at 811–14 (Republican Party efforts); 1088 (Democratic Party efforts). It was clear that at least some of the recruiting was conducted at least in part in response to the Justice Department's investigation here; more importantly, few Hispanic candidates ultimately were put ***439** forward by the parties, despite these purported outreach strategies.

h. Additional factors in the Senate Report

i. Lack of responsiveness to the particularized needs of Hispanics

Plaintiffs have not attempted to make an issue of Port Chester's lack of responsiveness to the particularized needs of members of the Hispanic community.

ii. Tenuousness of the challenged voting practice or procedure

Plaintiffs put forward no evidence to suggest that the policy rationales underlying Port Chester's voting system are tenuous. Port Chester has had an at-large system of elections in place since 1868, more than a century before the Hispanic population became a plurality. The Village has offered evidence that it holds local elections in March to insulate them from the vagaries of the national election cycle and, in part, to bring the Village in line with other New York State localities.

C. Conclusions of Law

1. First *Gingles* precondition: the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district

[8] To satisfy the first *Gingles* precondition, Plaintiffs must prove that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles,* 478 U.S. at 50, 106 S.Ct. 2752. In sum, unless minority voters possess the potential to elect representatives in the absence of an at-large voting system, they cannot claim that their voting rights have been implicated by that system. *See id.* at 50, n. 17, 106 S.Ct. 2752. This requirement is designed to ensure that the minority population in the subject area will have a real opportunity to elect candidates of its choice.

[9] As a threshold matter, although there was some anecdotal evidence presented that the 2000 Census might not have placed every voter in the exact block of their residence, this Court recognizes that Census data is presumptively accurate. *See Valdespino v. Alamo Heights Indep. Sch. Dist.,* 168 F.3d 848, 853–54 (5th Cir.1999); *Johnson v. DeSoto County Bd. of Comm'rs,* 204 F.3d 1335, 1341 (11th Cir.2000) ("the presumption is that Census figures are continually accurate"). The *Valdespino* court determined that "proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census." *Valdespino,* 168 F.3d at 854. Defendants have not come close to meeting that burden here through Cleary's testimony, and this Court accepts the 2000 Census data as reliably accurate, though not perfect, in this case.

[10] **[11]** **[12]** First, the size and shape of the illustrative districts contained in Plaintiffs' Plan A and Modified Plan A comport with traditional districting principles of population equality and compactness. *See Shaw v. Reno,* 509 U.S. 630, 651, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *United Jewish Orgs. v. Carey,* 430 U.S. 144, 168, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977)). In addition, while respect for existing political boundaries is also a valued traditional districting method, *see Miller v. Johnson,* 515 U.S. 900, 919, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), election precincts are not such important political boundaries that they should negate a districting proposal, particularly where, as here, other key districting principles are obeyed. The Court finds no fault with Dr. Beveridge's decision to disregard the precinct boundaries when drawing the proposed districts. Finally, ***440** based on the testimony of the parties' respective experts, this Court is firmly convinced that race was not the "predominant, overriding factor explaining" Dr. Beveridge's Modified Plan A. *See id.,* 515 U.S. at 920, 115 S.Ct. 2475.

[13] While traditional districting principles typically require the use of total population in drawing district boundaries,

in determining whether the minority group at issue has a sufficient majority in an illustrative district to satisfy the first *Gingles* precondition, courts look to the VAP, and in particular to the CVAP, as the relevant population in the district. *See, e.g., Rodriguez v. Pataki,* 308 F.Supp.2d 346, 378 n. 38 (S.D.N.Y.2004) (three-judge panel) (*citing Valdespino,* 168 F.3d at 851–53; *Negron v. City of Miami Beach,* 113 F.3d 1563, 1569 (11th Cir.1997); and *France v. Pataki,* 71 F.Supp.2d 317, 326 (S.D.N.Y.1999)).

Plaintiffs have proven that Hispanics comprise 56.27 percent of the CVAP in proposed District 4 under Modified Plan A, which clearly represents a majority of CVAP in that area. *See Goosby I,* 956 F.Supp. at 348 (finding that Plaintiffs satisfied the first *Gingles* precondition with a proposed district where African–Americans comprised 52.57 percent of the VAP in the district). Though the Supreme Court has held in dicta that it is theoretically possible for a minority group to lack "real electoral opportunity" in a district even if that group constitutes a majority of CVAP in that district, *see League of United Latin Am. Citizens (LULAC) v. Perry,* 548 U.S. 399, 428, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006), the weight of authority indicates that a CVAP majority will typically constitute an effective majority for the purposes of the first *Gingles* precondition. Indeed, even the *Perry* Court indicated that a 57.5 percent CVAP majority did possess electoral opportunity protected by Section 2 of the Voting Rights Act. *Id.*

Though the Village argued that the proportion of Hispanic registrants and the turnout rate among Hispanics in proposed District 4 are such that the Hispanic population would not constitute an effective voting majority, there are significant shortcomings in both lines of reasoning. As to the turnout issue, we agree with the view expressed by the Ninth Circuit about the proper consideration of voter turnout in a Section 2 analysis: "if low voter turnout could defeat a Section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on." *United States v. Blaine County,* 363 F.3d 897, 911 (9th Cir.2004). A similar logic applies to voter registration —if, as expected, the elimination of a Section 2 violation will increase opportunities for Hispanics in Port Chester to participate in the political process of the Village, it seems likely that such participation will extend down to the simplest level of participation: registering to vote.

Thus, as to the first *Gingles* precondition, this Court finds that Plaintiffs have demonstrated adequately through Modified Plan A that Hispanics in Port Chester are sufficiently large in number and geographically compact to constitute an effective majority in a single-member district in the Village. Accordingly, Plaintiffs have satisfied the first *Gingles* factor.

2. Second *Gingles* precondition: the minority group must be politically cohesive and vote as a bloc

[14] **[15]** The second *Gingles* precondition requires Plaintiffs to demonstrate that Hispanics in Port Chester are politically cohesive. *See Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. According to the *Gingles* ***441** Court, "if the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* Plaintiffs proved during these proceedings that Hispanic voters in Port Chester voted cohesively in all 16 election contests in the Village between 2001 and 2007. The methods employed by Dr. Handley to reach these conclusions have been accepted by numerous courts in voting rights cases. *See Gingles,* 478 U.S. at 52–53, 106 S.Ct. 2752 (accepting bivariate ecological regression analysis); *Rodriguez,* 308 F.Supp.2d at 388 (accepting ecological inference methodology).

Further, this Court declines to adopt Dr. Weber's position that the Hispanic community in Port Chester cannot be considered cohesive unless 10 percent of the Hispanic CVAP votes in a given election. This Court does not believe that there should be any arbitrarily fixed percentage for CVAP participation in order to find cohesion; such a bright-line threshold for minority CVAP turnout is not helpful or appropriate here. *See Blaine County,* 363 F.3d at 911 (9th Cir.2004); *Uno v. City of Holyoke,* 72 F.3d 973, 987 (1st Cir.1995). Dr. Weber conceded that if this Court were to reject his turnout requirements, Hispanics in Port Chester were cohesive in 13 of 15 elections between 2001 and 2006. Accordingly, this Court concludes that Plaintiffs have proven that Hispanics in Port Chester vote cohesively, and therefore that Plaintiffs have fulfilled the second *Gingles* precondition.

3. Third *Gingles* precondition: the White majority must vote sufficiently as a bloc to enable it, in the absence of

special circumstances, to defeat the minority's preferred candidate

[16] To satisfy the third *Gingles* precondition, Plaintiffs must demonstrate that "the White majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. Proving this third point enables the minority group to show that "submergence in a White multimember district impedes its ability to elect its chosen representatives." *Id.* Further, the requirement that the White majority be repeatedly successful "distinguishes structural dilution from the mere loss of an occasional election." *Id.*

[17] **[18]** In assessing which elections should be afforded the greatest probative value, the Court was guided by two Second Circuit pronouncements on this question. First, it is clear that, in this Circuit, at least, district courts must consider "White versus White" elections as part of a Section 2 analysis. *Niagara Falls,* 65 F.3d at 1015–17. In addition, "exogenous elections—those not involving the particular office at issue—are less probative than elections involving the specific office that is the subject of the litigation." *Goosby III,* 180 F.3d at 497 (quoting *Clark v. Calhoun County, Miss.,* 88 F.3d 1393, 1397 (5th Cir.1996)); *see Niagara Falls,* 65 F.3d at 1015 n. 16. In light of these decisions, we believe that the proper focus in this case was on endogenous elections in the Village, even though all but one of these elections were "White versus White" contests.

Defendant argues that any elections that occurred after spring 2001 cannot form the basis of a Section 2 violation here, because "if a Section 2 violation exists it must be one that could have been reasonably evident to the Village contemporaneous with the release of the decennial census data.... The law cannot require the Village to create districts because sometime in the future, (but before the next census) population changes might lead to an allegation that its at-large system dilutes minority ***442** voting rights." Def. Post–Trial Mem. of L. at 13. The Village does not cite any case law in support of the proposition that this Court should not consider the most recent elections in the jurisdiction as part of its Section 2 analysis. A brief look at *Goosby I* reveals that other district courts in this Circuit have not adhered to Defendant's position. The original Complaint in *Goosby I* was filed in 1988, and a bench trial was held in July 1996. *See Goosby I,* 956 F.Supp. at 329. By Defendant's logic, the *Goosby I* court should not have considered any Town of Hempstead elections that took place after spring 1991, yet the record is replete with evidence from two elections held in 1993. *See, e.g., id.* at 334. The argument that post–2001 elections should not be considered here is without merit.

Courts have employed methods that are very similar to Dr. Handley's functional approach to assess whether Whites vote as a bloc to defeat Hispanic-preferred candidates. *See Gingles,* 478 U.S. at 53, 106 S.Ct. 2752. That is, the critical point is whether White voters are voting for other candidates to such a degree that Hispanic-preferred candidates are consistently defeated. *See, e.g., Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.,* 4 F.3d 1103, 1123 (3d Cir.1993) ("the correct question is ... whether, as a practical matter, the usual result of the bloc voting that exists is the defeat of the minority-preferred candidate"). The motivations of the White voters under such a framework are irrelevant—indeed, Plaintiffs did not introduce evidence sufficient to prove that the non-Hispanic community in Port Chester voted the way it did because of any sort of racial bias. Contrary to Dr. Weber's view, however, the degree of White voter cohesion is also irrelevant, and the Court declines to adopt Dr. Weber's 60 percent cohesion requirement in this matter.

[19] The evidence here is clear that in 12 of the 16 elections this Court views as most probative in this case, the candidates of choice of Hispanic voters in Port Chester were defeated by the candidates of choice of non-Hispanic voters. Defendant is correct to point out that three of the four elections in which Hispanic candidates were not defeated are among the most recent contests in the Village—the two Trustee races in 2006 and the 2007 Mayoral election. Nevertheless, it is well-settled that "in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting." *Gingles,* 478 U.S. at 57, 106 S.Ct. 2752. Moreover, the March 2007 election—which took place in the after this Court issued the preliminary injunction, and in which this lawsuit became a central campaign issue—was characterized by the type of "special circumstances" that make the results of this election somewhat of an outlier in the overall analysis.[28] In addition, Defendant seeks to use data from elections held between 1995 and 2000 to rebut Dr. Handley's conclusions; however, this Court concurs with the views of the parties' experts that the data from those elections is unreliable, and therefore ***443** should not form the basis of any legal conclusions here.

Defendant attempts to explain differences in voter behavior by claiming that partisan politics, and not racial polarization, is the cause of these electoral outcomes. The Second Circuit has counseled, however, that arguments concerning the causes of racially polarized outcomes are to be considered as part of the totality of the circumstances analysis, and not as part of the *Gingles* determination. *See Goosby III,* 180 F.3d at 493 ("the best reading of the several opinions in *Gingles,* however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, *see Gingles,* 478 U.S. at 62, 106 S.Ct. 2752 (Brennan, J., plurality op.) but relevant in the totality of circumstances inquiry").

In sum, it is clear to this Court that Hispanic voters and non-Hispanic voters in Port Chester prefer different candidates, and that non-Hispanic voters generally vote as a bloc to defeat Hispanic-preferred candidates. Accordingly, Plaintiffs have succeeded in proving the third *Gingles* precondition, and therefore have established all three of the required *Gingles* preconditions in this case. We now turn to the totality of the circumstances analysis.

4. Senate Report factors—totality of the circumstances

[20] As outlined above, even though this Court has found that Plaintiffs have satisfied all three *Gingles* preconditions, it is also necessary to consider the totality of the circumstances before finding a Section 2 violation. *See Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Goosby III,* 180 F.3d at 492. As discussed in further detail below, it is this Court's view that Plaintiffs have proved that all seven of the Senate factors are present in Port Chester; accordingly, the totality of the circumstances clearly indicates that Defendant's method of electing the members of its Board of Trustees violates Section 2 of the Voting Rights Act.

a. History of official discrimination

This Court is persuaded that there is some history of official discrimination in Port Chester that continues to touch the rights of Hispanics to participate in the political process. Other courts in this district have cited the "regrettable history of discrimination in employment, housing and education in the Westchester County area," *New Rochelle Voter Defense Fund,* 308 F.Supp.2d at 159, as part of a Voting Rights Act analysis. While this Court finds the New York State and Westchester County examples of discrimination to be relevant, we were far more influenced by the examples from Port Chester itself, including the lack of Spanish-language voter assistance in the Village and the 1991 and 1992 School Board elections. At the very least, it is apparent that the Village Clerk's Office has failed to take proactive steps to address the needs of the Hispanic population in Port Chester, despite the rapid growth of the Hispanic community. While the evidence in support of this conclusion is not overwhelming, this Court does believe that, on balance, the first Senate factor supports a finding in favor of Plaintiff.

b. Extent of racially polarized voting

[21] The *Gingles* Court cited this as one of the two most important Senate factors, *see Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. 2752, and this Court considers it significant that this factor strongly bolsters Plaintiffs' position in this matter. According to *Gingles,* 478 U.S. at 53, 106 S.Ct. 2752, "racial polarization exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes." As discussed above in connection with the second and ***444** third *Gingles* factors, the evidence presented in this case demonstrates that such a consistent relationship clearly exists in Port Chester: Hispanic voters vote cohesively, and the non-Hispanic community tends to vote as a bloc, generally resulting in the defeat of the Hispanic preferred candidates. Defendant argued at various points that the outcomes of the Village elections could be viewed as a factor of partisan political preferences rather than racial polarization of the electorate. That there is some correlation between political party and the voting preferences of Hispanics in Port Chester, however, does not contradict the conclusion that voting in the Village is polarized along racial lines. *See Goosby I,* 956 F.Supp. at 355. Senate factor two clearly suggests that judgment for Plaintiffs is appropriate here.

c. Electoral practices that enhance opportunities for discrimination

Port Chester's practice of holding local elections "off-cycle" in March and staggering its Trustee elections combines to enhance the opportunity for discrimination against the Hispanic voting population. There is little question that the difference between holding an election "off-cycle" in March as opposed to holding it in November alongside major state and national elections can have a significant impact on voter

behavior. *See NAACP v. Hampton County Election Comm.,* 470 U.S. 166, 178, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985) (noting that in the jurisdiction at issue, "an election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November"). The lower turnout rates for March elections in Port Chester is at least partly the result of a structural flaw in the system, and is indicative of the Section 2 violation here; holding local elections at a time when only the most engaged and politically astute citizens—those citizens who feel the most enfranchised—are likely to vote will almost certainly result in the diminished influence of groups who feel generally excluded from the political fabric of the community.

The Supreme Court has recognized that staggered elections may enhance the discriminatory effect of certain voting systems. *See, e.g., Lockhart v. United States,* 460 U.S. 125, 143, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983). Particularly given that many of Port Chester's Trustee elections have been close in terms of number of votes received, it is substantially less likely that White bloc voting could defeat all Hispanic-preferred candidates if all six trustees were chosen at one time. There has been no evidence to suggest that the Village adopted either of these practices with the intention of discriminating against Hispanic citizens, but as noted above, intent is not the touchstone of a Section 2 violation. What is important here is that off-cycle and staggered Trustee elections contribute to the Hispanic community's difficulty in electing its candidates of choice and "enhance the opportunity for discrimination" against Hispanics. Thus, this Senate factor points toward judgment for the Plaintiffs.

d. Access to the candidate slating process

While the candidate selection process of Port Chester's two major political parties formally allows for candidates to have open access to the ballot through the party caucus system, the reality of local politics in this community is that virtually binding decisions are made at closed meetings of the parties' respective nominating committees, which allow limited access to outsiders or upstart candidates.

The Second Circuit has held that a system that provides only a theoretical avenue for minority or other upstart candidates to get their names on the ballot while for all practical purposes making it ***445** extremely difficult for such candidates to have a meaningful opportunity to participate does in fact contribute to a violation of Section 2 of the Voting Rights Act. *See Goosby III,* 180 F.3d at 496 (describing Town of Hempstead process where Republican Committee members "theoretically are empowered to choose a slate of candidates for the Town Board, [but where] the actual selection process has been much different").

The candidate slating process employed by Port Chester's political parties to select their candidates for Trustee positions effectively limits access to those who are invited to interview before the parties' nominating committees, a situation which makes it all the more difficult for Hispanic citizens in the Village to elect their candidates of choice. Accordingly, this Court concludes that Senate factor four supports judgment for the Plaintiffs.

e. Discrimination in other areas that hinders the ability of Hispanics to participate effectively in the political process

While experts from both sides agreed that factors other than the socioeconomic disparities between Hispanics and non-Hispanics in Port Chester contribute to the differences in political participation rates in the Village, experts also agreed that there are substantial differences in education and income between Hispanics and non-Hispanics.

The Supreme Court has recognized that "political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles,* 478 U.S. at 69, 106 S.Ct. 2752. The Senate Report itself specifies that: "the courts have recognized that disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation." Where these conditions are shown, and where the level of [minority] participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation. S.Rep. No. 97–417 at 29 n. 114. Various circuit courts, including the Second Circuit, have followed this line of reasoning, finding that plaintiffs are not required to prove a causal connection between socioeconomic factors and depressed political participation. *See Niagara Falls,* 65 F.3d at 1021 ("according to the Senate Report, voting rights plaintiffs need not establish [a causal] nexus where both disparate socioeconomic conditions and depressed political participation are shown to exist"); *Teague v. Attala County,* 92 F.3d 283, 294 (5th Cir.1996); *United*

States v. Marengo County Comm., 731 F.2d 1546, 1569 (11th Cir.1984). Instead, the burden falls to Defendant to show that the cause is something else. *Marengo County Comm.,* 731 F.2d at 1569.

Port Chester has not offered any persuasive evidence to suggest that socioeconomic factors do not contribute to differing rates of political participation of Hispanics in Port Chester. For this Senate factor to support a Section 2 violation, it is not necessary to find that socioeconomic status alone led to disparate levels of political participation; indeed, such a finding would be nearly impossible given the number of factors that contribute to any one individual's decisions about political participation. That said, it is the view of this Court that the effects of Hispanics' socioeconomic status, when combined with the structure of elections in Port Chester, limit the opportunities of the Hispanic community to participate in the political process and to elect candidates of choice. Senate factor five, therefore, also supports a finding of a Section 2 violation here.

***446 f. Racial appeals in political campaigns**

There can be no question that the most recent election for Mayor of Port Chester was marred by a racial appeal. Though Plaintiffs did not present any compelling evidence of racial appeals prior to 2007, the fact that such a blatant racial message—one which several witnesses conceded was racist—emerged in the midst of the ongoing proceedings in this case is troubling to this Court. The district court in *Goosby I* found that far more subtle racial appeals than this one contributed to the Section 2 violation in the Town of Hempstead. *See Goosby I,* 956 F.Supp. at 343, 353. Thus, in light of the evidence presented at trial, it is clear that this Senate factor weighs in favor of a ruling for Plaintiffs.

g. Election of Hispanics to public office in the jurisdiction

The *Gingles* Court also cited this as one of the two most important Senate factors. *See Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. 2752. The evidence here is undisputed that no member of the Hispanic community in Port Chester has ever been elected to the Board of Trustees. With the exception of the recent election of Blanca Lopez to the School Board, an election the Court has not considered as probative in this case, no other Hispanics have been elected to public office in the Village. In short, there cannot be any more compelling case in support of Senate factor seven. *See Goosby I,* 956 F.Supp. at 343–44 (finding that Senate factor seven supported a Section 2 violation where only one African–American had ever been elected to the Town Board). Without question, this critical Senate factor supports a finding of a Section 2 violation.

h. Additional factors in the Senate Report

The Senate Report makes clear that the issue of a political subdivision's responsiveness has little probative value, particularly where the plaintiff has not made it an issue in the case—"defendants' proof of some responsiveness would not negate plaintiffs' showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process." *See Marengo County Comm.,* 731 F.2d at 1572 (*citing* S.Rep. No. 97–417 at 29 n. 116). Thus, while Defendant at various points attempted to demonstrate that the Village is in fact sensitive to the needs of the Hispanic community, that alone is not enough to overcome this Court's findings with regard to the other Senate factors. Further, the current Port Chester system is not a marked departure from past practices in the Village, nor is it necessarily a significant departure from the structure employed by other localities in New York State. Plaintiff does not appear to contest these conclusions.

5. Conclusion

Having conducted the thorough and careful analysis required by the statute, this Court finds that Plaintiffs have demonstrated that the Village of Port Chester's at-large system for electing its Board of Trustees violates Section 2 of the Voting Rights Act. Plaintiffs have proven the existence of all three *Gingles* preconditions, and have shown clearly that under the totality of the circumstances, the at-large election system for electing members of the Board of Trustees prevents Hispanic voters from participating equally in the political process in the Village.

Defendant argued throughout the course of this case that, given time and assuming the continued growth of the Hispanic population of the Village, the Hispanic community could come to dominate the political landscape in Port Chester even under the current at-large system. This Court, however, is not charged with projecting what ***447** might happen years, or decades, from now; rather, we are faced with the current political reality in the Village, and based on the

evidence presented, the Village is currently in violation of Section 2 of the Voting Rights Act.

III. Implementing a Remedial Plan

Both parties gave oral argument on their proposed remedies at conferences on July 17, 28, 29, 2008 and September 22 and 23, 2008. In October 2009, both parties submitted letters to the Court requesting a swift resolution to the case before the next Village Trustee elections on March 16, 2010. Port Chester's letter stated that an indication of the Court's decision could enable the elections to proceed if it was received on or before November 9, 2009, the last date by law to publish notices regarding the March election or specifying boundaries of election districts. *See* N.Y.S. Elec. Law § 15–104(3)(a), § 15–110(5).

The Court issued a summary order informing the parties of its decision to adopt Port Chester's proposal for cumulative voting. It also lifted the injunction on the Trustee elections, but required the 2010 election to be delayed until June 2010 to ensure enough time to properly implement the new system.

A. The parties' proposed remedial plans

1. Port Chester proposes a cumulative voting system

The Village of Port Chester proposes an at-large, cumulative voting scheme with the elimination of staggered terms. Each voter would be allotted the same number of votes as there are seats up for election and would be free to allocate them however he or she chooses. Voters may choose to "plump" all their votes on one candidate—the strategy of choice for minority communities who want to indicate a strong preference for a particular candidate. Defendant also acknowledges the need for an education program to help voters, and in particular Port Chester's Hispanic population, understand how cumulative voting works and what their strategic options are under the system.

2. Plaintiffs propose six single-member districts

Plaintiffs propose a districting plan that divides Port Chester into six single-member districts with one majority-minority Hispanic district. The plan is identical to the one drawn by Dr. Beveridge during the liability phase to demonstrate the *Gingles* factors. The plan's six districts have roughly equal populations, with deviations of about 3.34 percent. Dr. Beveridge has also testified that his plan satisfies a number of different measures of compactness. The majority-minority district has 56.27% Hispanic Citizen Voting Age Population (CVAP) according to the 2000 Census, and 70.35% Hispanic CVAP according to 2006 estimates of Port Chester's population. There are four districts in total in which the Hispanic share of the CVAP is greater than in the Village as a whole. However, the majority-minority district is the only district in which Hispanics would be able to elect a representative of their choice completely on their own (i.e. without crossover voting).

B. Legal Standard for Choosing a Proposed Plan

[22] **[23]** The Court must give the defendant jurisdiction the first opportunity to suggest a legally acceptable remedial plan, based on the theory that the judiciary should not intrude on legislative policy any more than necessary. *White v. Weiser,* 412 U.S. 783, 794–95, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973); *Upham v. Seamon,* 456 U.S. 37, 41, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982); *Cottier v. City of Martin,* 445 F.3d 1113, 1123 (8th Cir.2006). The Court must also defer to the choice of the governing ***448** legislative body so long as the choice is consistent with federal statutes and the Constitution. *Whitcomb v. Chavis,* 403 U.S. 124, 160–61, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *White,* 412 U.S. at 797, 93 S.Ct. 2348. The degree of deference is quite strong. A district court may not substitute its own remedial plan for defendant's legally acceptable one, even if it believes another plan would be better. *See, e.g., Upham,* 456 U.S. at 42, 102 S.Ct. 1518.

Courts have explicitly recognized this deference applies to claims under Section 2 of the Voting Rights Act, as well as to one-person, one-vote cases. *See, e.g., Growe v. Emison,* 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993); *Cottier,* 445 F.3d at 1123; *Cane v. Worcester County,* 35 F.3d 921, 927–28 (4th Cir.1994); *Harper v. City of Chicago Heights,* 223 F.3d 593, 601–602 (7th Cir.2000); *McGhee v. Granville County,* 860 F.2d 110, 115 (4th Cir.1988). Courts have also expressly applied deference to the defendant jurisdiction's remedial plan in cases involving local legislative bodies. *Harper,* 223 F.3d at 601–02 (citing *White v. Weiser*). Therefore, if the Village's proposal is a legally acceptable remedy, the Court must accept it regardless of any alternative remedies proposed by Plaintiffs.

C. The Court adopts Port Chester's proposed remedy because it is legally acceptable

1. Cumulative voting is lawful as a remedy under the Voting Rights Act and New York Law

[24] There is no case law that rejects cumulative voting as a lawful remedy under the Voting Rights Act. Recently, a district court in the Northern District of Ohio did exactly what Port Chester is asking of the Court in this case: it accepted the defendant's proposal for limited voting instead of the plaintiffs' districting plan to remedy a Section 2 violation. *United States v. Euclid City School Bd. ("Euclid III"),* 632 F.Supp.2d 740.[29] Federal courts have repeatedly mentioned cumulative voting as a remedial option in Voting Rights Act cases. *Holder v. Hall,* 512 U.S. 874, 897–99, 908–13, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., concurring in the judgment) ("Nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under Section 2"); *Branch v. Smith,* 538 U.S. 254, 309–10, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (O'Connor, J., concurring) ("a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act"); *LULAC v. Clements,* 986 F.2d 728, 814–15 (5th Cir.1993) ("[S]tate policy choices may require the district court to carefully consider remedies such as cumulative voting" and other remedies), *rev'd on other grounds,* 999 F.2d 831 (5th Cir.1993) (en banc); *United States v. Marengo County Comm'n,* 731 1546, 1560 (11th Cir.1984); *Dillard v. Town of Louisville,* 730 F.Supp. 1546, 1548 n. 8 (M.D.Ala.1990); *Dillard v. Chilton County Bd. of Educ.,* 699 F.Supp. 870, 875 (M.D.Ala.1988), *aff'd,* 868 F.2d 1274 (11th Cir.1989); *Euclid III,* 632 F.Supp.2d at 752 n. 11 (N.D.Ohio 2009). Cumulative voting has also been mentioned as an option in New York voting rights cases. *Lopez Torres v. New York State Bd. of Elec.,* 411 F.Supp.2d 212 (E.D.N.Y.2006), *rev'd on other grounds,* ***449** 552 U.S. 196, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008).

Plaintiffs would like the Court to believe that cumulative voting has been consistently rejected as a remedy to a Section 2 violation. This is a misstatement of the case law. None of the cases cited by Plaintiffs are rejecting cumulative voting as a concept,[30] and a number of them go out of their way to clarify that the decision should not be taken as a condemnation of cumulative voting, *see, e.g., Cane,* 35 F.3d at 928–29 (4th Cir.1994); *Harper,* 223 F.3d at 601 (7th Cir.2000). Instead, the circuit courts found either that the district court improperly imposed its own remedy without first finding that defendant's plan was not legally acceptable, *see Harper,* 223 F.3d at 601, or the district court's plan did not adequately take into account the preferences of the defendant, *Cane,* 35 F.3d at 928–29. In others, cumulative voting was deemed inappropriate in judicial elections for reasons unique to the judiciary, *see, e.g., Nipper v. Smith,* 39 F.3d 1494 (11th Cir.1994) (en banc). In this case, the Court will adopt defendant's proposal for cumulative voting as legally acceptable, rather than "conjure up such an election scheme [on its own] and impose it" on the Village, *Dillard,* 376 F.3d at 1268.

Cumulative voting is also not prohibited by New York law. New York's Constitution gives local legislatures full authority to adopt all laws "not inconsistent with" the state constitution or statutes concerning its own "affairs or government." Constitution of State of New York, Art. IX, § 2(3)(c). This includes the "membership and composition" of a village's legislative body. *Id.* The same authority is codified in state statutes. *See* Municipal Home Rule Law, Art. 2, § 10(1)(i)-(ii). In the Northern District of Ohio, the district court rejected the argument that because Ohio law is silent on the issue of cumulative or limited voting, the court should not give deference to the defendant's plan for cumulative or limited voting. *Euclid III,* 632 F.Supp.2d at 750 n. 9. Here too, the Court does not find that cumulative voting is prohibited by New York law just because the law is silent on the issue. The Court also does not find that the absence of cumulative voting in other New York villages means that Port Chester should get less deference, as Plaintiffs suggest. *See* Memorandum of Law of the U.S. in Support of Plaintiffs' Joint Proposed Remedial Plan, at 18.

2. Port Chester's cumulative voting plan would cleanse the Section 2 violation

[25] For the Village's plan to cleanse the Section 2 violation, it must afford Hispanics in Port Chester an "equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles,* 478 U.S. 30, 44, 106 S.Ct. 2752, 92 L.Ed.2d 25; *see also Hall v. Virginia,* 385 F.3d 421 (4th Cir.2004); 42 U.S.C. § 1973(b) (2000). This does not mean that Port Chester is obligated to guarantee electoral success for Hispanics, but rather the plan must provide a

genuine opportunity "to exercise an electoral power that is commensurate with its population." *LULAC v. Perry,* 548 U.S. 399, 428, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006); *see also Johnson v. DeGrandy,* 512 U.S. 997, 1014 n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) ("[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of ***450** electoral success for minority-preferred candidates of whatever race").

[26] **[27]** The defendant's plan to remedy a Section 2 violation should also not create a new Section 2 violation. *See, e.g., United States v. City of Euclid ("Euclid II"),* 523 F.Supp.2d 641, 644 (N.D.Ohio 2007). Moreover, the defendant's plan must also meet the constitutional requirements of one-person, one vote and the prohibition on the improper use of race in districting. *See Goosby v. Town Bd. of Town of Hempstead,* 981 F.Supp. 751, 755–56 (E.D.N.Y.1997), *aff'd,* 180 F.3d 476 (2d Cir.1999).

a. Port Chester's plan gives Hispanics a genuine opportunity to elect a representative of their choice

[28] Courts evaluate whether cumulative voting will actually give minorities the opportunity to elect candidates of their choosing using a commonly-accepted and reliable political science concept called the "threshold of exclusion." *See, e.g., Cottier v. City of Martin,* 475 F.Supp.2d 932, 937 (D.S.D.2007); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies,* 33 Harv. L. Rev.. 333, 337 (1998). The threshold of exclusion "is the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances." *Cottier,* 475 F.Supp.2d at 937 (quoting *Dillard v. Chilton County Bd. of Educ.,* 699 F.Supp. 870, 874 (M.D.Ala.1988), *aff'd,* 868 F.2d 1274 (11th Cir.1989)). The threshold of exclusion is calculated according to the following formula: 1/(1 + number of seats available). Mulroy, at 1880.

The threshold of exclusion takes into account the following "worst case scenario:" (1) the majority sponsors as many candidates as there are seats to be filled (in this case, six candidates); and (2) the majority spreads its votes evenly among its candidates, with no support for the minority-preferred candidate. The threshold of exclusion also assumes that the minority population will allocate all of their votes to the minority-preferred candidate, often called "plumping" votes. If the minority population exceeds the threshold of exclusion and "plumps" their votes, they are virtually guaranteed to elect their preferred candidate even under the worst case scenario. *Dillard,* 699 F.Supp. at 874; *see also* Richard Engstrom, *Report on Cumulative Voting for United States v. Village of Port Chester,* Feb. 7, 2008, at ¶¶ 12–14 [hereinafter Engstrom Report].

Because the minority population achieves electoral success by plumping their votes, the cohesiveness of the minority voting bloc is very important. *See* Mulroy, at 1908. The Court finds that it is highly likely that Hispanics in Port Chester will plump their votes behind a candidate of choice because of the degree to which Hispanics voted cohesively in other elections. *See supra* II.B.3. For example, virtually 100 percent of Hispanics who voted cast a vote for Hispanic Trustee candidate Ruiz, a Plaintiff in this case. *Id.* Given this level of cohesiveness, it is reasonable to expect that the Hispanic population would continue to vote as a bloc and would therefore be able to take advantage of their voting power under a cumulative voting plan.

Currently, Port Chester has a six-member Board of Trustees, and each Trustee serves staggered three-year terms such that two positions are open for election each calendar year. Defendants propose eliminating the staggered terms so that six seats are up for election at each election. The threshold of exclusion would be 1/1+6 or 14.3 percent. In Port Chester, the Hispanic percentage of the CVAP according to the 2000 Census was 21.9 percent. Dr. Beveridge estimates that in 2006, the ***451** Hispanic CVAP will be 27.5 percent. Both of these figures are well above the threshold of exclusion: the 2000 count is 153.1 percent and the 2006 estimate is 192.3 percent above. Thus, Hispanics would have a genuine opportunity to elect one representative of their choice under Defendant's plan. Furthermore, the 2006 estimates suggest that Hispanics are also close to being able to guarantee the election two representatives of their choice using plumping. Because Hispanic CVAP is much greater than the threshold of exclusion, Hispanics still have an opportunity to elect their preferred candidate even if not all Hispanics plump their votes behind a single candidate of choice. *See* Remedy Hearing Tr., July 17, 2008, at 28.

In addition, both Plaintiffs' and Defendant's experts recognize that the opportunity to elect a candidate of choice tends to dramatically increase voter registration and turnout in the minority community. *See* Engstrom Report, at ¶ 25 (citing Beverage, Trial Tr., Feb. 16, 2007, at 606–07, 633; Handley, Trial Tr., Feb 15, 2007, at 466; Gaddie, Trial Tr., Feb. 22, 2007, at 1327). Courts have acknowledged that voter

turnout is depressed in a discriminatory system and therefore may not be a reliable measure for turnout under a non-discriminatory plan. *See, e.g., Solomon v. Liberty County ("Solomon I"),* 865 F.2d 1566, 1574 (11th Cir.1988); *Harvell v. Blytheville School Dist. No. 5,* 71 F.3d 1382, 1388 (8th Cir.1995) ("[L]ow voter turnout has often been considered the result of the minority's inability to effectively participate in the political process"); *cf. Rodriguez v. Pataki,* 308 F.Supp.2d 346, 401 (S.D.N.Y.2004) (accepting the theory that minority voter turnout increases with genuine opportunity to elect a minority-preferred candidate, but finding that plaintiffs may not rely without evidence on this "warming effect" alone to create the requisite majority-minority district). Therefore, the Court can expect that turnout will likely increase as Hispanics in Port Chester realize their opportunity to elect their preferred representative.

b. Port Chester's plan does not create a new Section 2 violation so long as it is accompanied by a sufficient educational program and other conditions to be embodied in a consent decree

[29] Because cumulative voting is not a common form of voting in this country, it is not automatically understood by voters. Also, the very rules of cumulative voting that enable minority populations to elect representatives of their choice are relatively complex and require voter education. *See* Lani Guinier, *No Two Seats, the Elusive Quest for Political Equality,* 77 Va. L. Rev. 1413, 1471 n. 211 (1991). Particularly when a cumulative voting plan is proposed in a jurisdiction where vote dilution is due in part to historical discrimination in education and socio-economic factors, it must contain a plan to educate voters on the new process or else it is counterproductive to correcting the Section 2 violation. *See Euclid III,* 632 F.Supp.2d at 756–57, 757 n. 15.

In this case, Port Chester's plan offers Hispanics a genuine opportunity to elect a representative of their choice only if they understand cumulative voting and how to take advantage of their electoral power. During the liability phase of this case, the Court found that Hispanics in Port Chester are at a distinct socio-economic and educational disadvantage compared to non-Hispanics. *See supra* II.B.5.e. The Court also found that Port Chester has historically failed to provide bilingual poll workers or election materials in Spanish to enable Hispanic voters to participate. *See supra* II.B.5.a. Against the background of these disparities and historical discrimination against Hispanics, it is imperative that the Village adequately address the barriers ***452** that might keep Hispanics from participating in the new system.

Defendant does propose an educational program to help voters understand cumulative voting rules, as well as to educate voters on their strategic options and how cumulative voting allows them to express the intensity of their preferences. In particular, Hispanic voters would need to grasp their power to plump votes in order to elect a candidate of their choice. *See* Engstrom Report, at ¶¶ 37–38. At the remedy hearing, Dr. Engstrom, the Village's expert witness, emphasized the need for special education when implementing a new, alternative voting system. *See* Remedy Hearing Tr., July 17, 2008, at 66–68 (Engstrom's suggestion that voters receive pamphlets, practice voting on test ballots, and learn what their options are under cumulative voting); *see also* Malroy, at 1893.

However, Port Chester's education plan does not contain enough details to reassure the Court that there will be a thorough effort to educate Hispanic voters. A federal court may make modifications to a defendant jurisdiction's plan, but the court is "limited to those necessary to cure any constitutional or statutory defect." *Branch v. Smith,* 538 U.S. 254, 309–10, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (O'Connor, J., concurring) (citing *Upham*). In this case, the Court finds it is necessary to modify the Defendant's plan to eliminate any possibility of perpetuating the Section 2 violation that may result if Hispanic voters do not fully understand cumulative voting. Therefore, as a condition of accepting Port Chester's cumulative voting plan, the Court ordered both parties to determine the necessary conditions for the non-discriminatory implementation of cumulative voting, with a specific focus on the education program and election day support for Spanish-speakers. The parties detailed these conditions in a Consent Decree that the Court reviewed and approved on December 22, 2009. The Court further approved an addendum to the Consent Decree on February 23, 2010.

c. Port Chester's plan does not violate one-person, one-vote or use of race improperly in districting

In addition to satisfying Section 2, the defendant's remedial plan must also comply with the Fourteenth Amendment's one-person, one-vote requirement. *See Abrams v. Johnson,* 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). District courts have consistently found that cumulative voting complies with one-person, one-vote because the entire

population is contained in one district and each voter is given the same number of votes. *See, e.g., Cottier v. City of Martin,* 475 F.Supp.2d 932, 939 (D.S.D.2007); *McCoy v. Chicago Heights,* 6 F.Supp.2d 973, 984 (N.D.Ill.1998), *rev'd sub nom. on other grounds by Harper v. City of Chicago Heights,* 223 F.3d 593 (7th Cir.2000); *Cane v. Worcester County,* 847 F.Supp. 369, 374 n. 8 (D.Md.1994), *rev'd on other grounds,* 35 F.3d 921 (4th Cir.1994). Thus, Port Chester's cumulative voting plan does not violate one-person, one-vote.

[30] Since *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the Supreme Court has recognized that the Equal Protection Clause of the Fourteenth Amendment limits the use of race in districting. If race is the predominant factor motivating the districting plan such that the legislature subordinated traditional race-neutral districting principles, the Court should apply strict scrutiny. Under strict scrutiny, the challenged plan will only survive if it is narrowly tailored to serve a compelling state interest. *Id.; Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475 (1995).

Plaintiffs do not argue that the Village's plan is a *Shaw* violation, nor does the plan ***453** involve any consideration of race since every voter is treated exactly the same. In fact, cumulative voting and other alternative voting schemes have received focus precisely because they avoid the *Shaw* problem that plagued drawing single-member districts. *See, e.g.,* Jason Kirksey, et al., "*Shaw v. Reno* and the New Election Systems: The Cumulative Voting Alternative," Voting Rights Rev. 10 (Spring 1995). Therefore, the Court finds that cumulative voting in this case does not improperly use race.

3. The Court has no obligation to consider whether districting would be better if the defendant's plan is legally acceptable

As explained above, the Court is required to defer to the defendant's remedial plan and evaluate only whether it is legally acceptable. If the defendant's plan has a statutory or constitutional infirmity, the Court must fashion a remedy that complies with Section 2 and also "to the greatest extent possible give[s] effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable one offered by the legislative body." *Cane v. Worcester County,* 35 F.3d 921, 928 (4th Cir.1994). Since the only criteria for judging the sufficiency of Port Chester's plan is statutory and constitutional acceptableness, the Court need not consider whether Plaintiffs' remedial plan is better. Therefore, Plaintiffs' assertions that single-member districts are preferable remedies in Section 2 violation cases are not relevant to this determination. Nor is it relevant that Plaintiffs have proposed a districting plan that would itself pass constitutional muster. Had Port Chester proposed or supported the districting plan, the Court would examine it for legal acceptableness. However, Port Chester has clearly stated its preference for cumulative voting in a multi-member district and since the Court has found that plan to be legally acceptable, the inquiry must end there.

IV. Conclusion

The Court conducted a careful analysis of Port Chester's at-large voting scheme for electing its Board of Trustees and determined that the system violated Section 2 of the Voting Rights Act. Plaintiffs have proven the existence of all three *Gingles* preconditions, and have shown clearly that under the totality of the circumstances, the at-large election system for electing members of the Board of Trustees prevents Hispanic voters from participating equally in the political process in the Village.

Having found a Section 2 violation, the Court evaluated the parties' proposed remedial plans. Following the high level of deference accorded to the defendant jurisdiction, the Court adopted Port Chester's proposal for cumulative voting because it was deemed legally acceptable under the Voting Rights Act, the Constitution, and New York law. The Court has approved the parties' agreed upon Consent Decree detailing the education and outreach program that will ensure the effective and non-discriminatory implementation of the new system. To give sufficient time for implementation, the Court also orders Port Chester to hold its 2010 Trustee elections in June 2010.

It is So Ordered.

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Footnotes

1 The March 2, 2007 injunction did, however, allow the Village to decide whether it would go forward with its Mayoral election—also scheduled for March 20, 2007—given that the instant lawsuit does not challenge the Village's system for electing its Mayor. The Village held its Mayoral election as scheduled, and as a result, Gerald Logan, who testified at both the preliminary injunction and trial phases of this proceeding, was replaced as Mayor by Dennis Pilla ("Pilla"), who also testified during the trial phase.

2 In the interest of judicial efficiency, this Court accepted all of the testimony and exhibits from the preliminary injunction hearing as if they had been offered and received in the same way at the trial. *See* Trial Tr. at 2. Because the pagination of the May/June trial transcripts did not resume from where the February hearing transcripts ended, however, this Decision employs different citation formats for the different phases of the proceedings. All references to the transcripts of the May/June 2007 trial will be cited as "Trial Tr. at XX" (pages 1 through 1015), and all references to the transcripts of the February 2007 hearing will be cited as "Hearing Tr. at XX" (pages 1 through 1683).

3 *See* Br. of Amicus Curiae (docket number 77) at 1.

4 To eliminate any potential confusion, this Court will refer to the 16 numbered election districts as "precincts" for the purposes of this Decision; future references to "districts" will refer to Plaintiffs' proposed political subdivisions for electing representatives to the Board of Trustees.

5 Defendants argue that the Plan A and Modified Plan A create an unconstitutionally extreme deviation in the CVAP of the districts. Defendants contend that the votes of citizens in, for example, District 1 are "devalued" by the proposed districting plans because the number of citizens in District 1 is greater than the number of citizens in District 4, yet the Districts have the same share of political power in the Village since each district would be able to elect one member of the Board of Trustees. While this argument raises important legal questions deserving of full analysis, it is inappropriate to address those questions at this time because the Court has chosen the Village's proposal for cumulative voting over the Plaintiffs' districting plan. *See infra* III.C. Since the districting plan's legality is not before the Court, it is not compelled to confront Defendant's devaluation concerns. Accordingly, the Court reserves judgment on that question.

6 As Dr. Beveridge described, "packing" a minority population would involve forcing as many members of the minority community as possible into a single district to limit their political clout. Conversely, "cracking" a minority community involves spreading the minority community to limit that group's ability to elect a candidate of its choice. *See* Hearing Tr. at 634–36.

7 Dr. Morrison calculated that there was a "moderately high" level of segregation in the Village. Hearing Tr. at 1492. In addition, Plaintiffs' expert Robert Courtney Smith ("Professor Smith"), an expert in the areas of history of discrimination against Hispanics and the socioeconomic disparities of Hispanics in New York, described Port Chester as "a very segregated town." *Id.* at 372 (expert qualifications); 408 (quotation).

8 Defendant presented testimony from Patrick Cleary ("Cleary"), who worked as the Village's principal planner from 1986 through 1990, and has served as a planning consultant to Port Chester for the majority of time since then. Referring to Gov. Ex. 34, Cleary testified that certain blocks on that map (which, according to the 2000 Census, contain some number of residents) are in fact purely industrial areas that have no residential units whatsoever. He further testified that other blocks likely did not contain as many residents as indicated by the 2000 Census data as a result of various development initiatives in the Village. *See generally* Trial Tr. at 797–813.

During cross-examination, however, Cleary admitted that he uses Census data as a benchmark in his own work as a planner, and it also became evident that Cleary had no idea about the population characteristics of Census blocks in Port Chester other than the few he described during his direct testimony. *See id.* at 815, 818–19. Cleary's selective examination of certain Census blocks in Port Chester consisted of little more than his personal observations of land uses and development patterns—there was no analysis of population trends, and certainly no sampling of the accuracy of Census data throughout the Village. On the whole, Defendant's contention that the 2000 Census should not be accepted as reliable is unavailing.

9 The Court will not discuss at length Dr. Morrison's effort to discredit Dr. Beveridge's estimates (*see* Def. Ex. LL. at 25–30), though considerable time was spent on this issue at both the hearing and trial of this matter. The Court was not

convinced by Dr. Morrison's analysis in this part of his report because, among other reasons, his charts relied heavily on the accuracy of registration data but did not reflect any of the admitted problems with registration data as an accurate measure of voters in a given area. *See* section III.B.3 *infra.*

10 Though districts are drawn on the basis of total population, the effectiveness of the minority group is not measured with reference to the total population data. Dr. Morrison indicated in his final expert report that showing that Hispanics represent a majority of CVAP in a single member district "is a typical method for arguing that there is an ability to elect." Def. Ex. LL at 21.

11 Dr. Morrison posited that CVAP data for Port Chester may not be fully accurate because there is some evidence that there is over-reporting of citizenship status by Hispanics in the Census in general—that is, Hispanic non-citizens will indicate on Census forms that they are in fact citizens. *See* Def. Ex. LL at 31. Dr. Morrison did admit, however, that he had no evidence showing any such over-reporting of citizenship status in Port Chester specifically. *See* Hearing Tr. at 1500.

12 This Court recognizes that there is an inherent problem with the data collected in Gov. Ex. 92, because the chart compares the voter registration rolls in November 2004 with the CVAP data as of the 2000 Census. A population increase in these jurisdictions between 2000 and 2004 could account for part of, but certainly not all of, the inflated percentage of Census 2000 CVAP registered to vote in 2004. It is our view, however, that population changes alone cannot account for the significant degree to which the percentage of CVAP on the registration rolls exceeds expected levels; those discrepancies are more likely than not attributable to the types of problems—including deceased voters and voters who moved—highlighted by the Plaintiffs.

13 Experts for both parties used the Census Bureau List of Spanish Surnames to calculate the number of Hispanic voters in a particular area in various charts they prepared (hereinafter "Spanish Surname Analysis"). Neither party disputes that Spanish Surname Analysis is an accepted methodology, though it is clear that certain individuals who identify as Hispanic will be missed by this approach and certain individuals who do not identify as Hispanic will be included in these counts.

14 Dr. Morrison does not provide any analysis of voter registration or turnout for proposed District 4 in Modified Plan A, the plan that clearly contains a greater proportion of Hispanic population, VAP, and CVAP within the boundaries of District 4.

15 This Decision concentrates on endogenous elections between 2001 and 2006 because both Dr. Handley and Dr. Weber testified that these contests produced the most reliable data for their analyses. *See* Hearing Tr. at 499, 506–07 (Dr. Handley explaining how the data for the 1999 and 2000 Trustee elections were unreliable); 1015 (Dr. Weber admitting his concern about the reliability of the data in this case, particularly with respect to the "earlier" data between 1995 and 2000).

16 Unlike Dr. Handley, Dr. Weber will only consider a group to be cohesive if 60 percent of that group votes for the same candidate. Given the degree of cohesion of the Hispanic community in Port Chester, however, this requirement was regularly met; accordingly, this Court will not make any findings of fact regarding this 60 percent threshold in this section. *But see* section III.D.2 *infra.*

17 When questioned, Dr. Weber conceded that the 10 percent figure was arbitrary. The Court inquired: "But why ten? Why is ten the magic number and not 12 and not 8? ... Is there any science; is there any statistical data that supports a 10 percent number? Versus a 9 percent, versus an 11 percent number?" Dr. Weber's candid response was "No. No there isn't. No." Hearing Tr. at 980.

18 Dr. Weber did not perform any analysis of the 2007 Mayoral election. Hispanic voters were not cohesive in the remaining two elections, according to Dr. Weber, because they did not reach his 60 percent threshold.

19 In the Defendant's Motion to Reconsider, Port Chester brings to the Court's attention that the Consent Decree expired in December 2008 and the Department of Justice did not seek to renew it. As the Court found in its decision to deny the Motion to Reconsider, the expiration of the Consent Decree has no bearing on the Court's finding of a *history* of discrimination that led to the Consent Decree.

20 The terms "poll worker" and "election inspector" are used interchangeably here, as they were during the Hearing and Trial.

21 In the data presented by Dr. Handley in support of her conclusions of polarization, African–American and other minority voters are grouped in with the "non-Hispanic" voting bloc. Thus, to the extent, if any, that African–American voters actually tend to vote in a manner more comparable to the Hispanic citizens of Port Chester than the non-Hispanic White citizens of Port Chester, the polarization data actually understates the separation between the Hispanic and non-Hispanic White communities in the Village.

22 Dr. Handley arrived at substantially similar results using ecological inference methodology for the 2001, 2003, and 2007 elections, but her ecological inference estimates for the 2005 Mayoral race ascribed only 52.6 percent of the Hispanic vote to the Hispanic-preferred candidate, as opposed to 96.2 percent support under the bivariate ecological regression method.

23 Nine candidates reached this threshold based on Dr. Handley's ecological inference methodology.

24 To explain lower rates of Hispanic political participation in Port Chester, Dr. Morrison attempted to place great emphasis on the fact that the Hispanic community in the Village contains many recent arrivals and is generally a more transient population. *See* Trial Tr. at 427. Dr. Morrison, however, has not conducted any particular studies to determine how transient the Hispanic community actually is in Port Chester, let alone how this would impact the rate of political participation of the Hispanic population. *See* Trial Tr. at 409–11.

25 According to Didden, two other individuals collaborated on the final version of the flyer: John Crane, a current member of the Board of Trustees, and Dominic Bencivenga, who was then a member of the School Board. Both Crane and Bencivenga testified that they were only minimally involved in the creation of the flyer. Bencivenga stated that he did not have anything to do with the drafting of the flyer, though he did make certain comments and recommendations about the content of the flyer when he viewed it in draft form. Trial Tr. at 360, 364–66. Crane, at the very least, saw the flyers before they were mailed. Trial Tr. at 364–67. Neither Crane nor Bencivenga did anything to stop Didden from sending out the flyer, even though they both recognized that the document was "troubling" and/or "racist, sexist and disgusting."

26 Nelson Rodriguez ran in 1991 and ran again in 1992 as part of the state-mandated re-vote for the 1991 election. Rodriguez's 1988 School Board candidacy was also unsuccessful. Hearing Tr. at 278

27 In addition, though this lawsuit does not name African–Americans as a minority group experiencing a violation of the Voting Rights Act in Port Chester, it is worth noting that no African–American has ever been elected Mayor or to the Board of Trustees, and no African–American has ever been elected to the School Board, despite the fact that African–American candidates ran for the School Board eight times between 1991 and 2006.

28 Though the Second Circuit has not specifically defined the contours of the "special circumstances" doctrine, the Court thinks the Ninth Circuit's reasoning on this point is instructive. That court found that "to invoke the special circumstances doctrine regarding an election that occurred after a Section 2 lawsuit is filed, plaintiffs must show that a particular election was surrounded by unusual circumstances. Those unusual circumstances must demonstrate that the election was not representative of the typical way in which the electoral process functions. The focus is voter behavior, not voter motivation." *Ruiz v. City of Santa Maria,* 160 F.3d 543, 557 (9th Cir.1998).

29 The court in *Euclid III* chose defendant's alternative proposal for limited voting over cumulative voting for nuanced reasons that were specific to the jurisdiction, such as a law requiring staggered elections and the prevalence of limited voting in the state. *Euclid III,* 632 F.Supp.2d at 746.

30 *Cf. Cousin v. Sundquist,* 145 F.3d 818, 829–30 (6th Cir.1998) (the dicta expresses discomfort with the use of cumulative voting as a remedial measure in Section 2 violation cases but in particular with respect to judicial elections for reasons unique to the judiciary; the holding, however, does not rely on this at all since the court in that case found no Section 2 violation).

96 S.Ct. 2040
Supreme Court of the United States

Walter E. WASHINGTON, etc., et al., Petitioners,

v.

Alfred E. DAVIS et al.

No. 74-1492.
|
Argued March 1, 1976.
|
Decided June 7, 1976.

Synopsis

Unsuccessful black applicants for employment as police officers by the District of Columbia brought class action claiming that recruiting procedures, including a written personnel test administered to determine whether applicants have acquired a particular level of verbal skill, were racially discriminatory. The United States District Court for the District of Columbia, 348 F.Supp. 15, granted defendants' motions for summary judgment and plaintiffs appealed. The Court of Appeals, 168 U.S.App.D.C. 42, 512 F.2d 956, reversed and directed summary judgment for plaintiff and certiorari was granted. The Supreme Court, Mr. Justice White, held that standards applicable to equal employment opportunity cases should not have been applied in resolving issue whether the test violated due process clause of the Fifth Amendment; that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose; that the disproportionate impact of the test, which was neutral on its face, did not warrant conclusion that test was a purposely discriminatory device; and that a positive relationship between the test and training school performance was sufficient to validate the test, wholly aside from its possible relationship to actual performance as a police officer.

Judgment of Court of Appeals reversed.

Mr. Justice Stewart joined in parts of the opinion.

Mr. Justice Stevens filed concurring opinion.

Mr. Justice Brennan, with whom Mr. Justice Marshall joined, filed dissenting opinion.

West Headnotes (16)

[1] **Federal Courts** Presentation of Questions Below or on Review; Record; Waiver

Although petition for certiorari to United States Court of Appeals did not present as ground for reversal the Court of Appeals' erroneous application of statutory standards in resolving constitutional issue before it, occasion was appropriate for the Supreme Court to invoke plain error rule. Supreme Court Rules, rule 40, subd. 1(d)(2), 28 U.S.C.A.

30 Cases that cite this headnote

[2] **Constitutional Law** Discrimination and Classification

The standard for adjudicating claims of invidious racial discrimination under the due process clause of the Fifth Amendment is not identical to the standards applicable under the Equal Employment Opportunity Act. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amends. 5, 14.

199 Cases that cite this headnote

[3] **Constitutional Law** Race, National Origin, or Ethnicity

The central purpose of the equal protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. U.S.C.A.Const. Amend. 14.

772 Cases that cite this headnote

[4] **Constitutional Law** Race, National Origin, or Ethnicity

Constitutional Law Relationship to equal protection guarantee

Though the due process clause of the Fifth Amendment contains an equal protection

component prohibiting the government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. U.S.C.A.Const. Amend. 5.

1159 Cases that cite this headnote

[5] **Constitutional Law** Race, National Origin, or Ethnicity

A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on basis of race. U.S.C.A.Const. Amends. 5, 14.

95 Cases that cite this headnote

[6] **Constitutional Law** Race, National Origin, or Ethnicity

An invidious discriminatory purpose in application of a statute may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. U.S.C.A.Const. Amends. 5, 14.

367 Cases that cite this headnote

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

Constitutional Law Intentional or purposeful action

Disproportionate impact of a statute is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution and, standing alone, does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. U.S.C.A.Const. Amends. 5, 14.

289 Cases that cite this headnote

[8] **Constitutional Law** Intentional or purposeful action

In proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor in determining a constitutional violation. U.S.C.A.Const. Amends. 5, 14.

501 Cases that cite this headnote

[9] **Public Employment** Examination

The Constitution does not prevent the government from seeking through a written test of verbal skill modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. U.S.C.A.Const. Amends. 5, 14.

18 Cases that cite this headnote

[10] **Constitutional Law** Public employees and officials

Negro applicants for employment as police officers could no more successfully claim that written test of verbal skill denied them equal protection than could white applicants who also failed the test. U.S.C.A.Const. Amend. 5; D.C.C.E. §§ 1–320, 4–103; 5 U.S.C.A. § 3304(a).

59 Cases that cite this headnote

[11] **Civil Rights** Educational requirements; ability tests

The disproportionate impact on Negroes of written test of verbal skill administered to applicants for employment as police officers did not warrant the conclusion that the test, which was neutral on its face, was a purposely discriminatory device. U.S.C.A.Const. Amend. 5; 5 U.S.C.A. § 3304(a); 42 U.S.C.A. § 1981; D.C.C.E. §§ 1–320, 4–103.

115 Cases that cite this headnote

[12] **Civil Rights** Admissibility of evidence; statistical evidence

The affirmative efforts of police department to recruit black officers, the changing racial

composition of the recruit classes and of the force in general, and the relationship of written test of verbal skill to the training program negated any inference that the department discriminated on the basis of race notwithstanding the disproportionate impact of the test on Negro applicants. U.S.C.A.Const. Amend. 5; 5 U.S.C.A. § 3304(a); 42 U.S.C.A. § 1981; D.C.C.E. §§ 1–320, 4–103.

245 Cases that cite this headnote

[13] **Civil Rights** Judicial review and enforcement of administrative decisions

The statutory standard of review of the Equal Employment Opportunity Act involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact of written personnel test is claimed. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amends. 5, 14.

19 Cases that cite this headnote

[14] **Constitutional Law** Civil rights

Extension of a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another, beyond those areas where the rule is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

27 Cases that cite this headnote

[15] **Civil Rights** Educational requirements; ability tests

Positive relationship between test of verbal skill administered applicants for employment as police officers to training course performance was sufficient to validate the test, wholly aside from its possible relationship to actual performance as a police officer. U.S.C.A.Const. Amend. 5; D.C.C.E. §§ 1–320, 4–103; 5 U.S.C.A. § 3304(a).

38 Cases that cite this headnote

[16] **Civil Rights** Educational requirements; ability tests

District court's conclusion that test of verbal skill administered to applicants for employment as police officers was directly related to the requirements of the police training program was supported by a validation study as well as by other evidence of record. U.S.C.A.Const. Amend. 5; D.C.C.E. §§ 1–320, 4–103; 5 U.S.C.A. § 3304(a).

68 Cases that cite this headnote

****2042** Syllabus*

***229** Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment, 42 U.S.C. s 1981, and D.C.Code s 1-320. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for ****2043** summary judgment. The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment,

in view of the facts that 44% Of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance) and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on ***230** appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted. The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use ofests that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance. Held:

1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases. Pp. 2046-2052.

(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional Solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Pp. 2047-2050.

(b) The Constitution does not prevent the Government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed. P. 2050.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the District Court properly held that any inference of discrimination was unwarranted. Pp. 2050-2051.

(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is ***231** appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. Any extension of that statutory standard should await legislative prescription. Pp. 2051-2052.

2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion ****2044** that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate. Pp. 2052-2054.

168 U.S.App.D.C. 42, 512 F.2d 956, reversed.

Attorneys and Law Firms

David P. Sutton, Washington, D. C., for petitioners.

Mark L. Evans, Washington, D. C., for the federal respondents.

Richard B. Sobol, Washington, D. C., for respondents Davis et al.

Opinion

***232** Mr. Justice WHITE delivered the opinion of the Court.

This case involves the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The test was sustained by the District Court but invalidated by the Court of Appeals. We are in agreement with the District Court and hence reverse the judgment of the Court of Appeals.

I

This action began on April 10, 1970, when two Negro police officers filed suit against the then Commissioner of the District of Columbia, the Chief of the District's Metropolitan Police Department, and the Commissioners of the United States Civil Service Commission.[1] An amended complaint, filed December 10, alleged that the promotion policies of the Department were racially discriminatory and sought a declaratory judgment and an injunction. The respondents Harley and Sellers were permitted to intervene, their amended complaint asserting ***233** that their applications to become officers in the Department had been rejected, and that the Department's recruiting procedures discriminated on the basis of race against black applicants by a series of practices including, but not limited to, a written personnel test which excluded a disproportionately high number of Negro applicants. These practices were asserted to violate respondents' rights "under the due process clause of the Fifth Amendment to the United States Constitution, under 42 U.S.C. s 1981 and under D.C.Code s 1-320."[2] Defendants answered, and discovery ****2045** and ***234** various other proceedings followed.[3]Respondents then filed a motion for partial summary judgment with respect to the recruiting phase of the case, seeking a declaration that the test administered to those applying to become police officers is "unlawfully discriminatory and thereby in violation of the due process clause of the Fifth Amendment . . . ." No issue under any statute or regulation was raised by the motion. The District of Columbia defendants, petitioners here, and the federal parties also filed motions for summary judgment with respect to the recruiting aspects of the case, asserting that respondents were entitled to relief on neither constitutional nor statutory grounds.[4] The District Court granted petitioners' and denied respondents' motions. 348 F.Supp. 15 (DC1972).

According to the findings and conclusions of the District Court, to be accepted by the Department and to enter an intensive 17-week training program, the police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," ***235** and which was "designed to test verbal ability, vocabulary, reading and comprehension." *Id.,* at 16.

The validity of Test 21 was the sole issue before the court on the motions for summary judgment. The District Court noted that there was no claim of "an intentional discrimination or purposeful discriminatory acts" but only a claim that Test 21 bore no relationship to job performance and "has a highly discriminatory impact in screening out black candidates." Ibid. Respondents' evidence, the District Court said, warranted three conclusions: "(a) The number of black police officers, while substantial, is not proportionate to the population mix of the city. (b) A higher percentage of blacks fail the Test than whites. (c) The Test has not been validated to establish its reliability for measuring subsequent job performance." Ibid. This showing was deemed sufficient to shift the burden of proof to the defendants in the action, petitioners here; but the court nevertheless concluded that on the undisputed facts respondents were not entitled to relief. The District Court relied on several factors. Since August 1969, 44% Of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated. It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty. The District Court rejected the assertion that Test 21 was culturally slanted to favor whites and was "satisfied that the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program and that it is neither so designed nor operates (Sic) to discriminate ***236** against otherwise qualified blacks' Id., at 17. It was thus not necessary to show that Test 21 was not only a useful indicator of training school performance but had also been validated in terms of job performance "The lack of job performance validation does not defeat the Test, given its direct relationship ****2046** to recruiting and the valid part it plays in this process." Ibid. The District Court ultimately concluded that "(t)he proof is wholly lacking that a police officer qualifies on the color of his skin rather than ability" and that the Department "should not be required on this showing to lower standards or to abandon efforts to achieve excellence."[5] Id., at 18.

Having lost on both constitutional and statutory issues in the District Court, respondents brought the case to the Court of Appeals claiming that their summary judgment motion, which rested on purely constitutional grounds, should have been granted. The tendered constitutional issue was whether the use of Test 21 invidiously discriminated against Negroes and hence denied them due process of law contrary to the commands of the Fifth Amendment. The Court of Appeals, addressing that issue, announced that it would be guided by

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), a case involving the interpretation and application of Title VII of the Civil Rights Act of 1964, and held that the statutory standards elucidated in that case were to govern the due process question tendered in this one.[6] 168 U.S.App.D.C. 42, 512 F.2d 956 (1975). ***237** The court went on to declare that lack of discriminatory intent in designing and administering Test 21 was irrelevant; the critical fact was rather that a far greater proportion of blacks four times as many failed the test than did whites. This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge. That the Department had made substantial efforts to recruit blacks was held beside the point and the fact that the racial distribution of recent hirings and of the Department itself might be roughly equivalent to the racial makeup of the surrounding community, broadly conceived, was put aside as a "comparison (not) material to this appeal." Id., at 46 n. 24, 512 F.2d, at 960 n. 24. The Court of Appeals, over a dissent, accordingly reversed the judgment of the District Court and directed that respondents' motion for partial summary judgment be granted. We granted the petition for certiorari, 423 U.S. 820, 96 S.Ct. 33, 46 L.Ed.2d 37 (1975), filed by the District of Columbia officials.[7]

***238** II

[1] Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Although the petition for certiorari did not present this ground for reversal,[8] our Rule 40(1)(d)(2) provides that we "may notice a ****2047** plain error not presented";[9] and this is an appropriate occasion to invoke the Rule.

[2] As the Court of Appeals understood Title VII,[10] employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion ***239** practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

[3] **[4]** The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact.

Almost 100 years ago, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880), established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause. "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." Akins v. Texas, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692, 1696 (1945). A defendant in a criminal case is entitled "to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." Alexander v. Louisiana, 405 U.S. 625, 628-629, 92 S.Ct. 1221, 1224, 31 L.Ed.2d 536 (1972). See also Carter v. Jury Comm'n, 396 U.S. 320, 335-337, 339, 90 S.Ct. 5, 526-528, 529, 24 L.Ed.2d 549, 560-561, 562 (1970); Cassell v. Texas, 339 U.S. 282, 287-290, 70 S.Ct. 629, 631-633, 94 L.Ed. 839, 847-849 (1950); Patton v. Mississippi, 332 U.S. 463, 468-469, 68 S.Ct. 184, 187, 92 L.Ed. 76, 80 (1947).

***240** The rule is the same in other contexts. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their ****2048** boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York

Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." Id., at 56, 58, 84 S.Ct., at 605, 11 L.Ed.2d, at 515. The dissenters were in agreement that the issue was whether the "boundaries . . . were purposefully drawn on racial lines." Id., at 67, 84 S.Ct., at 611, 11 L.Ed.2d, at 522.

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of De jure segregation is "a current condition of segregation resulting from intentional state action. Keyes v. School Dist. No. 1, 413 U.S. 189, 205, 93 S.Ct. 2686, 2696, 37 L.Ed.2d 548 (1973). The differentiating factor between De jure segregation and so-called De facto segregation . . . is Purpose or Intent to segregate." Id., at 208, 93 S.Ct., at 2696, 37 L.Ed.2d, at 561. See also Id., at 199, 211, 213, 93 S.Ct. at 2692, 2698, 2699, 37 L.Ed.2d, at 558, 564, 566. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "(t)he acceptance of appellants' ***241** constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Jefferson v. Hackney*, 406 U.S. 535, 548, 92 S.Ct. 1724, 1732, 32 L.Ed.2d 285, 297 (1972). And compare Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), with James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971).

[5] This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." Akins v. Texas, supra, 325 U.S., at 404, 65 S.Ct., at 1279, 89 L.Ed., at 1696. Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Pierre v. Louisiana, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939); Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567 (1881). A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, Hill v. Texas, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86 L.Ed. 1559, 1562 (1942), or with racially non-neutral selection procedures, Alexander v. Louisiana, supra ; Avery v. Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." Alexander, supra, 405 U.S., at 632, 92 S.Ct., at 1226, 31 L.Ed.2d, at 542. See also Turner v. Fouche, 396 U.S. 346, 361, 90 S.Ct. 532, 540, 24 L.Ed.2d 567, 579 (1970); Eubanks v. Louisiana, 356 U.S. 584, 587, 78 S.Ct. 970, 973, 2 L.Ed.2d 991, 994 (1958).

[6] **[7]** ***242** Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including ****2049** the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

There are some indications to the contrary in our cases. In Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), the city of Jackson, Miss., following a court decree to this effect, desegregated all of its public facilities save five swimming pools which had been operated by the city and which, following the decree, were closed by ordinance pursuant to a determination by the city council that closure was necessary to preserve peace and order and that integrated pools could not be economically operated.

Accepting the finding that the pools were closed to avoid violence and economic loss, this Court rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that ***243** racially invidious motivations had prompted the city council's action. The holding was that the city was not overtly or covertly operating segregated pools and was extending identical treatment to both whites and Negroes. The opinion warned against grounding decision on legislative purpose or motivation, thereby lending support for the proposition that the operative effect of the law rather than its purpose is the paramount factor. But the holding of the case was that the legitimate purposes of the ordinance to preserve peace and avoid deficits were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations. Whatever dicta the opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.

[8] Wright v. Council of City of Emporia, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972), also indicates that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor. That case involved the division of a school district. The issue was whether the division was consistent with an outstanding order of a federal court to desegregate the dual school system found to have existed in the area. The constitutional predicate for the District Court's invalidation of the divided district was "the enforcement until 1969 of racial segregation in a public school system of which Emporia had always been a part." Id., at 459, 92 S.Ct., at 2202, 33 L.Ed.2d, at 60. There was thus no need to find "an independent constitutional violation." Ibid. Citing Palmer v. Thompson, we agreed with the District Court that the division of the district had the effect of interfering with the federal decree and should be set aside.

That neither Palmer Nor Wright was understood to have changed the prevailing rule is apparent from Keyes v. School Dist. No. 1, supra, where the principal issue ***244** in litigation was whether to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system. Nor did other later cases, Alexander v. Louisiana, supra, and Jefferson v. Hackney, supra, indicate that either ****2050** Palmer or Wright had worked a fundamental change in equal protection law.[11]

Both before and after Palmer v. Thompson, however, various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.[12] The ***245** cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

[9] **[10]** As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that ***246** the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been ****2051** disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

[11] **[12]** Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be

said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability." 348 F.Supp., at 18.

[13] Under Title VII, Congress provided that when hiring ***247** and promotion practices disqualifying substantially disprortionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question.[13] However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes ***248** of applying the Fifth and the Fourteenth Amendments in cases such as this

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[14]

****2052** **[14]** Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

As we have indicated, it was error to direct summary judgment for respondents based on the Fifth Amendment.

III

We also hold that the Court of Appeals should have affirmed the judgment of the District Court granting the motions for summary judgment filed by petitioners and the federal parties. Respondents were entitled to relief on neither constitutional nor statutory grounds.

***249** The submission of the defendants in the District Court was that Test 21 complied with all applicable statutory as well as constitutional requirements; and they appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied.[15] The District Court also assumed that Title VII standards were to control the case identified the determinative issue as whether Test 21 was sufficiently job related and proceeded to uphold use of the test because it was "directly related to a determination of whether the applicant possesses sufficient skills requisite to the demands of the curriculum a recruit must master at the police academy." 348 F.Supp., at 17. The Court of Appeals reversed because the relationship between Test 21 and training school success, if demonstrated at all, did not satisfy what it deemed to be the crucial requirement ***250** of a direct relationship between performance on Test 21 and performance on the policeman's job.

[15] We agree with petitioners and the federal parties that this was error. The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence ****2053** placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties

to the case.[16] Nor is the ***251** conclusion closed by either Griggs or Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); and it seems to us the much more sensible construction of the job-relatedness requirement.

[16] The District Court's accompanying conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record;[17] ***252** and we are not convinced that this conclusion was erroneous.

The federal parties, whose views have somewhat changed since the decision of the Court of Appeals and who still insist that training-program validation is sufficient, now urge a remand to the District Court for the purpose of further inquiry into whether the training-program test scores, which were found to correlate with Test 21 scores, are themselves an appropriate measure of the trainee's mastership of the material taught in the course and whether the training program itself is sufficiently related to actual performance of the police officer's task. We think a remand is inappropriate. The District Court's judgment was warranted by the record before it, and we perceive no good reason to reopen it, particularly since we were informed at oral argument that although Test 21 is still being administered, the training program itself has undergone substantial modification in the course of this litigation. If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that Title.

The judgment of the Court of Appeals accordingly is reversed.

So ordered.

Mr. Justice STEWART joins Parts I and II of the Court's opinion.

****2054** Mr. Justice STEVENS, concurring.

While I agree with the Court's disposition of this case, I add these comments on the constitutional issue discussed ***253** in Part II and the statutory issue discussed in Part III of the Court's opinion.

The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

***254** My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 or Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.[*]

My agreement with the conclusion reached in Part II of the Court's opinion rests on a ground narrower than the Court describes. I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District

administration, would save Test 21 if it were otherwise invalid.

There are two reasons why I am convinced that the challenge to Test 21 is insufficient. First, the test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function, there is no evidence that the required passing grade was set at an arbitrarily high level, and there is sufficient disparity among high schools and high school graduates to justify the use of a separate uniform test. Second, ***255** the same test is used throughout the federal service. The applicants for employment in the District of ****2055** Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself. That evidence, without more, is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purposes" that term is used in constitutional adjudication.

My study of the statutory issue leads me to the same conclusion reached by the Court in Part III of its opinion. Since the Court of Appeals set aside the portion of the District Court's summary judgment granting the defendants' motion, I agree that we cannot ignore the statutory claims even though as the Court makes clear, Ante, at 238 n.10, there is no Title VII question in this case. The actual statutory holdings are limited to 42 U.S.C. s 1981 and s 1-320 of the District of Columbia Code, to which regulations of the Equal Employment Opportunity Commission have no direct application.

The parties argued the case as though Title VII standards were applicable. In a general way those standards shed light on the issues, but there is sufficient individuality and complexity to that statute, and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history. Moreover, the subject matter of this case the validity of qualifications for the law enforcement profession is one in which federal district judges have a greater expertise than in many others. I therefore do not regard this as a case in which the District Court was required to apply Title VII standards as strictly as would ***256** be necessary either in other contexts or in litigation actually arising under that statute.

The Court's specific holding on the job-relatedness question contains, I believe, two components. First, as a matter of law, it is permissible for the police department to use a test for the purpose of predicting ability to master a training program even if the test does not otherwise predict ability to perform on the job. I regard this as a reasonable proposition and not inconsistent with the Court's prior holdings, although some of its prior language obviously did not contemplate this precise problem. Second, as a matter of fact, the District Court's finding that there was a correlation between success on the test and success in the training program has sufficient evidentiary support to withstand attack under the "clearly erroneous" standard mandated by Fed.Rule Civ.Proc. 52(a). Whether or not we would have made the same finding of fact, the opinion evidence identified in n. 17 of the Court's opinion and indeed the assumption made by the Court of Appeals quoted therein is surely adequate to support the finding under the proper standard of appellate review.

On the understanding that nothing which I have said is inconsistent with the Court's reasoning, I join the opinion of the Court except to the extent that it expresses an opinion on the merits of the cases cited Ante, at 2050, n. 12.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

The Court holds that the job qualification examination (Test 21) given by the District of Columbia Metropolitan Police Department does not unlawfully discriminate on the basis of race under either constitutional or statutory standards.

***257** Initially, it seems to me that the Court should not pass on the statutory questions, because they are not presented by this case. The Court says that respondents' summary judgment motion "rested on purely constitutional grounds," Ante, at 2046, and that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it," Ante, at 2046. There is a suggestion, however, that petitioners are entitled to prevail because they met the burden of proof imposed by 5 U.S.C. s 3304. Ante, at 2052 n. 15. As I understand the opinion, ****2056** the Court therefore holds that Test 21 is job-related under s 3304, but not necessarily under Title VII. But that provision, by the Court's own analysis, is no more in the case than Title VII; respondents' "complaint asserted no claim under s 3304." Ante, at 2045 n. 2. Cf. Ante, at 2046-2047 n. 10. If it was "plain error" for the Court of Appeals to apply a statutory standard to this case, as the Court asserts, Ante,

at 2046-2047, then it is unfortunate that the Court does not recognize that it is also plain error to address the statutory issues in Part III of its opinion.

Nevertheless, although it appears unnecessary to reach the statutory questions, I will accept the Court's conclusion that respondents were entitled to summary judgment if they were correct in their statutory arguments, and I would affirm the Court of Appeals because petitioners have failed to prove that Test 21 satisfies the applicable statutory standards.[1] All parties' arguments and ***258** both lower court decisions were based on Title VII standards. In this context, I think it wrong to focus on s 3304 to the exclusion of the Title VII standards, particularly because the Civil Service Commission views the job-relatedness standards of Title VII and s 3304 as identical.[2] See also Infra, at 2058-2059.

In applying a Title VII test,[3] both the District Court and the Court of Appeals held that respondents had offered sufficient evidence of discriminatory impact to shift to petitioners the burden of proving job relatedness. 348 F.Supp. 15, 16; 168 U.S.App.D.C. 42, 45-47, 512 F.2d 956, 959-961. The Court does not question these rulings, and the only issue before us is what petitioners were required to show and whether they carried their burden. The Court agrees with the District Court's conclusion that Test 21 was validated by a positive relationship between Test 21 scores and performance in police training courses. This result is based upon the Court's reading of the record, its interpretation of instructions ***259** governing testing practices issued by the Civil Service Commission (CSC), and "the current views of the Civil Service Commissioners who were parties to the case." We are also assured that today's result is not foreclosed by *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). Finally, the Court asserts that its conclusion is "the much more sensible construction of the job relatedness requirement." *Ante,* at 2053.

But the CSC instructions cited by the Court do not support the District Court's conclusion. More importantly, the brief filed in this Court by the CSC takes the position that petitioners did not satisfy the burden of proof imposed by the CSC guidelines. It also appears that longstanding regulations of the Equal Employment Opportunity Commission (EEOC) previously ****2057** endorsed by this Court require a result contrary to that reached by the Court. Furthermore, the Court's conclusion is inconsistent with my understanding of the interpretation of Title VII in Griggs and Albemarle. I do not find this conclusion "much more sensible" and with all respect I suggest that today's decision has the potential of significantly weakening statutory safeguards against discrimination in employment.

I

On October 12, 1972, the CSC issued a supplement to the Federal Personnel Manual containing instructions for compliance with its general regulations concerning employment practices.[4] The provision cited by the Court ***260** requires that Test 21 "have a demonstrable and rational relationship to important job-related performance objectives identified by management." "Success in training" is one example of a possible objective. The statistical correlation established by the Futransky validity study, Ante, at 2053 n. 17, was between applicants' scores on Test 21 and recruits' average scores on final examinations given during the police training course.

It is hornbook law that the Court accord deference to the construction of an administrative regulation when that construction is made by the administrative authority responsible for the regulation. E. g., Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965). It is worthy of note, therefore, that the brief filed by the CSC in this case interprets the instructions in a manner directly contrary to the Court, despite the Court's claim that its result is supported by the Commissioners' "current views."
"Under Civil Service Commission regulations and current professional standards governing criterion-related test validation procedures, the job-relatedness of an entrance examination may be demonstrated by proof that scores on the examination predict properly measured success in job-relevant training (regardless of whether they predict success on the job itself).

"The documentary evidence submitted in the district court demonstrates that scores on Test 21 are predictive of Recruit School Final Averages. There ***262** is little evidence, however, concerning the relationship between the Recruit School tests and the substance of the training program, and between the substance of the training program and the post-training job of a police officer. It cannot be determined, therefore, whether the Recruit School Final Averages are a proper measure of success in training and whether the training program is job-relevant." Brief for CSC 14-15 (emphasis added).

The CSC maintains that a positive correlation between scores on entrance examinations and the criterion of success in training may establish the job relatedness of an entrance test thus relieving an employer from the burden of providing a relationship to job performance after training but only subject to certain limitations.

"Proof that scores on an entrance examination predict scores on training school achievement tests, however, does not, by itself, satisfy the burden of demonstrating the job-relatedness of the entrance examination. There must also be evidence the nature of which will depend on the particular circumstances of the case showing that the achievement test scores are an appropriate measure of **2058 the trainee's mastery of the material taught in the training program and that the training program imparts to a new employee knowledge, skills, or abilities required for performance of the post-training job." Id., at 24-25.

Applying its standards[5] the CSC concludes that none of the evidence presented in the District Court established "the appropriateness of using Recruit School Final Averages as the measure of training performance or the relationship of the Recruit School program to the job of a police officer." Id., at 30.[6]

The CSC's standards thus recognize that Test 21 can be validated by a correlation between Test 21 scores and recruits' averages on training examinations only if (1) the training averages predict job performance or (2) the averages are proved to measure performance in job-related training. There is no proof that the recruits' average is correlated with job performance after completion of training. See n. 10, Infra. And although a positive relationship to the recruits' average might be sufficient to validate Test 21 if the average were proved to reflect mastery of material on the training curriculum that was in turn demonstrated to be relevant to job performance, the record is devoid of proof in this regard. First, there is no demonstration by petitioners that the training-course examinations measure comprehension of the training curriculum; indeed, these examinations do not even appear in the record. Furthermore, the Futransky study simply designated an average of 85 on the *263 examination as a "good" performance and assumed that a recruit with such an average learned the material taught in the training course.[7] Without any further proof of the significance of a score of 85, and there is none in the record, I cannot agree that Test 21 is predictive of "success in training."

II

Today's decision is also at odds with EEOC regulations issued pursuant to explicit authorization in Title VII, 42 U.S.C. s 2000e-12(a). Although the dispute in this case is not within the EEOC's jurisdiction, as I noted above, the proper construction of Title VII nevertheless is relevant. Moreover, the 1972 extension of Title VII to public employees gave the same substantive protection to those employees as had previously been accorded in the private sector, Morton v. Mancari, 417 U.S. 535, 546-547, 94 S.Ct. 2474, 2480-2481, 41 L.Ed.2d 290, 298-299 (1974), and it is therefore improper to maintain different standards in the public and private sectors. Chandler v. Roudebush, 425 U.S. 840, 864, 96 S.Ct. 1949, 1961, 48 L.Ed.2d 416, 433 (1976). See n. 2, Supra.

As with an agency's regulations, the construction of a statute by the agency charged with its administration is entitled **2059 to great deference. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415, 419 (1972); Udall v. Tallman, 380 U.S., at 16, 85 S.Ct., at 801, 13 L.Ed.2d, at 625; Power Reactor Co. v. Electricians, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924, 932 (1961). The deference *264 due the pertinent EEOC regulations is enhanced by the fact that they were neither altered nor disapproved when Congress extensively amended Title VII in 1972.[8] Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 410, 95 S.Ct. 1066, 1075, 43 L.Ed.2d 279, 290 (1975); Cammarano v. United States, 358 U.S. 498, 510, 79 S.Ct. 524, 531, 3 L.Ed.2d 462, 470 (1959); Allen v. Grand Central Aircraft Co., 347 U.S. 535, 547, 74 S.Ct. 745, 752, 98 L.Ed. 933, 943 (1954); Massachusetts Mut. Life Ins. Co. v. United States, 288 U.S. 269, 273, 53 S.Ct. 337, 339, 77 L.Ed. 739, 742 (1933). These principles were followed in Albemarle where the Court explicitly endorsed various regulations no fewer than eight times in its opinion, 422 U.S., at 431-436, 95 S.Ct., at 2378-2381, 45 L.Ed.2d, at 304-307[9] and Griggs, 401 U.S., at 433-434, 91 S.Ct., at 854-855, 28 L.Ed.2d, at 165-166.

The EEOC regulations require that the validity of a job qualification test be proved by "empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 CFR s 1607.4(c) (1975). This construction of Title VII was approved in Albemarle, where we quoted this provision and remarked that "(t)he message of these

Guidelines is the same as that of the Griggs case." 422 U.S., at 431, 95 S.Ct., at 2378, 45 L.Ed.2d, at 304. The regulations also set forth minimum standards for ***265** validation and delineate the criteria that may be used for this purpose.

"The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses." 29 CFR s 1607.5(b)(3) (1975).

This provision was also approved in Albemarle, 422 U.S., at 432, 95 S.Ct., at 2379, 45 L.Ed.2d, at 304, and n. 30.

If we measure the validity of Test 21 by this standard, which I submit we are bound to do, petitioners' proof is deficient in a number of ways similar to those noted above. First, the criterion of final training examination averages does not appear to be "fully described." Although the record contains some general discussion of the training curriculum, the examinations are not in the record, and there is no other evidence completely elucidating the subject matter tested by the training examinations. Without this required description we cannot determine whether the correlation with training examination averages is sufficiently related to petitioners' need to ascertain "job-specific ability." See Albemarle, 422 U.S., at 433, 95 S.Ct., at 2379, 45 L.Ed.2d, at 305. Second, the EEOC regulations do not expressly permit validation by correlation to training performance, unlike the CSC instructions. ****2060** Among the specified criteria the closest to training performance is "training time." All recruits to the Metropolitan Police Department, however, go through the ***266** same training course in the same amount of time, including those who experience some difficulty. See n. 7, *supra*. Third, the final requirement of s 1607.5(b)(3) has not been met. There has been no job analysis establishing the significance of scores on training examinations, nor is there any other type of evidence showing that these scores are of 'major or critical " importance.

Accordingly, EEOC regulations that have previously been approved by the Court set forth a construction of Title VII that is distinctly opposed to today's statutory result.

III

The Court also says that its conclusion is not foreclosed by Griggs and Albemarle, but today's result plainly conflicts with those cases. Griggs held that "(i)f an employment practice which operates to exclude Negroes cannot be shown to be Related to job performance, the practice is prohibited." 401 U.S., at 431, 91 S.Ct., at 853, 28 L.Ed.2d, at 164 (emphasis added). Once a discriminatory impact is shown, the employer carries the burden of proving that the challenged practice "bear(s) a Demonstrable relationship to successful performance of the jobs for which it was used." Ibid. (emphasis added). We observed further:

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." Id., at 436, 91 S.Ct., at 856, 28 L.Ed.2d, at 167.

Albemarle read Griggs to require that a discriminatory test be validated through proof "by professionally acceptable methods" that it is " 'predictive of or significantly ***267** correlated with *important* elements of work behavior *which comprise or are relevant to the job or jobs* for which candidates are being evaluated.' " 422 U.S., at 431, 95 S.Ct., at 2378, 45 L.Ed.2d, at 304 (emphasis added), quoting 29 CFR s 1607.4(c) (1975). Further, we rejected the employer's attempt to validate a written test by proving that it was related to supervisors' job performance ratings, because there was no demonstration that the ratings accurately reflected job performance. We were unable "to determine whether the criteria Actually considered were sufficiently related to the (employer's) legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact." 422 U.S., at 433, 95 S.Ct., at 2379, 45 L.Ed.2d, at 305 (emphasis in original). To me, therefore, these cases read Title VII as requiring proof of a significant relationship to job performance to establish the validity of a discriminatory test. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 678 and n. 14 (1973). Petitioners do not maintain that there is a demonstrated correlation between Test 21 scores and job performance. Moreover, their validity study was unable to discern a significant positive relationship between training averages and job performance.[10] Thus, there is no proof of a correlation either direct or indirect between Test 21 and performance of the job of being a police officer.

It may well be that in some circumstances, proof of a relationship between a discriminatory qualification test and training **2061 performance is an acceptable substitute for establishing a relationship to job performance. But this question is not settled, and it should not be resolved *268 by the minimal analysis in the Court's opinion.[11] Moreover, it is particularly inappropriate to decide the question on this record. "Professionally acceptable methods" apparently recognize validation by proof of a correlation with training performance, rather than of performance, if (1) the training curriculum includes information proved to be important to job performance and (2) the standard used as a measure of training performance is shown to reflect the trainees' mastery of the material included in the training curriculum. See Brief for CSC 24-29; Brief for the Executive Committee of Division 14 of the American Psychological Assn. as Amicus Curiae 37-43. But no authority, whether professional, administrative, or judicial, has accepted the sufficiency of a correlation with training performance in the absence of such proof. For reasons that I have stated above, the record does not adequately establish either factor. As a result, the Court's conclusion cannot be squared with the focus on job performance in Griggs and Albemarle, even if this substitute showing is reconcilable with the holdings in those cases.

Today's reduced emphasis on a relationship to job performance is also inconsistent with clearly expressed congressional intent. A section-by-section analysis of the 1972 amendments to Title VII states as follows:
"In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would *269 continue to govern the applicability and construction of Title VII." 118 Cong.Rec. 7166 (1972).

The pre-1972 judicial decisions dealing with standardized tests used as job qualification requirements uniformly follow the EEOC regulations discussed above and insist upon proof of a relationship to job performance to prove that a test is job related.[12] Furthermore, the Court ignores Congress' explicit hostility toward the use of written tests as job-qualification requirements; Congress disapproved the CSC's "use of general ability tests which are not aimed at any direct relationship to specific jobs." H.R.Rep. No. 92-238, p. 24 (1971). See S.Rep. No. 92-415, pp. 14-15 (1971). Petitioners concede that Test 21 was devised by the CSC for general use and was not designed to be used by police departments.

Finally, it should be observed that every federal court, except the District Court in this case, presented with proof identical to that offered to validate Test 21 has reached a conclusion directly opposite to that of the *270 Court today.[13] Sound policy considerations **2062 support the view that, at a minimum, petitioners should have been required to prove that the police training examinations either measure job-related skills or predict job performance. Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than "job-specific ability." As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous. It seems to me, however, that the Court's holding in this case can be read as endorsing this dubious proposition. Today's result will prove particularly unfortunate if it is extended to govern Title VII cases.

Accordingly, accepting the Court's assertion that it is necessary to reach the statutory issue, I would hold that petitioners have not met their burden of proof and affirm the judgment of the Court of Appeals.

All Citations

426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597, 12 Fair Empl.Prac.Cas. (BNA) 1415, 11 Empl. Prac. Dec. P 10,958

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

1 Under s 4-103 of the District of Columbia Code, appointments to the Metropolitan Police force were to be made by the Commissioner subject to the provisions of Title 5 of the United States Code relating to the classified civil service. The District of Columbia Council and the Office of Commissioner of the District of Columbia, established by Reorganization

Plan No. 37 of 1967, were abolished as of January 2, 1975, and replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia.

2 Title 42 U.S.C. s 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1-320 of the District of Columbia Code (1973) provides:

"In any program of recruitment or hiring of individuals to fill positions in the government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color, or national origin."

One of the provisions expressly made applicable to the Metropolitan Police force by s 4-103 is 5 U.S.C. s 3304(a), which provides:

"s 3304. Competitive service; examinations.

"(a) The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, for

"(1) open, competitive examinations for testing applicants for appointment in the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought; and

"(2) noncompetitive examinations when competent applicants do not compete after notice has been given of the existence of the vacancy."

The complaint asserted no claim under s 3304.

3 Those proceedings included a hearing on respondents' motion for an order designating the case as a class action. A ruling on the motion was held in abeyance and was never granted insofar as the record before us reveals.

4 In support of the motion, petitioners and the federal parties urged that they were in compliance with all applicable constitutional, statutory, and regulatory provisions, including the provisions of the Civil Service Act which since 1883 were said to have established a "job relatedness" standard for employment.

5 When summary judgment was granted, the case with respect to discriminatory promotions was still pending. The District Court, however, made the determination and direction authorized by Fed.Rule Civ.Proc. 54(b). The promotion issue was subsequently decided adversely to the original plaintiffs. Davis v. Washington, 352 F.Supp. 187 (DC 1972).

6 "Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inapplicable to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case. . . . The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII." 168 U.S.App.D.C. 42, 44 n. 2, 512 F.2d 956, 958 n. 2 (1975).

7 The Civil Service Commissioners, defendants in the District Court, did not petition for writ of certiorari but have filed a brief as respondents. See our Rule 21(4). We shall at times refer to them as the "federal parties."

8 Apparently not disputing the applicability of the Griggs and Title VII standards in resolving this case, petitioners presented issues going only to whether Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), had been misapplied by the Court of Appeals.

9 See, E. g., Silber v. United States, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962); Carpenters v. United States, 330 U.S. 395, 412, 67 S.Ct. 775, 784, 91 L.Ed. 973, 987 (1947); Sibbach v. Wilson & Co., 312 U.S. 1, 16, 61 S.Ct. 422, 427, 85 L.Ed. 479, 486 (1941); Mahler v. Eby, 264 U.S. 32, 45, 44 S.Ct. 283, 288, 68 L.Ed. 549, 557 (1924); Weems v. United States, 217 U.S. 349, 362, 30 S.Ct. 544, 547, 54 L.Ed. 793, 796 (1910).

10 Although Title VII standards have dominated this case, the statute was not applicable to federal employees when the complaint was filed; and although the 1972 amendments extending the Title to reach Government employees were adopted prior to the District Court's judgment, the complaint was not amended to state a claim under that Title, nor did the case thereafter proceed as a Title VII case. Respondents' motion for partial summary judgment, filed after the 1972 amendments, rested solely on constitutional grounds; and the Court of Appeals ruled that the motion should have been granted.

At the oral argument before this Court, when respondents' counsel was asked whether “this is just a purely Title VII case as it comes to us from the Court of Appeals without any constitutional overtones,” counsel responded: “My trouble honestly with that proposition is the procedural requirements to get into court under Title VII, and this case has not met them.” Tr. of Oral Arg. 66.

11 To the extent that Palmer suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases as indicated in the text are to the contrary; and very shortly after Palmer, all Members of the Court majority in that case joined the Court's opinion in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

12 Cases dealing with public employment include: Chance v. Board of Examiners, 458 F.2d 1167, 1176-1177 (CA2 1972); Castro v. Beecher, 459 F.2d 725, 732-733 (CA1 1972); Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1337 (CA2 1973); Harper v. Mayor of Baltimore, 359 F.Supp. 1187, 1200 (D.Md.), aff'd in pertinent part Sub nom. Harper v. Kloster, 486 F.2d 1134 (CA4 1973); Douglas v. Hampton, 168 U.S.App.D.C. 62, 67, 512 F.2d 976, 981 (1975); but cf. Tyler v. Vickery, 517 F.2d 1089, 1096-1097 (CA5 1975), cert. pending, No. 75-1026. There are also District Court cases: Wade v. Mississippi Cooperative Extension Serv., 372 F.Supp. 126, 143 (ND Miss. 1974); Arnold v. Ballard, 390 F.Supp. 723, 736, 737 (N.D. Ohio 1975); United States v. City of Chicago, 385 F.Supp. 543, 553 (N.D. Ill. 1974); Fowler v. Schwarzwalder, 351 F.Supp. 721, 724 (D.Minn. 1972), rev'd on other grounds, 498 F.2d 143 (CA8 1974).

In other contexts there are Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (CA2 1968) (urban renewal); Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108, 114 (CA2 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971) (zoning); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (CA9 1970) (dictum) (zoning); Metropolitan H. D. Corp. v. Village of Arlington Heights, 517 F.2d 409 (CA7), cert. granted, December 15, 1975, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975) (zoning); Gautreaux v. Romney, 448 F.2d 731, 738 (CA7 1971) (dictum) (public housing); Crow v. Brown, 332 F.Supp. 382, 391 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (CA5 1972) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (CA5 1971), aff'd on rehearing en banc, 461 F.2d 1171 (1972) (municipal services).

13 It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966), accept three basic methods of validation: “empirical” or “criterion” validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); “construct” validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and “content” validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant). These standards have been relied upon by the Equal Employment Opportunity Commission in fashioning its Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1975), and have been judicially noted in cases where validation of employment tests has been in issue. See, E.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280, 304 (1975); Douglas v. Hampton, 168 U.S.App.D.C., at 70, 512 F.2d, at 984; Vulcan Society v. Civil Service Comm'n, 490 F.2d 387, 394 (CA2 1973).

14 Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif.L.Rev. 275, 300 (1972), suggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . .; (s)ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule. Silverman, Equal Protection, Economic Legislation, and Racial Discrimination, 25 Vand.L.Rev. 1183 (1972). See also Demsetz, Minorities in the Market Place, 43 N.C.L.Rev. 271 (1965).

15 In their memorandum supporting their motion for summary judgment, the federal parties argued:

"In Griggs, supra, the Supreme Court set a job-relationship standard for the private sector employers which has been a standard for federal employment since the passage of the Civil Service Act in 1883. In that act Congress has mandated that the federal government must use '. . . examinations for testing applicants for appointment . . . which . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought.' 5 U.S.C. s 3304(a)(1). Defendants contend that they have been following the job-related standards of Griggs, supra, for the past eighty-eight years by virtue of the enactment of the Civil Service Act which guaranteed open and fair competition for jobs."

They went on to argue that the Griggs standard had been satisfied. In granting the motions for summary judgment filed by petitioners and the federal parties, the District Court necessarily decided adversely to respondents the statutory issues expressly or tacitly tendered by the parties.

16 See n. 17, Infra. Current instructions of the Civil Service Commission on "Examining, Testing, Standards, and Employment Practices" provide in pertinent part:

"S2-2 Use of applicant appraisal procedures

a. Policy. The Commission's staff develops and uses applicant appraisal procedures to assess the knowledges, skills, and abilities of persons for jobs and not persons in the abstract.

"(1) Appraisal procedures are designed to reflect real, reasonable, and necessary qualifications for effective job behavior.

"(2) An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:

"(a) Effective job performance;

"(b) Capability;

"(c) Success in training;

"(d) Reduced turnover; or

"(e) Job satisfaction." 37 Fed.Reg. 21557 (1972).

See also Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 CFR s 1607.5(b)(3) (1975), discussed in Albemarle Paper Co. v. Moody, 422 U.S., at 430-435, 95 S.Ct. 2362, 2378-2380, 45 L.Ed.2d 280, 304-307.

17 The record includes a validation study of Test 21's relationship to performance in the recruit training program. The study was made by D. L. Futransky of the Standards Division, Bureau of Policies and Standards, United States Civil Service Commission. App., at 99-109. Findings of the study included data "support(ing) the conclusion that T(est) 21 is effective in selecting trainees who can learn the material that is taught at the Recruit School." Id., at 103. Opinion evidence, submitted by qualified experts examining the Futransky study and/or conducting their own research, affirmed the correlation between scores on Test 21 and success in the training program. E. g., Affidavit of Dr. Donald J. Schwartz (personnel research psychologist, United States Civil Service Commission), App. 178, 183 ("It is my opinion . . . that Test 21 has a significant

positive correlation with success in the MPD Recruit School for both Blacks and whites and is therefore shown to be job related . . .”); affidavit of Diane E. Wilson (personnel research psychologist, United States Civil Service Commission), App. 185, 186 (“It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training”).

The Court of Appeals was “willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive of further progress in Recruit School.” 168 U.S.App.D.C., at 48, 512 F.2d, at 962.

* Specifically, I express no opinion on the merits of the cases listed in n. 12 of the Court's opinion.

1 Although I do not intend to address the constitutional questions considered by the Court in Part II of its opinion, I feel constrained to comment upon the propriety of footnote 12, Ante, at 2049-2050. One of the cases “disapproved” therein is presently scheduled for plenary consideration by the Court in the 1976 Term, Metropolitan Housing Development Corp. v. Village of Arlington Heights, 517 F.2d 409 (CA7), cert. granted, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975). If the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not be effectively reversed merely by its inclusion in a laundry list of lower court decisions.

2 The only administrative authority relied on by the Court in support of its result is a regulation of the Civil Service Commission construing the civil service employment standards in Title 5 of the United States Code. Ante, at 2052-2053 n. 16. I note, however, that 5 U.S.C. s 3304 was brought into this case by the CSC, not by respondents, and the CSC's only reason for referring to that provision was to establish that petitioners had been “following the job-related standards of Griggs (V. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971),) for the past eighty-eight years.” Ante, at 2052 n. 15.

3 The provision in Title VII on which petitioners place principal reliance is 42 U.S.C. s 2000e-2(h). See Griggs v. Duke Power Co., supra, 401 U.S., at 433-436, 91 S.Ct., at 854-856, 28 L.Ed.2d, at 165-167.

4 See 5 CFR s 300.101 Et seq. (1976). These instructions contain the “regulations” that the Court finds supportive of the District Court's conclusion, which was reached under Title VII, but neither the instructions nor the general regulations are an interpretation of Title VII. The instructions were issued “under authority of sections 3301 and 3302 of title 5, United States Code, and E.O. 10577, 3 CFR 1954-58 Comp., p. 218.” 37 Fed.Reg. 21552 (1972). The pertinent regulations of the CSC in 5 CFR s 300.101 Et seq. were promulgated pursuant to the same authorities, as well as 5 U.S.C. ss 7151, 7154 and Exec.Order No. 11478, 3 CFR (1966-1970 Comp.) 803.

5 The CSC asserts that certain of its guidelines have some bearing on Test 21's job relatedness. Under the CSC instructions, “ ‘criterion-related’ validity,” see Douglas v. Hampton, 168 U.S.App.D.C. 62, 70 n. 60, 512 F.2d 976, 984 n. 60 (1975), can be established by demonstrating a correlation between entrance examination scores and “a criterion which is legitimately based on the needs of the Federal Government.” P S3-2(a)(2), 37 Fed.Reg. 21558 (1972). Further, to prove validity, statistical studies must demonstrate that Test 21, “to a significant degree, measures performance or qualifications requirements which are relevant to the job or jobs for which candidates are being evaluated.” P S3-3(a), 37 Fed.Reg. 21558 (1972). These provisions are ignored in the Court's opinion.

6 On this basis, the CSC argues that the case ought to be remanded to enable petitioners to try to make such a demonstration, but this resolution seems to me inappropriate. Both lower courts recognized that petitioners had the burden of proof, and as this burden is yet unsatisfied, respondents are entitled to prevail.

7 The finding in the Futransky study on which the Court relies, Ante, at 2053 n. 17, was that Test 21 “is effective in selecting trainees who can learn the material that is taught at the Recruit School,” because it predicts averages over 85. On its face, this would appear to be an important finding, but the fact is that Everyone learns the material included in the training course. The study noted that all recruits pass the training examinations; if a particular recruit has any difficulty, he is given assistance until he passes.

8 Still another factor mandates deference to the EEOC regulations. The House and Senate committees considering the 1972 amendments to Title VII recognized that discrimination in employment, including the use of testing devices, is a “complex and pervasive phenomenon.” S.Rep. No. 92-415, p. 5 (1971); H.R.Rep. No. 92-238, p. 8 (1971); U.S.Code

Cong. & Admin.News 1972, p. 2137. As a result, both committees noted the need to obtain “expert assistance” in this area. S.Rep. No. 92-415, Supra, at 5; H.R.Rep. No. 92-238, Supra, at 8.

9 Indeed, two Justices asserted that the Court relied too heavily on the EEOC guidelines. 422 U.S. 449, 95 S.Ct. 2389, 45 L.Ed.2d 316 (Blackmun, J., concurring in judgment); Id., at 451, 95 S.Ct., at 2387, 45 L.Ed.2d, at 317 (Burger, C. J., concurring in part and dissenting in part).

10 Although the validity study found that Test 21 predicted job performance for white officers, but see Albemarle, 422 U.S., at 433, 95 S.Ct., at 2379, 45 L.Ed.2d, at 305, no similar relationship existed for black officers. The same finding was made as to the relationship between training examination averages and job performance. See Id., at 435, 95 S.Ct., at 2380, 45 L.Ed.2d, at 306.

11 The Court of Appeals recognized that deciding whether 42 U.S.C. s 2000e-2(h) permitted such proof “is not a simple or insignificant endeavor.” 168 U.S.App.D.C. 42, 50 n. 59, 512 F.2d 956, 964 n. 59. The court declined to express any view on this issue on the ground that petitioners had not satisfied this standard even if it were acceptable, which seems to me the proper treatment of the question.

12 Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418, 456-457 (CA5 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972); Hicks v. Crown Zellerbach Corp., 319 F.Supp. 314, 319-321 (E.D.La.1970) (issuing preliminary injunction), 321 F.Supp. 1241, 1244 (1971) (issuing permanent injunction). See also Castro v. Beecher, 334 F.Supp. 930 (D.Mass.1971), aff'd in part and rev'd in part on other grounds, 459 F.2d 725 (CA1 1972); Western Addition Community Org. v. Alioto, 330 F.Supp. 536, 539-540 (N.D.Cal.1971), 340 F.Supp. 1351, 1354-1356 (1972) (issuing preliminary injunction), 360 F.Supp. 733 (1973) (issuing permanent injunction); Chance v. Board of Examiners, 330 F.Supp. 203 (S.D.N.Y.1971), aff'd, 458 F.2d 1167 (CA2 1972); Baker v. Columbus Mun. Sep. School Dist., 329 F.Supp. 706, 721-722 (N.D.Miss.1971), aff'd, 462 F.2d 1112 (CA5 1972); Arrington v. Massachusetts Bay Transp. Auth., 306 F.Supp. 1355 (D.Mass.1969).

13 United States v. City of Chicago, 385 F.Supp. 543, 555-556 (N.D.Ill.1974) (police department); Officers for Justice v. CSC, 371 F.Supp. 1328, 1337 (N.D.Cal.1973) (police department); Smith v. City of East Cleveland, 363 F.Supp. 1131, 1148-1149 (N.D.Ohio 1973) (police department), aff'd in part and rev'd in part on other grounds, 520 F.2d 492 (CA6 1975); Harper v. Mayor of Baltimore, 359 F.Supp. 1187, 1202-1203 (D.Md.) (fire department), modified and aff'd, 486 F.2d 1134 (CA4 1973); Pennsylvania v. O'Neill, 348 F.Supp. 1084, 1090-1091 (E.D.Pa.1972) (police department), aff'd in pertinent part and vacated in part, 473 F.2d 1029 (CA3 1973).

93 S.Ct. 2332
Supreme Court of the United States

Mark WHITE, Jr., et al., Appellants
v.
Diana REGESTER et al.

No. 72—147
|
Argued Feb. 26, 1973.
|
Decided June 18, 1973.

Synopsis

Actions attacking Texas legislative redistricting plan were consolidated. A three judge United States District Court for the Western District of Texas, 343 F.Supp. 704 granted injunctive relief, and an appeal was taken. The Supreme Court, Mr. Justice White, held that reapportionment plan for Texas House of Representatives which had as the largest deviation therein between districts of 9.9% but which had an average deviation from the ideal of 1.82% was not invidiously discriminatory, but the disestablishment of two multimember districts in plan was justified because of the history of discrimination against the Negroes and Mexican-Americans residing there.

Affirmed in part, reversed in part and remanded.

For opinion of Mr. Justice Brennan concurring in part and dissenting in part in which Mr. Justice Douglas and Mr. Justice Marshall joined, see 93 S.Ct. 2342.

West Headnotes (12)

[1] **Federal Courts** Elections and reapportionment

Challenge to statewide reapportionment statute which asked for injunctions against its enforcement and which raised constitutional questions which were not insubstantial on their face was properly heard before a three-judge federal district court. 28 U.S.C.A. § 1253.

2 Cases that cite this headnote

[2] **Federal Courts** Constitutional questions

Where a three-judge federal district court declared statewide reapportionment statute unconstitutional but entered an injunction with respect to its implementation only as to two counties, state was properly before United States Supreme Court on direct appeal with respect to that injunction. 28 U.S.C.A. § 1253.

2 Cases that cite this headnote

[3] **Federal Courts** Constitutional questions

Appellants which directly appealed entry of injunction by three-judge federal district court against the implementation of statewide reapportionment statute as it related to two counties were entitled to review of the district court's accompanying declaration that the proposed plan was invalid statewide. 28 U.S.C.A. § 1253.

3 Cases that cite this headnote

[4] **States** Political subdivisions; multi-member districts

There is no authority for proposition that mere mixture of multi- and single-member districts in a single legislative reapportionment plan, even among urban areas, is invidiously discriminatory.

15 Cases that cite this headnote

[5] **States** Method of Apportionment in General

State reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. U.S.C.A.Const. Amend. 14.

12 Cases that cite this headnote

[6] **States** Dilution of voting power in general

States Population as basis and deviation therefrom

Relatively minor population deviations among state legislative districts do not substantially dilute weight of the individual votes in larger districts so as to deprive individuals in these districts of fair and effective representation. U.S.C.A.Const. Amend. 14.

106 Cases that cite this headnote

[7] **Constitutional Law** Population deviation

Reapportionment plan for Texas House of Representatives districts which contained a variation of 9.9% between the largest and smallest district when compared to the ideal district and which had an average deviation of all districts from the ideal of 1.82% did not violate equal protection and existence of deviations alone were not sufficient to satisfy threshold requirement of proving a prima facie case of invidious discrimination. U.S.C.A.Const. Amend. 14; Vernon's Ann.St.Tex.Const. art. 3, §§ 26, 28.

156 Cases that cite this headnote

[8] **States** Political subdivisions; multi-member districts

Multimember state legislative districts are not per se unconstitutional nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of state. U.S.C.A.Const. Amend. 14.

20 Cases that cite this headnote

[9] **States** Political subdivisions; multi-member districts

To sustain contention that multimember state legislative districts are being used invidiously to cancel out or minimize voting strength of racial groups, it is not enough that racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential, and plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election are not equally open to participation by group in question and that its members have less opportunity than other residents in district to participate in the political process and to elect legislators of their choice.

257 Cases that cite this headnote

[10] **States** Political subdivisions; multi-member districts

Findings of three-judge district court that the Negro community had been excluded from participation in Democratic primary selection process and was not permitted to enter into political process in Dallas County in a reliable and meaningful manner was sufficient to sustain court's judgment that the disestablishment of a multimember House of Representatives district in Dallas County was warranted. U.S.C.A.Const. Amend. 14.

60 Cases that cite this headnote

[11] **States** Political subdivisions; multi-member districts

Three-judge district court finding that the multimember House of Representative district as designed and operated in Bexar County, Texas, invidiously excluded Mexican-Americans from effective participation in political life and specifically in the election of representatives to the House warranted district court's disestablishment of the multimember district in that county. U.S.C.A.Const. Amend. 14.

80 Cases that cite this headnote

[12] **States** Legislature; apportionment

Not every racial or political group has a constitutional right to be represented in state legislature. U.S.C.A.Const. Amend. 14.

2 Cases that cite this headnote

****2334** ***755** Syllabus*

In this litigation challenging the Texas 1970 legislative reapportionment scheme, a three-judge District Court held that the House plan, statewide, contained constitutionally impermissible deviations from population equality, and that the multimember districts provided for Bexar and Dallas Counties invidiously discriminated against cognizable racial or ethnic groups. Though the entire plan was declared invalid, the court permitted its use for the 1972 election except for its injunction order requiring those two county multimember districts to be reconstituted into single-member districts. Held:

1. This Court has jurisdiction under 28 U.S.C. s 1253 to consider the appeal from the injunction over applicable to the Bexar County and Dallas County districting, since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. Pp. 2336—2337.

2. State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art. I, s 2, and the District Court erred in concluding that this case, where the total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. Cf. Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298. Pp. 2337—2339.

3. The District Court's order requiring disestablishment of the multi-member districts in Dallas and Bexar Counties was warranted in the light of the history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups. Pp. 2339—2341.

D.C., 343 F.Supp. 704, affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***756** Leon Jaworski, Houston, Tex., for appellants.

David R. Richards, Austin, Tex., for appellees Regester and others.

Ed Idar, Jr., San Antonio, Tex., for the Mexican-American appellees, Bernal and others.

Thomas Gibbs Gee, Austin, Tex., for the Republican appellees Willeford and others.

Opinion

Mr. Justice WHITE delivered the opinion of the Court.

This case raises two questions concerning the validity of the reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board: First, whether there were unconstitutionally large variations in population among the districts defined by the plan; second, whether the multimember districts provided for Bexar and Dallas ****2335** Counties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.

***757** The Texas Constitution requires the state legislature to reapportion the House and Senate at its first regular session following the decennial census. Tex.Const., Art. III, s 28 Vernon's Ann. St.[1] In 1970, the legislature proceeded to reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation ***758** was immediately commenced in state court challenging the constitutionality of the House reapportionment. The Texas Supreme Court held that the legislature's plan for the House violated the Texas Constitution.[2] Smith v. Craddick, 471 S.W.2d 375 (1971). Meanwhile, pursuant to the requirements of the Texas Constitution, a Legislative Redistricting Board had been formed to begin the task of redistricting the Texas Senate. Although the Board initially confined its work to the reapportionment of the Senate, it was eventually ordered, in light of the judicial invalidation of the House plan, to also reapportion the House. Mauzy v. Legislative Redistricting Board, 471 S.W.2d 570 (1971).

On October 15, 1971, the Redistricting Board's plan for the reapportionment of the Senate was released, and, on October 22, 1971, the House plan was promulgated. Only the House plan remains at issue ****2336** in this case. That plan divided the 150-member body among 79 single-member and 11 multimember districts. Four lawsuits, eventually consolidated, were filed challenging the ***759** Board's Senate and House plans and asserting with respect to the House plan that it contained impermissible deviations from population equality and that its multimember districts for

Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities.

A three-judge District Court sustained the Senate plan, but found the House plan unconstitutional. Graves v. Barnes, 343 F.Supp. 704 (W.D.Tex.1972). The House plan was held to contain constitutionally impermissible deviations from population equality, and the multimember districts in Bexar and Dallas Counties were deemed constitutionally invalid. The District Court gave the Texas Legislature until July 1, 1973, to reapportion the House, but the District Court permitted the Board's plan to be used for purposes of the 1972 election, except for requiring that the Dallas County and Bexar County multi-member districts be reconstituted into single-member districts for the 1972 election.

Appellants appealed the statewide invalidation of the House plan and the substitution of single-member for multi-member district in Dallas County and Bexar County.[3] Mr. Justice Powell denied a stay of the judgment of the District Court, 405 U.S. 1201, 92 S.Ct. 752, 30 L.Ed.2d 769 and we noted probable jurisdiction sub nom., Bullock v. Regester, 409 U.S. 840, 93 S.Ct. 70, 34 L.Ed.2d 79.

I

[1] **[2]** We deal at the outset with the challenge to our jurisdiction over this appeal under 28 U.S.C. s 1253, which permits injunctions in suits required to be heard and determined by a three-judge district court to be appealed ***760** directly to this Court.[4] It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face, and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. Appellants are therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order 'granting . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges' within the meaning of s 1253.

[3] We also hold that appellants, because they appealed from the entry of an injunction, are entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts; for its order that 'unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a ****2337** plan to reapportion the legislative districts ***761** within the State in accordance with the constitutional guidelines set out in this opinion this Court will so reapportion the State of Texas'; and for its order that the Secretary of State 'adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion . . ..' 343 F.Supp., at 737. In these circumstances, although appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, Gunn v. University Committee, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); Mitchell v. Donovan, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970), we conclude that we have jurisdiction of the entire appeal. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960). With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. Roe v. Wade, supra, 410 U.S. at 123, 93 S.Ct. at 711; Carter v. Jury Comm'n, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); Florida Lime & Avocado Growers v. Jacobsen, supra, 362 U.S. at 80, 80 S.Ct. at 573.

II

The reapportionment plan for the Texas House of Representatives provides for 150 representatives to be selected from 79 single-member and 11 multimember districts. The ideal district is 74,645 persons. The districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between the largest and smallest district is thus 9.9%.[5]

[4] The District Court read our prior cases to require any deviations from equal population among districts to be

***762** justified by 'acceptable reasons' grounded in state policy; relied on Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), to conclude that the permissible tolerances suggested by Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), had been substantially eroded; suggested that Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), in accepting total deviations of 11.9% in a county reapportionment was sui generis; and considered the 'critical issue' before it to be whether 'the State (has) justified any and all variances, however small, on the basis of a consistent, rational State policy.' 343 F.Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court concluded that justification by appellants was called for and could discover no acceptable state policy to support the deviations. The District Court was also critical of the actions and procedures of the Legislative Reapportionment Board and doubted 'that (the) board did the sort of deliberative job . . . worthy of judicial abstinence.' Id., at 717. It also considered the combination of single-member and multimember districts in the House plan 'haphazard,' particularly in providing single-member districts in Houston and multimember districts in other metropolitan areas, and that this 'irrationality, without reasoned justification, may be a separate and distinct ground for declaring the plan unconstitutional.'[6] Ibid. ****2338** ***763** Finally, the court specifically invalidated the use of multimember districts in Dallas and Bexar Counties as unconstitutionally discriminatory against a racial or ethnic group.

The District Court's ultimate conclusion was that 'the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote,' and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities.' Id., at 735.[7]

[5] **[6]** **[7]** Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), and Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. Kirkpatrick v. Preisler did not dilute the tolerances contemplated by Reynolds v. Sims with respect to state districting, and we did not hold in Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967), or Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), or ***764** later in Mahan v. Howell, supra, that any deviations from absolute equiality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in Gaffney v. Cummings, supra, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy,' Reynolds v. Sims, 377 U.S., at 579, 84 S.Ct. at 1391; Mahan v. Howell, supra, 410 U.S. at 325, 93 S.Ct. 985, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude ****2339** from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its judgment must be reversed in this respect.[8]

***765** III

[8] **[9]** We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); Mahan v. Howell, supra; see Burns v. Richardson,

384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965); Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964); Reynolds v. Sims, supra.[9] But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See Whitcomb v. Chavis, supra; Burns v. Richardson, supra; Fortson v. Dorsey, supra. To sustain such claims, it is not enough that the racial group allegedly ***766** discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. Whitcomb v. Chavis, supra, at 149—150, 91 S.Ct. at 1872.

[10] With due regard for these standards, the District Courty first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F.Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These ****2340** characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party ***767** candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon 'racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.' Id., at 727. Based on the evidence before it, the District Court concluded that 'the black community has been effectively excluded from participation in the Democratic primary selection process,' id., at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

IV

The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination. Surveying the historic and present condition of the Bexar County Mexican-American community, which is concentrated ***768** for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas,[12] had long 'suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.' 343 F.Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier[13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect ****2341** to the political life of Bexar County. '(A) cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.' 343 F.Supp., at 731. The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that, only five Mexican-Americans since 1880 have served in the Texas Legislature from ***769** Bexar

County. Of these, only two were from the Barrio area.[14] The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county. Its judgment was that Bexar County Mexican-Americans 'are effectively removed from the political processes of Bexar (County) in violation of all the Whitcomb standards, whatever their absolute numbers may total in that County.' Id., at 733. Single-member districts were thought required to remedy 'the effects of past and present discrimination against Mexican-Americans,' ibid., and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.

[11] **[12]** The District Court apparently paid due heed to Whitcomb v. Chavis, supra, did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of ***770** the Bexar County multimember district in the light of past and present reality, political and otherwise.

Affirmed in part, reversed in part, and remanded.

APPENDIX TO OPINION OF THE COURT

The Redistricting Board's plan embodied the following districts:

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
1	76,285		1,640	2.2
2	77,102		2,457	3.3
3	78,943		4,298	5.8
4	71,928		(2,717)	(3.6)
5	75,014		369	.5
6	76,051		1,406	1.9
7 (3)	221,314	73,771	(874)	(1.2)
8	74,303		(342)	(.5)
9	76,813		2,168	2.9
10	72,410		(2,235)	(3.0)
11	73,136		(1,509)	(2.0)
12	74,704		59	.1

13	75,929		1,284	1.7
14	76,597		1,952	2.6
15	76,701		2,056	2.8
16	74,218		(427)	(.6)
17	72,941		(1,704)	(2.3)
18	77,159		2,514	3.4
19 (2)	150,209	75,104	459	.6
20	75,592		947	1.3
21	74,651		6	.0
22	73,311		(1,334)	(1.8)
23	75,777		1,132	1.5
24	73,966		(679)	(.9)
25	75,633		988	1.3
26 (18)	1,327,321	73,740	(905)	(1.2)
27	77,788		3,143	4.2
28	72,367		(2,278)	(3.1)
29	76,505		1,860	2.5
30	77,008		2,363	3.2
31	75,025		380	.5
32 (9)	675,499	75,055	410	.5
33	73,071		(1,574)	(2.1)
34	76,071		1,426	1.9
35 (2)	147,553	73,777	(868)	(1.2)
36	74,633		(12)	(.0)
37 (4)	295,516	73,879	(766)	(1.0)
38	78,897		4,252	5.7
39	77,363		2,718	3.6
40	71,597		(3,048)	(4.1)
41	73,678		(967)	(1.3)

42	74,706		61	.1
43	74,160		(485)	(.6)
44	75,278		633	.8
45	78,090		3,445	4.6
46 (11)	826,698	75,154	509	.7
47	76,319		1,674	2.2
48 (3)	220,056	73,352	(1,293)	(1.7)
49	76,254		1,609	2.2
50	74,268		(377)	(.5)
51	75,800		1,155	1.5
52	76,601		1,956	2.6
53	74,499		(146)	(.2)
54	77,505		2,860	3.8
55	76,947		2,302	3.1
56	74,070		(575)	(.8)
57	77,211		2,566	3.4
58	75,120		475	.6
59 (2)	144,995	72,497	(2,148)	(2.9)
60	75,054		409	.5
61	73,356		(1,289)	(1.7)
62	72,240		(2,405)	(3.2)
63	75,191		546	.7
64	74,546		(99)	(.1)
65	75,720		1,075	1.4
66	72,310		(2,335)	(3.1)
67	75,034		389	.5
68	74,524		(121)	(.2)
69	74,765		120	.2
70	77,827		3,182	4.3

71	73,711		(934)	(1.3)
72 (4)	297,770	74,442	(203)	(.3)
73	74,309		(336)	(.5)
74	73,743		(902)	(1.2)
75 (2)	147,722	73,861	(784)	(1.1)
76	76,083		1,438	1.9
77	77,704		3,059	4.1
78	71,900		(2,745)	(3.7)
79	75,164		519	.7
80	75,111		466	.6
81	75,674		1,029	1.4
82	76,006		1,361	1.8
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,084)	(4.1)
86	73,157		(1,488)	(2.0)
87	73,045		(1,600)	(2.1)
88	75,076		431	.6
89	74,206		(439)	(.6)
90	74,377		(268)	(.4)
91	73,381		(1,264)	(1.7)
92	71,908		(2,737)	(3.7)
93	72,761		(1,884)	(2.5)
94	73,328		(1,317)	(1.8)
95	73,825		(820)	(1.1)
96	72,505		(2,140)	(2.9)
97	74,202		(443)	(.6)
98	72,380		(2,265)	(3.0)
99	74,123		(522)	(.7)

100	75,682	1,037	1.4
101	75,204	559	.7

All Citations

412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314

Footnotes

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

1 Article III, s 28, of the Texas Constitution provides:

'The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislature Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission (Board) to perform it duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951. As amended Nov. 2, 1948.'

2 The Court held that the plan violated Art. III, s 26, of the Texas Constitution, which provides:

'The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.'

3 In a separate appeal, we summarily affirmed that portion of the judgment of the District Court upholding the Senate plan. Archer v. Smith, 409 U.S. 808, 93 S.Ct. 62, 34 L.Ed.2d 68 (1972).

4 28 U.S.C. s 1253 provides:

'Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.'

5 See Appendix to opinion of the Court, post, p. 2342.

6 It may be, although we are not sure, that the District Court would have invalidated the plan statewide because of what it thought was an irrational mixture of multimember and single-member districts. Thus, in questioning the use of single-member districts in Houston but multimember districts in all other urban areas, and remarking that the State had provided neither 'compelling' nor 'rational' explanation for the differing treatment, the District Court merely concluded that this classification 'may be' an independent ground for invalidating the plan. But there are no authorities in this Court for the proposition that the mere mixture of multimember and single-member districts in a single plan, even among urban areas, is invidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

7 The District Court also concluded, contrary to the assertions of certain plaintiffs, that the Senate districting scheme for Bexar County did not 'unconstitutionally dilute the votes of any political faction or party.' 343 F.Supp. 704, 735. The majority of the District Court also concluded that the Senate districting scheme for Harris County did not dilute black votes.

8 The Court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require reconsideration and reversal under Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). The Texas Constitution, Art. III, s 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of Mahan v. Howell, may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

9 See Whitcomb v. Chavis, 403 U.S. 124, 141—148, 91 S.Ct. 1858, 1867—1871, 29 L.Ed.2d 363 (1971), and the cases discussed in n. 22 of that opinion, including Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was 'an unconstitutional 'crazy quilt.'' Id., at 121, 87 S.Ct. at 821.

10 There is no requirement that candidates reside in subdistricts of the multimember district. Thus, all candidates may be selected from outside the Negro residential area.

11 The District Court found that 'it is extremely difficult to secure either a expresentative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government.' 343 F.Supp., at 726.

12 Mexican-Americans constituted approximately 20% of the population of the State of Texas.

13 The District Court found that '(t)he fact that (Mexican-Americans) are reared in a sub-culture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems.' 343 F.Supp., at 730.

14 Two other residents of the Barrio, a Negro and an Anglo-American, have also served in the Texas Legislature.

59 Cal.App.5th 385
Court of Appeal, Sixth District, California.

LaDonna YUMORI-KAKU et al., Plaintiffs and Respondents,

v.

CITY OF SANTA CLARA, Defendant and Appellant.

H046105, H046696
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Filed 12/30/2020

Synopsis

Background: Asian American residents brought action against city, contending that at-large elections for the office of city council violated the California Voting Rights Act of 2001. Following a bench trial, the Superior Court, Santa Clara County, No. 17CV319862, Thomas E. Kuhnle, J., entered judgment for residents and awarded attorney's fees. City appealed.

Holdings: The Court of Appeal, Premo, J., held that:

[1] issue of whether an equal ratio of polarized to non-polarized elections precludes liability for racially polarized voting and vote dilution under the Voting Rights Act involves a mixed question of law and fact that is best addressed by novo review;

[2] court could discount Asian American candidate's poor performance with Asian American voters in three elections when considering whether racially polarized voting existed;

[3] court's decision to use 80 percent confidence intervals to ascertain Asian American cohesion behind a preferred candidate fell well within the bounds of its discretion;

[4] calculation of Asian American voter support for preferred candidate at 80 percent confidence interval did not invalidate the trial court's substantive findings of racially polarized at-large elections for office of city council;

[5] Court of Appeal would decline to address city's claim that trial court's judgment violated city's equal protection rights; and

[6] application of the Voting Rights Act to city's charter did not impinge unlawfully on the city's plenary authority to control the manner and method of electing its officers.

Affirmed.

West Headnotes (34)

[1] Election Law Racially polarized or bloc voting

A plaintiff must show racially polarized voting to prove a violation of California Voting Rights Act of 2001 provision stating that an at-large method of election may not be imposed in a manner that impairs the ability of a protected class to elect candidates of its choice. Cal. Elec. Code § 14027, 14028(a).

1 Case that cites this headnote

[2] Election Law Dilution of voting power in general

Three threshold requirements under *Gingles* for providing a Voting Rights Act violation of prohibition against vote dilution are: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

1 Case that cites this headnote

[3] Election Law Dilution of voting power in general

Under the federal Voting Rights Act, a plaintiff who satisfies the three *Gingles* preconditions for proving a minority vote dilution case must then prove the ultimate issue of vote dilution based

on the totality of circumstances; the focus at this stage is on the impact of the contested structure or practice on minority electoral opportunities. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

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

The most important factors in assessing a vote dilution claim under the federal Voting Rights Act are the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the elections of the state or political subdivision is racially polarized. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

1 Case that cites this headnote

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

The district court's determination under the federal Voting Rights Act as to whether the political processes are "equally open" depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b).

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

California Voting Rights Act of 2001 diverged from the federal Voting Rights Act in ways consistent with the California Legislature's intent to provide a broader cause of action for vote dilution than the federal law provides. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301 et seq.; Cal. Elec. Code § 14025 et seq.

[7] **Evidence** Legislative history

Court considering vote dilution case would grant city's unopposed request for judicial notice of the Senate Floor Analysis of Senate Bill No. 976, which supplemented portions of the legislative history of the California Voting Rights Act of 2001 that were already in the record. Cal. Elec. Code § 14025 et seq.

[8] **Evidence** Elections and Appointments to Office

Evidence Unopposed motions or requests

Court considering vote dilution claims regarding at-large elections for office of city council would grant city residents' unopposed request for judicial notice of the election results of recent city district elections. Cal. Evid. Code §§ 452(h), 459.

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

Issue of whether an equal ratio of polarized to non-polarized elections precludes liability for racially polarized voting and vote dilution under the California Voting Rights Act of 2001 involves a mixed question of law and fact that is best addressed by novo review. Cal. Elec. Code § 14027.

[10] **Appeal and Error** Review for Correctness or Error

Appeal and Error Construction, Interpretation, or Application of Law

Appeal and Error Mixed questions of law and fact

Deferential review of ultimately factual findings does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.

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

It is the difference between the voting preferences of the voters in the protected class and those of voters in the rest of the electorate that determines racially polarized voting under the California Voting Rights Act of 2001, as that difference is defined in case law based on the

federal Voting Rights Act. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301 et seq.; Cal. Elec. Code § 14026(e).

1 Case that cites this headnote

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

Only the second and third *Gingles* vote dilution factors, showing the minority group is politically cohesive and that majority bloc voting enables it to usually defeat the minority's preferred candidate, are required to prove a violation at the liability stage under California Voting Rights Act of 2001. Cal. Elec. Code § 14026.

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

The third *Gingles* factor for a claim of vote dilution states that the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. Cal. Elec. Code § 14026.

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

Whether a majority voting block is "usually" able to defeat a cohesive minority group's preferred candidate, per the third factor under *Gingles* for determining vote dilution, is not measured by mathematical formula, but by the trial court's searching assessment of statistical and other evidence presented. Cal. Elec. Code § 14025 et seq.

1 Case that cites this headnote

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

Whether repeated occurrences of racially polarized voting cross the "usually" threshold for a violation of the *Gingles* vote dilution factor depends on context; it is the extent to which voting in the elections of the state or political subdivision is racially polarized that is relevant to a vote dilution claim. Cal. Elec. Code § 14026.

1 Case that cites this headnote

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

Because the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance for a claim of vote dilution will vary from district to district. Cal. Elec. Code § 14026.

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

What constitutes legally significant racial bloc voting, for purposes of *Gingles* vote dilution factor providing that majority bloc voting enables it to usually defeat the minority's preferred candidate, will vary depending on a range of factual circumstances; as such, whether majority bloc voting usually enables defeat of the minority preferred candidate cannot be reduced to a simple mathematical or doctrinal test.

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

The "usually" threshold stated in the third *Gingles* factor for determining vote dilution, providing that majority bloc voting enables it to usually defeat the minority's preferred candidate, does not as a matter of law preclude a determination of racially polarized voting when the factual findings point to an equal number of polarized and non-polarized elections over time.

1 Case that cites this headnote

[19] **Municipal Corporations** Appointment or Election

Public Employment Elective office

Trial court considering Asian American residents' challenge that at-large elections for office of city council violated the California Voting Rights Act of 2001 could discount Asian American candidate's poor performance with Asian American voters in three elections when considering whether racially polarized voting existed, even absent any finding that candidate's races constituted a special circumstance under *Gingles*. Cal. Elec. Code §§ 14026(e), 14028.

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

The extent to which racially polarized voting impairs the minority group's political power depends on case-specific circumstances in a vote dilution action; at times, the court may need to extend its inquiry to consider factors likely to have influenced the electoral outcomes, including features of the local election system affecting cohesion levels and election results that fall outside of the dominant pattern of polarization due to "special circumstances." Cal. Elec. Code § 14025 et seq.

[21] **Evidence** Gatekeeping in general

Trial courts have a substantial "gatekeeping" responsibility with respect to expert testimony.

[22] **Evidence** Matters of Opinion or Fact

Consistent with statutory and decisional law, the trial court determines whether expert opinion testimony is admissible at a bench trial.

[23] **Evidence** Factors, Tests, and Standards in General

The court at the admissibility stage of expert testimony does not weigh an opinion's probative value or substitute its own opinion for the expert's opinion.

1 Case that cites this headnote

[24] **Evidence** Gatekeeping in general

Trial court's gatekeeping responsibility is simply to exclude clearly invalid and unreliable expert opinion.

2 Cases that cite this headnote

[25] **Appeal and Error** Province of, and deference to, lower court in general

Evidence Gatekeeping in general

For purposes of appeal from a bench trial, the court as trier of fact weighs the evidence, in addition to its gatekeeping responsibility with respect to expert testimony. Cal. Civ. Proc. Code § 631.8(a).

[26] **Municipal Corporations** Appointment or Election

Public Employment Elective office

Trial court's decision to use 80-percent confidence intervals to ascertain Asian American cohesion behind a preferred candidate fell well within the bounds of its discretion in action challenging at-large elections for office of city council as diluting vote of Asian Americans in violation of the California Voting Rights Act of 2001, and did not constitute an improper conjuring of its own statistical model; selection of an alternative confidence interval did not dictate the methods of proving liability or restrict the city from litigating its defenses or the specific issue of how the confidence interval affected the results of the inference analyses, question of confidence intervals was thoroughly litigated, and court found that in the few disputed elections in which preferred status could not be confirmed at 95 percent confidence, it could be confirmed at 80 percent. Cal. Elec. Code § 14025 et seq.

[27] **Municipal Corporations** Appointment or Election

Public Employment Elective office

Calculation of Asian American voter support for preferred candidate at 80-percent confidence

interval did not, as a matter of law, invalidate the trial court's substantive findings of racially polarized at-large elections for office of city council; court found that five of ten city council elections involved racially polarized voting. Cal. Elec. Code § 14025 et seq.

[28] **Election Law** Evidence

The evidence presented in a voting rights case must be evaluated with a functional, rather than a formalistic, view of the political process. Cal. Elec. Code § 14028.

[29] **Evidence** Statistics

Where the outcome of a voting rights case depends to some degree on evidence produced by statistical analysis, courts must be able to exercise discretion in weighing the probative value against the uncertainties and limitations inherent in statistical methods.

[30] **Election Law** Weight and sufficiency

Evidence Statistics

A statistical approach in a voting rights case might yield an inexact result for purposes of a hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting; the standard of proof is preponderance, not mathematical certainty. Cal. Elec. Code § 14026.

[31] **Appeal and Error** Defects, objections, and amendments

Court of Appeal would decline to address city's claim that trial court's judgment finding that occurrences of racially polarized voting impaired the ability of Asian American voters, as a result of vote dilution, to elect their preferred candidates to city council through at-large voting, violated city's equal protection rights; city's as-applied claim was merely a conclusory statement, without citation to the record, that the trial court forced the city to adopt a district-based system and to choose "among proposed maps that all took race into account in drawing the proposed boundaries between districts," and city failed to point to even a single example from the record that would show the trial court's selection of a district-based remedy made race the predominant factor motivating the redistricting decision. U.S. Const. Amend. 14; Cal. Elec. Code §§ 14026, 14028, 14032.

[32] **Evidence** Elections and Appointments to Office

Court of Appeal considering city's allegation that trial court's application of the California Voting Right Act of 2001 to at-large elections for city council violated city's charter authority would grant request for judicial notice of city ballot advisory measure asking whether city should draft charger amendment ballot measures to elect council members by district, the election results in favor of that advisory measure, and the meeting agenda of the city charter review committee including results of survey showing voters prefer district election system for city council. Cal. Elec. Code § 14025 et seq.; Cal. Evid. Code §§ 452(h), 459.

[33] **Municipal Corporations** Validity in General

Legislative declarations of statewide concern are not determinative but are relevant and entitled to great weight by the court in deciding whether the general law supersedes conflicting municipal charter enactments.

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

Municipal Corporations Appointment or Election

Application of the California Voting Rights Act of 2001 to city's charter, which resulted in determination that city's at-large voting for office of city council resulted in vote dilution which prohibited Asian American residents from

electing their preferred candidates to city council and order that city implement district-based city council elections, did not impinge unlawfully on the city's plenary authority to control the manner and method of electing its officers; charter was subject to the Act's implementation of equal protection guarantees securing the ability of members of a protected class to exercise their voting rights, and court satisfied the applicable standard in determining racially polarized voting resulting in vote dilution. U.S. Const. Amend. 14; Cal. Const. art. 11, § 5(b); Cal. Elec. Code §§ 14026(c), 14027, 14031.

Witkin Library Reference: 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 259 [Prohibited Practices.]

****442** Trial Court: Santa Clara County Superior Court, Trial Judge: Hon. Thomas E. Kuhnle (Santa Clara County Super. Ct. No. 17CV319862)

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Opinion

Premo, Acting P.J.

***391** Five Asian American residents sued the City of Santa Clara (City) contending that at-large elections for the office of city council violated the California Voting Rights Act of 2001 (Elec. Code, § 14025). The trial court agreed after a bench trial that occurrences of racially polarized voting impaired the ability of Asian American voters, as a result of ****443** vote dilution, to elect their preferred candidates to Santa Clara's seven-member city council. It ordered the City to implement district-based city council elections and awarded attorney fees and costs to plaintiffs totaling more than $3 million.

***392** On appeal, the City challenges the trial court's liability finding and the resulting award of attorney fees and costs. The City contends that the trial court erred as a matter of law in concluding that racially polarized voting in five of 10 city council elections satisfied the standard for a cognizable voting rights claim, which requires a showing that the majority voting bloc in Santa Clara's electorate "usually" voted to defeat the candidate preferred by Asian American voters. The City also challenges the trial court's use of statistical evidence to support its findings of racially polarized voting. The City argues that the trial court's imposition of "race-based districts" based on legally inadequate findings of racially polarized voting violated the equal protection clause of the United States Constitution and the City's plenary authority as a charter city under the California Constitution to control the manner and method of electing its officers.

We find no reversible error in the trial court's interpretation of the governing legal principles and its application of the law to the evidence presented at trial.

I. BACKGROUND

A. Overview of Legal Framework on Racially Polarized Voting

This case concerns enforcement of the California Voting Rights Act of 2001 (Elec. Code, §§ 14025-14032, hereafter "the Act")[1] and the interpretation of federal voting rights law upon which the Act was in part modeled.

The Act provides a private right of action for members of a protected class to challenge at-large election methods in their political subdivision. Section 14027 states that "[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026." To prove a section 14027 violation, the protected class must prove that the challenged

voting method impairs its ability to elect preferred candidates or influence election outcomes because of the dilution or abridgment of its voting rights. (§ 14027.)

[1] A plaintiff must show racially polarized voting to prove a violation of section 14027. (§ 14028, subd. (a); *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667, 51 Cal.Rptr.3d 821 (*Sanchez*).) Section 14028, subdivision (a) provides that a violation is established "if it is shown that ***393** racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." The City in our case challenges only the trial court's finding of racially polarized voting under section 14028. We turn our attention accordingly to the factors and preconditions relevant to proving racially polarized voting.

We begin with California's statutory definition of racially polarized voting. " 'Racially polarized voting' means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates ****444** or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting." (§ 14026, subd. (e).)

We take note of two directions in the statutory definition. First, racially polarized voting draws a comparison between the voting preferences of the "voters in [the] protected class" and those of "voters in the rest of the electorate." (§ 14026, subd. (e).) Second, it is the difference between the voting pattern of the two groups that determines racially polarized voting, as that difference is defined in case law based on the federal Voting Rights Act of 1965 (52 U.S.C. § 10301 et seq.). (§ 14026, subd. (e).) Federal cases also demonstrate the methodologies that may be used to prove that elections are characterized by racially polarized voting. (*Ibid.*) The landmark voting rights decision in *Thornburg v. Gingles* (1986) 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (*Gingles*) serves as our principal guide.

[2] The United States Supreme Court in *Gingles* construed section 2 of the federal Voting Rights Act of 1965, which like California's voting rights law creates liability for vote dilution. (*Gingles, supra*, 478 U.S. at p. 34, 106 S.Ct. 2752.) A section 2 violation is established by a showing, "based on the totality of circumstances, ... that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (52 U.S.C.A. § 10301, subd. (b).) The *Gingles* court delineated three threshold requirements to proving a section 2 violation, sometimes referred to as the "*Gingles* factors" or "*Gingles* preconditions." These are: "(1) The racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial ***394** group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate." (*Missouri State Conference of the NAACP v. Ferguson-Florissant School District* (8th Cir. 2018) 894 F.3d 924, 930 (*Missouri State*) see *Gingles, supra*, 478 U.S. at pp. 50-51, 106 S.Ct. 2752.) As we explain below, only the second and third *Gingles* factors are required to prove a violation of California's Act.

[3] Under the federal Voting Rights Act of 1965, a plaintiff who satisfies the three *Gingles* preconditions must then prove the ultimate issue of vote dilution based on the totality of circumstances. (*Old Person v. Cooney* (9th Cir. 2000) 230 F.3d 1113, 1120 (*Old Person*); accord *Missouri State, supra*, 894 F.3d at p. 930.) The focus at this stage is on "the impact of the contested structure or practice on minority electoral opportunities ...." (*Gingles, supra*, 478 U.S. at p. 44, 106 S.Ct. 2752.) In its analysis, the court considers a list of factors based on the 1982 Senate Judiciary Committee majority report that accompanied the bill amending section 2 of the federal Voting Rights Act of 1965, sometimes referred to as "the Senate Factors." (*Gingles, supra*, at p. 36, 106 S.Ct. 2752.) The "list is exemplary, and not exhaustive, and ' "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." [(*Gingles*, at p. 45, 106 S.Ct. 2752.)]" (*Old Person, supra*, 230 F.3d at p. 1128.)

****445** **[4]** **[5]** The Senate Factors include "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent

to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group ...; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction." (*Gingles, supra*, 478 U.S. at pp. 44-45, 106 S.Ct. 2752.) The most important factors in assessing a vote dilution claim "are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.' " (*Id.* at pp. 48–49, fn. 15.) Use of the factors is intended to support a "flexible, fact-intensive" approach to answering the question of whether vote dilution is actionable. (*Id.* at p. 46, 106 S.Ct. 2752.) The district court's determination of " 'whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality" ' ... and on a 'functional' view of the political process." (*Gingles, supra*, at p. 45, 106 S.Ct. 2752 citation omitted.)

***395** The liability determination for a voting rights violation under California law in many respects mirrors the process articulated in leading federal cases. As stated above, the plaintiff must establish that racially polarized voting is present and that the method of voting impairs the protected class members' ability to elect their choice of candidates or influence the election outcome. (§§ 14028, 14027.) And as mentioned, the Act directs California courts assessing racially polarized voting to federal case law on section 2 of the federal Voting Rights Act of 1965. (§ 14026, subd. (e).)

[6] The Act also diverges from the federal Voting Rights Act of 1965 in ways consistent with the Legislature's intent to provide a broader cause of action for vote dilution than the federal law provides. (*Sanchez, supra*, 145 Cal.App.4th at p. 667, 51 Cal.Rptr.3d 821.) The Legislature eliminated the first *Gingles* precondition requiring plaintiffs to show they are sufficiently large and geographically compact to enable a majority-minority district but retained geographical compactness as a consideration at the remedy stage. (*Sanchez, supra*, at p. 669, 51 Cal.Rptr.3d 821.) Section 14028, subdivision (c) states that "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section ...." The intent behind this change, expressed in a bill analysis prepared by staff for the Assembly Judiciary Committee, was to allow a showing of dilution or abridgement of minority voting rights without proving geographical compactness, which the authors deemed less relevant to assessing dilution and more relevant to determining an appropriate remedy if racially polarized voting is shown. (*Sanchez, supra*, at p. 669, 51 Cal.Rptr.3d 821, citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002.)

[7] The Act's legislative history further acknowledged the need to address racially polarized voting in the context of California's ****446** unique diversity and "lack of a racial majority group." (*Sanchez, supra*, 145 Cal.App.4th at p. 669, 51 Cal.Rptr.3d 821, citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002; see also Sen. Com. on Judiciary, 3d reading analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended June 11, 2002, p. 3 [stating author's intent for the legislation to " 'address[ ] the problem of racial block voting, which is particularly harmful to a state like California due to its diversity' "].)[2] Section 14028, subdivision (b) provides that "[t]he occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, ***396** or other electoral choices that affect the rights and privileges of members of a protected class." It further provides that in determining a violation of section 14027, one circumstance the court may consider "is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of" the action. (§ 14028, subd. (b).) Section 14028 also specifies that proof "of an intent on the part of the voters or elected officials to discriminate against a protected class is not required" (*id.*, subd. (d)) and that other factors (reflective of several of the Senate Factors) "are probative, but not necessary" to establish a violation (*id.*, subd. (e)).

The probative factors listed in section 14028, subdivision (e) include, "the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of

candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns ....”

The case law construing the Act, which took effect in 2003, is limited to a few published Court of Appeal decisions, none which address the issues in this appeal.

B. City of Santa Clara

The City of Santa Clara adopted its charter in 1951. Santa Clara's charter establishes a council-manager form of government. The city council is composed of seven-members, including the mayor. Each city council office other than mayor is designated by a seat number, sometimes referred to as a “numbered post” (e.g., Council Member Seat No. 1, Council Member Seat No. 2). The charter establishes an at-large system of elections for city council, whose members hold four-year terms. The trial court's ruling in this case stated that the Act supersedes the charter provision, as discussed further *post* (pt. II.E.).

At the time of trial in 2018, Santa Clara had a population of approximately 125,000. Asian Americans comprised approximately 39.5 percent of the total population and 30.5 percent of its citizen-voting-age population, which we refer to as eligible voters. Latinos comprised approximately 16.9 percent of the total population and 15.0 percent ****447** of eligible voters. The remaining population, for purposes of this case, was grouped together and classified as ***397** “non-Hispanic Whites and Blacks.” Non-Hispanic Whites and Blacks comprised 46.3 percent of Santa Clara residents and 51 percent of eligible voters. The race and ethnicity classifications used at trial reflect those used by the United States Census and adopted by the federal Voting Rights Act of 1965

The City began to consider changes to its electoral system in 2011, prompted by a letter from plaintiffs' attorney which stated that the at-large election system appeared to violate the Act. The city council convened a charter review committee and solicited proposals to analyze the election system. A demographic research firm provided several reports to the City on election demographics and voting patterns, resulting in a recommendation by the charter committee that the City abandon its numbered post system and move to a pure at-large system.

The city council did not adopt the recommendation but later convened a new charter review committee. In July 2017, the city council adopted recommendations of the 2017 charter review committee to amend the city charter by splitting the City into two voting districts and allowing voters to rank their preferences. The city council approved resolutions in December 2017 and March 2018 to submit the proposed changes to the electorate on June 5, 2018. This action followed.

C. Complaint for California Voting Rights Act of 2001 Violation

Plaintiffs and respondents LaDonna Yumori-Kaku, Wesley Kazuo Mukoyama, Umar Kamal, Michael Kaku, and Herminio Hernando (together, plaintiffs) filed the operative complaint (complaint) on December 27, 2017, alleging that the at-large election system established by the City's charter, and the proposed changes approved by the city council, violated the Act. Plaintiffs are Asian American residents of Santa Clara, registered voters, and members of a protected class under section 14026, subdivision (d).[3]

Plaintiffs alleged that racially polarized voting between the electoral choices of Asian American voters and those of non-Asian American voters prevented Asian American voters from electing candidates of their choice to the city council. They alleged that the City had taken no action to change its unlawful election system despite being on notice for years of potential federal and state law violations. Plaintiffs complained that the changes proposed in 2017 did nothing to remedy the voting rights violations, thus “ensuring that the City's elections w[ould] continue to disenfranchise Asian-American voters in Santa Clara.” The complaint sought declaratory and injunctive relief to ***398** prevent the City from retaining its at-large method of electing city council members and to implement district-based elections, or other alternative relief to remedy the violation of the Act. Plaintiffs also sought attorney fees and costs.

Santa Clara denied the material allegations of the complaint.

D. Trial Phase I: Liability

The case proceeded to a bifurcated bench trial. The trial court conducted the liability phase of the trial over several days in April 2018. It issued a proposed statement of decision on May 15, 2018. Plaintiffs and the City filed their respective ****448** objections and responses to the proposed statement of

decision. On June 6, 2018, the trial court issued its statement of decision finding "the City liable for violating the [Act]."

To evaluate the trial court's reasoning and conclusions, we believe it necessary to summarize in some detail the evidence adduced during the liability trial. This consisted principally of competing expert testimony on the analytical methodologies and validity of the statistical outcomes. Testimony pertaining to other statutory factors like historical patterns of discrimination and political exclusion supplemented the statistical evidence. Plaintiffs also introduced percipient witness testimony by the demographer who authored the reports on Santa Clara's election demographics and voting patterns, which informed the charter review committee's consideration of changes to the at-large election system.

1. Statistical Analyses of Election Results

The trial court considered the opinions of "[t]wo prominent statistics experts."[4] Dr. Morgan Kousser, a professor of history and social science at the California Institute of Technology, testified for plaintiffs. Dr. Jeffrey B. Lewis, a professor of political science at the University of California, Los Angeles, testified for the City. The trial court also relied on the testimony of Dr. S. Karthick Ramakrishnan, plaintiffs' expert on Asian American political and civic participation.

Dr. Kousser analyzed data from 10 city council elections held between 2002 and 2016 involving one or more Asian American candidates, as well as Santa Clara precinct data for nine county board of education and school ***399** district elections between 2000 and 2016.[5] Dr. Kousser explained that alongside the "endogenous" city council elections involving only the jurisdiction at issue, "exogenous" Santa Clara Unified School District and Santa Clara County Board of Education elections were "the most important ... to analyze" because they were local, nonpartisan, and did not involve statewide issues or partisan allegiances that could complicate their relationship with nonpartisan city council elections. (See *Luna v. County of Kern* (E.D. Cal. 2018) 291 F.Supp.3d 1088, 1120 [defining exogenous elections as "contests for any other office aside from the" office in dispute].) We refer to the school district and county board of education elections together as "school elections."

Plaintiffs presented three statistical methods at trial: ecological regression, weighted ecological regression, and ecological inference. Dr. Kousser testified that experts in voting rights cases necessarily draw inferences from statistical analyses of aggregate data at the precinct level because they lack direct evidence about individual voting choices. He outlined the history, limitations, methodology, and results for each method he applied. He explained ****449** that ecological regression was the dominant method for nearly 40 years and was used to estimate racial polarization in the leading Supreme Court case, *Gingles, supra*, 478 U.S. at pages 52 through 54, 106 S.Ct. 2752. Here, he used ecological regression to estimate Asian American voting behavior by correlating the precinct-level results for each candidate in the city council contest for that year with the percentage of Asian American voters. His weighted ecological regression method produced similar but more nuanced results than standard regression by accounting for the variations in precinct sizes. Lastly, he testified that ecological inference was developed by a Harvard political scientist to overcome certain limitations in the regression models. Political scientists have come to view ecological inference as the most advantageous of the three models.

Dr. Kousser ran the data according to each method and tabulated the results. He "relied on surnames as a proxy for race/ethnicity classifications," separating the Santa Clara population into three groups: non-Hispanic Whites and Blacks, Latinos, and Asian Americans. Dr. Kousser explained that because these "three significant ethnic groups" systematically voted differently and could be distinguished by surname, it would be inappropriate to ***400** employ two-variable (bivariate) analyses (e.g., Asian American and non-Hispanic Whites and Blacks). Instead, he used multivariable (multivariate) models to estimate voting patterns between the three groups. Dr. Kousser did not separate the Asian American group by country of origin because each subgroup would be too small to analyze. He opined, however, that there was "substantial cohesion" across the Asian American group. African American and non-Hispanic White voters were grouped together because their surnames are indistinguishable. Dr. Kousser noted that even though their voting patterns could not be analyzed separately, the effect was minimal since the "overwhelming proportion" of the group is non-Hispanic White. Using the regression and inference methods, he estimated rates of support among the three ethnic groups for the different candidates.

Dr. Kousser ultimately concluded that "in half of the contests, the voting was racially polarized between" Asian American voters and non-Hispanic White and Black voters. He opined that of the 10 city council races, only those involving a candidate named Gap Kim in 2004 and a candidate named

Mohammed Nadeem, who ran unsuccessfully in 2010, 2012, 2014, and 2016, were not racially polarized or were polarized in the " 'wrong' " direction as when Nadeem received more votes from non-Hispanic White and Black voters. Dr. Kousser believed that the lack of Asian American support for Nadeem could be attributed to what the Supreme Court in *Gingles* called "special circumstances." (*Gingles, supra*, 478 U.S. at p. 57, 106 S.Ct. 2752.) We discuss the special circumstances issue in detail *post* (part II.C.1). Dr. Kousser opined that "the most important fact, ascertained without any statistical analysis whatsoever, is that all of the Asian-American candidates lost."

Dr. Kousser suggested that the Santa Clara Unified School District was most relevant to the school elections analysis, because it handled matters significant for local schools and because its races involved several Asian American candidates who consistently lost. Dr. Kousser concluded that in all but one of the school district races, the vote for the Asian American candidate was racially polarized by all three statistical techniques between Asian American voters and non-Hispanic White and Black voters.

****450** Dr. Kousser opined that the statistical results and race outcomes for the 10 city council races, considered together with special circumstances like those concerning candidate Nadeem, supported a finding of what the Supreme Court in *Gingles* called " 'legally significant racial polarization.' " He added that while the school elections were "less important in evaluating racial polarization for the City of Santa Clara," they nonetheless reinforced the general conclusion that Asian American candidates usually lost and that Santa Clara elections were racially polarized in a legal significant way.

***401** Dr. Lewis, whose field of political methodology focuses on quantitative analysis and political science, challenged Dr. Kousser's methodology and conclusions though he agreed with certain premises. He explained that surname matching using the statewide database on voter registration and turnout "is a widely-used and accepted way of measuring the ethnic composition of precincts in instances in which surnames are strongly indicative of ethnicity." And he recognized the fundamental purpose of the statistical methods identified by Dr. Kousser as a way to infer "the behavior of individuals (here voters of different ethnicities) from observations on aggregate units (here the jurisdiction and its precincts) ...." He also agreed that between ecological inference and ecological regression, the inference method "more fully exploits the information that's available in the data, and ... at least in theory should provide better estimates."

But Dr. Lewis disagreed that those methods could provide reliable estimates of voting behavior. He testified that the reliability of the regression and ecological inference models depended on the degree of racial or ethnic homogeneity of precincts. Dr. Lewis explained that despite the fact that approximately 22 percent of registered Santa Clara voters are Asian American (spread across six national origin groups), the most heavily-concentrated precinct is only 42 percent Asian American. He opined that such disbursement across precincts "provides little or no direct deterministic information about the presence of racially polarized voting," leaving the statistical models to rely on "untestable assumptions" about support for candidates among members of each racial or ethnic group. Dr. Lewis explained that under these circumstances, substantial uncertainty accompanies the use of ecological regression and ecological inference. Only by making "strong, and largely untestable, assumptions, these models narrow the range of logically possible rates of support for each candidate among the voter of each ethnic group described above down to a single 'best guess' (point estimate) and associate degree of uncertainty (confidence ... interval)."

Dr. Lewis illustrated how the confidence interval produced by the ecological inference and regression models may "substantially understate the possible departures of the model's estimates from the true values of the quantities of interest" by applying them to the 2016 election for city council seat 7 and using democratic party registration data to test the validity of the underlying assumptions. Dr. Lewis explained that party registration is a "vote-like variable that can be tabulated at the individual level for the voters in the jurisdiction under study" and compared to the estimate of those values produced by applying regression or ecological inference techniques. It is "the one sort of political decision that one can directly observe at the individual-level within the jurisdiction ...." Dr. Lewis found that his calculation of democratic party registration using ecological regression for Asian American and other voters in Santa Clara differed from the true rate by 30 percentage ***402** points. He noted ****451** that "even the large confidence interval [did] not come close to capturing the true rate of Democratic registration among Asians." For example, the statistical model showed "95 percent of the time that you do this you capture the truth," while the party registration data he looked at showed it was true "less than half the time."

Dr. Lewis concluded that the "massive bias" seen in the party registration exercise casts "serious doubt" on the reliability of the regression results to measure voting patterns. He acknowledged on cross-examination that it was "possible" that voting in local nonpartisan elections might not closely correlate with political party registration.

Dr. Lewis further opined that despite improved estimation techniques, ecological inference could not solve the inference problem illustrated by the democratic party registration example because it relies on the same, underlying independence assumption as the regression method. He explained that ecological inference is "more robust to violations of this assumption" only "when the logical bounds are informative ...." Logical bounds are a factor of relative group size, becoming "increasingly tight for the larger group as the population becomes increasingly homogenous, until in the limiting case of complete homogeneity, the problem becomes trivial and the upper and lower logical bounds converge on a single value." But he testified that this case presented "two forms of uncertainty. One is the qualifiable uncertainty, which is the uncertainty that is provided by the confidence levels that are generated by the model under the condition that the maintained assumptions hold. [¶] In addition to that qualifiable uncertainty ..., there's additional uncertainty that arises from the fact that it's quite likely that those assumptions do not hold." Dr. Lewis concluded that the ecological inference method provided "little evidence of cohesive voting by either Asians or non-Asians in the City of Santa Clara" and no evidence of polarization.

Dr. Lewis acknowledged on cross-examination that while he was not able to arrive at a sufficiently reliable result using the data made available to him, there was "more information that could have been gleaned" from analyzing other contests in addition to the 2016 city council races. He could not offer a direct opinion based on his own analysis as to whether racially polarized voting occurred in any earlier city council elections or other local nonpartisan elections. He also could not reliably conclude for the 2016 elections that racially polarized voting occurred or did not occur. He confirmed that in three of the four 2016 elections that he analyzed which involved an Asian American candidate, there was at least an 80 percent probability that Asian American voters supported the Asian American candidate. He also confirmed that he performed a bivariate analysis, comparing Asian American to non-Asian American voting patterns, in contrast with Dr. Kousser's trivariate analysis.

***403** In rebuttal, Dr. Kousser disagreed with Dr. Lewis's interpretation of party registration data. He pointed out that Asian American voters in Santa Clara County "tend more than other groups to have no party preference, and where there are particularly high proportions of Asians, they are particularly likely to have no party preference." Dr. Kousser believed that the nonpartisan characteristic of Asian American voters in Santa Clara made any analogy between partisanship and candidate preferences in local, nonpartisan elections less informative. Dr. Kousser also generally disagreed with Dr. Lewis's opinions on methodology. He opined that Dr. Lewis's methodological choices tended to "cause ****452** the finding of least polarization and least cohesion."

2. Historical Discrimination and Political Participation

The trial court heard additional evidence relevant to "other factors" deemed probative for determining a voting rights violation, as set forth in section 14028, subdivision (e). Dr. Ramakrishnan, a professor of public policy and political science and associate dean at the University of California, Riverside, testified as an expert on immigrant political and civic participation and cohesiveness. He identified three areas relevant to Asian American political participation and power.

Dr. Ramakrishnan first described historical patterns of discrimination and political exclusion of Asian Americans in California that inform present-day disparities in political outreach and participation. He highlighted the anti-Asian policies that had existed in California since the 1850s, embodied in iterations of legislative and constitutional enactments and reinforced by federal anti-immigration policies and naturalization bans that persisted until the 1950s. He described additional restrictions imposed in Santa Clara and other cities through the 1960s which limited meaningful civic engagement. And he stated that undercurrents of political and social exclusion persist today, citing broad and vocal opposition to efforts to recognize symbols of racial diversity in the community, popular perceptions of the Asian as the "perpetual foreigner," and recent upticks in hate crimes. Dr. Ramakrishnan opined that these mechanisms of political exclusion leave legacies. He explained that "even if Asians are gaining in terms of economic mobility, they are not seen as fully part of the civic fabric of the United States."

Dr. Ramakrishnan next addressed political cohesion. He testified that the Asian American community is demographically diverse but "remarkably consistent across national origin groups in their public opinion" regarding

policy and political preferences. Dr. Ramakrishnan testified that several national surveys have shown cohesion across Asian American national origin groups on issues like environmental protection, school funding, taxation, and government provision of social services. He opined that there was more ***404** political cohesion among Asian Americans than might be expected given the diversity of national origin, language, and socioeconomic status.

Dr. Ramakrishnan explained that despite sharing common policy preferences, the political power of Asian Americans is limited. Factors that reduce Asian American political participation include the legacy of exclusion, the high percentage of eligible Asian American voters who are naturalized citizens and face language barriers, and the lack of outreach and political campaigning directed at Asian Americans. He reported that out of 10 city council election cycles from 2004 to 2016 in Santa Clara, there were only two instances in which an Asian American candidate received a public endorsement from a current mayor or city councilmember. Dr. Ramakrishnan also noted that the distribution of Asian American voters across the jurisdiction makes it challenging for an Asian American to succeed to citywide elected office.

Dr. Jeanne Gobalet testified as a percipient witness. The City retained her firm in 2011 and again in 2016 to provide demographic services to the charter review committee. Dr. Gobalet testified that on September 12, 2011, her firm sent a report titled "Report on Demographic Characteristics and Voting Patterns of Residents of the City of Santa Clara" to the acting city ****453** attorney. The report was not marked as a draft. It expressed reservations about the statistical methods used to ascertain racially polarized voting but nevertheless concluded that the City was vulnerable to a lawsuit because of its election history and because courts have accepted ecological regression as a method to determine racially polarized voting. Dr. Gobalet sent a slightly revised version of the report the next day as well as several days later, making additional revisions after an e-mail from the acting city attorney commented on the second version of the report. Dr. Gobalet testified that she had heard of the ecological inference method but was not familiar with it. She believed the use of any ecological regression or inference method was "deeply flawed" because "race ethnicity is only one of many factors that affect voting."

3. Statement of Decision (Liability)

After closing statements and the filing of posttrial briefs, the trial court issued a proposed statement of decision finding the City liable for violations of the Act. On June 6, 2018, after considering the parties' written objections and comments, the trial court issued its final statement of decision. We highlight those aspects of the trial court's decision that are pertinent to the issues on appeal.

The trial court observed that while the percentage of Santa Clara *residents* who are non-Hispanic White and Black (46.3 percent) is not so different from ***405** the percentage who are Asian American (39.5 percent), the percentage of *actual voters* is different (64.1 percent non-Hispanic White and Black versus 21.2 percent Asian American). The court noted that this disparity "raises the possibility that [non-Hispanic White and Black] bloc voting could impair the ability of Asians to elect preferred candidates."

The trial court then considered the evidence presented by the experts at trial and the election outcomes for those races analyzed between 2002 and 2016. The court explained that the output from the ecological inference models includes the "most likely 'point estimate' along with a 'standard error' associated with the point estimate," which "in turn, can be converted into 'confidence intervals' that represent a range within which there is a certain degree of confidence." The court then made findings on the methodological disputes, noting that the few published court cases interpreting the California Voting Rights Act did not address the disputed issues.

First, the trial court found that Dr. Kousser's trivariate analysis—dividing the electorate into three groups (non-Hispanic Whites and Blacks, Latinos, and Asian Americans)—was consistent with the statutory language defining racially polarized voting in terms of the voting choices of the voters in the protected class and those of the "voters in the rest of the electorate." (§ 14026, subd. (e).) The court rejected the City's interpretation of the statutory language as requiring a bivariate analysis comparing Asian American voting preferences with those of *all* the other voters in the electorate, meaning in this case non-Hispanic Black and White voters *and* Latino voters.

Next, the trial court found that ecological inference provided a valid tool to assess political cohesion among Asian American voters in Santa Clara despite the uncertainty and aggregation bias highlighted by the City. In pertinent part, the court rejected the City's claim that potential correlation errors undermined the reliability of the ecological inference results.

It recognized that the distribution of Asian American voters across precincts would impact the statistical results but noted that plaintiffs had conceded this as the reason the ****454** confidence intervals were often quite large. The court reasoned that if the ecological inference results presented by Dr. Kousser were less reliable than those generated in more segregated communities, they were "nonetheless probative." It cited federal cases applying the federal Voting Rights Act of 1965 where the inference data was inexact and held that "confidence intervals less than 95 percent may be sufficient."

The trial court also noted the experts' consensus at trial in this case that there is no bright line minimum at which ecological inference results are no longer valid and no better statistical method for determining racial or ethnic group voting behavior. The experts also agreed that some information gained ***406** from statistical models is better than none. The trial court rejected the City's argument that aggregation bias, as illustrated by Dr. Lewis's democratic party registration analysis, rendered the ecological inference results too unreliable. It found that the party registration analysis was itself "fraught with uncertainties" and did not predict voting preferences in nonpartisan candidate races.

The trial court lastly evaluated the statistical evidence and "other probative factors set forth" in the Act. It found that the parties agreed that of the 10 city council elections at issue, three were racially polarized (seat 2 in 2002; seat 3 in 2004; and seat 5 in 2014) and five were not racially polarized (seat 4 in 2004; seat 2 in 2010; seat 3 in 2012; seat 2 in 2014; and seat 6 in 2016). Of the two city council elections in dispute (seats 4 and 7 in 2016), the trial court ultimately rejected the City's argument that plaintiffs could not show an Asian American preferred candidate due to overlapping confidence intervals. The court stated that although the 95 percent confidence intervals overlapped among the Asian American-supported candidates, "at the 80 percent confidence interval urged by [p]laintiffs in their post-trial brief, there is an Asian preferred candidate in both contests ...." The court reasoned that use of the 80 percent confidence interval provided "sufficiently reliable results" to support a finding of racially polarized voting in the two disputed elections. In a footnote, the trial court provided the calculations it used to determine the 80 percent confidence intervals and rejected the City's argument that in doing so it has "assumed it was 'acceptable' for [the court] to 'create its own evidence.' " It noted that it also could look to point estimates to assess cohesion around a preferred candidate, citing an unpublished district court case as an example.

The trial court also considered how "special circumstances" as described in *Gingles, supra*, 478 U.S. at page 51, 106 S.Ct. 2752, might affect the weight given to any of the election results. The trial court did not adopt Dr. Kousser's interpretation of Asian American candidate Nadeem's four election losses (2010, 2012, 2014, 2016) as the likely result of special circumstances. It found the evidence too speculative to warrant disregarding those elections, which comprised four of the five city council elections in which the parties agreed that racially polarized voting was not present. The court nonetheless decided to assign less weight to those four elections because Nadeem's poor track record as a candidate —evidenced by his diminishing returns in each subsequent contest—was "a reasonable explanation for the lack of Asian support."

The trial court similarly evaluated the school election evidence. The parties agreed that two of the nine school elections at issue were racially polarized (2004 district and 2016 county) and three were not (county in 2000, 2008, and 2012). Of the four school elections in dispute (district elections in 2008, 2010, 2012, and 2014), the ****455** trial court acknowledged that plaintiffs could not ***407** show a preferred candidate among Asian American voters at 95 percent confidence intervals. It found, however, that there was an Asian American-preferred candidate in two school elections (2008 and 2012) at the 80 percent confidence intervals. Based on these calculations, the trial court found racially polarized voting in four of nine school elections between 2000 and 2016.

The trial court additionally considered other statutory factors relevant to ascertaining vote dilution. It observed, under section 14028, subdivision (b), that no Asian American had "ever won" a city council election even though Asian American candidates ran 10 times in elections from 2002 to 2016. It reviewed evidence of past discrimination and of practices that enhance vote dilution under section 14028, subdivision (e). It found that the "numbered posts" system of at-large elections was an electoral device with known disadvantages for minority voters. And it noted that the City failed to change the system despite the recommendations of the charter review committee in 2011. The court found that "[i]nstead of candidly addressing the issue, the City's interim general counsel asked that [Dr. Gobalet's] report be 'stripped' of 'the information about the council election history and the charts ... showing racial polarization' before it was distributed" to the city council and the

charter review committee. As to California's history of discrimination against Asian Americans, the trial court found it difficult to measure the present-day effects of the historical discrimination shown by Dr. Ramakrishnan. It concluded that the evidence at trial did not suggest any unique circumstances affecting Asian American voting patterns in Santa Clara elections.

The trial court summarized the totality of its findings to conclude that plaintiffs had proven their case by a preponderance of the evidence. The trial court found that the statistical analyses showed (1) racially polarized voting in five of 10 city council elections between 2002 and 2016, and cohesive voting among Asian Americans in six of those races, and (2) racially polarized voting in four of nine school elections, though those had lower probative value than the city elections. The court also found that *no* members of the protected class had been elected to the governing body of the relevant political subdivision, and that the City's response was inaction despite an "overwhelming majority" of charter committee members voting in 2011 to modify the numbered posts, at-large election system. Finally, the court found the evidence of historical discrimination had few measurable effects but still supported a finding that the City's system of city council elections violated the Act.

E. Trial Phase II: Remedy

The trial court conducted the remedies phase of the trial in July 2018. The parties stipulated to join the Santa Clara County Registrar of Voters as a ***408** necessary party. After a bench trial of several days, which included expert testimony on both sides, the trial court issued a statement of decision, followed shortly after by an amended statement of decision and judgment. It found, pursuant to section 14029,[6] that the adoption of district-based elections based on the districting plan proposed the City would "adequately remediate the City's violations of the [Act] and best serve its residents."

****456** **[8]** The details of the remedial plan are not at issue here. We note only the trial court's findings that the statistics generated for the chosen district plan showed it would "remedy the dilution and abridgement of voting rights of Asians who reside in the City" including by creating one district of 51 percent eligible Asian American voters. The court ordered the City to adopt the district-based elections for six city council seats and to retain the at-large system of election for the mayor's seat. It noted the two provisions of the city charter affected by the ruling and ordered the registrar of voters to immediately begin implementing the plan to meet its timetable for the upcoming November 2018 elections. The November 2018 elections implemented the court-ordered remedy.[7]

F. Judgment and Appeals

On July 24, 2018, the court entered judgment in favor of plaintiffs in accordance with the statement of decision after the liability and remedies phases of the trial. Plaintiffs moved for an award of reasonable attorney fees, expenses, and costs as the prevailing party pursuant to section 14030. The City opposed the motion, and the matter was litigated extensively. After an initial hearing and supplemental briefing, the trial court issued an order on January 22, 2019, granting the motion for attorney fees. The court struck time listed for certain activities deemed not recoverable, reduced in part the ***409** lodestar and lodestar multiplier, and ordered the City to pay attorney fees in the amount of $3,164,955.61. On January 22, 2019, the trial court amended the judgment to include the attorney fees award and costs order.

The City timely appealed from both the July 24, 2018 judgment after trial and from the January 22, 2019 amended judgment stating the attorney fees and costs award.

II. DISCUSSION

The City claims that plaintiffs failed to make the necessary showing to establish legally cognizable racially polarized voting under the Act. At issue is whether plaintiffs proved that Santa Clara's non-Hispanic White and Black majority "votes sufficiently as a bloc to enable it ... *usually* to defeat" (*Gingles, supra*, 478 U.S. at p. 51, 106 S.Ct. 2752, italics added) the preferred candidate of Asian American voters in Santa Clara City Council elections. The City contends that the trial court stretched the meaning of the word "usually" beyond even its most generous judicial interpretation to make a liability finding based on racially polarized voting in only five of 10 city council elections. The City also contends that the trial court improperly conducted its own statistical analysis to find ****457** liability, rather than rely on the expert testimony presented through the adversarial process at trial.

A. Standard of Review

The parties dispute the standard of review that applies to our analysis. We must decide whether the trial court erred as a

matter of law in finding racially polarized voting in five of 10 city elections sufficient to satisfy the "usually" standard of the third *Gingles* precondition—a question that the City asserts calls for de novo review, or whether the determination of racially polarized voting is a question of fact subject to deferential review, as plaintiffs have asserted.

Our Supreme Court has explained the general principles governing the standards of appellate review as follows. " 'Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is ***410** predominantly legal and its determination is reviewed independently.' " (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384, 112 Cal.Rptr.3d 853, 235 P.3d 152 (*Haworth*).) One reason that mixed questions of law and fact are reviewed de novo in most cases is " ' "because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." ' " (*Id.* at p. 385, 112 Cal.Rptr.3d 853, 235 P.3d 152.)

[9] We find the main issue on appeal in this case—whether an equal ratio of polarized to nonpolarized elections precludes liability for racially polarized voting and vote dilution—involves a mixed question of law and fact that is best addressed by novo review. This is not to ignore the intensely factual nature of the inquiry. Plaintiffs are correct that federal voting rights law treats the ultimate finding of racially polarized voting and vote dilution as a question of fact subject to the clearly-erroneous standard of appellate review under rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.). (*Gingles, supra*, 478 U.S. at pp. 78-79.) The district court's findings of fact are reviewed for clear error because the determination of vote dilution " ' "is peculiarly dependent upon the facts of each case," ' ... and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." (*Id.* at p. 79, citation omitted.) Under the federal standard, reviewing courts defer to the district court's "superior fact-finding capabilities" (*Smith v. Salt River Project Agricultural Improvement & Power District* (9th Cir. 1997) 109 F.3d 586, 591) and review the ultimate finding of vote dilution "only for clear error ...." (*Ibid.*) Of course, deferential review also applies to factual findings under California law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800, [35 Cal.Rptr.2d 418, 883 P.2d 960] [" 'Questions of fact are reviewed by giving deference to the trial court's decision.' "].)

[10] But as the Supreme Court recognized in *Gingles*, deferential review of ultimately factual findings " 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a ****458** misunderstanding of the governing rule of law.' " (*Gingles, supra*, 478 U.S. at p. 79, 106 S.Ct. 2752.) Here, the central issue on appeal is whether findings of racially polarized voting are legally cognizable under California voting rights law if they do not appear to meet the "usually" standard for the third *Gingles* factor. This requires the application of law to facts. (*Haworth, supra*, 50 Cal.4th at p. 384, 112 Cal.Rptr.3d 853, 235 P.3d 152.) What is more, in the context of state voting rights, it requires careful consideration of legal concepts developed under the rubric of the federal law and inevitably involves the exercise of judgment about the values expressed therein. (See *ibid.*)

We apply our independent judgment in accordance with these principles.

***411 B. The Third *Gingles* Factor (Requiring a Showing that Majority Bloc Voting "Usually" Enables Defeat of the Minority Preferred Candidate) Did Not Preclude the Trial Court's Finding of Racially Polarized Voting**

The City submits that despite articulating the correct standards of proof at the liability phase of trial, the trial court never applied the "usually" requirement of the third *Gingles* factor to its findings of fact on the number of racially polarized elections. The City argues that having failed to prove "that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, ... *usually* to defeat the minority's preferred candidate" (*Gingles, supra*, 478 U.S. at p. 51, 106 S.Ct. 2752, italics added), plaintiffs could not establish legally cognizable racially polarized voting.

Plaintiffs do not dispute that their burden at trial required them to satisfy both the second and third *Gingles* factors.

But they argue that the third *Gingles* factor does not impose a strict mathematical formula, and that in any event they proved occurrences of racially polarized voting sufficient to support the trial court's judgment. In an amicus curiae brief filed by Asian Americans Advancing Justice—Asian Law Caucus (Advancing Justice—ALC) and joined by several legal services and community-based organizations, amici curaie Advancing Justice—ALC et al., emphasize the historic foundations for the Act and related reasons that the City's attempt to establish a bright-line threshold for legally cognizable racially polarized voting contravenes the Act's purpose.

[11] **[12]** We stated in our introductory discussion of the overarching legal framework (see *ante*, pt. I.A.) that section 14026 defines racially polarized voting by reference to federal case law. (§ 14026, subd. (e).)[8] It is the *difference* between the voting preferences of the "voters in [the] protected class" and those of "voters in the rest of the electorate" (§ 14026, subd. (e).) that determines racially polarized voting, *as that difference is defined in case law based on the federal Voting Rights Act of 1965*. (§ 14026, subd. (e).). Following the United States Supreme Court's decision in *Gingles*, three factors are prerequisite to establishing liability under the ****459** federal law for a claim of vote dilution. (*Gingles, supra*, 478 U.S. at pp. 50-51, 106 S.Ct. 2752.) Only the ***412** second and third *Gingles* factors—showing the minority group is politically cohesive *and* that majority bloc voting enables it to usually defeat the minority's preferred candidate (*Missouri State, supra*, 894 F.3d at p. 930)—are required to prove a violation at the liability stage under California's Act. (*Sanchez, supra*, 145 Cal.App.4th at p. 667, 51 Cal.Rptr.3d 821; see § 14028, subd. (c).) The City, despite criticizing the statistical evidence behind the trial court's finding of Asian American political cohesion in the disputed elections, does not challenge the application of the second *Gingles* factor. We focus our attention on the third *Gingles* factor and whether the trial court misapplied it in this case.

[13] The third factor states that the minority group "must be able to demonstrate that the White majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, ... usually to defeat the minority's preferred candidate." (*Gingles, supra*, 478 U.S. at p. 51, 106 S.Ct. 2752.) The Supreme Court expanded on this principle by explaining that whether a political subdivision "experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices." (*Id.* at p. 56, 106 S.Ct. 2752.) Where the minority group also shows its political cohesiveness (the second factor), "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." (*Ibid.*) The Supreme Court emphasized the significance of "a pattern of racial bloc voting that extends over a period of time" (*id.* at p. 57, 106 S.Ct. 2752) to distinguish between the "loss of political power through vote dilution" (*ibid.*) and "the mere inability to win a particular election ...." (*Ibid.*) It is "the usual predictability of the majority's success [that] distinguishes structural dilution from the mere loss of an occasional election." (*Id.* at p. 51, 106 S.Ct. 2752.)

The City contends that federal cases have uniformly applied the third *Gingles* factor to require a plaintiff to prove that a majority voting bloc defeats the minority's preferred candidates in *more than 50 percent* of the relevant elections. The City points to several federal appellate decisions in support of its more-than-50-percent proposition. It avers that the Ninth Circuit in *Old Person, supra*, 230 F.3d at page 1122 endorsed the definition of "usually" as "more than half the time." And it argues that other federal circuits have required an even greater showing to satisfy the "usually" requirement. For example, in *Lewis v. Alamance County* (4th Cir. 1996) 99 F.3d 600 (*Lewis*), the court expounded in a footnote its understanding that the third *Gingles* element is not satisfied "if plaintiffs merely show that white bloc voting defeats the minority-preferred candidate more often than not." (*Id.* at p. 606, fn. 4.) The court reasoned that the Supreme Court's use of the terms " 'usually,' " " 'normally,' " and " 'generally' " to describe the third *Gingles* factor "mean something more than just 51%." (*Ibid.*, citing *Gingles, supra*, 478 U.S. at pp. 49, 51, 56, 106 S.Ct. 2752.)

***413** The City argues that apart from case law, simple logic contravenes the trial court's application of the third *Gingles* factor. The City asserts that just as "[n]o one would say that a flipped coin 'usually' lands on heads, because it is equally likely to land on tails," it cannot be said that Santa Clara's city council elections are "usually" characterized by racially polarized voting after the trial court found that to be true in only five of 10 elections.

****460** **[14]** **[15]** **[16]** We find the City's reasoning is sound in theory but flawed in practice. It ignores that whether a majority voting bloc is "usually" able to defeat a cohesive minority group's preferred candidate per *Gingles's* third factor is not measured by mathematical formula but by the trial court's searching assessment of statistical and other evidence

presented. It indeed would be strange to say that a flipped coin "usually" lands on heads when odds are 50-50 that it lands on tails. But the City's analogy to a coin toss here fails because it ignores that the legal standard requires a consideration of local circumstances and weighing of factors, not just a simplistic arithmetic exercise. Whether repeated occurrences of racially polarized voting cross the "usually" threshold articulated in *Gingles* depends on context. It is "the '*extent* to which voting in the elections of the state or political subdivision is racially polarized,' ... [that] is relevant to a vote dilution claim." (*Gingles, supra*, 478 U.S. at p. 55, citation omitted, italics added, quoting the 1982 Senate Judiciary Committee majority report, at p. 206.) As the Supreme Court explained, "[b]ecause ... the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district." (*Gingles, supra*, at pp. 55-56, 106 S.Ct. 2752.)

A closer look at the cases referenced by the City reveals that they are not inconsistent with this approach. In *Old Person*, the Ninth Circuit found that the district court erred in applying the third *Gingles* factor to conclude that White bloc voting "did not usually (i.e., more than half of the time) vote to defeat the preferred candidate of Indian voters." (*Old Person, supra*, 230 F.3d at p. 1122.) The decision, however, was not based on the number of occurrences of White bloc voting but on the district court's erroneous failure to distinguish electoral success in majority-Indian jurisdictions from the results in majority-White jurisdictions. (*Id.* at pp. 1122, 1127.) The court notably rejected the suggestion of a "bright-line test" (*id.* at p. 1127) regarding the standard for determining legally significant White bloc voting in instances when "white voters 'cross over' and vote for the minority-preferred candidate." (*Ibid.*) Instead, the court reiterated the *Gingles* court's observation that " 'there is no simple doctrinal test for the existence of legally significant racial bloc voting.' " (*Ibid.*, quoting *Gingles, supra*, 478 U.S. at p. 58, 106 S.Ct. 2752.)

***414** Similarly in *Lewis*, though the Fourth Circuit's decision addressed the third *Gingles* factor, the subject of the court's inquiry did not depend on the legal standard for racially polarized elections sufficient to satisfy the "usually" requirement, as that concept is challenged in this case. (See *Lewis, supra*, 99 F.3d at pp. 605-606.) In fact, the "overarching error" identified in *Lewis* was that the plaintiffs only introduced evidence of elections in which a black candidate was on the ballot (*id.* at p. 605), a consideration that would be treated differently under California's Act, which expressly directs the court to ascertain racially polarized voting by "examining results of elections in which at least one candidate is a member of a protected class ...." (§ 14028, subd. (b).)

We believe it would be inappropriate to derive a bright-line rule for the minimum frequency of legally significant racially polarized voting based on the "usually" standards recited in *Old Person* and *Lewis*, which in each case are not necessary to the decision rendered and may be considered dictum. (****461** *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 958, 190 Cal.Rptr.3d 319, 352 P.3d 883 [" ' "Dictum is the 'statement of a principle not necessary to the decision.' " ' "].) What is more, as emphasized in the analysis in *Old Person*, the analysis of the third *Gingles* factor does not lend itself to a " 'simple doctrinal test' " (*Old Person, supra*, 230 F.3d at p. 1127) because "the degree of racial bloc voting that is cognizable as an element of a ... vote dilution claim will vary according to a variety of factual circumstances." (*Gingles, supra*, 478 U.S. at pp. 57-58, 106 S.Ct. 2752.) Indeed, we agree with plaintiffs and their amici curiae that federal decisions consistently espouse a flexible approach to the third *Gingles* factor.

For example, in *Vecinos De Barrio Uno v. City of Holyoke* (1st Cir. 1995) 72 F.3d 973, the First Circuit highlighted the rigorous, yet flexible approach, required to assess a vote dilution claim. The court compared racially polarized voting to "a silent, shadowy thief" of minority voting rights (*id.* at p. 984) whose "process of detection typically involves resort to a multifaceted array of evidence including demographics, election results, voting patterns, campaign conduct, and the like" (*ibid.*). *Uno* explained that "the question whether a given electoral district experiences racially polarized voting to a legally significant extent demands a series of discrete inquiries not only into election results but also into minority and white voting practices over time." (*Ibid.*) The court used familiar language to describe the third *Gingles* factor, which it said "embodies a showing that the majority votes sufficiently as a bloc to enable it, in the ordinary course, to trounce minority-preferred candidates most of the time ...." (*Id.* at p. 980.) Yet in reviewing the district court's findings, the court emphasized that "determining whether racial bloc voting exists is not merely an arithmetic exercise that consists of toting up columns of numbers, and nothing more. To the contrary, the district court should not confine itself to raw numbers, but must make a practical, ***415** commonsense

assay of all the evidence." (*Id.* at p. 989.) The court concluded, however, that the district court's factual findings "reflecting racially polarized voting in at most three or four elections (out of eleven)" (*ibid.*) did not justify a finding of vote dilution, particularly where the district court "offered no explanation of this seeming contradiction" (*ibid.*).

In *Gomez v. Watsonville* (9th Cir. 1988) 863 F.2d 1407, Hispanic residents challenged the city of Watsonville's at-large system of mayoral and city council elections under the federal Voting Rights Act of 1965. The Ninth Circuit viewed Watsonville's at-large election scheme as "the functional equivalent of the electoral scheme at issue in *Gingles*" (*id.* at p. 1413) and applied the *Gingles* factors. Among the facts cited by the reviewing court, voting-age Hispanics comprised about 40 percent of Watsonville's residents and 37.0 percent of citizens, and no Hispanic had been elected as mayor or city council member prior to trial, though eight Hispanic candidates had run for city council positions and one Hispanic had run for mayor. (*Id.* at pp. 1409-1410.) The court did not take a formulaic approach to assessing the third *Gingles* factor. Rather, it accepted the trial court's factual finding "that Hispanics and Anglos supported different candidates" (*id.* at p. 1417) based on average support for Hispanic candidates by voters in predominantly White precincts as compared to in heavily Hispanic precincts and noted that a "pattern over time of minority electoral failure" was also probative under *Gingles*. These combined facts supported the district court's determination that "the non-Hispanic majority in Watsonville usually vote[d] sufficiently as a bloc to defeat the minority votes plus any crossover votes" (*ibid.*).

****462** In *Pope v. County of Albany* (2d Cir. 2012) 687 F.3d 565, 578, the Second Circuit explained that the law guiding application of the third *Gingles* factor "recognizes the need for some flexibility." Though *Pope* upheld the district court's finding that Black and Hispanic voters failed to demonstrate a likelihood of success at the preliminary injunction stage on the third *Gingles* factor, because data omitted from the plaintiffs' expert's bloc voting analysis raised questions about the patterns presented (*id.* at pp. 578-582), the court reiterated that flexibility is warranted depending on the data available (*id.* at p. 581). Similarly in *Flores v. Town of Islip* (E.D.N.Y. 2019) 382 F.Supp.3d 197, the district court relied on *Pope* and other Second Circuit cases for its pronouncement that determining whether the evidence of White bloc voting satisfies the third *Gingles* factor "is largely a fact-driven inquiry" (*Flores, supra*, at p. 231) that requires flexibility and for which reason "courts have deviated from a bright-line rule" (*ibid.*). In *Flores*, the district court found that because the Hispanic-preferred candidates lost in 13 of 14 town elections, the evidence showed "sufficient white bloc voting to usually defeat the minority-preferred candidate for Town Board." (*Id.* at p. 232.) The court explained that while the showing of White voter cohesion may have been weaker than in other cases, "the particular percentage of bloc voting is ***416** significantly less important than whether the white bloc regularly defeats the minority-preferred candidate." (*Ibid.*)

[17] **[18]** These cases evince a flexible approach to ascertaining the third *Gingles* factor, grounded in the recognition that what constitutes legally significant racial bloc voting will vary depending on a range of factual circumstances. As such, whether majority bloc voting usually enables defeat of the minority preferred candidate cannot be reduced to a simple mathematical or doctrinal test. (*Gingles, supra*, 478 U.S. at pp. 56-58, 106 S.Ct. 2752.) It follows that the "usually" threshold stated in the third *Gingles* factor does not *as a matter of law* preclude a determination of racially polarized voting when the factual findings point to an equal number of polarized and nonpolarized elections over time.

C. The Evidence of Racially Polarized Voting Was Adequate To Support the Trial Court's Determination Under the Third *Gingles* Factor

We next consider whether the trial court erred in finding that plaintiffs' showing of racially polarized voting in five of 10 city council elections satisfied the third *Gingles* factor. Plaintiffs argue that even applying a strict interpretation of the "usually" standard, the record supports the trial court's judgment. They assert that after factoring in the reduced weight attributed to several of the nonracially polarized elections, the trial court's findings showed racially polarized voting in a majority of the more heavily weighted elections. We agree that the trial court's determination based on the extent of racially polarized voting in this case was consistent with a section 14028 violation because the threshold of legal significance varies according to factual circumstances. (*Gingles, supra*, 478 U.S. at p. 56, 106 S.Ct. 2752.) The City's arguments to the contrary pertain to (1) the trial court's application of the "special circumstance" doctrine articulated in federal case law and (2) the validity of its statistical analysis. We reject both contentions for reasons we explain herein.

1. The Trial Court Did Not Err in Assigning Less Weight to Certain Elections

As described above, plaintiffs' expert, Dr. Kousser, performed a series of trivariate ****463** statistical analyses using the three statistical methods to estimate voting patterns among Asian American, Latino, and non-Hispanic White and Black voters in Santa Clara.

Dr. Kousser noted that for three of the five city council elections in which voting was not clearly polarized, Asian American support for Asian American candidate Mohammed Nadeem dwindled each time. He estimated based on ***417** the ecological inference method that Nadeem's percentage of the Asian American vote was 63.2 percent in 2010; 47.2 percent in 2012; 19.8 percent in 2014; and 16.7 percent in 2016. He observed that Nadeem's declining popularity could be attributed to his shifting allegiances on controversial issues that dominated Santa Clara politics at the time, particularly support for development of the football stadium, or to the fact that he was one of only four members of the charter review committee who voted *against* recommending changes to the at-large electoral system. Dr. Kousser posited that Nadeem's inconsistent stance on the dominant issue in the City's politics seemed to be a "special circumstance" that accounted for the lack of racial polarization in those contests. Yet Dr. Kousser pointed out that the last three city council elections he analyzed (seats 5 in 2014; seats 4 and 7 in 2016) *were* racially polarized regardless of the candidates' preferences on those same, controversial issues, suggesting that the Asian American candidate losses could not be attributed to political stance. Dr. Kousser opined that "whichever factional white candidate they opposed, the Asian candidates always lost."

[19] In its statement of decision, the trial court discounted Dr. Kousser's proffered explanation for Nadeem's poor performance with Asian American voters as "speculative" but found that Nadeem's track record for losing Asian American support still justified giving less weight at least to the 2012, 2014, and 2016 election data. The City contends that in doing so the trial court misconstrued the "special circumstances" doctrine—which under *Gingles* may be applied to explain instances of minority electoral *success* in a polarized environment, not electoral *failure*. (*Gingles, supra*, 478 U.S. at p. 57, fn. 26, 106 S.Ct. 2752.) The City argues that in the absence of a "special circumstances" finding, the trial court's decision to give "less weight" to those election results is not supported by case law governing what constitutes racially polarized voting under section 14026, subdivision (e). Plaintiffs respond that courts applying the fact-intensive and flexible standards under federal case law and section 14028 may properly increase or decrease the weight given to individual elections for reasons not limited to the "special circumstances" discussed in *Gingles*.

The City is correct that the Supreme Court in *Gingles* framed "special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting" as a way to explain instances of minority candidate electoral success in a polarized contest. (*Gingles, supra*, 478 U.S. at p. 57, 106 S.Ct. 2752.) The City points out that neither plaintiffs nor the trial court in this case cited a single case in which "special circumstances" applied to a nonpolarized election involving an unsuccessful minority candidate. We find the point moot, however, because the trial court in this case *rejected* Dr. Kousser's suggestion to treat the Nadeem races as a special circumstance and instead applied its broader factfinding discretion to give less credit to those elections. ***418** In other words, the trial court's finding that Dr. Kousser's "speculation about Dr. Nadeem's voting record" on issues salient to Santa Clara voters did not "rise[ ] to the ****464** level of 'special circumstances' that [would] warrant disregarding Dr. Nadeem's election losses" did *not* preclude the trial court from deciding to give those elections less weight based on the peculiar circumstance of an Asian American candidate losing support from Asian American voters in each subsequent race.

By its plain language, section 14028 suggests that courts look to "the extent to which candidates who are members of a protected class *and who are preferred by voters of the protected class*, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of" an action for vote dilution under the Act. (§ 14028, subd. (b), italics added.) The trial court properly considered the 10 city council elections in which Asian American candidates participated. The fact that one of those Asian American candidates lost ground each time as a preferred candidate of the protected class, as demonstrated by Dr. Kousser's analysis, is a valid circumstance for consideration. (*Ibid.*) As explained in *Gingles*, the court performs "discrete inquiries into minority and white voting practices" (*Gingles, supra*, 478 U.S. at p. 56, 106 S.Ct. 2752) to ascertain whether the district experiences legally significant racially polarized voting.

[20] As we understand *Gingles*'s elucidation of legally significant racially polarized voting, the extent to which racially polarized voting impairs the minority group's political power depends on case-specific circumstances. (*Gingles, supra*, 478 U.S. at pp. 56-57, 106 S.Ct. 2752.) At times,

the court may need to extend its inquiry to consider factors likely to have influenced the electoral outcomes, including features of the local election system affecting cohesion levels (*id.* at p. 56, 106 S.Ct. 2752) and election results that fall outside of the dominant pattern of polarization due to "special circumstances" (*id.* at p. 57, 106 S.Ct. 2752). For each example in which the Supreme Court listed such factors, it noted they were "illustrative" and not comprehensive or exclusive. (*Id.* at p. 56, 106 S.Ct. 2752, fn. 24 [factors affecting degree of minority cohesion]; *id.* at p. 57, fn. 26, 106 S.Ct. 2752 [special circumstance factors].) *Gingles* thus expressed a broad view of the factors relevant to the assessment of racially polarized voting, even as it defined "special circumstances" in relation to atypical instances of minority electoral success. We are not convinced that the trial court erred in weighing certain elections differently.

We find support for this conclusion by looking to federal cases in which courts gave more (or less) weight to certain elections based on factors other than "special circumstances." One such case is *Ruiz v. City of Santa Maria* (9th Cir. 1998) 160 F.3d 543, 552, in which the Ninth Circuit considered ***419** whether the district court "should have placed less evidentiary weight on Hispanic voters' ability to elect ... a white candidate … than on their inability to elect a Hispanic candidate." After reviewing how circuit courts addressed similar arguments in other cases, the court reasoned that "the inability of Hispanic voters to elect a Hispanic candidate is more probative in a *Gingles* prong three analysis than the ability of Hispanic voters to elect a non-minority candidate." (*Id.* at p. 553.) The court held accordingly that the minority group's ability to elect a nonminority candidate warranted less weight in the *Gingles* prong three analysis. (*Id.* at pp. 553-554). It explained that the district court's "mechanical approach" (*id.* at p. 554) to analyzing the election data failed to fulfill its duty "to make 'a searching practical evaluation of the past and present reality' with 'a functional view of the political ****465** process.' " (*Ibid.*, quoting *Gingles, supra*, 478 U.S. at p. 45, 106 S.Ct. 2752.)

Other cases similarly assign more probative value to elections involving a minority candidate, as opposed to elections involving only majority-representative candidates. (See, e.g., *Jenkins v. Red Clay Consolidated School District Bd. of Education* (3d Cir. 1993) 4 F.3d 1103, 1128-1129; *League of United Latin American Citizens, Council No. 4434 v. Clements* (5th Cir. 1993) 986 F.2d 728, 748 (*Clements*) ["[I]n ascertaining whether a community's elections are characterized by racially polarized voting, a court may properly give more weight to elections in which the minority-preferred candidate is a member of the minority group"].) In another example, also from *Clements*, the Fifth Circuit accepted the district court's weighting of certain elections as more probative than others, noting the district court must retain flexibility when faced with a sparsity of data. (*Clements, supra*, at p. 792.)

The City disputes the relevance of *Ruiz* and the other cases cited by plaintiffs, none of which address the probative value of nonpolarized elections involving a minority candidate. We recognize that the cited cases have limited applicability to the factual circumstance presented here. What they do provide is direction as far as the legal principles established by case law that guide the trial court's analysis. (See § 14026, subd. (e).) These cases are "driven by the facts." (*Clements, supra*, 986 F.2d at p. 736.) It is appropriate under such circumstances for the existence of baseline prerequisites, like the three *Gingles* factors, to embody the "flexible, fact-intensive" (*Gingles, supra*, 478 U.S. at p. 46, 106 S.Ct. 2752) nature of the vote dilution inquiry.

We conclude that a court's analysis of racially polarized voting, in accordance with *Gingles*' third factor and consistent with section 14028, invariably depends on its ability to weigh the usefulness of the election evidence presented and to assign probative value where appropriate. We decline to penalize the trial court for assigning less evidentiary significance to the Nadeem races. To impose an overly restrictive interpretation on the trial ***420** court's reasonable discretion to assign probative value would contravene the flexible, factfinding approach indicated in cases enforcing the federal Voting Rights Act of 1965 (*Gingles, supra*, 478 U.S. at p. 62) and suggested by the language of section 14028.

2. The Trial Court Did Not Abuse Its Discretion in Considering a Lower Confidence Interval for the Racially Polarized Voting Analysis

Having found no error of law in the trial court's application of the third *Gingles* factor, we turn to the City's contention that the trial court abused its discretion by conducting a posttrial statistical analysis to find racially polarized voting in five of 10 city council elections.[9]

As previously summarized, the trial court credited Dr. Kousser's analytical methodology and found the ecological inference ****466** results "probative" despite the uncertainties highlighted by the City's expert, Dr. Lewis. It rejected the

City's contention that overlapping 95 percent confidence intervals made it impossible to identify the Asian preferred candidate in the disputed, 2016 city council elections for seat 4 and seat 7. The trial court found that applying an 80 percent confidence interval enabled identification of an Asian preferred candidate and provided "sufficiently reliable results."

The City attacks the trial court's use of a lower confidence interval to ascertain which candidate was preferred by Asian American voters and its reference to point estimates to bolster its findings. It contends that the trial court stepped outside of its gatekeeping role by substituting its own methodology for the analyses offered by the expert witnesses at trial, arriving at a result that was unsupported by the evidence and inadequate to satisfy the third *Gingles* factor.

Plaintiffs dispute any error in the trial court's methods. They argue that the trial court soundly rejected the City's claim that the candidates preferred by Asian American voters could not be shown with sufficient reliability in the two disputed city council elections. Plaintiffs assert that the law does not require use of a 95 percent confidence level to determine racially polarized ***421** voting, because the test for legally significant racially polarized voting is not tied to a specified level of statistical significance.

We evaluate the contentions by two-part inquiry. First, did the trial court violate its gatekeeping responsibility by adopting a statistical method that was unvetted by the adversarial process or expert witness testimony? Second, did the trial court's process undermine or invalidate its substantive findings of racially polarized voting in satisfaction of section 14028?

[21] **[22]** **[23]** **[24]** **[25]** As to the first question, the City relies on case authority that delineates the procedures for admitting and evaluating expert testimony. "Under California law, trial courts have a substantial 'gatekeeping' responsibility." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769, 149 Cal.Rptr.3d 614, 288 P.3d 1237.) Consistent with statutory and decisional law, the trial court determines whether the expert opinion testimony is admissible. (*Id.* at pp. 771-772, 149 Cal.Rptr.3d 614, 288 P.3d 1237.) The court at the admissibility stage does "not weigh an opinion's probative value or substitute its own opinion for the expert's opinion." (*Id.* at p. 772, 149 Cal.Rptr.3d 614, 288 P.3d 1237.) Its gatekeeping responsibility "is simply to exclude 'clearly invalid and unreliable' expert opinion." (*Ibid.*) In a bench trial, of course, the court as trier of fact also weighs the evidence. (See Code Civ. Proc., § 631.8, subd. (a).) The City contends, however, that the judge's role as the trier of fact in a bench trial does not permit the court to conduct an independent "expert" analysis. The City argues that expert opinion must be vetted through the adversarial process, especially in complex matters dependent on statistical methods, like those to estimate group voting behavior.

The City cites *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 49, 172 Cal.Rptr.3d 371, 325 P.3d 916 (*Duran*) for the proposition that a trial court may not substitute its own statistical methods for the analyses offered by the expert witnesses at trial. The trial court in *Duran* devised a statistical sampling plan, without input from the parties' experts, for use in the liability and damages phases of a wage and hour class action bench trial. (*Id.* at pp. 12, 38, 172 Cal.Rptr.3d 371, 325 P.3d 916.) The court's method extrapolated from the testimony of a small sample ****467** group, restricted to 21 of the 260 class members, to determine liability as to the entire class, and to prove damages. (*Id.* at p. 12, 172 Cal.Rptr.3d 371, 325 P.3d 916.) The court "adamantly adhered" to its "invented" methodology (*id.* at p. 49, 172 Cal.Rptr.3d 371, 325 P.3d 916) despite "substantial expert criticism" (*ibid.*). The California Supreme Court rejected the trial court's approach and reversed the judgment, explaining that "[a] trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced." (*Id.* at p. 13, 172 Cal.Rptr.3d 371, 325 P.3d 916.) The high court found the court's sampling method was "profoundly flawed" (*ibid.*) for numerous reasons related to the limited sample size, selection bias, and resulting margin of error. (*Id.* at pp. 42-46, 172 Cal.Rptr.3d 371, 325 P.3d 916.)

***422** The City likens the trial court's use of a lowered confidence interval in this case to the statistical sampling plan devised by the trial court in *Duran.* It contends that the application of an "80 percent confidence interval" lacked any support in expert evidence or input from the adversarial process and, like the sampling plan in *Duran, supra*, 59 Cal.4th at page 13, 172 Cal.Rptr.3d 371, 325 P.3d 916, deprived the City of any opportunity to impeach it. The City further contends that by selecting an untested confidence interval and applying it to the two 2016 elections at issue, the trial court (perhaps inadvertently) grossly increased the margin of error while ignoring evidence in the record that expert statisticians do not use such low confidence intervals

in their ordinary work. It argues that because a 95 percent confidence interval means the true answer is not in the identified range five times out of 100, as Dr. Kousser explained, and an 80 percent confidence interval means the true answer is outside the range 20 times in 100, the difference marks a 400 percent increase in the likelihood of error. The City notes that the trial court repeated the "same unsupported statistical analysis" in its review of the school elections.

[26] We find that the trial court's decision to use 80 percent confidence intervals to ascertain Asian American cohesion behind a preferred candidate fell well within the bounds of its discretion. *Duran* is distinguishable because the "invented" and unvetted statistical sampling plan (*Duran, supra*, 59 Cal.4th at p. 49, 172 Cal.Rptr.3d 371, 325 P.3d 916) defined all manner of proof of liability at trial (*id.* at pp. 39-40, 172 Cal.Rptr.3d 371, 325 P.3d 916) and deprived the defendant of the ability to litigate certain affirmative defenses (*id.* at p. 35, 172 Cal.Rptr.3d 371, 325 P.3d 916). Here, the selection of an alternative confidence interval did not dictate the methods of proving liability or restrict the City from litigating its defenses or the specific issue of how the confidence interval affected the results of the inference analyses. On the contrary, the question of confidence intervals—their application and interpretation—was thoroughly litigated.

In his testimony, Dr. Kousser described the 95 percent confidence interval as "a standard convention" and "the most usual one" seen in political science literature. He testified that it "means that if the null hypothesis is that there is no difference between one point estimate and the other point estimate, that five times out of 100 we would say that there was a difference at some level. But we would be wrong." Though he used the 95 percent confidence interval (also referred to, conversely, as 0.05) for his calculations, he explained that other confidence levels could be used: "If you look at the standard errors, you can use any confidence interval that you want ****468** to.... [¶] ... I used .05 [95 percent confidence] because that's a standard convention."

As plaintiffs point out, Dr. Kousser described in detail during his redirect examination how a lower confidence interval could apply. He explained that his calculations showed an Asian American preferred candidate in six of the ***423** 10 city council elections at the 95 percent confidence interval.[10] But at an alternative measure of statistical significance, such as 90 percent confidence, "[y]ou could reject the null hypothesis that there was no preferred candidate" and would be wrong "ten times out of 100 rather than five times out of 100." Dr. Kousser stepped plaintiffs' counsel through the process of lowering the confidence interval, explaining that "[y]ou can do the same thing for 80 percent .... And the way to get those figures to make that determination is to multiply [the standard errors] by 1.65 for 90 percent or 1.28 for 80 percent rather than 1.96 ... for 95 percent."

In the re-cross examination that followed, the City's counsel asked no questions about lowering the confidence interval. This pattern repeated the next day when plaintiffs' counsel pressed the City's expert, Dr. Lewis, on his opinion that "sufficient uncertainty in the estimates" meant he could not reliably conclude whether racially polarized voting had occurred. Plaintiffs' counsel asked if Dr. Lewis had attempted to apply 80 percent or 90 percent confidence intervals to the data to see if that would allow him to draw a conclusion. Dr. Lewis explained that in the 2016 elections he analyzed, he "reported estimates of the probability" of each candidate being the preferred candidate among each group without identifying a threshold confidence interval. The trial court interjected with its own questions about Dr. Lewis's data, including about his preferred candidate analysis for the disputed 2016 election (seat 7). Dr. Lewis estimated that there was an 80 percent probability that candidate Park was the preferred candidate of Asian Americans. The trial court inquired, "[s]o when we see a .80 here, do you believe that it is unreliable to assume that Park was not preferred candidate of Asian Americans?" Dr. Lewis answered that assuming the other model assumptions were correct, he "couldn't say that with ... 95 percent certainty" but "could say it with 80 percent certainty." The City's counsel followed in redirect without addressing confidence intervals or Asian American cohesion.

Plaintiffs revisited the subject again in Dr. Kousser's rebuttal testimony. Dr. Kousser agreed that there could be a statistical correlation at less than 95 percent confidence interval or at the 0.05 uncertainty level, as Dr. Lewis had himself done in his tables on preferred candidates, and testified extensively about how overlapping confidence intervals may be interpreted according to different statistical theories. The City declined to examine Dr. Kousser further. Plaintiffs reiterated the point in their posttrial brief, charging that the City's attempt to refute plaintiffs' showing of racially polarized voting by claiming the statistical inference analyses did not show Asian American cohesion behind a preferred candidate was flawed in several respects. The thrust of plaintiffs' argument was that federal case authority following ***424** *Gingles* did not require cohesion to be shown by a statistically significant preference for a single candidate, that it was error

to conflate statistical significance with plaintiffs' burden to prove politically cohesive voting at the preponderance of the evidence standard, and that in any ****469** event confidence levels of 80 percent were probative to show correlation between Asian American voters and a preferred candidate.

The record thus reflects extensive expert testimony—and pointed questions by the trial court—about calculating Asian American voter cohesion behind a preferred candidate at 80 percent confidence interval as opposed to the standard convention of 95 percent, from both technical and interpretive perspectives. This record undercuts the City's claim that the trial court usurped the role of the expert witness and applied a methodology that was not vetted by the adversarial process. Nor did the trial court create its own evidence, as the City suggests. Since Dr. Kousser reported the standard errors for each election that he analyzed, including the city council elections that the City disputes showed statistically significant cohesion behind a preferred candidate (2016 seats 4 and 7), the trial court's decision to adopt the alternate convention at 80 percent confidence interval for those elections can hardly be compared to conjuring its own statistical model. (Cf. *Duran, supra*, 59 Cal.4th at p. 49, 172 Cal.Rptr.3d 371, 325 P.3d 916.) Instead, the trial court credited Dr. Kousser's analysis of preferred candidates but found that in the few disputed elections in which preferred status could not be confirmed at 95 percent confidence, it could be confirmed at 80 percent. We find this was a valid exercise of discretion by the trial court as the finder of fact when faced with competing opinions on the need to identify the candidate preferred by Asian American voters at a stated confidence level.

[27] Turning to the second question, the City contends that because the trial court's calculations were not supported by evidence in the record or vetted through the adversarial process, they cannot support the finding that five of 10 city council elections, or four of nine school elections, involved racially polarized voting. We find the issue largely resolved by our analysis of the record above, which contains ample evidentiary support for the trial court's use of a lower confidence interval in assessing the disputed evidence of voter cohesion. We nevertheless briefly address the implication that calculating voter support for a preferred candidate at 80 percent confidence interval invalidated the trial court's substantive findings of racially polarized voting.

The City suggests that the trial court likely did not understand the effect of the lower confidence level on the reliability of the conclusion. We believe this supposition is contradicted by the record. The trial court's colloquies with counsel and the experts reveal that the court was conversant with the relevant statistical principles. More importantly, the court's determination that assessing the protected class's preferred candidate at 80 percent confidence interval ***425** was "sufficiently reliable" under the circumstances to support a finding of racially polarized voting must be viewed in context of the operating framework of the Act.

This framework, as previously discussed (see *ante*, parts I.A and II.C.1) was patterned after the federal Voting Rights Act but "provide[s] a broader cause of action for vote dilution." (*Sanchez, supra*, 145 Cal.App.4th at p. 669, 51 Cal.Rptr.3d 821.) As plaintiffs and amici curiae Advancing Justice—ALC have variously pointed out, the Act recognizes "[t]he methodologies for estimating group voting behavior" (§ 14026, subd. (e)) approved in federal case law to establish racially polarized voting but does not mandate that plaintiffs seeking to prove a vote dilution claim under California law adopt those same methodologies. (*Ibid.* [methodologies approved in federal ****470** case law "may" be used to prove that elections are characterized by racially polarized voting].)

Even if California's definition of racially polarized voting had limited state trial courts to the methodologies approved in federal Voting Rights Act of 1965 case law to estimate group voting behavior, we are unaware of federal case authority that prescribes a bright-line rule tying legal sufficiency of cohesion to a mathematical formula or statistical method. For example, in *U.S. v. City of Euclid* (N.D. Ohio 2008) 580 F.Supp.2d 584, 596 (*Euclid*), the district court expressly rejected the contention that a "failure to satisfy ... proposed statistical benchmarks" precluded the plaintiffs' vote dilution claim. The court emphasized that when assessing statistical evidence of racially polarized voting, courts should keep in mind "the broader legal principles described in *Gingles*" and be "neither ... wedded to, nor hamstrung by, blind adherence to statistical outcomes.... [W]hile courts have found certain particular statistical or mathematical outcomes to be compelling evidence *in the context of the cases before them*, no decision out of either the Supreme Court or the Sixth Circuit (or any other Circuit for that matter) requires the use of a particular statistical methodology, or demands a particular statistical outcome before a court may conclude that racial bloc voting exists." (*Ibid.*)

[28] It bears repeating that voting rights claims as interpreted according to federal case authority "are inherently fact-

intensive" (*Nipper v. Smith* (11th Cir. 1994) 39 F.3d 1494, 1498), requiring "a 'searching practical evaluation of the "past and present reality" ' of the electoral system's operation" (*ibid.*, quoting *Gingles, supra*, 478 U.S. at p. 45, 106 S.Ct. 2752). California's statute demands an equally fact-intensive expedition through the factors for ascertaining racially polarized voting while also enabling greater flexibility around variables like geographic compactness (§ 14028, subd. (c)) and "[o]ther factors" deemed "probative" but not necessary to establish a violation (*id.*, subd. (e)). The evidence presented "must be evaluated with a functional, rather than a ***426** formalistic, view of the political process ...." (*Nipper, supra*, at p. 1498; see *Gingles, supra*, at pp. 45, 79, 106 S.Ct. 2752.) The City's restrictive view of the trial court's ability to make findings at 80 instead of 95 percent confidence intervals clashes with this flexible and functional approach. We decline to edge toward a bright-line rule for substantially similar reasons as we stated in our rejection of a percentile-based "usually" requirement for the third *Gingles* factor. (See *ante*, pt. II.B.)

[29] **[30]** In sum, where the outcome depends to some degree on evidence produced by statistical analysis, courts must be able to exercise discretion in weighing the probative value against the uncertainties and limitations inherent in statistical methods. We agree to that end with the district court's observation in *Euclid* that a statistical approach "might yield an inexact result for purposes of a hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting. The standard of proof ... is preponderance, not mathematical certainty." (*Euclid, supra*, 580 F.Supp.2d at p. 602; cf. *Turpin v. Merrell Dow Pharmaceuticals, Inc.* (6th Cir. 1992) 959 F.2d 1349, 1357, fn. 2 [distinguishing scientists' use of confidence intervals "as a common-sense device to give professional weight to their results" from the preponderance of the evidence standard of proof, which "requires proving one's case by the greater weight of the evidence"].)

****471** We conclude that statistical tools for expressing degrees of certainty should not eclipse the factfinder's ability to weigh the evidence and decide whether it meets the legal standard of proof, as occurred here.[11]

D. The District-based Remedy Did Not Violate Equal Protection

The City contends that the trial court's judgment violated the equal protection clause of the Fourteenth Amendment to the United States Constitution by imposing a "draconian race-conscious remedy" without an adequate showing that structural vote dilution existed in the jurisdiction, or that abolishing at-large elections for Santa Clara City Council seats would remedy any such vote dilution. The City's constitutional claim is premised on the argument that by erroneously failing to enforce the "usually" requirement of the third *Gingles* factor in its liability determination, the trial court imposed a race-conscious remedy without meeting strict scrutiny standards.

The City's argument may be summarized as follows. The City generally asserts that the Act uses race-based classifications both to authorize a ***427** challenge by a member of a protected class to an at-large election system (§§ 14032, 14026, subd. (d)) and to confer liability on the basis of racially polarized voting (§§ 14028, 14026, subd. (e)). It contends that racially polarized voting under the Act distinguishes between individuals on racial grounds and accordingly "falls within the core prohibition of the Equal Protection Clause." It claims that because the "usually" test required by the third *Gingles* factor enables courts to "distinguish[ ] structural dilution from the mere loss of an occasional election" (*Gingles, supra*, 478 U.S. at p. 51, 106 S.Ct. 2752), its enforcement by courts serves as a crucial safeguard to the constitutional application of the Act. The City avers that without the "usually" test, the trial court's imposition of a district-based electoral remedy that takes race into account cannot survive strict scrutiny review.

The City's equal protection argument fails on all fronts. The City invokes strict scrutiny review without squarely addressing settled California authority holding that the race-conscious provisions of the Act do not trigger strict scrutiny. In *Sanchez*, the Fifth District Court of Appeal rejected the City of Modesto's attempt to show the Act was facially invalid because any possible application of it would necessarily involve unconstitutional racial discrimination by using "race" to identify the polarized voting that causes vote dilution. (*Sanchez, supra*, 145 Cal.App.4th at pp. 665, 666, 51 Cal.Rptr.3d 821.) *Sanchez* found that the race-related provisions of the Act do not trigger strict scrutiny because the Act does not favor any race over others or allocate benefits or impose burdens on the basis of race. (*Sanchez*, at pp. 680-681, 687-688.) Having rejected the argument that strict scrutiny should apply, *Sanchez* held that the Act "readily passes" rational basis review. (*Id.* at p. 680, 51 Cal.Rptr.3d 821.)

We reject the City's attempt to revive arguments that were rejected over a decade ago in *Sanchez, supra*, 145 Cal.App.4th at pages 665, 680 through 681, 51 Cal.Rptr.3d 821. The City suggests no case authority or reasoned argument that would lead us to depart from the thoroughly supported ruling in *Sanchez.* It does not explain how the Act "distributes burdens or ****472** benefits on the basis of individual racial classifications" such as would trigger strict scrutiny review. (*Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508.) Instead, the City attempts to frame its equal protection argument as an as-applied challenge based on the purportedly race-conscious remedy ordered by the trial court without application of the "usually" test.

In theory, the City has a valid basis for trying to raise an as-applied challenge. *Sanchez* addressed only the facial validity of the Act, leaving room for a defendant in a vote dilution case "to attempt to show *as-applied* invalidity ... if liability is proven and a specific application or remedy is considered that warrants the attempt." (***428** *Sanchez, supra*, 145 Cal.App.4th at p. 665, 51 Cal.Rptr.3d 821.) The court stated, for example, that a defendant faced with "a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries ... may again assert the meaty constitutional issues" raised by the City of Modesto in that case. (*Ibid.*)

[31] The City's as-applied attempt here, however, fails on the merits. It states, without citation to the record, that the trial court forced the City to adopt a district-based system and to choose "among proposed maps that all took race into account in drawing the proposed boundaries between districts." Given that "race-conscious redistricting is not always unconstitutional" (*Shaw v. Reno* (1993) 509 U.S. 630, 642, 113 S.Ct. 2816, 125 L.Ed.2d 511), more than a conclusory statement that the trial court took race into account is required.

This is true even insofar as the City's invocation of strict scrutiny for the as-applied challenge. (See *Bush v. Vera* (1996) 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 ["Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."].) The City fails to point this court to even a single example from the record that would show the trial court's selection of a district-based remedy made race " '*the predominant* factor motivating the ... [redistricting] decision.' " (*Id.* at p. 959, 116 S.Ct. 1941; see also *Higginson v. Becerra* (S.D. Cal. 2019) 363 F.Supp.3d 1118, 1125 [holding that a plaintiff seeking to state "a racial gerrymandering claim subject to strict scrutiny under the Equal Protection Clause ... must allege facts to support the inference that a districting decision was made 'on the basis of race' "], aff'd (9th Cir. 2019) 786 Fed. Appx. 705.) In *Higginson*, the district court dismissed a challenge similar to that which the City outlines here, finding that the complaint's allegations under the Act did not support the inference that passage of the Act, or its implementation through the City of Poway's ordinance implementing district-based elections, "classified [the plaintiff] into a district because of his membership in a particular racial group." (*Higginson, supra*, at p. 1127.)

We find, based on these principles, that the unsupported reference to race-based considerations does not support the City's call for strict scrutiny review. Its arguments based on the "usually" test also do not assist its case because, as explained *ante* in our discussion of the third *Gingles* factor, the trial court's determination of racially polarized voting did not fail to apply the "usually" requirement. We accordingly reject the City's claim to strict scrutiny review. Since the City does not attempt to assert an as-applied challenge under rational basis review, we conclude that its equal protection claim fails.

****473 *429 E. Application of the California Voting Rights Act of 2001 to Santa Clara Did Not Violate Charter City Plenary Authority Under the California Constitution**

The City's final argument is based on article XI, section 5, subdivision (b) of the California Constitution, which grants charter cities, in relevant part, "plenary authority" to decide "the manner in which" their municipal officers are elected. (Cal. Const., art. XI, § 5.)

In its statement of decision, the trial court summarily relied on *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 802, 172 Cal.Rptr.3d 333 (*Jauregui*) for the proposition that the Act preempts city charter provisions that establish at-large election of city council members. In *Jauregui*, the Court of Appeal held that the driving forces behind adoption of the Act, including the implementation of equal protection and voting rights and the integrity in the conduct of local elections, constituted an issue of statewide concern, enabling the statute to override the charter city's otherwise plenary power over its municipal elections. (*Jauregui*, at pp. 799-802.)

On appeal, the City claims that the *Jauregui* decision focused only on the question of the Act's statewide interest in preventing race-based voter dilution as justification to supersede the charter city's authority over its municipal affairs, based on article XI, section 5, subdivision (a) of the California Constitution, and failed to fully consider the charter city's "plenary" authority under article XI, section 5, subdivision (b)(4) of the California Constitution. An amicus curiae brief filed by John K. Haggerty, a resident of Santa Clara, expands on the City's "plenary authority" arguments and urges this court to part ways with *Jauregui.* Haggerty argues that the Court of Appeal in *Jauregui* did not adequately weigh the statewide interest held by California's citizens to protect charter cities' exclusive control over their own municipal affairs, especially their own local elections. He asserts that the *Jauregui* decision failed to adequately consider the "plenary authority" language used in article XI, section 5(b) of the California Constitution. Haggerty also raises the question of an as-applied equal protection violation, discussed above, arguing that the trial court's race-conscious remedy of imposing district-based elections should be reviewed both for its potential impingement on equal protection guarantees for affected citizens and for its imposition of a state authorized electoral remedy over a charter city's chosen manner of election.

[32] Plaintiffs defend the trial court's remedy and *Jauregui*'s interpretation of statewide interest. Plaintiffs assert, contrary to amicus Haggerty's depiction of the unwanted imposition of the district-based remedy, that a wide majority of Santa Clara voters actually supported an advisory ballot measure in Santa ***430** Clara's November 2018 election to engage citizens in a process to draft a charter amendment to elect council members, other than mayor, by district.[12] The vote on the advisory ****474** ballot measure took place after the liability and remedies phases of trial in this case.

[33] We observe that *Jauregui* directly addressed the "plenary authority" provision. (*Jauregui, supra*, 226 Cal.App.4th at pp. 802-803, 172 Cal.Rptr.3d 333.) The appellate court concluded that the plenary authority identified in article XI, section 5, subdivision (b) of the California Constitution and expressly applied to municipal elections "can be preempted by a statewide law after engaging in the four-step evaluation process specified by our Supreme Court" to ascertain whether the subject matter of the general law is of statewide concern. (*Jauregui, supra*, at p. 803, 172 Cal.Rptr.3d 333.) Although Haggerty contends that *Jauregui* erroneously determined that the Act's treatment of racial dilution in elections is a matter of statewide concern, the City's appeal does not challenge this point. The Legislature moreover declared its intent to codify the holding in *Jauregui* in amendments to the statute in 2015. (Stats. 2015, ch. 724 § 1, subds. (a)-(d) [declaring the dilution of votes of a protected class to be "a matter of statewide concern" for which the provisions of the Act "constitute a narrowly-drawn remedy that does not unnecessarily interfere with municipal governance" and stating the intent to apply the Act to charter cities and counties].) As amended, the Act expressly includes charter cities among the "political subdivisions" subject to the Act's provisions. (§ 14026, subd. (c).) Such legislative declarations of statewide concern are not determinative but are relevant and entitled to "great weight" by the court in deciding whether the general law supersedes conflicting charter enactments. (*Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 703, 707, 255 Cal.Rptr.3d 654; see *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 565, 143 Cal.Rptr.3d 529, 279 P.3d 1022.) We decline the invitation to depart from the *Jauregui* court's reasoning and holding.

***431** **[34]** The City acknowledges that its charter is subject to the Act's implementation of equal protection guarantees securing the ability of members of a protected class to exercise their voting rights. (See §§ 14027, 14031.) It "agrees that its charter must yield if the City's method of holding elections violates a protected class's right to equal protection of the laws, as implemented" in the Act. But it asserts there "can be no such violation unless" the at-large system of elections met the "usually" standard for racially polarized voting. It asks this court to consider its plenary power argument only in that "limited and specific context." Our conclusion that the trial court satisfied the applicable standard in determining racially polarized voting resulting in vote dilution, however, renders the argument moot. We conclude that the application of the Act to Santa Clara's charter did not impinge unlawfully on the City's plenary authority to control the manner and method of electing its officers.

F. Appeal of the Award of Attorney Fees and Costs

The City premises its appeal of the trial court's award of attorney fees and costs solely on the anticipated reversal of the trial court's liability judgment. Because we ****475** find no error requiring reversal of the judgment of liability under the Act, we affirm the award of attorney fees and costs.[13]

III. DISPOSITION

The judgment of liability under the California Voting Rights Act of 2001 is affirmed. The award of attorney fees and costs to plaintiffs is also affirmed. Plaintiffs are entitled to their costs on appeal.

Elia, J., and Danner, J., concurred.

All Citations

59 Cal.App.5th 385, 273 Cal.Rptr.3d 437, 21 Cal. Daily Op. Serv. 161, 2021 Daily Journal D.A.R. 102

Footnotes

1 Unspecified references are to the Elections Code.

2 We grant the City's unopposed request for judicial notice of the Senate Floor Analysis of Senate Bill No. 976 (2001–2002 Reg. Sess.), which supplements portions of the legislative history that are already in the record. Judicial notice is appropriate pursuant to Evidence Code sections 452 and 459.

3 The Elections Code defines a “protected class” as “a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).” (§ 14026, subd. (d).)

4 The trial court, in discussion with the parties, decided to treat the expert reports submitted by both sides as direct testimony. The parties supplemented the expert reports with additional direct testimony and cross-examination at the bench trial.

5 We grant the City's unopposed request for judicial notice of the official vote counts of the 19 elections analyzed in the trial court's ruling. The vote counts are produced by the Santa Clara County Registrar. They are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, §§ 452, 459.) Although the official vote counts were not produced as such at trial, they present in a familiar format the information already contained in plaintiffs' expert's report.

6 Section 14029 states, “Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.”

7 We grant plaintiffs' unopposed request for judicial notice of the election results of the November 2018 City of Santa Clara district 2 election. The election took place after the liability and remedies phases of trial in this case and after implementation of the judgment ordering the adoption of district-based elections based on the City's districting plan. The result of a public election is a fact not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, §§ 452, subd. (h), 459.) On the same basis, we grant plaintiffs' recently filed, unopposed request for judicial notice of the election results of the November 2020 City of Santa Clara district 4 and district 5 elections.

The November 2018 election resulted in the election of Raj Chahal as council member for district 2, making him the first Asian American candidate elected to the city council in Santa Clara's history. The November 2020 district 4 and district 5 elections resulted in the election of two more Asian American candidates to Santa Clara's city council since implementation of the trial court's judgment in this case.

8 We repeat the definition here. “ ‘Racially polarized voting’ means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.” (§ 14026, subd. (e).)

9 The City states in its reply brief that it "does not challenge" the trial court's finding that five out of 10 elections exhibited racially polarized voting. We do not construe this statement as a concession to the trial court's factual findings, which the City does challenge in its opening brief. Instead, we understand the arguments in the alternative. The City appears to challenge the trial court's application of the third *Gingles* factor, arguing that even if supported by the evidence, the statistical results cannot as a matter of law satisfy plaintiffs' burden to prove that racially polarized voting enables the White majority to "usually" defeat Asian American preferred candidates. Alternatively, the City challenges the trial court's factual finding of racially polarized voting in five out of 10 city council elections.

10 This finding was expressed in the relevant trial exhibit as "[s]tatistically significantly preferred over number two candidate at .05 level ...."

11 Because we find no abuse of discretion in the trial court's identification of the candidate preferred by Asian American voters for the disputed elections at a lowered confidence interval, we need not address the use of point estimates as an alternative to confidence intervals.

12 We grant plaintiffs' request for judicial notice of the following items: (1) City of Santa Clara resolution No. 18-8574, which placed on the November 2018 ballot an Advisory Measure N, asking "Shall the City of Santa Clara engage the voters in a public process to draft a Charter Amendment ballot measure to elect its Council Members, other than the Mayor, by district?"; (2) November 2018 election results for advisory measure N as produced by the Santa Clara County Registrar showing 70.4 percent "Yes" votes; and (3) meeting agenda of the City of Santa Clara charter review committee for September 26, 2019, which includes the results of a City-administered survey revealing that more than 60 percent of voters prefer a six-district election system for City Council.

The City does not oppose the request for judicial notice. The ballot measure, the election results on the ballot measure produced by the county registrar, and the charter review committee meeting agenda and City survey results are "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h); see *id.*, § 459.)

13 Plaintiffs assert that since the entry of the award of attorney fees and costs, they have expended "substantial time" and some costs on the appeal and "other case-related work." They ask this court to remand the matter with instructions to determine the amounts of reasonable costs and fees due for that work. Plaintiffs may pursue their costs claim in the superior court after the issuance of the remittitur in this matter, pursuant to California Rules of Court, rule 8.278(c).

485 F.2d 1297
United States Court of Appeals,
Fifth Circuit.

Charles F. ZIMMER, Plaintiff, Stewart Marshall, Intervenor-Appellant,

v.

John J. McKEITHEN et al., Defendants-Appellees.

No. 71-2649.
|
Sept. 12, 1973.

Synopsis

Action for reapportionment of school board and police juries in Louisiana Parish. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., Chief Judge, ordered at-large elections, and plaintiffs appealed. The Court of Appeals, 467 F.2d 1381, affirmed. On rehearing en banc, the Court of Appeals, Gewin, Circuit Judge, held that although population is the proper measure of equality in apportionment, access to the political process and not population is the barometer of dilution of minority voting strength and that repudiation of at-large elections for police jury and school board would be justified in view of confluence of factors, including past racial discrimination, supporting contention that at-large electoral scheme would have worked a diminution of black voting strength, and that fact that three black candidates had been successful in immediately preceding election did not dictate finding that at-large scheme did not in fact dilute black vote.

Panel decision reversed; judgment of district court vacated and cause remanded.

Coleman, Circuit Judge, dissented in part and filed opinion in which Ingraham, Circuit Judge, joined.

Clark, Circuit Judge, dissented and filed opinion in which Dyer, Morgan and Roney, Circuit Judges, joined.

West Headnotes (25)

[1] **Counties** Nature and constitution in general

The dilution standard, i. e., whether an apportionment scheme operates to minimize or cancel out voting strength of racial or political elements of the voting population, is a viable means of reconciling the disparate treatment of governmental body approved apportionment plans and court-approved plans under Voting Rights Act of 1965. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

5 Cases that cite this headnote

[2] **Election Law** Voting procedures

Provision of Voting Rights Act of 1965 governing alteration of voting qualifications and procedures by subject state or political subdivisions covers attempts to administer voting practices as well as attempts to enact them. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

7 Cases that cite this headnote

[3] **Constitutional Law** Population deviation

Concept of population in fair representation cases is not possessed of any talismanic quality; to rely on population statistics, to exclusion of all other factors, is to give such statistics greater sanctity than that which the law permits or requires. U.S.C.A.Const. Amends. 14, 15.

2 Cases that cite this headnote

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

Constitutional Law Equality of Voting Power (One Person, One Vote)

Inherent in concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable and second,

that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. U.S.C.A.Const. Amends. 14, 15.

3 Cases that cite this headnote

[5] **Constitutional Law** Population deviation

Although population is the proper measure of equality in apportionment, access to the political process and population is not the barometer of dilution of minority voting strength. U.S.C.A.Const. Amends. 14, 15.

5 Cases that cite this headnote

[6] **Counties** Nature and constitution in general

Legal standards for determining submergence of voting strength of racial elements of the voting population admit of no distinction on basis of size of population alone; preference for single-member districts in large districts is of no moment where a showing of dilution has been made. U.S.C.A.Const. Amends. 14, 15.

3 Cases that cite this headnote

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

Minorities are not to be exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone. U.S.C.A.Const. Amends. 14, 15.

1 Case that cites this headnote

[8] **Constitutional Law** Bodies, officers, and elections subject to limitations

Elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. U.S.C.A.Const. Amends. 14, 15.

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

To establish existence of a constitutionally impermissible redistricting plan, the plaintiff must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that, designedly or otherwise, an apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. U.S.C.A.Const. Amends. 14, 15.

8 Cases that cite this headnote

[10] **Counties** Nature and constitution in general

A reapportionment plan may not be invalidated solely because of the racial motivations of those who fashioned it; focus is on actual effect of the legislation being challenged and not the reason why the legislation was enacted. U.S.C.A.Const. Amends. 14, 15.

[11] **Constitutional Law** Multi-member or floterial districts

At-large and multimember districting schemes are not per se unconstitutional; nevertheless, where a petitioner can demonstrate that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice, such districting schemes are constitutionally infirm. U.S.C.A.Const. Amends. 14, 15.

4 Cases that cite this headnote

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

It is not enough, to establish dilution of voting strength of racial or political elements by use of at-large and multimember districting schemes, to prove a mere disparity between the number of

minority residents and the number of minority representatives. U.S.C.A.Const. Amends. 14, 15.

20 Cases that cite this headnote

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

Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that use of a multimember districting scheme is rooted in a strong state policy divorced from maintenance of racial discrimination, a holding of no dilution of minority voting strength is required; however, such a holding is not mandated where the state policy favoring multimember or at-large districting schemes is rooted in racial discrimination. U.S.C.A.Const. Amends. 14, 15.

41 Cases that cite this headnote

[14] **Constitutional Law** Elections, Voting, and Political Rights

Where a minority can demonstrate a lack of access to the process of slating candidates, unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that existence of past discrimination in general precludes the effective participation in the election system, a strong case of dilution of voting strength has been made. U.S.C.A.Const. Amends, 14, 15.

108 Cases that cite this headnote

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

Standards governing dilution of voting strength of racial or political elements of voting population by use of at-large or multimember districting scheme are applicable whether it is specific law or a custom or practice which causes the diminution of minority voting strength. U.S.C.A.Const. Amends. 14, 15.

2 Cases that cite this headnote

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

Proof of dilution of minority voting strength by use of at-large and multimember districting scheme is enhanced by a showing of existence of large districts, majority vote requirements, antisingle shot voting provisions and lack of provision for at-large candidates running from particular geographical subdistricts; fact of dilution is established on proof of existence of aggregate of such factors; however, all such factors need not be proved in order to obtain relief. U.S.C.A.Const. Amends. 14, 15.

85 Cases that cite this headnote

[17] **Constitutional Law** Fifteenth Amendment

Constitutional Law Elections in general

Counties Nature and constitution in general

Education Redistricting; Voting Rights Act

Repudiation of at-large elections for police juries and school board members was warranted where minority residents had suffered from protracted history of racial discrimination touching their ability to participate in electoral process, for years they had been compelled by statute of statewide application to attend racially segregated schools, voters had been subject to statewide interpretation test to qualify to vote and for 40 years no blacks had been permitted to register to vote; removal of such impediments did not vitiate significance of showing of past discrimination since debilitating effects thereof persisted, particularly in fact that although blacks comprised a majority of population they constituted a minority of registered voters. U.S.C.A.Const. Amends. 14, 15.

52 Cases that cite this headnote

[18] **Counties** Nature and constitution in general

Education Redistricting; Voting Rights Act

Absence of proof that representatives of police juries and school boards in parish were particularly insensitive to interests of minority residents was significant but not decisive of dilution of minority voting strength by at-large election of police juries and school board. U.S.C.A.Const. Amends. 14, 15.

[19] **Counties** Nature and constitution in general

Education Redistricting; Voting Rights Act

Fact that three black candidates had been successful in at-large election of parish police jurors and school board did not require finding that the at-large plan did not dilute black vote where results of election were not before district court when it rendered reapportionment opinion; also, success of black candidates at polls did not necessarily foreclose possibility of dilution of the black vote since such success might be attributable to work of politicians apprehending that support of black candidate would be politically expedient or that election of black candidate would thwart successful challenges to electoral schemes on dilution grounds. U.S.C.A.Const. Amends. 14, 15.

34 Cases that cite this headnote

[20] **Federal Courts** In general; necessity

An appellate court cannot take cognizance of matters not passed on by the trial court.

1 Case that cites this headnote

[21] **Constitutional Law** Elections, Voting, and Political Rights

To hold that a minority candidate's success at the polls is conclusive proof of minority group's access to the political process would be inviting attempts to circumvent the Constitution; showing of such success is not conclusive in a reapportionment case; rather, independent consideration of record is required. U.S.C.A.Const. Amends. 14, 15.

9 Cases that cite this headnote

[22] **Counties** Nature and constitution in general

Where district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion, starting point of Court of Appeals is pronouncement of United States Supreme Court that single-member districts are preferable to large multimember districts; such preference is not, however, an unyielding one. U.S.C.A.Const. Amends. 14, 15.

2 Cases that cite this headnote

[23] **Counties** Nature and constitution in general

Preference for single-member election district may yield in two situations: first, where a district court determines that significant interests would be advanced by use of multimember districts and use of single-member districts would jeopardize constitutional requirements; however, those significant interests must not themselves be rooted in racial discrimination and, second, where a district court determines that multimember districts afford minorities a greater opportunity for participation in the political processes than do single-member districts; in process of making the latter determination, a court need not be oblivious to the existence and location of minority voting strength. U.S.C.A.Const. Amends. 14, 15.

2 Cases that cite this headnote

[24] **Counties** Nature and constitution in general

It is permissible for a federal court to consider race in exercising its broad equitable powers to fashion a reapportionment decree. U.S.C.A.Const. Amends. 14, 15.

[25] **Counties** Nature and constitution in general

While not required to formulate a reapportionment plan that assures success of a minority at the polls, a court may in its discretion opt for a multimember plan which enhances the opportunity for participation in the political processes. U.S.C.A.Const. Amends. 14, 15.

1 Case that cites this headnote

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Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

Opinion

GEWIN, Circuit Judge:

Aristotle has written:

If liberty and equality, as is thought by some, are chiefly to be founded in democracy, they will be best attained when all persons alike share in the government to the utmost.[1]

This case evokes a consideration of the extent to which the Constitution of the United States compels adherence to this principle. Specifically, we are called upon to determine under what circumstances an apportionment scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population.[2] Appellant contends that the district court order, affirmed by a majority of a panel of this court, 467 F.2d 1381, requiring reapportionment for the school board and police juries in East Carroll Parish[3] under an at-large scheme of elections cannot pass muster under the aforementioned standard. Both the district court and a majority of a panel of this court held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish.[4] Upon rehearing en banc, this court finds the aforementioned conclusion infirm, and therefore we vacate and remand the district court's judgment.

I.

The panel opinion, recounting the facts which spawned this litigation and the protracted proceedings which it entailed, obviates the need for a full exposition of the present posture of this ***1301** case. Consequently, we shall highlight only those facts particularly germane to our disposition.

East Carroll is a rural parish located in the extreme northeast corner of Louisiana. According to the 1970 census, it has a population of 12,884, of which 7,568, or 58.7% are black. Until recently, blacks in the parish, like all blacks in Louisiana, suffered from the maintenance of dual school systems, and the interposition of an interpretation test which preconditioned qualification for voting. Additionally, from 1922 to 1962, no black resident of the Parish had been permitted to register to vote. With the removal of state and locally imposed impediments to voting, and through the efforts of federal registrars, registration statistics in the parish changed dramatically. As of October 6, 1971, there were 3,342 whites and 777 blacks registered on the East Carroll rolls and an additional 2,122 federally registered black voters in the parish.[5] Concurrent with the increased registration of black voters, elections under the predecessor ward system produced two black members of the policy jury and one black school board member.

The change from ward to at-large elections challenged herein was produced by the entry in 1968 of a district court order in a suit where petitioners sought to insure fidelity to the one-man, onevote principle of Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Three years elapsed between the entry of this order and the renewal of proceedings precipitated by instructions issued by the district court that East Carroll submit a reapportionment plan in light of the 1970 census. Pursuant to these instructions, the Parish

Police Jury resubmitted the 1968 at-large plan for approval. Subsequently, appellant Marshall was permitted to intervene on behalf of himself and all other similarly situated black voters in East Carroll, and challenge the propriety of the at-large plan as contravening the fourteenth and fifteenth amendments of the Constitution and Section 5 of the Voting Rights Act of 1965.[6] After the hearing conducted on July 29, 1971, the district court found, *inter alia,* that since under the at-large plan, there was a zero population deviation, the at-large plan did not dilute the voting strength of the black population. Accordingly, the district court ordered that police jury and school board elections be conducted pursuant to an at-large scheme of voting under which the parish was divided into 7 wards. Under this scheme, 6 of the wards were to elect 1 representative to the police jury and school board, and 1 ward was to elect 3 representatives. Although candidates were required to reside in the ward from which they sought election, they were to be voted upon by registered voters in the entire county.

Marshall urged several grounds for reversal on appeal: first, that the district court was without power to order at-large elections because under Section 5 of the Voting Rights Act of 1965, the Attorney General of the United States had tendered an objection to the Louisiana Statutes which prescribed at-large elections for police juries and school boards;[7] second, that the district court ***1302** applied an improper legal standard in evaluating dilution; and third, that the district court was clearly erroneous in finding that at-large elections do not dilute the voting strength of black voters in the parish. All three contentions were rejected by the panel.[8]

[1] **[2]** On rehearing, Marshall challenged the panel's disposition on all three grounds. Since we find his last two challenges meritorious, we need not consider his first contention concerning Section 5 of the Voting Rights Act of 1965.[9]

II.

Before proceeding further, we feel it is important to emphasize the posture in which the issues are presented in the instant case. The panel understood Marshall to contend that the district court abused its discretion in adopting a plan that did not comport with Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). We do not understand Marshall to make this contention. Consequently, we need not consider whether, absent an allegation that an at-large scheme unconstitutionally dilutes the voting strength of a minority, the district court's approval of an atlarge scheme would amount to an abuse of discretion under *Connor.*

Marshall's contention here is that the judicially approved at-large plan is unconstitutional,[10] not merely indiscrete. Having identified Marshall's contention, we turn to a consideration of first, the proper standard for testing dilution, and second, whether the district court erred in finding that there was no dilution in the instant case.

[3] We begin by noting that the concept of population in fair representation cases is not possessed of any talismanic quality. The Supreme Court recently affirmed this proposition in Gaffney v. Cummings, where it stated that "if it is the weight of a person's vote that matters, total population–even if stable and accurately taken–may not actually reflect that body of voters whose votes must be counted and weighed for purposes of reapportionment, because 'census persons' are not voters."[11] Indeed, ***1303** Reynolds v. Sims, *supra* and its progeny[12] marked a departure from statistical niceties. Consequently, to rely upon population statistics, to the exclusion of all other factors, is to give these statistics greater sanctity than that which the law permits or requires.

[4] **[5]** More fundamentally, the application of the population measure to this case is premised upon a misunderstanding of the thrust of the dilution problem presented in this case. Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable;[13] and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this court have long differentiated between these two propositions.[14] And although population is the proper measure of equality in apportionment, in Whitcomb v. Chavis, 403 U.S. 124, 149-150, 91 S.Ct. 1858, 29 L. Ed.2d 363 (1971) and White v. Regester, *supra,* 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324, the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.

[6] The district court applied a per se rule that since blacks were a majority in East Carroll Parish, the at-large plan could not possibly submerge their vote. Since in White v. Regester, *supra,* the Supreme Court affirmed a district court's finding of dilution in Bexar County even though Mexican-

Americans comprised a numerical majority of the population in that county, the per se rule applied by the district court below cannot withstand scrutiny. The panel also relied upon the fact that blacks in East Carroll comprised a majority of population in reaching its conclusion, but pointing to the size of the parish's population, it qualified the standard applied by the district court. We feel that this qualification, invoked to differentiate the instant case from Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971) where the Supreme Court announced a preference for single-member districts in "large" districts, is of no moment where, as here, a showing of dilution has been made. The legal standards announced by the Supreme Court in Whitcomb v. Chavis, *supra,* and White v. Regester, *supra* in determining submergence admit of no distinction on the basis of size of population alone.

[7] **[8]** Concededly, in ***1304** Whitcomb v. Chavis, *supra,* 403 U.S. at 143-144, 91 S.Ct. 1858, the Supreme Court acknowledged that the aggregation of several districts into multi-member districts or an at-large scheme may enhance the potential for dilution when the population of such districts is large. But just as the magnitude of the districts did not obviate the need for petitioners to satisfy their burden of proof in *Whitcomb,* the minuteness of the population in the instant case cannot be invoked to pretermit further inquiry into the possibility of dilution in East Carroll Parish. The import attributed to population by the majority of the panel had this preclusive effect. However, we cannot sanction the view that minorities are to be exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone.[15]

[9] **[10]** We also hold that the district court erred in finding that the at-large plan did not dilute the black vote in East Carroll. In Howard v. Adams County Board of Supervisors, *supra,* 453 F.2d at 457, this court stated that to establish the existence of a constitutionally impermissible redistricting plan, plaintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that ". . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." In view of our holding that Marshall satisfied the burden with respect to the second standard, we need not entertain his contention that the departure from the firmly entrenched state policy against at-large voting in elections in police juries and school boards comes within the first standard.[16]

[11] It is axiomatic that at-large and multi-member districting schemes are not per se unconstitutional.[17] Nevertheless, where the petitioner can demonstrate ***1305** that "its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice," White v. Regester, *supra,* 412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324, Whitcomb v. Chavis, *supra,* 403 U.S. at 149-150, 91 S.Ct. 1858, such districting schemes are constitutionally infirm.

[12] **[13]** **[14]** **[15]** **[16]** The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.[18] Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multimember districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis, *supra,* would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multimember or at-large districting schemes is rooted in racial discrimination.[19] Conversely, where a minority can demonstrate a lack of access to the process of slating candidates,[20] the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, antisingle shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.[21] The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, *supra,* demonstrates, however, that all these factors need not be proved in order to obtain relief.

[17] In *White,* the Supreme Court sustained the district court's invalidation of a multi-member districting scheme for the election of representatives to the Texas House of

Representatives from Dallas and Bexar Counties. The Court held that the following findings of fact made by the district court concerning Dallas County were sufficient to warrant the relief fashioned: first, that the blacks had suffered a history of official racial discrimination which touched their right to participate in democratic processes; second, that the Texas requirements for majority vote as a prerequisite to nomination in a primary, though not themselves improper, enhanced the opportunity for racial discrimination; and third, that black candidates had merely nominal success in the past in electing Representatives due to the indifference of the Democratic Party which controlled candidate-slating ***1306** in Dallas County. White v. Regester, *supra,* 412 U.S. at 766-767, 93 S.Ct. at 2339-2340, 37 L.Ed.2d at 324-325. With respect to Bexar County, the district court made similar findings concerning the history of discrimination against Mexican-Americans and the unresponsiveness of the Bexar County legislative delegation to the interests of Mexican-Americans. The Supreme Court held that the district court's findings were sufficient to sustain the relief awarded in Bexar County. White v. Regester, *supra,* 412 U.S. at 767-769, 93 S.Ct. at 2340-2341, 37 L.Ed.2d at 325-326. While the instant case is not on all fours with White v. Regester, we hold that the record reveals facts sufficiently within its purview to warrant a repudiation of at-large elections in East Carroll Parish.

As in Dallas and Bexar Counties, minority residents in East Carroll Parish have suffered from a protracted history of racial discrimination which touched their ability to participate in the electoral process. Until 1957, they were compelled by a statute of statewide application to attend racially segregated schools until this court took action in Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir.), cert. denied, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436 (1957). Less overt but equally invalid statewide schemes which fostered the maintenance of dual schools were operative until thwarted in 1960.[22] Until 1965, voters in East Carroll were subject to a state-required interpretation test in order to qualify to vote.[23] Finally, from 1922 to 1962, no black had been permitted to register to vote in the Parish.[24] Concededly, these impediments to participation in the electoral process have since been removed. The district court concluded that their removal vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist. *Cf.* Graves v. Barnes, 343 F. Supp. 704, 733 (W.D.Texas 1972), aff'd sub nom. White v. Regester, *supra.* Their persistence is manifested, in part, by the fact that although blacks in East Carroll comprise a majority of the population, they constitute a minority of registered voters.

Similarly, as in Dallas and Bexar Counties, the electoral device of a majority voting requirement is operative in East Carroll Parish.[25] This device has been severely criticized as tending to submerge a political or racial minority. Graves v. Barnes, *supra* at 725, aff'd sub nom. White v. Regester, *supra. See also* Evers v. State Board of Election Com'rs, 327 F.Supp. 640, 643 (S.D. Miss.1971). This criticism is appropriate in the instant case.

[18] The only distinction between the instant case and White v. Regester, *supra,* is that here, there is no proof that representatives of police juries and school boards in East Carroll were particularly insensitive to the interests of minority residents. While this distinction is significant, it is not decisive.[26] ***1307** We feel that this deficiency in proof is compensated for by an additional distinction between the circumstances in the instant case and *White.* In Dallas and Bexar Counties, there was a strong tradition of multi-member districting. In contrast, in East Carroll, the firmly entrenched state policy against at-large elections for police juries and school boards had persisted until as late as 1967. Moreover, although testimony elicited by the district court emphasized the fact that the problems confronting the police jury were parish-wide and hence could best be resolved by representatives sensitive to a parish-wide electorate, there is a dearth of evidence that would suggest that the police jury formerly elected by wards inadequately served parish-wide interests in the past. Indeed, we find it rather anomalous that appellees would contend that the parish is too small for there to be a dilution of minority votes under an at-large scheme, and yet too large for ward elected representatives to be responsive to parishwide interests.

Thus, on the basis of the evidence adduced on the record, we feel constrained to find that the district court erred in rejecting Marshall's contention that the at-large electoral scheme would work a diminution of the black voting strength in East Carroll Parish. The confluence of factors presented in the instant case bring it well within the Supreme Court's holding in White v. Regester, *supra.*

[19] **[20]** **[21]** Although the aforementioned analysis suffices to sustain our disposition, we are inclined to respond to an additional argument tendered by appellee in support of the panel's ruling. While acknowledging that the instant facts might theoretically present a case of dilution, appellee argued

that 1971 and 1972 elections under the at-large plan, with the attendant success of 3 black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote. The significance attached to success at the polls in the instant case is unavailing, however, for two reasons. First, these results were not before the district court when it rendered the opinion we are presently reviewing. It is axiomatic that an appellate court cannot take cognizance of matters not passed upon by the trial court. Second, we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations–namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

III.

[22] **[23]** **[24]** **[25]** We conclude our analysis in this case by returning to the point at which we began when we noted that this is not a case wherein a district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion. Where such a challenge is registered, our starting point would be Connor v. Johnson, *supra,* in which the Supreme Court announced that single-member districts are preferable ***1308** to large multi-member districts. This preference is not, however, an unyielding one. As the Supreme Court admonished in Whitcomb v. Chavis, *supra,* 403 U.S. at 161, 91 S.Ct. at 1878, 29 L. Ed.2d 363, "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited." Lest our decision today be misconstrued to narrowly circumscribe the discretion of a district court in fashioning a reapportionment plan itself free from constitutional infirmity, we would note that the preference for single-member districts may yield in two situations.

Where a district court determines that significant interests would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements, it can employ multi-member districts. *See* Mahan v. Howell, *supra,* 410 U.S. at 334-335, 93 S.Ct. 979, 35 L.Ed.2d 320. But these significant interests must not themselves be rooted in racial discrimination. *Cf.* Taylor v. McKeithen, *supra,* 407 U.S. at 194, 92 S.Ct. at 1982, 32 L. Ed.2d at 650 n. 3; White v. Weiser, 412 U.S. 783, 796, 93 S.Ct. 2348, 2355, 37 L. Ed.2d 335, 347 (1973).

The preference may also yield where a district court determines that multimember districts afford minorities a greater opportunity for participation in the political processes than do singlemember districts. In the process of making such a determination, a court need not be oblivious to the existence and location of minority voting strength.[27] While not required to formulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes.

We acknowledge that the legal standards fashioned in this area of the law require federal courts to engage in a particularly exacting and hazardous inquiry in order to divine the proper remedial action to be taken. Justice Stewart presaged what we today acknowledge in his dissent in Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 204, 92 S.Ct. 1477, 1487, 32 L.Ed.2d 1, 14 (1972), when he noted that "the federal courts are often going to be faced with hard remedial problems" in reapportionment cases. Nevertheless, we are confident that federal courts can come to grips with such problems.

For the reasons set forth above, we reverse the decision of the panel of this court and vacate and remand the judgment ***1309** of the district court for proceedings consistent with our disposition.

COLEMAN, Circuit Judge, with whom INGRAHAM, Circuit Judge, joins (dissenting in part):

On November 17, 1972, a majority of the Judges ordered this case reheard en banc, directing counsel to file through briefs on the issue of "dilution of the franchise of black voters" as raised in the District Court and considered by the panel decision.[1] Clearly, what the en banc court intended to do was to establish some standards as to what is required to

"minimize or cancel out black voting strength",[2] particularly in the context of a sparsely settled governmental unit inhabited by less than 13,000 people.

With sincere deference, I fear that the intended objective has eluded the en banc opinion. Regretfully, it leaves me with no plainly discernible idea of what the District Courts are hereafter to do with this troublesome problem. Moreover, I must disagree with the effect of those portions of the opinion which I think I do understand.

The opinion appears to be anchored, in the main, on the recent decision of the Supreme Court in White v. Regester, dealing with conditions prevailing as to the multi-member legislative districts in Dallas and San Antonio. East Carroll Parish, Louisiana, however, is a "far cry" from either of these highly populated metropolitan areas. The Parish Seat, Lake Providence, has a population of 6,183. The remaining 450 square miles of typical rural delta terrain have 6,701 inhabitants, with an average population density of fifteen persons (not voters) per square mile. In East Carroll blacks are in a heavily preponderant majority, not in the minority as were the blacks and Mexican-Americans in Dallas and San Antonio. In *White,* the Supreme Court considering the *totality of the circumstances,* was not inclined to disturb the findings of the Three Judge District Court that certain conditions in the cities had led to invidious discrimination against the minority groups. In the instant appeal, the en banc majority holds a non-cancellation, non-minimization finding of the District Court to be clearly erroneous.

Let us now turn to the undisputed facts in the case presently before us.

In round figures, the Parish population is 59% black and 41% white; the voting registration is 54% white and 46% black. *The record fails to reflect the number of eligible blacks who have chosen not to register.*

With a spread of only eight percentage points between white and black registration, even in an election conducted solely on racial considerations a switch of less than five percent would reverse the expected outcome. Does such a *thin line,* even in a formerly segregated jurisdiction, amount as a matter of law to impermissible "minimization" or "cancellation" of black voting strength? I would respond in the negative, but the en banc opinion says "yes"; that any other view is clearly erroneous. Of course, divergencies of such size in constitutionally mandated population reapportionments at state and local levels do not call for per se invalidation, White v. Regester, *supra.*

One of the factors stressed in White v. Regester was that for nearly a hundred years only two minority representatives from Dallas County and only five Mexican-Americans from Bexar County had been elected to the Texas Legislature. I do not know how many had been candidates nor what qualifications they possessed, but in East Carroll the en banc opinion declines to consider the unchallenged fact that in the at-large elections in East Carroll Parish in 1971 and 1972 three black candidates were elected ***1310** to office, including one who previously had been defeated when running in his own ward. The opinion holds that an appellate court cannot take cognizance of matters not passed upon by the trial court. It was all right for the Supreme Court to consider election results in Dallas and Bexar for the past one hundred years but when it comes to dismembering a little parish we must blind ourselves to facts asserted on oral argument and not in the least disputed. One rule for plaintiffs and the opposite for defendants. I might add that in the eight years I have served on this Court I have frequently seen it go outside the formal record in racially oriented cases for the reason that it would not blind itself to unchallenged facts.

Obviously, the election of three black candidates in at-large elections within two years after the adoption of the plan now under review, and at a time when black registration amounted to 46% and white registration came to 54%, pretty well explodes any notion that black voting strength has been cancelled or minimized. What the en banc opinion condemns as clearly erroneous turns out to be clearly right when put to the test of actual use at the ballot box rather than in the rarified atmosphere of the judicial chamber.

Additionally, in White v. Regester, the at-large candidates for the legislature were not required to live in a particular zone, so that it was possible for every legislator to be elected from outside the minority areas. Indeed, the Three Judge Texas District Court felt impelled to say, and the Supreme Court quoted it, that these legislators were "insufficiently responsive to Mexican-American interests".

In East Carroll Parish, however, the candidates were required to run from specifically designated areas.

I believe that White v. Regester was decided on the denial of access to the political process, not on cancellation or minimization of the minority vote. In any event, a decision rendered on the facts peculiar to that case and not shown to

exist in East Carroll provides faint precedential support for the en banc decision now about to be rendered.

In East Carroll Parish the black people hold a predominant population majority–59% to 41%. It necessarily follows that the opinion of the Court in this case can only mean that in formerly "segregated" areas a black population majority is of no consequence in one man-one vote reapportionment cases unless it is also matched by a black registration majority when there is an effort to escape from the pocket borough method of electing county officials. The basic requirement, the fundamental goal, of population equality must yield to registration equality.

I submit that this is a serious distortion of the one man-one vote principle. It has to be premised on the idea that voters will always vote for candidates of their own race, an idea which has repeatedly failed the test of electoral experience, even in East Carroll Parish itself. It also overlooks the absolute certainty that with such a predominantly heavy population majority it is only a matter of time, and not too long at that, when there will be a black registration majority in East Carroll.

The en banc opinion is quite inconclusive as to what the District Court must do on remand. Apparently, however, no choice is left but to direct the division of the Parish into wards (districts). The Balkan must be fragmented into nine Balkans. After it had lost jurisdiction in this case, as set forth in the panel opinion, the District Court approved a redistricting plan submitted by the plaintiff-appellants by which three of the nine board members would be elected from one ward while the other six wards would be allowed to elect only one each. One ward would elect ⅓ of the Board while the other six would elect $^1/_9$ each. So far as ultimate power on the Board ***1311** is concerned a vote in one ward would be worth exactly three times that of a vote in any other ward. To me that certainly smells of invidious discrimination and a complete distortion of the one man-one vote rule within a small county area.

The paramount consideration in this case is that in East Carroll Parish, Louisiana, the black race is a definite majority, not a minority.[3] Thus, the ultimate question is whether a 7% deficit in black registration cancels or minimizes the black voting strength of those who hold an 18% advantage in population. The en banc opinion says that it does, as a matter of law, and that the affirmative finding of the District Court to the contrary is clearly erroneous.

Hence, we direct a change in the election machinery of a small rural parish, where the black officials elected under the old malapportioned ward plan expressed, as the record shows, a preference for the at-large plan.

I would adhere to what the panel said originally:
"We are unable to see how at-large elections in this small parish could possibly discriminate against its black citizens. They have a commanding majority of the total population. This majority would participate in the election of not one but of every police juror and every school board member in the parish. Every elected official would thus be answerable to all black citizens of the entire parish. On a single-member district plan, if such can be devised, the voters would have a voice in the election of only one member on the police jury or the school board. It would, therefore, be just as easy to say, in the exercise of discretion, that a single district plan in this parish would more clearly dilute the voting power of the blacks than would one in which every voter, black and white, has the same identical voice in the selection of not one, *but all* members of the elective body. As a matter of fact, the District Judge so found."

To the extent indicated, I respectfully dissent.

CLARK, Circuit Judge, with whom DYER, LEWIS R. MORGAN and RONEY, Circuit Judges, join (dissenting):

The majority bases its reversal of the District Court order now on appeal on two grounds: first, the District Court improperly relied on population statistics alone in evaluating the effect of the plan ordered implemented in diluting the voting strength of black citizens and second, the District Court finding of no dilution was clearly erroneous. With deference, I differ as to both grounds. Of more fundamental importance is my disagreement with Part III of the majority opinion which creates a formula to test multimember district reapportionment plans for dilution of ethnic group voting strength. The tests laid down sweep too broadly and at least they are unnecessary in view of the clear exposition of the law in this field by the Supreme Court. For all of these reasons I respectfully dissent.

I.

White v. Regester announces the legal standard to be applied in this case as succinctly and cogently as it can be put. Omitting supportive citations, the Court stated:

Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State.

But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly ***1312** discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question–that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

The Supreme Court concluded that "on the totality of the circumstances" it would not overturn the findings of the District Court
representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member district in the light of the past and present reality, political and otherwise.

The majority epitomizes the District Court's order as one which based its determination of nondilution solely on the fact that the requirement of at-large elections eliminated any population deviation between voting units. However, I read the order to have a broader foundation. At the hearing held to determine the effect of the 1970 census upon the District Court's previous 1968 order for at-large elections, six plans were submitted to the court by the governmental agencies involved and by the black intervenor. None of these plans provided for single-member districts throughout the parish. Rather, they provided for various combinations of single and multimember districts and for various forms of parish-at-large elections with geographical residency requirements for the candidates for various posts. The evidence adduced during this hearing delved into what dilution would be brought about by the intervenor's proposed plans as compared with the dilution that would result from a parish-at-large reapportionment plan. Both forms of plans were also compared to the population proportions which existed under the per-1968 single-member ward system.

The District Court's decree now on appeal provided in pertinent part:

. . . the court having considered all plans presented as well as all alternate plans proposed by the parties hereto, it has made the following finding of facts:

1. That according to the 1970 U.S. Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other nationalities; that the black population of East Carroll Parish, Louisiana, comprises 58.7 percent of the total population.

2. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.

3. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.

4. That the plan recommended by East Carroll Parish Police Jury and East Carroll Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks.

5. That the plan represents the wishes of both public bodies, having been endorsed by two of the three black public officials now serving on these public bodies.

6. That the plan of apportionment offered by East Carroll Parish Police ***1313** Jury and East Carroll Parish School Board is a constitutionally acceptable plan and meets all of the requirements of the "one-man, one-vote" rule of law.
7. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population.

I read this order as addressing two separate considerations. The first is compliance with the one-man-one-vote mandate of Reynolds v. Sims. The second is a factual consideration of whether parish-at-large elections, which obviously solve this problem completely, might have the effect of diluting the voting strength of black voters who, while holding a majority

position in total population, comprise a slight minority of the registered voters in the entire parish. Findings 3, 4, 5 and 7 are expressly addressed to this second problem, and, when considered in the context of the hearing record in this case which directly dealt with the dilution of voter effectiveness on a racial basis, appear to me to go to the heart of the proper questions that should concern the trier of fact in such a case. Certainly they are not limited to population statistics alone.

There can be no serious quarrel with the abstract legal premise that bare population statistics cannot become a talisman for determining whether dilution of voting strength has occurred. However, this concession is no impediment to an insistence that the District Court and the prior panel opinion of this court were entitled and indeed required to consider the overall size of the population in this small rural parish in approving the apportionment plan involved. It is perfectly valid to compare the effect which an at-large voting plan would have on the strength of an ethnic group in East Carroll Parish with the result of any similar multimember district plan in a populous urban area such as those which have been involved in the previous Supreme Court cases to date. The opportunity for participation in a parish-at-large election among less than 13,000 people is *greater* than the opportunity to be a meaningful part of the elective process in a single-member district which numbers over 100,000 persons. Judge Dawkins also made a specific oral finding that the proposed plan was not racially motivated and did not have a racially deterrent effect in its operation. With all of these factors which were before the District Court and which obviously formed a part of its decisional process, I cannot agree that the District Court imposed a constitutionally infirm reapportionment plan which watered down voting rights on the basis of population statistics alone.

The almost gossamer distinction between weighing each man's vote equally and preventing the dilution of the overall voting strength of an identifiable racial element within the electorate can be an elusive concept at best. However, it is not one which in my view escaped either the attention of Judge Dawkins in his original opinion or the panel that initially heard this appeal. With full recognition that White v. Regester and the other precedents cited in footnote 2 of the en banc majority opinion discuss a panoply of factors which may help identify the existence of dilution, I find no rule requiring that every such factor must be tested for and found in every case in which a dilution issue may be raised. The common denominator which all precedents demand be weighed in reaching the required ad hoc fact adjudication is: has the plaintiff met the burden of demonstrating that members of the ethnic group in question have less opportunity than do other residents in the district to participate in the political processes and to elect legislators of their choice? Though not expressed in these terms, this is the rule Judge Dawkins applied in evaluating the design and impact of this plan.

***1314** II.

I would be quick to agree that the en banc majority is correct when it states that dilution of voting strength is a question of fact. The difference between us arises because of my view that the record establishes the decision of the trial court in this case was not clearly erroneous. For example, Judge Coleman points out with emphasis in his dissent that the record in this case fails to reflect the number of *eligible* black citizens who have chosen not to register. How the majority opinion can conclude on such a record that the plaintiffs have demonstrated that past impediments to black voting still persist in this parish and that the persistence of such impediments is manifested in the disparity between black population and black voter registration is an enigma to me.[1] Until eligibility–based on age, residence, and freedom from other disqualifications established under federal law–is compared to nonregistration, this appears to be nothing more than a tenuous assumption. However, it is an assumption which is essential to the en banc court's fact reversal of the trial court as clearly erroneous.

The proof adduced in the District Court concerning the operation of the at-large election plan which governed the 1970 elections in this parish disclosed that a black candidate in the primary election for the Police Jury was defeated by only 9 votes. Another black candidate qualified for the second primary in which he ran third, 12 votes behind the second place white candidate. A third black candidate won in his contest against the incumbent president of the Police Jury, polling more votes than any candidate, not just for this post but in the entire election.

In the 1972 election which was held for only three of the nine school board posts, two blacks and one white candidate were elected. If the focus is upon "the design and impact" of at-large elections "in the light of past and present reality, political and otherwise," it is manifest that here there was no dilution of the black vote. But the majority sets its blinders so that it cannot see the present political reality because the election results were not before the District Court when it rendered its judgment.

While I unqualifiedly endorse the view that we cannot take cognizance of issues not raised or evidence that could have been but was not introduced in the court below, we are confronted with neither of these factors here. The 1972 election was held subsequent to the District Court's judgment of August 2, 1971. The result of the election is *not disputed* and was proffered to us on appeal. While the appellate process is going on, we can no more halt the political and electoral processes than we can stop the clock. We should not, however, turn either of them back when they are running properly. I see nothing novel or prejudicial about the consideration of current relevant *undisputed* matters brought to our attention on an appeal from an injunction decree. Indeed, our failure to do so is to shut our eyes to present political reality in East Carroll Parish and to do violence to the basic legal principle that injunction orders operate *in futuro.*

Finally, I am unable to agree with the majority that the 1972 election results should not be considered because of the purely speculative possibilities that the election of a black might serve the selfish political purposes of a white candidate, or that it would be better for a white to lose an election than to lose a law suit.

III.

White v. Regester charts a clear course for adjudicating attacks on plans ***1315** involving multimember districts–which in logic of analysis are merely one form of at-large voting, differing only in the extent of the geographic area involved. I cannot help but conclude that part III of the en banc majority opinion is diametrically at variance with the simple direct rule laid down by the Supreme Court in that case. By today's decision this court creates a rule which would limit the use of multimember districts to those instances where proof can be adduced which demonstrates that a "*greater* opportunity for participation" in the political process would be afforded to whichever race may be in the minority than would be possible in single member districts, or for a showing that the use of at-large election districts "*enhances* the opportunity" for minority participation in the political process. Without regard to the fact that such proof might be well-nigh to impossible to make, the law's announced preference for single member districts in populous areas does not mean that multimember districts must overcome some stigma to survive. To require that any particular plan be demonstrated to operate so as to afford an advantage to any minority ethnic group at the polling place is not an exercise of color-blind color consciousness but a legal mandate for reverse discrimination. It is not merely a rule out of keeping with the latest law of the Supreme Court, but is a mistake of major dimensions that will place the courts squarely in the center of the "political thicket."

The trier of fact in this case did not utilize an erroneous legal principle but rather applied considerations well within the rule just announced in White v. Regester. The record demonstrates ample evidence to indicate that the findings of fact made by the District Court were not clearly erroneous. For these reasons I would affirm the District Court. Most certainly I would refrain from creating any new rule regarding the use of multimember districts which runs counter to the most recent pronouncement of the Supreme Court. Thus, I dissent.

All Citations

485 F.2d 1297

Footnotes

1 Aristotle, Politics, Book II.

2 White v. Regester, 412 U.S. 755, 765, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); Fortson v. Dorsey, 379 U.S. 433, 439, 85 S. Ct. 498, 13 L.Ed.2d 401 (1965); Burns v. Richardson, 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

3 In the absence of special legislative authority for school boards to apportion, the apportionment and reapportionment of parish school boards is dependent upon such apportionment of the police jury in the parish. Consequently, this case does not require a distinction between the reapportionment scheme as it affects either body.

4 As shall be discussed *infra,* a majority of the panel refrained from announcing a per se rule. Rather, it qualified its application of the majority of population standards on the grounds proffered by appellees, namely the size of the parish.

5 These figures are based on the 1962 findings of the district court in the voter registration suit brought in the Parish, United States v. Manning, 205 F.Supp. 172 (W.D. La.1962), and on the State of Louisiana Board of Registration, Report of

Registered Voters, month ending October 6, 1971. *See* Brief of Appellant at 3, Zimmer v. McKeithen, No. 71-2649 (5th Cir. filed Dec. 1, 1971); Brief of Appellee at 1, *id.* (5th Cir. filed March 28, 1972).

6 Although Marshall clearly raised the Voting Rights Act issue in his Complaint in Intervention, the district court in its order in 1971 did not rule on this issue. Since he preserved this contention on appeal, it was before a panel of this court.

7 Until 1968, Louisiana law prohibited atlarge elections for School Boards and Police Juries (the law required at least five wards from which the members of these bodies were to be elected). By Louisiana Acts of 1968 No. 445 Section 1 (amending La.R.S. 33:1221) and No. 561 (adding La.R.S. 17:71.1–17:71.6), Louisiana Law was amended to allow at-large elections (or elections from less than five wards) for School Boards and Police Juries.

On April 29, 1969, Acts 445 and 561 were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. On June 26, 1969, both Acts were rejected as having "the effect of discrimination against Negro voters on account of their race, and of denying to them an effective voice in the selection of Police Jury and School Board members." On September 10, 1969 this rejection was reaffirmed by the Attorney General of the United States, citing as a specific example of racial discrimination, the at-large scheme of elections in East Carroll Parish.

8 In all deference to the panel, we submit that they failed to give adequate consideration to Marshall's contention that the district court's finding of no dilution was clearly erroneous.

9 Marshall contended that the rule of Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971) and Sheffield v. Itawamba County Board of Supervisors, 439 F.2d 35 (5th Cir. 1971) that court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5 is inapposite where such plans are adopted by a court in "sweetheart" lawsuits. Although there may be merit in his contention that the failure to qualify *Connor* and *Sheffield* may result in the circumvention of the Voting Rights Act, we would merely note that the dilution standard is a viable means of reconciling the disparate treatment of governmental body approved plans and court approved plans under Section 5. Furthermore, since Section 5, 42 U.S.C. § 1973c (1970), covers attempts to administer voting practices as well as attempts to enact them, *see* Roman, Section 5 Of The Voting Rights Act: The Formation of an Extraordinary Legal Remedy, 22 Am.U.L.Rev. 111, 124 (1972), the panel's decision that *Connor* and *Sheffield* govern is quite appropriate.

10 A similar contention was made in Gunderson v. Adams, 328 F.Supp. 584 (S.D.Fla. 1970) aff'd, 403 U.S. 913, 91 S.Ct. 2225, 29 L.Ed.2d 692 (1971) where a Florida plan, codifying a court ordered plan, was challenged and upheld.

11 Gaffney v. Cummings, 412 U.S. 735-746, 93 S.Ct. 2321, 2328, 37 L.Ed.2d 298, 308 (1973). Thus, census figures include aliens, nonresident military personnel, nonresident students, all of whom may be ineligible to vote. The Supreme Court and lower courts have approved apportionment based not on population but on voter registration statistics on several occasions, where such data produces a distribution of legislators not differing substantially from the use of a permissible population basis. *See, e. g.,* Burns v. Richardson, *supra,* 384 U.S. at 93, 86 S.Ct. 1286; Ely v. Klahr, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971); Reynolds v. Gallion ex rel. Attorney General of Alabama, 308 F.Supp. 803 (M.D.Ala.1969); Pate v. El Paso County, Texas, 337 F.Supp. 95 (W.D. Tex.) aff'd, 400 U.S. 806, 91 S.Ct. 55, 27 L. E.2d 38 (1970).

12 E. g., Gaffney v. Cummings, *supra;* White v. Regester, *supra;* Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971); Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L. Ed.2d 501 (1967).

13 Reynolds v. Sims, *supra,* 377 U.S. at 577, 84 S.Ct., at 1389.

14 *See* Gaffney v. Cummings, *supra,* 412 U.S. at 751, 93 S.Ct. at 2330, 37 L.Ed.2d at 311; White v. Regester, *supra,* 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324; Whitcomb v. Chavis, *supra,* 403 U.S. at 142, 91 S.Ct. 1858, 29 L.Ed.2d 363; Abate v. Mundt, *supra,* 403 U.S. at 184 n.2, 91 S.Ct. 1904; Burns v. Richardson, *supra,* 384 U.S. at 88-89, 86 S.Ct. 1286; Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457 (5th Cir. 1972) cert. denied, 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972). *See also* Troxler v. St. John the Baptist Parish Police Jury, 331 F.Supp. 222 (E.D.La.1971), appeal dismissed, 452 F.2d 1388 (5th Cir. 1972).

15 We acknowledge, however, that elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. *See* Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973).

16 Similar contentions have met with varying degrees of success. For cases upholding the claim that a reapportionment plan was racially discriminatory, *see* Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); Smith v. Paris, 257 F.Supp. 901, 904 (M.D.Ala.) modified and aff'd, 386 F.2d 979 (5th Cir. 1967) on remand, United States v. Democratic Executive Committee of Barbour County, Alabama, 288 F.Supp. 943 (M.D.Ala.1968); Sims v. Baggett, 247 F.Supp. 96, 110 (M.D.Ala.1965). For cases in which such a claim was rejected, *see* Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964); Holt v. Richmond, 459 F.2d 1093 (4th Cir.)., cert. denied, 408 U.S. 931, 92 S.Ct. 2510, 33 L.Ed.2d 343 (1972).

Neither the language quoted from Howard v. Adams County Board of Supervisors, *supra,* nor the aforementioned cases should be read to hold that a reapportionment plan can be invalidated solely because of the racial motivations of those who fashioned it. In Palmer v. Thompson, 403 U.S. 217, 224-225, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), the Supreme Court stated that although its past decisions contain language which suggests that motive or purpose behind a law is relevant to its constitutionality, these decisions, including Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) focused on the actual effect of the legislation being challenged, and not the reason why the legislation was enacted.

17 White v. Regester, *supra,* 412 U.S. at 765, 93 S.Ct. at 2339, 37 L.Ed.2d at 324; Mahan v. Howell, *supra,* 410 U.S. at 335, 93 S.Ct. 979; Ferrell v. Hall, 339 F.Supp. 73 (W.D. Okl.) aff'd, 406 U.S. 939, 92 S.Ct. 2045, 32 L.Ed.2d 328, petition for rehearing denied, 408 U.S. 932, 92 S.Ct. 2489, 33 L.Ed.2d 344 (1972); Gunderson v. Adams, 328 F.Supp. 584 (S.D.Fla.1970); aff'd, 403 U.S. 913, 91 S.Ct. 2225, 29 L.Ed.2d 692 (1971); Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed. 2d 656 (1967); Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S.Ct. 820, 17 L.Ed.2d 771 (1967); Burns v. Richardson, *supra;* Fortson v. Dorsey, *supra;* Lipscomb v. Jonsson 459 F.2d 335, 337 (5th Cir. 1972); Howard v. Adams County Board of Supervisors, *supra,* 453 F.2d at 457-458.

18 *E. g.,* Whitcomb v. Chavis, *supra,* at 149, 91 S.Ct. 1858; Lipscomb v. Johnson, *supra,* 459 F.2d at 337.

19 Taylor v. McKeithen, 407 U.S. 191, at 194, 92 S.Ct. 1980, at 1982, 32 L.Ed.2d 648, at 650, n. 3. *See* Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering, 44 Miss.L.J. 391, 400 (1973).

20 The Supreme Court's focus in Whitcomb v. Chavis, *supra,* 403 U.S. at 149-150, 91 S. Ct. 1858, on the access of minorities to slating procedures in Marion County, Indiana, makes clear that the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes the diminution of minority voting strength.

21 *Compare* Whitcomb v. Chavis, *supra,* 403 U.S. at 143-144, 91 S.Ct. 1858, 29 L.Ed.2d 363, *with* Graves v. Barnes, 343 F.Supp. 704, 725 (W.D.Tex.1972), aff'd sub nom. White v. Regester, *supra.* The existence and mode of operation of voting procedures which enhance dilution is outlined in Derfner, Racial Discrimination and the Right to Vote, 26 Vand.L.Rev. 523, 553-55 and accompanying notes (1973).

22 *See, e. g.,* Bush v. Orleans Parish School Board, 188 F.Supp. 916, 920 (E.D.La.1960) (documenting additional circumventive artifices).

23 Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

24 United States v. Manning, *supra.*

25 La.Rev.Stat.Ann. art. 18, § 18:358 (1969). In addition, voters in East Carroll are subject to anti-single shot voting requirements, the effects of which though mitigated as to wards 1, 2, 4, 5, 6 and 7 under the district court's plan, are still egregious in ward 3 where 3 representatives to the police jury and school board are elected. *See* La.Rev. Stat.Ann. art. 18, § 18:351 (1969).

26 It may be that the absence on the record of any criticism of the responsiveness of the police jury and school board is attributable to an omission of proof. If so, our decision should not be interpreted as acquiescing to such omissions. However, it may be that the particular functions of the police jury, for example, do not easily lend themselves to unresponsive representation. The record establishes that the primary function of the juries is the drainage of rural farmlands, maintenance of rural roads, and the overseeing of a prison farm. Were we to hold that the absence of a claim of representation unresponsive to a minority's needs foreclosed constitutional attack, the voting strength of minorities could be freely diluted without fear of constitutional restraint. The absence of proof with respect to school boards could not be explained on such grounds.

27 The Supreme Court has never ruled on the question of the extent to which the board equitable powers of a federal court in fashioning reapportionment decrees are limited by the colorblind concept of Gomillion v. Lightfoot, *supra* and Wright v. Rockefeller, *supra. See* Taylor v. McKeithen, *supra,* 407 U.S. at 194, 92 S.Ct. at 1982, 32 L.Ed.2d at 650. Several courts have intimated that the colorblind concept is in fact a limitation. *See* Mann v. Davis, 245 F.Supp. 241, 245 (E.D.Va.) aff'd sub nom. Burnette v. Davis, 382 U.S. 42, 86 S.Ct. 181, 15 L.Ed.2d 35 (1965); Ferrell v. Hall, 339 F.Supp. 73, 83 (W.D.Okla.) aff'd, 406 U.S. 939, 92 S.Ct. 2045, 32 L.Ed.2d 328; rehearing denied, 408 U.S. 932, 92 S.Ct. 2489, 33 L.Ed.2d 344 (1972).

In discussing the remedial power of federal courts to fashion reapportionment decrees, the Court has cited Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), *see, e. g.,* Taylor v. McKeithen, *supra,* 407 U.S. at 194, 92 S. Ct. at 1982, 32 L.Ed.2d at 650; Sixty-Seventh Minnesota State Senate v. Beens, *infra,* 406 U.S. at 201, 92 S.Ct. at 1486, 32 L.Ed.2d at 12 (Stewart, J., dissenting), thereby suggesting that such powers in fashioning reapportionment decrees are coterminous with those in fashioning desegregation decrees. Since *Swann* noted that it was permissible for a federal court to consider race in the latter situation, *Swann, supra,* 402 U.S. at 25, 91 S.Ct. 1267, it would also be permissible to consider race in the former situation.

Our decision in Howard v. Adams County Board of Supervisors, *supra* is not inconsistent with the view maintained herein. In Howard, we observed that the district court was correct in noting that the organization commissioned by the legislature to draw up reapportionment plans did not consider race in its plan. Howard, *supra,* 453 F.2d at 458. We did not intimate any view as to the propriety of considering race in such circumstances.

1 The panel opinion in this case (Judge Gewin dissenting in part) is reported, 467 F.2d 1381.

2 Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376; Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401.

3 The en banc opinion speaks of single-shot voting, run-off elections, and slating candidates, but these were not issues in the court below.

1 For example, the 1970 census reflects that 49.6% of the black population of East Carroll Parish is under 18 years of age as compared to only 38.5% of the white population.

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-200

§ 17-200. Legislative purpose and statement of public policy

Effective: July 1, 2023
Currentness

In recognition of the protections for the right to vote provided by the constitution of the state of New York, which substantially exceed the protections for the right to vote provided by the constitution of the United States, and in conjunction with the constitutional guarantees of equal protection, freedom of expression, and freedom of association under the law and against the denial or abridgement of the voting rights of members of a race, color, or language-minority group, it is the public policy of the state of New York to:

1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and

2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-200, NY ELEC § 17-200
Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-202

§ 17-202. Interpretation of laws related to the elective franchise

Effective: July 1, 2023
Currentness

In further recognition of the protections for the right to vote provided by the constitution of the state of New York, all statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted; (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting. The authority to prescribe or maintain voting or elections policies and practices cannot be so exercised as to unnecessarily deny or abridge the right to vote. Policies and practices that burden the right to vote must be narrowly tailored to promote a compelling policy justification that must be supported by substantial evidence.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-202, NY ELEC § 17-202
Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Election Law § 17-204

§ 17-204. Definitions

Effective: August 6, 2024
Currentness

For the purposes of this title:

1. “At-large” method of election means a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; (b) in which the candidates are required to reside within given areas of the political subdivision and all of the voters of the entire political subdivision elect each of the members to the governing body; or (c) that combines at-large elections with district-based elections, unless the only member of the governing body of a political subdivision elected at-large holds exclusively executive responsibilities. For the purposes of this title, at-large method of election does not include ranked-choice voting, cumulative voting, and limited voting.

2. “District-based” method of election means a method of electing members to the governing body of a political subdivision using a districting or redistricting plan in which each member of the governing body resides within a district or ward that is a divisible part of the political subdivision and is elected only by voters residing within that district or ward, except for a member of the governing body that holds exclusively executive responsibilities.

3. “Alternative” method of election means a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting, cumulative voting, and limited voting.

4. “Political subdivision” means a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law.

5. “Protected class” means a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau.

5-a. “Language minorities” or “language-minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

6. “Racially polarized voting” means voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.

7. “Federal voting rights act” means the federal Voting Rights Act of 1965, 52 U.S.C. § 10301 et seq., as amended.

8. The “civil rights bureau” means the civil rights bureau of the office of the attorney general.

9. “Government enforcement action” means a denial of administrative or judicial preclearance by the state or federal government, pending litigation filed by a federal or state entity, a final judgment or adjudication, a consent decree, or similar formal action.

10. Repealed by L.2024, c. 216, § 2, eff. Aug. 6, 2024.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2024, c. 216, §§ 1, 2, eff. Aug. 6, 2024.)

McKinney's Election Law § 17-204, NY ELEC § 17-204
Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
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McKinney's Election Law § 17-206

§ 17-206. Prohibitions on voter disenfranchisement

Effective: August 6, 2024
Currentness

1. Prohibition against voter suppression. (a) No voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or political subdivision in a manner that results in a denial or abridgement of the right of members of a protected class to vote.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that, based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections.

2. Prohibition against vote dilution. (a) No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that a political subdivision:

(i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(ii) used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired.

(c) For the purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative

than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

3. In determining whether, under the totality of the circumstances, a violation of subdivision one or two of this section has occurred, factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.

4. Standing. Any aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action against a political subdivision pursuant to this section in the supreme court of the county in which the political subdivision is located.

5. Remedies. (a) Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans;

(iv) elimination of staggered elections so that all members of the governing body are elected on the same date;

(v) reasonably increasing the size of the governing body;

(vi) moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office as established in section eight of article three or section eight of article thirteen of the constitution, unless the budget in such political subdivision is subject to direct voter approval pursuant to part two of article five or article forty-one of the education law;

(vii) transferring authority for conducting the political subdivision's elections to the board of elections for the county in which the political subdivision is located;

(viii) additional voting hours or days;

(ix) additional polling locations;

(x) additional means of voting such as voting by mail;

(xi) ordering of special elections;

(xii) requiring expanded opportunities for voter registration;

(xiii) requiring additional voter education;

(xiv) modifying the election calendar;

(xv) the restoration or addition of persons to registration lists; or

(xvi) retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership, or in contravention of the voting guarantees set forth in this title, except that the court's finding shall not bar a subsequent action to enjoin enforcement of such redistricting plan.

(b) The court shall consider proposed remedies by any parties and interested non-parties, but shall not provide deference or priority to a proposed remedy offered by the political subdivision. The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.

6. Procedures for implementing new or revised districting or redistricting plans. The governing body of a political subdivision with the authority under this title and all applicable state and local laws to enact and implement a new method of election that

would replace the political subdivision's at-large method of election with a district-based or alternative method of election, or enact and implement a new districting or redistricting plan, shall undertake each of the steps enumerated in this subdivision, if proposed subsequent to receipt of a NYVRA notification letter, as defined in subdivision seven of this section, or the filing of a claim pursuant to this title or the federal voting rights act.

(a) Before drawing a draft districting or redistricting plan or plans of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting or redistricting process and to encourage public participation.

(b) After all draft districting or redistricting plans are drawn, the political subdivision shall publish and make available for release at least one draft districting or redistricting plan and, if members of the governing body of the political subdivision would be elected in their districts at different times to provide for staggered terms of office, the potential sequence of such elections. The political subdivision shall also hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input regarding the content of the draft districting or redistricting plan or plans and the proposed sequence of elections, if applicable. The draft districting or redistricting plan or plans shall be published at least seven days before consideration at a hearing. If the draft districting or redistricting plan or plans are revised at or following a hearing, the revised versions shall be published and made available to the public for at least seven days before being adopted.

(c) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of this title, and it shall take into account the preferences expressed by members of the districts.

7. Notification requirement and safe harbor for judicial actions. Before commencing a judicial action against a political subdivision under this section, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of this title. This written notice shall be referred to as a “NYVRA notification letter” in this title. The NYVRA notification letter shall specify the potential violation or violations alleged and shall contain a statement of facts to support such allegation; provided, however, that failure to so specify shall not be a basis for dismissal of such judicial action, but may affect the calculation of reimbursement pursuant to paragraph (e) of this subdivision. The prospective plaintiff shall also send by first class mail or email a copy of the NYVRA notification letter to the civil rights bureau. For actions against a school district or any other political subdivision that holds elections governed by the education law, the prospective plaintiff shall also send by certified mail a copy of the NYVRA notification letter to the commissioner of education.

(a) A prospective plaintiff shall not commence a judicial action against a political subdivision under this section within fifty days of sending to the political subdivision a NYVRA notification letter.

(b) Before receiving a NYVRA notification letter, or within fifty days of mailing of a NYVRA notification letter, the governing body of a political subdivision may pass a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy. Such a resolution shall be referred to as a “NYVRA resolution” in this title. If a political subdivision passes a NYVRA resolution, such political subdivision shall have ninety days after such passage to enact and implement such remedy, during which a prospective plaintiff

shall not commence an action to enforce this section against the political subdivision. For actions against a school district, the commissioner of education may order the enactment of a NYVRA resolution pursuant to the commissioner's authority under section three hundred five of the education law. Within seven days of passing a NYVRA resolution, the political subdivision shall send by first class mail or email a copy of the resolution to the civil rights bureau.

(c) If the governing body of a political subdivision lacks the authority under this title or applicable state law or local laws to enact or implement a remedy identified in a NYVRA resolution, or fails to enact or implement a remedy identified in a NYVRA resolution, within ninety days after the passage of the NYVRA resolution, or if the political subdivision is a covered entity as defined under section 17-210 of this title, the governing body of the political subdivision shall undertake the steps enumerated in the following provisions:

(i) The governing body of the political subdivision may approve a proposed remedy that complies with this title and submit such a proposed remedy to the civil rights bureau no later than one hundred twenty days after the passage of the NYVRA resolution. Such a submission shall be referred to as a "NYVRA proposal" in this title.

(ii) Prior to passing a NYVRA proposal, the political subdivision shall hold at least one public hearing, at which the public shall be invited to provide input regarding the NYVRA proposal. Before this hearing, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to encourage public participation.

(iii) Within sixty days of receipt of a NYVRA proposal, the civil rights bureau shall grant or deny approval of the NYVRA proposal. The civil rights bureau may invoke an extension of up to twenty days to review the proposal.

(iv) The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title cited in the NYVRA notification letter and would not give rise to any other violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any relevant federal law; and (D) implementation of the NYVRA proposal is feasible.

(v) If the civil rights bureau grants approval, the NYVRA proposal shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law.

(vi) If the political subdivision is a covered entity as defined under section 17-210 of this title, the political subdivision shall not be required to obtain preclearance for the NYVRA proposal pursuant to such section upon approval of the NYVRA proposal by the civil rights bureau.

(vii) If the civil rights bureau denies approval, the NYVRA proposal shall not be enacted or implemented. The civil rights bureau shall explain the basis for such denial and may, in its discretion, make recommendations for an alternative remedy for which it would grant approval.

(viii) If the civil rights bureau does not respond, the NYVRA proposal shall not be enacted or implemented.

(d) A political subdivision that has passed a NYVRA resolution may enter into an agreement with the prospective plaintiff providing that such prospective plaintiff shall not commence an action pursuant to this section against the political subdivision

for an additional ninety days. Such agreement shall include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or the political subdivision shall pass a NYVRA proposal and submit it to the civil rights bureau.

(e) If, pursuant to a process commenced by a NYVRA notification letter, a political subdivision enacts or implements a remedy or the civil rights bureau grants approval to a NYVRA proposal, a prospective plaintiff who sent the NYVRA notification letter may, within thirty days of the enactment or implementation of the remedy or approval of the NYVRA proposal, demand reimbursement for the cost of the work product generated to support the NYVRA notification letter. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services or for the analysis of voting patterns in the political subdivision. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree. The cumulative amount of reimbursements to all prospective plaintiffs, except for actions brought by the attorney general, shall not exceed forty-three thousand dollars, as adjusted annually to the consumer price index for all urban consumers, United States city average, as published by the United States department of labor. To the extent a prospective plaintiff who sent the NYVRA notification letter and a political subdivision are unable to come to a mutual agreement, either party may file a declaratory judgment action to obtain a clarification of rights.

(f) Notwithstanding the provisions of this subdivision, in the event that the first day for designating petitions for a political subdivision's next regular election to select members of its governing board has begun or is scheduled to begin within thirty days, or in the event that a political subdivision is scheduled to conduct any election within one hundred twenty days, a plaintiff alleging any violation of this title may commence a judicial action against a political subdivision under this section, provided that the relief sought by such a plaintiff includes preliminary relief for that election. Prior to or concurrent with commencing such a judicial action, any such plaintiff shall also submit a NYVRA notification letter to the political subdivision. In the event that a judicial action commenced under this provision is withdrawn or dismissed for mootness because the political subdivision has enacted or implemented a remedy or the civil rights bureau has granted approval of a NYVRA proposal pursuant to a process commenced by a NYVRA notification letter, any such plaintiff may only demand reimbursement pursuant to this subdivision.

8. Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2024, c. 216, §§ 3 to 8, eff. Aug. 6, 2024.)

McKinney's Election Law § 17-206, NY ELEC § 17-206

Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Election Law § 17-210

§ 17-210. Preclearance

Currentness

1. Preclearance. To ensure that the right to vote is not denied or abridged on account of race, color, or language-minority group, the enactment or implementation of a covered policy by a covered entity, as defined in subdivisions two and three of this section respectively, shall be subject to preclearance by the civil rights bureau or by a designated court as set forth in this section.

2. Covered policies. A “covered policy” shall include any new or modified voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy concerning any of the following topics:

(a) Method of election;

(b) Form of government;

(c) Annexation of a political subdivision;

(d) Incorporation of a political subdivision;

(e) Consolidation or division of political subdivisions;

(f) Removal of voters from enrollment lists or other list maintenance activities;

(g) Number, location, or hours of any election day or early voting poll site;

(h) Dates of elections and the election calendar, except with respect to special elections;

(i) Registration of voters;

(j) Assignment of election districts to election day or early voting poll sites;

(k) Assistance offered to members of a language-minority group; and

(l) Any additional topics designated by the civil rights bureau pursuant to a rule promulgated under the state administrative procedure act, upon a determination by the civil rights bureau that a new or modified voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy concerning such topics may have the effect of denying or abridging the right to vote on account of race, color, or language-minority group.

3. Covered entity. A "covered entity" shall include: (a) any political subdivision which, within the previous twenty-five years, has become subject to a court order or government enforcement action based upon a finding of any violation of this title, the federal voting rights act, the fifteenth amendment to the United States constitution, or a voting-related violation of the fourteenth amendment to the United States constitution; (b) any political subdivision which, within the previous twenty-five years, has become subject to at least three court orders or government enforcement actions based upon a finding of any violation of any state or federal civil rights law or the fourteenth amendment to the United States constitution concerning discrimination against members of a protected class; (c) any county in which, based on data provided by the division of criminal justice services, the combined misdemeanor and felony arrest rate of voting age members of any protected class consisting of at least ten thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the county, exceeds the proportion that the protected class constitutes of the citizen voting age population of the county as a whole by at least twenty percentage points at any point within the previous ten years; (d) any political subdivision in which, based on data made available by the United States census, the dissimilarity index of any protected class consisting of at least twenty-five thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the political subdivision, is in excess of fifty with respect to non-Hispanic white individuals within the political subdivision at any point within the previous ten years; (e) any political subdivision in which a board of elections has been established, if such political subdivision contains a covered entity fully within its borders; or (f) any board of elections that has been established in a political subdivision that is a covered entity pursuant to paragraph (a), (b), (c), (d) or (e) of this subdivision.

4. Preclearance by the attorney general. A covered entity may obtain preclearance for a covered policy from the civil rights bureau pursuant to the following process:

(a) The covered entity shall submit the covered policy in writing to the civil rights bureau. If the covered entity is a county or city board of elections, it shall contemporaneously provide a copy of the covered policy to the state board of elections.

(b) Upon submission of a covered policy for preclearance, as soon as practicable but no later than within ten days, the civil rights bureau shall publish the submission on its website.

(c) After publication of a submission, there shall be an opportunity for members of the public to comment on the submission to the civil rights bureau within the time periods set forth below. To facilitate public comment, the civil rights bureau shall provide an opportunity for members of the public to sign up to receive notifications or alerts regarding submission of a covered policy for preclearance.

(d) Upon submission of a covered policy for preclearance, the civil rights bureau shall review the covered policy, and any public comment, and shall, within the time periods set forth below, provide a report and determination as to whether, under this title,

preclearance should be granted or denied to the covered policy. Such time period shall run concurrent with the time periods for public comment. The civil rights bureau shall not make such determination until the period for public comment is closed. The civil rights bureau may request additional information from a covered entity at any time during its review to aid in developing its report and recommendation. The failure to timely comply with reasonable requests for more information may be grounds for the denial of preclearance. The civil rights bureau's reports and determination shall be posted publicly on its website.

(e) In any determination as to preclearance, the civil rights bureau shall identify in writing whether it is approving or rejecting the covered policy; provided, however, that the civil rights bureau may, in its discretion, designate preclearance as "preliminary" in which case the civil rights bureau may deny preclearance within sixty days following the receipt of submission of the covered policy.

(i) The civil rights bureau shall grant preclearance only if it determines that the covered policy will not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office. If the civil rights bureau grants preclearance, the covered entity may enact or implement the covered policy immediately.

(ii) If the civil rights bureau denies preclearance, the civil rights bureau shall interpose objections explaining its basis and the covered policy shall not be enacted or implemented.

(iii) If the civil rights bureau fails to respond within the required time frame as established in this section, the covered policy shall be deemed precleared and the covered entity may enact or implement such covered policy.

(f) The time periods for public comment, civil rights bureau review, and the determination of the civil rights bureau to grant or deny preclearance on submission shall be as follows:

(i) For any covered policy concerning the designation or selection of poll sites or the assignment of election districts to poll sites, whether for election day or early voting, the period for public comment shall be five business days. The civil rights bureau shall review the covered policy, including any public comment, and make a determination to deny or grant preclearance for such covered policy within fifteen days following the receipt of such covered policy.

(ii) The civil rights bureau may invoke an extension of up to twenty days to make a determination pursuant to this paragraph, if the civil rights bureau determines that good cause exists for such extension.

(iii) For any other covered policy, the period for public comment shall be ten business days. The civil rights bureau shall review the covered policy, including any public comment, within fifty-five days following the receipt of such covered policy and make a determination to deny or grant preclearance for such covered policy. The civil rights bureau may invoke up to two extensions of ninety days each.

(iv) The civil rights bureau is hereby authorized to promulgate rules for an expedited, emergency preclearance process in the event of a covered policy occurring during or imminently preceding an election as a result of any disaster within the meaning of section 3-108 of this chapter or other exigent circumstances. Any preclearance granted under this provision shall be designated "preliminary" and the civil rights bureau may deny preclearance within sixty days following receipt of the covered policy.

(g) Appeal of any denial by the civil rights bureau may be heard in the supreme court for the county of New York or the county of Albany in a proceeding commenced against the civil rights bureau, pursuant to article seventy-eight of the civil practice law and rules, from which appeal may be taken according to the ordinary rules of appellate procedure. Due to the frequency and urgency of elections, actions brought pursuant to this section shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference on appeal.

5. Preclearance by a designated court. A covered entity may obtain preclearance for a covered policy from a court pursuant to the following process:

(a) The covered entity shall submit the covered policy in writing to the following designated court in the judicial department within which the covered entity is located: (i) first judicial department: New York county; (ii) second judicial department: Westchester county; (iii) third judicial department: Albany county; and (iv) fourth judicial department: Erie county. If the covered entity is a county or city board of elections, it shall contemporaneously provide a copy of the covered policy to the state board of elections.

(b) The covered entity shall contemporaneously provide a copy of the covered policy to the civil rights bureau. The failure of the covered entity to provide a copy of the covered policy to the civil rights bureau will result in an automatic denial of preclearance.

(c) The court shall grant or deny preclearance within sixty days following the receipt of submission of the covered policy.

(d) The court shall grant preclearance only if it determines that the covered policy will not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office. If the court grants preclearance, the covered entity may enact or implement the covered policy immediately.

(e) If the court denies preclearance, or fails to respond within sixty days, the covered policy shall not be enacted or implemented.

(f) Appeal of any denial may be taken according to the ordinary rules of appellate procedure. Due to the frequency and urgency of elections, actions brought pursuant to this section shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference on appeal.

6. Failure to seek or obtain preclearance. If any covered entity enacts or implements a covered policy without seeking preclearance pursuant to this section, or enacts or implements a covered policy notwithstanding the denial of preclearance, either the civil rights bureau or any other party with standing to bring an action under this title may bring an action to enjoin the covered policy and to seek sanctions against the political subdivision and officials in violation.

7. Notification. (a) Any political subdivision that becomes subject to a court order or government enforcement action as provided in paragraph (a) or (b) of subdivision three of this section shall notify the civil rights bureau within thirty days of the issuance of such order or enforcement action.

(b) Any political subdivision that becomes involved in litigation concerning voting shall notify the civil rights bureau within thirty days of the commencement of such litigation.

(c) No more than thirty days after publication of a list of covered entities by the civil rights bureau, each covered entity included in such list shall notify the civil rights bureau of the name, email address, and telephone number of an individual with the authority to submit covered policies for preclearance on behalf of the covered entity. Each such covered entity shall notify the civil rights bureau within thirty days of any material change to the information required pursuant to this paragraph.

Credits

(Added L.2022, c. 226, § 4, eff. Sept. 22, 2024. Amended L.2024, c. 216, §§ 9 to 11, eff. Sept. 22, 2024.)

McKinney's Election Law § 17-210, NY ELEC § 17-210
Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-212

§ 17-212. Prohibition against voter intimidation, deception or obstruction

Effective: August 6, 2024
Currentness

1. (a) No person, whether acting under color of law or otherwise, may engage in acts of intimidation, deception, or obstruction that affects the right of voters to access the elective franchise.

(b) A violation of paragraph (a) of this subdivision shall be established if:

(i) a person uses or threatens to use any force, violence, restraint, abduction or duress, or inflicts or threatens to inflict any injury, damage, harm or loss, or in any other manner practices intimidation that causes or will reasonably have the effect of causing any person to vote or refrain from voting in general or for or against any particular person or for or against any proposition submitted to voters at such election; to place or refrain from placing their name upon a registry of voters; or to request or refrain from requesting an early mail or absentee ballot; or

(ii) a person knowingly uses any deceptive or fraudulent device, contrivance or communication that (A) pertains to: (1) the time, place, or manner of any election; (2) the qualifications or restrictions on voter eligibility for such election; (3) any voter's eligibility to vote in any election; (4) the consequences for voting or failing to vote in any election; or (5) a statement of endorsement by any specifically named person, political party, or organization; and (B) impedes, prevents or otherwise interferes with the free exercise of the elective franchise by any person, or causes or will reasonably have the effect of causing any person to vote or refrain from voting in general or for or against any particular person or for or against any proposition submitted to voters at such election; to place or refrain from placing their name upon a registry of voters; or to request or refrain from requesting an early mail or absentee ballot; or

(iii) a person obstructs, impedes, or otherwise interferes with access to any polling place or elections office, or obstructs, impedes, or otherwise interferes with any voter in any manner that causes or will reasonably have the effect of causing any delay in voting or the voting process, including the canvassing and tabulation of ballots.

2. Standing. Any aggrieved persons, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action pursuant to this section in the supreme court of the county in which the alleged violation of this section occurred.

3. Remedies. Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies that are tailored to remedy the violation, including but not limited to providing for additional time to cast a ballot that may be counted in the election at issue. Any party who shall violate any of the provisions of the foregoing section or who shall aid the violation of any of said provisions shall be liable to any prevailing plaintiff party for damages, including nominal damages for any violation, and compensatory or punitive damages for any intentional violation.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023. Amended L.2023, c. 481, § 33, eff. Jan. 1, 2024; L.2024, c. 216, § 12, eff. Aug. 6, 2024.)

Notes of Decisions (1)

McKinney's Election Law § 17-212, NY ELEC § 17-212
Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-222

§ 17-222. Severability

Effective: July 1, 2023
Currentness

If any provision of this title or its application to any person, political subdivision, or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-222, NY ELEC § 17-222
Current through L.2024, chapters 1 to 457. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10301
Formerly cited as 42 USCA § 1973

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

Effective: September 1, 2014
Currentness

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

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

CREDIT(S)

(Pub.L. 89-110, Title I, § 2, Aug. 6, 1965, 79 Stat. 437; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 94-73, Title II, § 206, Aug. 6, 1975, 89 Stat. 402; Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

Notes of Decisions (1352)

52 U.S.C.A. § 10301, 52 USCA § 10301
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10303
Formerly cited as 42 USCA § 1973b

§ 10303. Suspension of the use of tests or devices in determining eligibility to vote

Effective: September 1, 2014
Currentness

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no

declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under chapters 103 to 107 of this title have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 10304 of this title, including compliance with the requirement that no change covered by section 10304 of this title has been enforced without preclearance under section 10304 of this title, and have repealed all changes covered by section 10304 of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 10304 of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 10304 of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under chapters 103 to 107 of this title; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1). Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1,

1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 10305 or 10309 of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided,* That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

CREDIT(S)

(Pub.L. 89-110, Title I, § 4, Aug. 6, 1965, 79 Stat. 438; renumbered Title I, and amended Pub.L. 91-285, §§ 2 to 4, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73, Title I, § 101, Title II, §§ 201 to 203, 206, Aug. 6, 1975, 89 Stat. 400 to 402; Pub.L. 97-205, § 2(a) to (c), June 29, 1982, 96 Stat. 131 to 133; Pub.L. 109-246, §§ 3(d)(2), (e)(1), 4, July 27, 2006, 120 Stat. 580; Pub.L. 110-258, § 2, July 1, 2008, 122 Stat. 2428.)

VALIDITY

<The United States Supreme Court has held Section 4(b) of the Voting Rights Act of 1965 unconstitutional as a violation of the fundamental principle of equal sovereignty among states. Shelby County, Ala. v. Holder, U.S.2013, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651.>

Notes of Decisions (85)

52 U.S.C.A. § 10303, 52 USCA § 10303
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10310
Formerly cited as 42 USCA § 1973*l*

§ 10310. Enforcement proceedings

Currentness

(a)Criminal contempt

All cases of criminal contempt arising under the provisions of chapters 103 to 107 of this title shall be governed by section 1995 of Title 42.

(b)Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction

No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of chapters 103 to 107 of this title or any action of any Federal officer or employee pursuant hereto.

(c)Definitions

(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d)Subpenas

In any action for a declaratory judgment brought pursuant to section 10303 or 10304 of this title, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e)Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

CREDIT(S)

(Pub.L. 89-110, Title I, § 14, Aug. 6, 1965, 79 Stat. 445; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 94-73, Title II, § 207, Title IV, § 402, Aug. 6, 1975, 89 Stat. 402, 404; Pub.L. 109-246, §§ 3(e)(3), 6, July 27, 2006, 120 Stat. 580, 581.)

Notes of Decisions (206)

52 U.S.C.A. § 10310, 52 USCA § 10310
Current through P.L. 118-107. Some statute sections may be more current, see credits for details.

West's Annotated California Codes
Elections Code (Refs & Annos)
Division 14. Election Day Procedures (Refs & Annos)
Chapter 1.5. Rights of Voters (Refs & Annos)

West's Ann.Cal.Elec.Code § 14028

§ 14028. Violation of protected class voter rights; determination

Effective: January 1, 2003
Currentness

(a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

Credits
(Added by Stats.2002, c. 129 (S.B.976), § 1.)

Notes of Decisions (13)

West's Ann. Cal. Elec. Code § 14028, CA ELEC § 14028
Current with urgency legislation through Ch. 1002 of 2024 Reg.Sess. Some statute sections may be more current, see credits for details.

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