PREJUDICE ON TRIAL

Theodore Roosevelt Inn of Court
Nassau County Bar Association
Tuesday, March 3, 2020
6:15 p.m.

Sheryl A. Channer, Esq.
Hon. Randall T. Eng
Hon. Tricia M. Ferrell
Sarika Kapoor, Esq.
Harry Kutner, Esq.
Hon. Ira B. Warshawsky

...

Michael Sugamele, 1L, Touro Law School

PREJUDICE ON TRIAL

Theodore Roosevelt Inn of Court

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Program Outline

Introduction	**Judge Warshawksy**	**6:15 pm - 6:20 pm**
	Part I: Criminal	
Background Summary and Context	Harry Kutner	6:20 pm - 6:25 pm
Pretrial Argument	Harry Kutner Judge Eng	6:25 pm - 6:30 pm
The Trial	Harry Kutner Judge Warshawsky Sarika Kapoor Sheryl Channer Michael Sugamele Judge Ferrell	6:30 pm – 7:00 pm
Post-Trial Question to Jury Room	Judge Warshawsky	7:00 pm – 7:05 pm
Closing (Short Synopsis)	Harry Kutner	7:05 pm - 7:15 pm
	Part II: Civil	
Opening: Relevant Case Law	Michael Sugamele	7:15 pm - 7:20 pm
Ivy League Interview	Judge Warshawsky Michael Sugamele Judge Eng	7:20 pm - 7:30 pm
Admission Committee Discussion	Judge Warshawsky Sarika Kapoor Harry Kutner	7:30 pm – 7:40 pm
Summary of Harvard Case	Judge Eng	7:40 pm – 7:50 pm
Question and Answer Period for Entire Program	**All Panelists**	**7:50 pm –7:55 pm**

CLE Credits: 2.0 hour of Diversity, Inclusion and Elimination of Bias

Sheryl Channer, Esq.

Law Office of Sheryl Channer

114 Old Country Road, Suite 200

Mineola, New York 11501

Schanneresq@gmail.com

(516) 721-0180

Sheryl is a sole practitioner. Her area of practice is criminal law.

Previously, Sheryl served as a Principal Court Attorney to both the Honorable Frank A, Gulotta, Jr., and the Honorable Jerald S. Carter. Sheryl began her career as an Assistant District Attorney in the Nassau County District Attorney's Office.

She is a member of the Nassau County Bar Association, the Amistad Long Island Black Bar, the Nassau County Woman's Bar Association, the New York State Defenders Association and the Nassau County Criminal Court Bar Association. She serves as a member of the executive board of Nassau County Criminal Court Bar Association.

Sheryl volunteers as a pro bono attorney with the Nassau County Bar Association Forfeiture Court. She also works as a mentor at the Barack Obama Elementary School in Hempstead.

She received her JD, Duquesne University School of Law and her BS from SUNY College at Brockport.



HON. RANDALL T. ENG

990 Stewart Avenue
Garden City, NY 11530

Direct: (516) 741-6565
Fax: (516) 741-6706

reng@msek.com

Download VCard

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Justice Randall T. Eng is Of Counsel to Meyer, Suozzi, English & Klein, P.C., and a member of the Litigation Department, including the Appellate Practice and

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Association of New York's Annual Judges' Reception. Justice Eng also received The Queens District Attorney Office Public Service Excellence Award at The Annual Asian American Pacific Islander Heritage Celebration.

Immediately prior to joining Meyer Suozzi, Justice Eng served as the Presiding Justice of the Appellate Division, Second Department – the busiest and largest Judicial Department in the State of New York, covering Queens, Brooklyn, Staten Island, the counties of Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland and Westchester, handling over 9,000 appeals per year. The presiding justice is the highest-ranking judge in the appellate division, in charge of all of its operations, as well as a sitting practicing judge on panels of appeal.

Born in Guangzhou, China, Justice Eng was raised in New York City. He earned his undergraduate degree from State University of New York at Buffalo and his juris doctor degree from St. John's University School of Law in 1972.

Following law school, Justice Eng began his esteemed legal career in public service as an assistant district attorney in Queens County. At the time, he became the first Asian American appointed as an assistant prosecutor in New York State history and served in this role from 1973-1980. He then served as the Deputy Inspector General of the New York City Correction Department from 1980 to 1981, and later became the Inspector General, a role in which he served from 1981 to 1983.

In 1983, Justice Eng became the first Asian American to become a judge in New York State, when he was appointed to the Criminal Court of the City of New York by Mayor Edward I. Koch. He sat in the Criminal Court until 1988 when he was designated an Acting Justice of the New York State Supreme Court. In 1990 and 2004, Justice Eng was elected and reelected to full 14-year terms on that bench.

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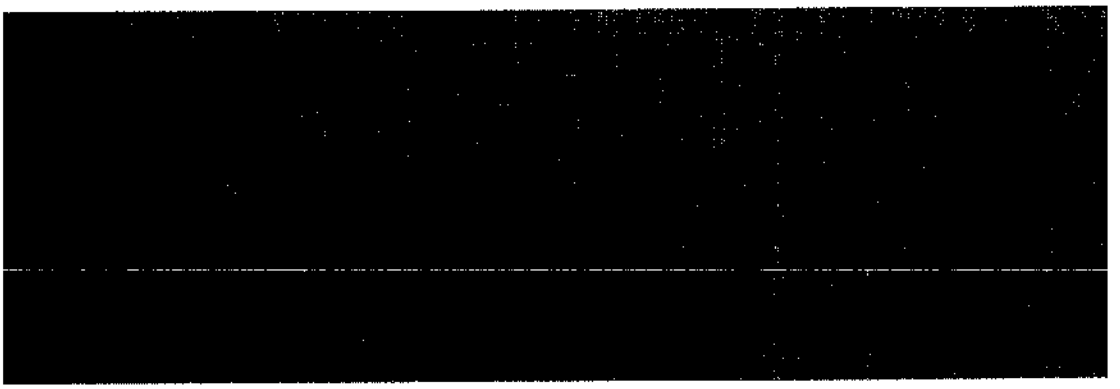
Following these terms, he was appointed Administrative Judge of the Criminal Term of Queens County Supreme Court in 2007, and served in that role until 2008. In 2012, Governor Cuomo appointed Justice Eng to lead the Second Department, where he became the first Asian American to serve as Presiding Justice in New York State's history.

Justice Eng served as President of the Association of Supreme Court Justices of the City of New York and as a member of the Advisory Committee on Judicial Ethics. He is currently a member of the Permanent Sentencing Commission for New York State and the New York State Judicial Institute on Professionalism in the Law. He has also served as an adjunct professor at St. John's University School of Law.

In addition to his prolific legal career, Justice Eng proudly served his country as a member of the New York Army National Guard from 1970 until 2004, when he retired as State Judge Advocate holding the rank of Colonel.



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Garden City, NY 11530
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BIOGRAPHICAL-JUDGE TRICIA M. FERRELL

Tricia M. Ferrell was appointed as a Judge of the Nassau County District Court in March 2008. She was subsequently elected that same year to serve a six-year term and re-elected in 2014. The Judge adjudicates criminal matters and previously presided over the Driving While Intoxicated Court as well as the Domestic Violence Court. Presently, Judge Ferrell handles cases assigned to a criminal court part designated for defendants with privately retained counsel.

Prior to sitting on the bench, Judge Ferrell was employed in 2006, as the Director of Compliance for Nassau County, where she managed the internal controls for various departments countywide. The Judge also formerly held the position of Deputy Village Attorney, where she prosecuted cases for the Incorporated Village of Hempstead. Judge Ferrell's legal career began as an eager Nassau County Assistant District Attorney in 1998, under the Honorable Denis Dillon, where she prosecuted both misdemeanor and felony cases.

Judge Ferrell is actively involved in the legal arena and holds membership in the Nassau County Criminal Courts Bar Association where she was awarded the Norman F. Lent Memorial Award for Distinguished Jurist in March of this year. She's also a member of the Women's Bar Association of the State of New York and the Nassau County Women's Bar Association, where she recently presented for its *Chamber Chat Series.* As a Nassau County Bar Association member, she is a longtime and energetic youth mentor, serving the Uniondale middle school population and she was a Co-Chair of the Bar Association's Judicial Section. She is also a member of the Theodore Roosevelt Inn of Court, the Amistad Long Island Black Bar Association, the New York State Bar Association, the New York State District Court Judges Association and the Nassau County District Court Judges Association, where she formerly held the office of secretary.

Sarika Kapoor

Sarika Kapoor is an Associate Court Attorney in the Nassau County Supreme Court Law Department. She was hired at the Law Department as a "Court Attorney – Pending Admission" in August 2004. Following her admission to the Second Judicial Department in January 2005, she assumed the position of Court Attorney. She served as a Court Attorney from 2005 through 2009, as a Senior Court Attorney from 2009 through 2011, and has been serving as an Associate Court Attorney since 2011.

Ms. Kapoor has also served an interim law clerk to the Hon. William R. LaMarca (deceased), Justice of the Supreme Court, Nassau County and the Hon. Jerome C. Murphy, Justice of the Supreme Court, Nassau County.

In 2005, Ms. Kapoor was appointed by the former Chief Administrative Judge of the New York State Courts, Jonathan Lippman, to serve as a Small Claims Assessment Review (SCAR) Hearing Officer. In 2015, Ms. Kapoor was appointed by the Nassau County Administrative Judge, Thomas A. Adams, to serve as a Special Election Law Referee. She continues to serve as both a SCAR Hearing Officer and Special Election Law Referee to date.

Ms. Kapoor received her Bachelor of Arts, Political Science, *magna cum laude*, *Phi Beta Kappa*, from Queens College in 2001. She received her Juris Doctorate from the Maurice A. Deane School of Law at Hofstra University in 2004. At Hofstra Law, she was a recipient of the Walter Sackur Scholarship, the Senior Notes and Comments Editor for the *Hofstra Journal of International Business & Law*, a member of the Hofstra Moot Court Association, the sole recipient of the Best Brief Award at the Hofstra Moot Court Competition (2003-2004) and, more recently, on various occasions, a guest lecturer at Hofstra Law School and a diversity program panelist.

Ms. Kapoor's professional accomplishments include her being appointed to the Committee on Character and Fitness in the Second Judicial Department, a former member of the Hofstra Law School Alumni Association Board, a former member of the Nassau County Bar Association's Board of Directors, former co-chair of the WE CARE Advisory Board (the charitable arm of the Nassau County Bar Association) as well as a member of almost a dozen committees at the Bar Association.

In addition, she currently serves as a member of the Board of the Theodore Roosevelt Inn of Court, a member of the Nassau County Judicial Committee on Women in the Courts and a member of the Nassau County Women's Bar Association.

HARRY H. KUTNER, JR.

136 Willis Avenue
Mineola, New York 11501
(B) (516) 741-1400
(F) (516) 741-8712
hkutner@gmail.com

Education:

Fordham University School of Law, New York, NY 1973
J.D., Doctor of Jurisprudence

Iona College, New Rochelle, New York 1969
B.A., Bachelor of Arts (Political Science)

Admitted:

New York, 1974
U.S. Court of Appeals Second Circuit 1980
U.S. Federal Courts, 1975 (EDNY and SDNY)
U.S. Supreme Court 1980
U.S. Tax Court 1982

Martindale-Hubbell rating: AV Preeminent

Professional experience:

Legal career in a general practice spanning forty-six years, noteworthy for its variety and results across a wide spectrum of legal issues, in both civil and criminal litigation in federal and state courts. Reported cases involve personal injury, wrongful death, zoning and land use, class action frauds, estates, real estate, commercial sales and financing, civil rights, extradition, intentional torts, medical malpractice, Article 78, criminal, and commercial.

Professional Affiliations:

Theodore Roosevelt American Inn of Court (1993-present)
Criminal Courts Bar Association (1974-present, Past President '89-'90)
Catholic Lawyers Guild (1974-present, Past President '86-'87)
Friendly Sons of St. Patrick (Charter Member, Past President '94-'96)

HARRY H. KUTNER, JR.
ATTORNEY-AT-LAW

Public service:

Nassau Community College, Trustee ('91-'97)
Nassau County Planning Commission, Commissioner ('79-'82)

Military service:

U.S.M.C. 1970-1972 (Honorable Discharge)

Expert testimony:

In addition to many appearances before courts as to the prevailing rates and value of legal services performed, has testified in front of the House of Representatives Banking Committee as an outgrowth of his successful pursuit of a federal class action against banks, mortgage brokers, home improvement contractors, title companies, at more than a serious risk of death from them (as a result of which, in the adjunct criminal prosecution, 68 individuals were federally convicted), and although it became mildly contentious with the Committee Chairman (later imprisoned), his testimony contributed to several bank-consumer lending reforms.

Representative cases, both civil and criminal, tried to verdict in federal and state courts as plaintiff and defendant:

medical malpractice, dental malpractice, automobile liability, product liability, premises liability, breach of contract, construction accident, wrongful death, 42 USC § 1983 civil rights, and criminal-felonies (murder, robbery, East Coast Rodney King, burglary, grand larceny, assault, etc.) and misdemeanors (DWI, assault, larceny, etc.)

A list of the following reported cases, in a wide range of issues in both civil and criminal, is illustrative:

People v. Stock, 88 Misc.2d 1058 (Dist. Ct. Nassau Co. 1976): dismissal motion based on retributive prosecution

Bethiel v. Saxton, 55 A.D.2d 612 (2d Dept. 1976): defense of wrongful death (early case dealing with economic value of a housewife-mother); reversal of Special Term's grant of special preference to plaintiff

Carinha v. Action Crane Corp., 58 A.D.2d 261 (1st Dept. 1977) defense of co-plaintiff-joined wrongful death and leg-off cases; very early LL § 240 case involving contractual and common law indemnity, general and special employment, Workers' Comp. as complete defense

People v. Ronald C., 61 A.D.2d 988 (2d Dept. 1978): robbery case; whether it was abuse of discretion for trial court to refuse "Serrano" plea

Bethiel v. Action Crane Corp. (Saxton), 61 A.D.2d 1022 (2d Dept. 1978): later appeal of same case above; second appeal after special issue trial among three defendants as to employer of crane driver at time of collision

People v. Joe, 63 A.D.2d 737 (2d Dept. 1978): criminal possession of weapon; conviction reversed, indictment dismissed based on illegal stop, search and seizure

Scharf v. Thaul, 65 A.D.2d 819 (2d Dept. 1978): Article 78 admin. review (zoning); affirmed homeowner client's prevailing at Special Term annulling Zoning Board's denial of variance

Rand v. Rand, 84 A.D.2d 785 (2d Dept. 1981): successful appeal of denial of vacatur of client's default and consolidation of two actions

People v. Albanese, 88 A.D.2d 603 (2d Dept. 1982): reversal

People v. Robert P.T., 91 A.D.2d 1075 (2d Dept. 1983): modification of sentence

Thompson v. Whitestone S & L, 101 A.D.2d 833 (2d Dept. 1984), lv. to app. den., 65 N.Y.2d 636 (1985): 12,262 plaintiffs-clients' class action certification affirmed

Hayden v. Village of Hempstead, 103 A.D.2d 765 (2d Dept. 1984): reversal of Special Term's refusal to grant client's GML § 50-e(5) application for leave to file late notice of claim

Rand v. Rand, 134 A.D.2d 336 (2d Dept. 1987): contract action; appeal of order of substitution

Maia v. Castro, 139 Misc.2d 312 (Dist. Ct. Nass. Co. 1988): prevailed on tenants' motion to dismiss client's eviction based on "good cause" to terminate lease, and federal law's application

Merrick Gables v. Fields, 143 A.D.2d 117 (2d Dept. 1988): Art. 78 admin. review; upheld client's use variance grant by Town Board of Zoning Appeals

Abrams, etc. v. Harris Home Designs, etc., 1989 WL 88690 (S.D.N.Y): upheld the integrity of Mr. Kutner's billing records

DeGennaro v. Town of Riverhead, 836 F. Supp. 109 (E.D.N.Y. 1993): 42 USC § 1983 action: denied FRCP 56 motion; later at trial, plaintiff's verdict for $765,000.00

Bezerra v. County of Nassau, 846 F. Supp. 214 (E.D.N.Y. 1994): 42 USC § 1983 action (police excessive force); denial of motion to dismiss; later jury verdict and sheriff's levy on 3rd Precinct

People v. Karimi, 204 A.D.2d 572 (2d Dept. 1994): defense of vehicular homicide; affirmance of dismissal of indictment

Mackay v. Real Cars, Inc., 215 A.D.2d 538 (2d Dept. 1995): affirmance of dismissal of libel action against defendant-client

Siskin v. Complete Aircraft, 231 B.R. 514 (Bankr. Ct. E.D.N.Y. 1999): client-creditor's defense against disbarred attorney debtor's claims that collection efforts violated bankruptcy stay; debtor's claims dismissed and client paid (258 B.R. 554)

Ligon v. Doherty, 208 F. Supp.2d 384 (E.D.N.Y. 2002) 42 U.S.C. § 1983 action: defendants' motion to dismiss client's claim

Woodley v. State, 306 A.D.2d 524 (2d Dept. 2003): CCA § 8-b wrongful imprisonment claim

Villano v. Kresch, 3 A.D.3d 344 (1st Dept. 2004): dental malpractice

Panagis v. Vlattas, 6 A.D.3d 596 (2d Dept. 2004): medical malpractice; affirmance of denial of defendants' motion to dismiss client's claim

Halleran v. Narula, 6 A.D.3d 661 (2d Dept. 2004): medical malpractice; affirmed denial of defendants' SJ motion

DePiazzy v. Lakey, 10 A.D.3d 670 (2d Dept. 2004): represented decedent's husband in probate (post-death forged will set aside), fraudulent divorce (vacated), negligence claims against executor and GAL; removed to federal court and later returned based on probate exception to diversity jurisdiction; affirmed denial of default vacatur of fraud claim

David W. v. State, 27 A.D.3d 111 (2d Dept. 2006): CCA § 8-b wrongful imprisonment claim

Blake v. Pataki, 13 Misc. 3d 347 (Sup. Ct. Suff. Co. 2006): client's writ of habeas corpus granted dismissing extradition proceeding

Prosperity Partners v. Bonilla, 2005 WL 1661702 (E.D.N.Y.), aff'd 249 Fed. Appx. 910 (2d Cir. 2007) : defense of claimed breach of contract to sell lottery winnings; client's FRCP 12-56 motion granted; affirmed

Kutner v. Vazquez, 17 Misc.3d 1123(A) (Dist. Ct. Nass. Co. 2007): denied parties' cross-motions for summary judgment

U.S.A. v. Mustachio, 254 Fed Appx. 853 (2d Cir. 2007): appeal of client's bail reduction denial

Blake v. Pataki, 57 A.D.3d 583 (2d Dept. 2008): client's grant of habeas corpus at Special Term reversed

People v. Olsen, 23 Misc.3d 593 (Dist. Ct. Nass. Co. 2009): client's multi-pronged motion to review complainant's medical records denied; case later dismissed

Rasanen v. Brown, 603 F. Supp.2d 550 (E.D.N.Y. 2009): 42 USC § 1983 action excessive force and wrongful death; defendants' Rule 56 motion denied

People v. Flood, 25 Misc.3d 843 (Dist. Ct. Nass. Co. 2009): DWI; upheld original dismissal, and dismissed second prosecution as time-barred

Blake v. Pataki, 13 N.Y.3d 912 (2010): affirmed Appellate Division's reversal of Special Term's dismissal of extradition

Stella v. County, 71 A.D.3d 573 (1st Dept. 2010): tort defense; affirmed dismissal of claims against clients

LoPresti v. Florio, 71 A.D.3d 574 (1st Dept. 2010): tort defense; affirmed dismissal of attorney-plaintiff's suit against clients, but allowed her 306-b extension of time

Gorman v. Rice, 29 Misc.3d 610 (Sup. Ct. Nass. Co. 2010): Article 78 (prohibition) based on double jeopardy; petition granted resulting in dismissal of prosecution for DWI (0.25%)

Forgione v. Forgione, 77 A.D.3d 943 (2d Dept. 2010): estate; affirmed dismissal of client's sister's probate proceeding

Rasanen v. Brown, 841 F. Supp. 2d 687 (EDNY 2012): 42 USC § 1983 action (excessive force and wrongful death); denied plaintiff's post-verdict Rule 60 motion

Delaney v. Delaney, 83 A.D.2d 647 (2d Dept. 2011): non-matrimonial, breach of contract verdict for client affirmed

People v. Benson, 34 Misc.3d 1226A (Dist. Ct. Nass. Co. 2011): post-verdict motion

Fernandez v. Stockbridge Homes, 35 Misc.3d 1204A (Sup. Ct. N.Y. Co. 2012): LL § 240

Gannon v. Juliano, 95 A.D.3d 822 (2d Dept. 2012): personal injury; reversal of Special Term's denial of vacatur of dismissal caused by attorney illness

People v. Celentano, 36 Misc.3d 1217A (Dist Ct. Nass. Co. 2012): contempt motion against non-party witness

Thomas v. Venditto, 2013 WL 653962 (EDNY 2013): 42 USC § 1983 (racially-based selective prosecution) and Article 78 (prohibition)

Gorman v. Rice, 106 A.D.3d 1000 (2d Dept. 2013): reversal of Special Term's above-cited grant of a writ of prohibition against further prosecution and dismissal of case (double jeopardy)

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ATTORNEY-AT-LAW

Rasanen v. Brown, 723 F.3d 325 (2d Cir. 2013): reversal of trial court's denial of motion to set aside defendant's verdict in above-cited 42 USC § 1983 action (excessive force and wrongful death); new trial ordered; later settled

Polluki Constr. v. Capobianco, 115 A.D.3d 837 (2d Dept. 2014): mechanic's lien foreclosure; affirmance of Special Term's denial of SJ motion

Cusumano Assocs., Inc. v. Politoski, 118 A.D.3d 936 (2d Dept. 2014): real estate broker's commission; reversal of trial court's verdict for plaintiff

In re Carney, 2014 WL 5365333 (Surr. Ct. Nass. Co. 2014): in an accounting, denial of residuary legatee's application to revoke her RRW based on fraud

Lexington Village v. Scottsdale Ins. Co., et al., 136 A.D.3d 645 (2d Dept. 2016): affirmed denial of defendants' SJ motions

Thomas v. Town of Oyster Bay, 152 A.D.3d 777 (2d Dept. 2017): affirmed denial of Article 78 writ (prohibition)

REFERENCES AVAILABLE UPON REQUEST



HON. IRA B. WARSHAWSKY

990 Stewart Avenue
Garden City, NY 11530

Direct: (516) 741-6565
Fax: (516) 741-6706

iwarshawsky@msek.com

Download VCard

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Justice Ira B. Warshawsky, ret. is Of Counsel in the Litigation and Alternative Dispute Resolution practices at Meyer, Suozzi, English & Klein, P.C. in Garden

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leading trial parts – the Commercial Division – where he presided over all manner of business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases.

Judge Warshawsky started his career in public service as a Legal Aid attorney in 1970 when he was Assistant Chief of the Family Court branch in Queens County. He served as a Nassau County Assistant District Attorney in the District and County Court trial bureaus from 1972 to 1974. Following these four years of prosecution and defense work, he became a law secretary, serving judges of the New York State Court of Claims and County Court of Nassau County. In 1987 he was elected to the District Court and served there until 1997. In 1997 he was elected to the Supreme Court of the State of New York where he has presided in a Dedicated Matrimonial Part, a Differentiated Case Management Part and sat in one of the county's three Dedicated Commercial Parts until 2011.

Judge Warshawsky has been active in numerous legal, educational and charitable organizations during his career. The Judge recently served as an expert in New York Law in the Grand Court of the Cayman Islands. He has also served as a lecturer in various areas of commercial, civil and criminal law, most recently in the area of e-discovery and its ethical problems. He frequently lectures for the National Institute of Trial Advocacy (NITA) at Hofstra and Widener Law Schools. The Judge currently serves as a contributing editor of the *Benchbook for Trial Judges* published by the Supreme Court Justices Association of the State of New York. He has served as a member of the Office of Court Administration's Civil Curriculum Committee. In 2010, while still on the bench, he was named the official representative of the New York State Unified Court System to The Sedona

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Conference®, a leading organization credited with developing rules and concepts which address electronically stored information in litigation. The judge is currently a member of the Advisory Board of The Sedona Conference.

As a judge in the Commercial Division of the Supreme Court, he authored several informative decisions dealing with the discoverability and cost of producing electronic materials as well as determining "fair value" in corporate dissolution matters. He has presented numerous seminars on electronic discovery to practicing lawyers through the ABA, the NYSBA, the Nassau Bar Association and private corporate law forums.

In 1996 Judge Warshawsky was the recipient of EAC's Humanitarian of the Year Award, in 1997 he received the Nassau County Bar Association President's Award, in 2000 he received the Former Assistant District Attorneys Association's Frank A. Gulotta Criminal Justice Award and in 2004, the Nassau Bar Association's Director's Award. He is also past president of the Men of Reform Judaism, the men's arm of the Union of Reform Judaism, the parent body of the Reform movement of Judaism. In 2013, 2015, and 2016, Judge Warshawsky was voted as one of the top 10 Arbitrators in a New York Law Journal reader's poll. In 2017, he was given a ProBono Award at the Nassau County Bar Association's Access to Justice for being one of Nassau's attorneys to provide the most pro bono hours of service in 2016. In both 2016 and 2018, Judge Warshawsky was also named an "ADR Champion" by the National Law Journal.

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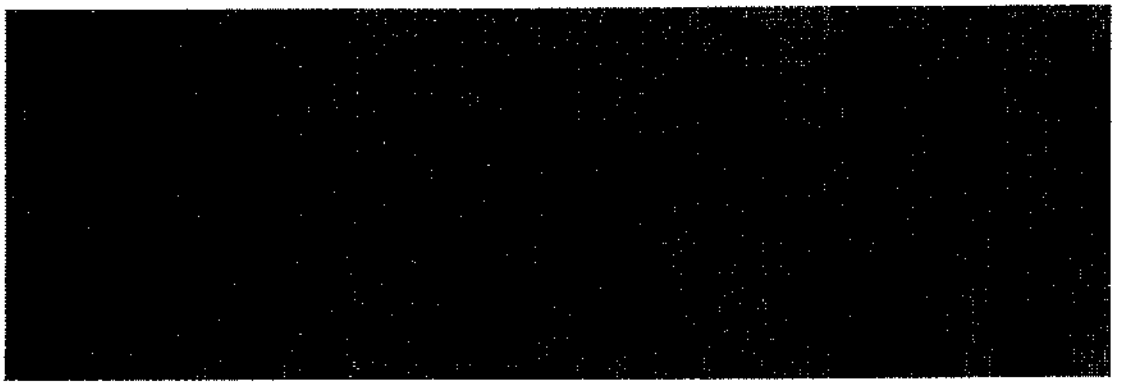
In 2019, Judge Warshawsky received the Of Counsel Award for Long Island Business News' Leadership in Law Awards. In 2018, Judge Warshawsky was named ADR Champion by The National Law Journal. In 2017, he was given a ProBono Award at the Nassau County Bar Association's Access to Justice for being one of Nassau's attorneys to provide the most pro bono hours of service in 2016.



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Garden City, NY 11530
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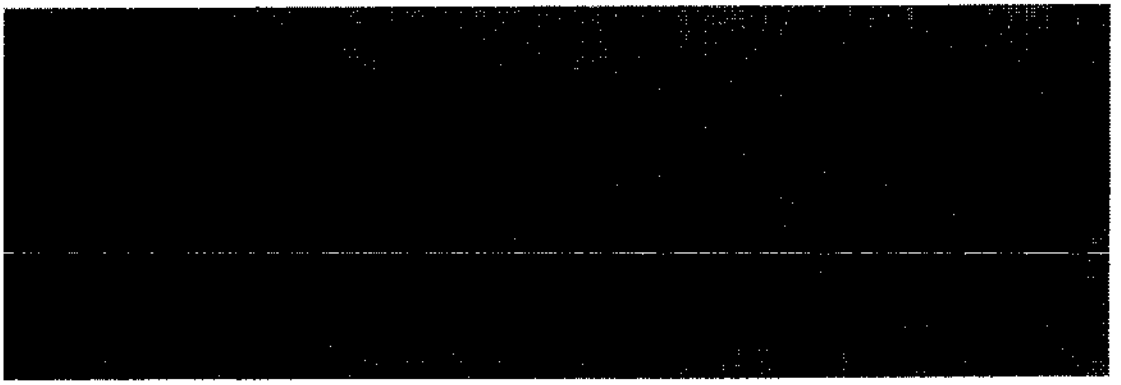

1350 Broadway, Suite 1420
New York, NY 10018
Phone: (212) 239-4999 Fax: (212) 239-1311

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MICHAEL V. SUGAMELE

136 Division Avenue
Massapequa, NY 11758
(516) 301-7636
msugamel@student.touro.edu

EDUCATION

Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY
Juris Doctor Candidate, May 2022
Class Rank: 10/110 (9.09%)
Honors: Merit Scholarship Recipient
Dean's List – Fall 2019 Semester
Activities: Student Bar Association, 1L Representative
Court Observation Program
Legal Education Access Program
Suffolk County Bar Association – Touro Chapter, Treasurer

St. John's University, Queens, NY
Bachelor of Science in Criminal Justice, May 2018
Honors: Omicron Delta Kappa Honor Society
National Honor Society of Leadership and Success
Activities: Chi Theta Omega Fraternity, President

EXPERIENCE

Stern & Stern, P.C., Bellmore, NY
Paralegal March 2019 – Present
Prepare documents including motions, orders, and answers related to debt collection matters. Manage attorney calendar and monitor court appearances. Prepare for and assist with trials, including organizing court documents, conducting legal research, and drafting case summaries.

Law Office of Ronald D. Weiss, Melville, NY
Paralegal (Temporary) December 2018 – February 2019
Assisted attorneys with matters related to bankruptcy and mortgage foreclosure proceedings. Prepared documents including motions, orders and answers. Communicated with clients and opposing counsel. Prepared for and assisted with trials, including organizing court documents and conducting legal research.

The Lavelle Law Firm, Mineola, NY
Paralegal October 2013 – December 2018
Assisted supervising attorney with representing plaintiffs in personal injury litigation matters. Prepared documents including complaints, motions, orders, pleadings, and subpoenas. Managed attorney calendar and monitored court appearances. Reviewed discovery material and responded to demand requests. Communicated with clients to gather relevant information. Answered telephones and assisted with other administrative tasks.

OTHER

Languages: Conversational Spanish; Basic Mandarin Chinese
Skills: eCourts; Westlaw; LexisNexis; MyCase; Timeslips
Interests: Golf; bowling; softball; running

PREJUDICE ON TRIAL

Theodore Roosevelt Inn of Court

Tuesday, March 3, 2020

The following are the specific portions of the Harvard Decision that reference Title VI

Students For Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation)
https://admissionscase.harvard.edu/files/adm-case/files/2019-10-30_dkt_672_findings_of_fact_and_conclusions_of_law.pdf

TITLE VI REFERENCES	Page No.
In the late 1980s, Harvard faced allegations of bias against Asian American applicants in its admissions process that culminated in a 1990 report by the United State Department of Justice Office of Civil Rights ("OCR") ("OCR Report"). [PX555 at 2, 15–16]. The OCR Report reached an "overall conclusion that Harvard did not discriminate against Asian American applicants to its undergraduate program in violation of Title VI of the Civil Rights Act," but its findings indicated that some admissions officers took race into account when assigning the personal rating during the period preceding the 1990 report. See [id. at 45–46].	43 of 130
VII. CONCLUSIONS OF LAW A. Overview The Court first affirms its previously expressed view that SFFA has standing and then turns to SFFA's four pending Title VI claims: impermissible racial balancing (Count II), failure to use race merely as a "plus factor" (Count III) the availability of race-neutral alternatives (Count V), and intentional discrimination (Count I). Ultimately, the Court finds that Harvard has met its burden of showing that its admissions process complies with the principles articulated by the Supreme Court in Fisher II, 136 S. Ct. at 2208, and concludes that judgment must issue for Harvard on each of the remaining claims	92-93 of 130
VII. CONCLUSIONS OF LAW C. The Supreme Court and Race-Conscious Admissions *** The Supreme Court directly confronted the issue of affirmative action or race-conscious admissions in the context of higher education for the first time in	95 of 130

Regents of University of California v. Bakke, 438 U.S. 265 (1978) (plurality opinion). In that case, the Supreme Court struck down an admissions policy at the University of California at Davis Medical School pursuant to Title VI and the Equal Protection Clause. Bakke, 438 U.S. at 271 (1978). At that time, the Medical School admitted most of its minority students through a "special admissions program" that filled 16 of the class' 100 spots with economically or educationally disadvantaged applicants who were members of a minority group. Id. at 272–75. White applicants could compete for 84 of the seats in the Medical School's class, while all 100 seats were potentially open to minority students. Id. at 289.

Justices Brennan, White, Marshall, and Blackmun would have found Title VI coextensive with the Equal Protection Clause and upheld the medical school's policy on the basis that the government may use race to remedy disadvantages to minorities caused by past racial prejudice. Id. at 355, 324–79 (concurring in part and dissenting in part). Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist would have found the special admissions program in violation of Title VI, irrespective of the Equal Protection Clause. Id. at 408–21. Justice Powell, who announced the judgment of the Supreme Court, agreed with Justices Brennan, White, Marshall, and Blackmun that Title VI proscribes only those racial classifications that would violate the Equal Protection Clause, but unlike his fellow justices, concluded that diversity was an asserted state interest that could withstand strict scrutiny and that to satisfy strict scrutiny, the medical school's approach to diversity had to "encompass[a broad] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Id. at 315. Although no majority agreed on a particular rationale, the Supreme Court determined that the medical school's special admissions program was unconstitutional because it involved "the use of an explicit racial classification" that told "applicants who are not Negro, Asian, or Chicano that they [were] totally excluded from a specific percentage of the seats in an entering class." Id. at 319.

***On the same day the Supreme Court decided Grutter, it held in Gratz v. Bollinger, 539 U.S. 244 (2003), that the admissions process at the University of Michigan College of Literature, Science, and the Arts violated Title VI and the Equal Protection Clause. Gratz, 539 U.S. at 275. The University of Michigan admitted or rejected applicants to the College of Literature, Science, and the Arts based on the number of points that an applicant scored under a rubric that offered points for high school GPA, standardized test scores, the academic strength of the applicant's high school, the applicant's high school curriculum, in-state residency, alumni relationship, personal essay, and other achievements. Id. at 255. Underrepresented minority applicants received an additional 20 points scored in a "miscellaneous" category which provided a significant bump towards the 75 to 100 points that were, depending on the year and the applicant's in-state residency status, generally required for admission. Id. at 255–56, & n.8. The Supreme Court

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in Gratz concluded that the admissions policy was impermissible under Justice Powell's opinion in Bakke because giving every underrepresented minority applicant 20 points did not provide the necessary "individualized consideration" and instead had "the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant." Id. at 271–72 (quoting Bakke, 438 U.S. at 317). The university's use of race was therefore not narrowly tailored to achieve the asserted compelling interest in diversity and thus violated the Equal Protection Clause and Title VI. Id. at 275–76.***

Most significantly, the controlling principles articulated by the Supreme Court in Fisher II reflect the sum of its holdings in cases concerning higher education admissions over the last forty years and now guide the application of Title VI in this case. 102 of 130

D. Harvard's Admission Program and Strict Scrutiny Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. In the higher education admissions context, the contours of Title VI claims are largely shaped by the Equal Protection Clause of the Fourteenth Amendment. The "intentional discrimination proscribed by Title VI is discrimination that violates the Equal Protection Clause of the Fourteenth Amendment." Weser v. Glen, 190 F. Supp. 2d 384, 396 (E.D.N.Y.), aff'd, 41 F. App'x 521 (2d Cir. 2002); see Bakke, 438 U.S. at 284, 286 (noting that Title VI reflects a "congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution," but "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); see also Grutter, 539 U.S. at 343 (adopting reasoning in Bakke); Gratz, 539 U.S. at 276 n.23 ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." (first citing Alexander v. Sandoval, 532 U.S. 275, 281 (2001), then citing United States v. Fordice, 505 U.S. 717, 732, n.7 (1992), and then citing Alexander v. Choate, 469 U.S. 287, 293 (1985))). 102-103 of 130

Although Harvard is not a state actor, Harvard College is a component of Harvard University which receives federal funds and intentionally provides tips in its admissions process based on students' race. See [ECF No. 570 at 9–10]. Harvard College is therefore subject to the same standards that the Equal Protection Clause imposes upon state actors for the purposes of a Title VI claim. See Students for Fair Admissions, 346 F. Supp. 3d at 192 n.16 ("Harvard does not identify any specific reasons for distinguishing public universities from federally-funded private universities, or explain how the analytical framework would differ for private versus public litigants . . . ."). Under Grutter, "strict scrutiny must be

applied to any admissions program using racial categories or classifications." Fisher I, 570 U.S. at 310; see also Grutter 539 U.S. at 326. Because Harvard both accepts federal funds and uses race in making admissions decisions, its admissions program is subject to strict scrutiny.

Notably, the Supreme Court has consistently used strict scrutiny when reviewing school admissions programs that consider race. FN 56 — 104-105 of 130

FN 56: Where a school admissions program is subject to strict scrutiny, the Court understands this to mean that the admissions program in its entirety is subject to strict scrutiny and not just the admissions decisions that involve the students that it seeks to advantage. Here, Harvard presses the idea that its admissions program is facially neutral and should be evaluated by a less demanding standard than strict scrutiny. Harvard's admissions program is facially neutral in that it does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances. The policy cannot, however, be considered facially neutral from a Title VI perspective given that admissions officers provide tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip. In this circumstance, the standard for facially neutral policies could arguably be applied in evaluating any disparate outcomes as between whites and Asian Americans, keeping in mind that the purpose of strict scrutiny is to ferret out inappropriate racial classifications, and given that there is no suggestion of a racially motivated classification involving whites and Asian Americans. See Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (noting that the purpose of subjecting a racial classification to strict scrutiny is to determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"); Grutter, 539 U.S. at 326 ("We apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool." (quotation marks omitted and modifying punctuation omitted)). In the case of a facially neutral policy, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Were that standard to be applied here, the Court would easily find in favor of Harvard on SFFA's claim of intentional discrimination as there has been no showing of discriminatory intent or purpose.

Strict scrutiny requires that classifications used by Harvard in its admissions program be narrowly tailored to further a compelling interest. FN 57 — 105 of 130

FN 57: SFFA contends that it may also succeed on its intentional discrimination claim by showing a "pattern or practice" of discrimination through statistically significant evidence of discrimination that then shifts to Harvard the burden of disproving the alleged pattern or practice. [ECF No. 620 ¶¶ 167–76]. This burden shifting framework, which is rooted in the statutory provisions of Title VII, see 42 U.S.C. § 2000e-6, is inapplicable to a non-class, private plaintiff such as SFFA, even assuming that it could apply in a Title VI case. See Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 149–50 (2d Cir. 2012) (holding "that the pattern-or-practice method of proof is not available to nonclass, private plaintiffs in cases such as the one before us" and noting that "all of our sister circuits to consider the question have held that the pattern-or-practice method of proof is not available to private, nonclass plaintiffs"); see also Semsroth v. City of Wichita, 304 Fed. Appx. 707, 715 (10th Cir. 2008); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 967–69 (11th Cir. 2008); Bacon v. Honda of Am. Mfg., 370 F.3d 565, 575 (6th Cir. 2004); Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56 (5th Cir. 2001), abrogated on other grounds by, Health v. Bd. of Supervisors for the S. Univ. of Agric. & Mech. Coll., 850 F.3d 731 (5th Cir. 2017); Gilty v. Vill. of Oak Park, 919 F.2d 1247, 1252 (7th Cir. 1990); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999).

E. Count II: Harvard Does Not Engage in Racial Balancing 112-114 of 130

Count II alleges that Harvard engaged in impermissible racial balancing, that is, racial balancing that does not adhere to the parameters established by the Supreme Court. To maintain a permissible race-conscious admissions policy, Harvard may not "impose a fixed quota," Fisher II, 136 S. Ct. at 2208, or otherwise "'assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin,'" as such a practice "would amount to outright racial balancing, which is patently unconstitutional" under the Equal Protection Clause and therefore prohibited by Title VI. Grutter, 539 U.S. at 329–30 (quoting Bakke, 438 U.S. at 307). The requirement that colleges and universities that accept federal funds abstain from such quota systems stems from the "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)). Quota systems are impermissible because they insulate some "category of applicants with certain desired qualifications from competition with all other applicants." Grutter, 539 U.S. at 334 (quoting Bakke, 438 U.S. at 315); see Wessmann v. Gittens, 160 F.3d 790, 798 (1st Cir. 1998) ("A single-minded focus on ethnic diversity 'hinder[s] rather than further[s] attainment of genuine diversity.'" (quoting Bakke, 438 U.S. at 315)).

Harvard's admissions program intends to treat every applicant as an individual. Harvard does not employ a race-based quota, set aside seats for minority students,

or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" Fisher I, 570 U.S. at 311 (quoting Bakke, 438 U.S. at 307). Every applicant competes for every seat. See [Oct. 18 Tr. 112:1–21]. Although a university could run afoul of Title VI's prohibition on quotas even where it stopped short of defining a specific percentage and instead allowed some fluctuation around a particular number, see Parents Involved, 551 U.S. at 712 (striking down school district student allocation plan that allowed for 10% variation from the district's overall white/nonwhite racial balance), Harvard's admissions policy has no such target number or specified level of permissible fluctuation. As Justice Powell recognized in Bakke and as was affirmed in Grutter, "minimum goals for minority enrollment . . . [without a] specific number firmly in mind" did not make Harvard's program "the functional equivalent of a quota merely because it had some 'plus' for race, or gave greater 'weight' to race than to some other factors, in order to achieve student body diversity." Grutter, 539 U.S. at 335 (quoting Bakke, 438 U.S. 317–318, 323).***

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Further, it may well be necessary to give attention to numerical indicators of racial diversity when an institution elects to adopt a race-conscious admissions program so as to remain compliant with the dictates of strict scrutiny, including monitoring the ongoing need for a raceconscious admissions process and the availability of race-neutral alternatives. See Fisher II, 136 S. Ct. at 2214–15 (requiring UT Austin to "continue to use [] data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative action measures it deems necessary"). Harvard's awareness and consideration of the number of minority students likely to enroll throughout its annual admissions cycle is consistent with the fact that there is "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." Grutter, 539 U.S. at 336 (quoting Bakke 438 U.S. at 323).

Additionally, Harvard also considers the racial distribution of its admitted students to assist it in predicting its yield rate and thereby avoid overenrolling its freshman class because students from some racial groups historically matriculate at higher rates than others. These practices do not violate Title VI.

Harvard could adopt a more significant tip for economically disadvantaged students, but every such proposal presented to the Court would result in a significant decline in African American representation. Achieving even roughly comparable levels of combined African American and Hispanic representation to those Harvard presently achieves would require Harvard to sacrifice the academic strength of its class and forgo other admissions policies from which it derives financial, reputational, and academic benefits. See supra at Section III.B.3. As 122-23 of 130

such, Harvard would compromise some degree of its reputation for academic excellence and still be less diverse than it is currently. Title VI does not require such an outcome. See Fisher II, 136 S. Ct. at 2213 (explaining that the Supreme "Court's precedent [makes] clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence").

Harvard has demonstrated that no workable and available race-neutral alternatives would allow it to achieve a diverse student body while still maintaining its standards for academic excellence. Judgment shall therefore enter in Harvard's favor on Count IV, race-neutral alternatives.

Count I: Harvard Does Not Intentionally Discriminate

SFFA's intentional discrimination claim, Count I, requires the Court to determine whether Harvard's admissions program violates Title VI through intentional discrimination against Asian Americans notwithstanding the Court's conclusion that Harvard has shown that its admissions program serves its compelling interest in diversity, that some racial categorizations are necessary to serve that interest, that it does not engage in proscribed racial balancing, and that no workable and available, fully race-neutral alternatives would suffice to meet Harvard's goals.

SFFA is not claiming that Harvard excludes Asian Americans and in fact, Asian Americans are admitted at virtually the same rate as white applicants. What it does claim is that, based solely on the quantifiable aspects of admissions, Asian Americans should be admitted at an even higher rate and that, if the personal ratings were not depressed, there would be more Asian Americans admitted.

To these, the Court reiterates the following findings specific to this case: 123-25 of 130

1. Throughout this trial and after a careful review of all exhibits and written submissions, there is no evidence of any racial animus whatsoever or intentional discrimination on the part of Harvard beyond its use of a race conscious admissions policy, nor is there evidence that any particular admissions decision was negatively affected by Asian American identity. FN 62

2. A race-conscious admissions program allows Harvard to achieve a level of robust diversity that would not otherwise be possible, at least at this time.

3. The Court firmly believes that Asian Americans are not inherently less personable than any other demographic group, just as it believes that Asian Americans are not more intelligent or more gifted in extracurricular pursuits than any other group.

---

4. There is a statistical difference in the personal ratings with white applicants faring better that Asian American applicants. Asian American applicants, however, do better on the extracurricular and academic ratings than their white counterparts. All three ratings incorporate subjective and objective elements, and while implicit biases may be affecting Harvard's ratings at the margins, to the extent that the disparities are the result of race, they are unintentional and would not be cured by a judicial dictate that Harvard abandon considerations of race in its admission process.

5. Harvard's admissions program is conceptually narrowly tailored to meet its interest in diversity. In practice, as more fully discussed above, it does not seem to unduly burden Asian Americans despite the fact that some percentage of Asian American applicants have received lower personal ratings than white applicants who seem similarly situated. The reason for these lower scores is unclear, but they are not the result of intentional discrimination. They might be the result of qualitative factors that are harder to quantify, such as teacher and guidance counselor recommendations, or they may reflect some implicit biases. Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population. Here, any relative burden on Asian Americans (and it is not clear that there is a disproportionate burden) is not enough to warrant a finding that Harvard's admissions process fails to survive strict scrutiny or to require it to move to an admissions model that foregoes diversity in favor of parity based solely on quantifiable metrics.

FN 62: The Court notes that under the Title VI standard applicable outside the higher education admissions context, SFFA's intentional discrimination claim would fail because SFFA has not shown, by a preponderance of the evidence, that (1) Harvard discriminated on the basis of race, (2) that the discrimination was intentional, and (3) that the discrimination was a substantial or motivating factor for admissions decisions. See Goodman v. Bowdoin Coll., 380 F.3d 33, 43 (1st Cir. 2004) (citing Tolbert v. Queens Coll., 242 F.3d 58, 69 (2d Cir. 2001)). The requirement for a "substantial or motivating factor" requires "evidence of racial animus," id. at 43, and no racial animus was present here.

Further, under the standard articulated in Goodman v. Bowdoin College, 380 F.3d 33 (1st Cir. 2004), the Court would enter judgment for Harvard because it has shown that its admissions program was employed to promote diversity, which is not an invidious discriminatory purpose. See supra at Section III.D. Admissions decisions are made only after a careful process that considers and appreciates the diversity that applicants from diverse racial backgrounds, including Asian Americans, provide at Harvard. Harvard's only intentional consideration of race views increased racial diversity as a positive attribute of its admitted class, which

it achieves by considering an individual's race through an individualized, holistic evaluation of every applicant in the manner envisioned by the Supreme Court. Further, the Court feels confident stating that the statistical disparities in personal ratings and admissions probabilities that have been identified are the result of some external race-correlated factors and perhaps some slight implicit biases among some admissions officers that, while regrettable, cannot be completely eliminated in a process that must rely on judgments about individuals.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	Civil Action No. 14-cv-14176-ADB
PRESIDENT AND FELLOWS OF HARVARD COLLEGE (HARVARD CORPORATION),	*	
	*	
Defendant.	*	

FINDINGS OF FACT AND CONCLUSION OF LAW

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BURROUGHS, D.J.

I. INTRODUCTION

Plaintiff Students for Fair Admissions, Inc. ("SFFA") alleges that Defendant President and Fellows of Harvard College ("Harvard") discriminates against Asian American applicants in the undergraduate admissions process to Harvard College in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* ("Title VI").[1] Harvard acknowledges that its undergraduate admissions process considers race as one factor among many, but claims that its use of race is consistent with applicable law.

II. PROCEDURAL HISTORY

On November 17, 2014, SFFA initiated this lawsuit by filing a complaint that alleged that Harvard violates Title VI by intentionally discriminating against Asian Americans ("Count I"), using racial balancing ("Count II"), failing to use race merely as a "plus" factor in admissions decisions ("Court III"), failing to use race merely to fill the last "few places" in the incoming freshman class ("Count IV"), using race where there are available and workable race-neutral alternatives ("Count V"), and using race as a factor in admissions ("Count VI"). [ECF No. 1 ¶¶ 428–505]. SFFA seeks declaratory judgment, injunctive relief, attorneys' fees, and costs. Id. at 119. On February 18, 2015, Harvard filed its answer, in which it denied any liability. See [ECF No. 17]. On April 29, 2015, several prospective and then-current Harvard students filed a motion to intervene. [ECF No. 30]. Although the Court denied the motion to intervene, it

[1] There is considerable variation in the terminology individuals use to describe their racial and ethnic identities. This opinion uses the terms Hispanic, African American, Asian American, and white to describe the four racial or ethnic identities that account for the majority of applicants to Harvard because those are the terms the parties have used in litigating this case. The term Asian American, as opposed to Asian, is used because SFFA alleges that Harvard discriminates against United States citizens who identify as Asian American. Where "Asian" alone is used, this generally reflects the language used by others in their own analyses which are referred to herein and may include Asian applicants who would not identify as Asian American.

allowed the students to participate in the action as *amici curiae* (friends of the court). Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39, 51–53 (D. Mass.), ECF No. 52, aff'd, 807 F.3d 472 (1st Cir. 2015).

On September 23, 2016, Harvard moved (1) to dismiss the lawsuit for lack of standing and (2) for judgment on the pleadings as to Counts IV and VI. [ECF Nos. 185, 187]. On June 2, 2017, the Court found that SFFA had the associational standing required to pursue this litigation, because it was an organization whose membership included Asian Americans who had applied to Harvard, been denied admission, and were prepared to apply to transfer to Harvard. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 261 F. Supp. 3d 99, 111 (D. Mass. 2017), ECF No. 324. On the same date, the Court granted Harvard's motion for judgment on the pleadings and dismissed Counts IV and VI, namely the failure to use race only to fill the last few places in the incoming freshman class and the use of race as a factor in admissions. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), No. 14-CV-14176-ADB, 2017 WL 2407254, at *1 (D. Mass. June 2, 2017), ECF No. 325.[2]

Following the conclusion of discovery, on June 15, 2018, the parties filed cross motions for summary judgment on the four remaining counts, [ECF Nos. 412, 417], which the Court denied on September 28, 2018. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174, 180 (D. Mass. 2018), ECF No. 566. The case proceeded to trial on Counts I (intentional discrimination), II (racial balancing), III (failure to use race merely

[2] Although discovery ended on May 1, 2018, [ECF Nos. 363, 364], the Court ordered supplemental document productions during trial when it became apparent that Harvard had modified its admissions procedures to provide admissions officers with more explicit guidance on the use of race despite seemingly contradictory testimony by various witnesses. See [ECF No. 645 at 7:20–19:24].

as a "plus" factor), and V (race-neutral alternatives), and from October 15 through November 2, 2018, the Court heard testimony from eighteen current and former Harvard employees, four expert witnesses, and eight current or former Harvard College students who testified as *amici curiae*. On February 13, 2019, following the parties' submissions of proposed findings of fact and conclusions of law and responses to each other's respective submissions, see [ECF Nos. 619, 620], the Court heard final closing arguments.

The Court now makes the following findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

III. FINDINGS OF FACT: DIVERSITY, ADMISSIONS PROCESS, AND LITIGATION

A. Diversity at Harvard

1. Harvard's Interest in Diversity

It is somewhat axiomatic at this point that diversity of all sorts, including racial diversity, is an important aspect of education. See Brown v. Bd. of Educ., 347 U.S. 483 (1954).[3] The

[3] On October 30, 2018, the Court heard testimony from Dr. Ruth Simmons, the current President of Prairie View A&M University. President Simmons was born in a sharecropper's shack on a plantation in Grapeland, Texas. She attended primary and secondary school in a completely segregated environment in Houston, and then Dillard University, an African American institution supported by the Methodist Church in New Orleans. President Simmons was selected to spend her junior year of college at Wellesley, where she studied alongside white students in the United States for the first time. After graduating from Dillard University, President Simmons traveled to France, where she studied as a Fulbright Scholar. She then returned to the United States and earned a Ph.D. from Harvard's Department of Romance Languages and Literatures. President Simmons held positions at Princeton University, Spelman College, and Smith College before becoming President of Brown University. She retired from Brown University after eleven years and returned to Texas, where she worked on nonprofit projects in the Houston area before being persuaded to come out of retirement to serve as the president of Prairie View A&M. President Simmons offered expert testimony on Harvard's interest in diversity. Her testimony and her life story, perhaps the most cogent and compelling testimony presented at this trial, demonstrate the extraordinary benefits that diversity in education can achieve, for students and institutions alike. See [Oct. 30 Tr. 6:11–70:23].

evidence at trial was clear that a heterogeneous student body promotes a more robust academic environment with a greater depth and breadth of learning, encourages learning outside the classroom, and creates a richer sense of community. See [Oct. 19 Tr. 185:23–187:24; Oct. 23 Tr. 24:13-20, 31:2–34:11, 59:8–14; Oct. 30 Tr. 27:20–28:8]. The benefits of a diverse student body are also likely to be reflected by the accomplishments of graduates and improved faculty scholarship following exposure to varying perspectives. See [Oct. 30 Tr. 28:9–30:11].

Harvard College's mission, as articulated in its mission statement, is "to educate the citizens and citizen-leaders for our society" and it seeks to accomplish this "through . . . the transformative power of a liberal arts and sciences education." [DX109 at 1].[4] In aid of realizing its mission, Harvard values and pursues many kinds of diversity within its classes, including different academic interests, belief systems, political views, geographic origins, family circumstances, and racial identities. See [Oct. 17 Tr. 182:17–183:7; Oct. 23 Tr. 24:13–20]. This interest in diversity and the wide-ranging benefits of diversity were echoed by all of the Harvard admissions officers, faculty, students, and alumni that testified at trial. SFFA does not contest the importance of diversity in education, but argues that Harvard's emphasis on racial diversity is too narrow and that the full benefits of diversity can be better achieved by placing more emphasis on economic diversity. See [ECF No. 620 ¶¶ 216, 231].

Consistent with Harvard's view of the benefits of diversity in and out of the classroom, Harvard tries to create opportunities for interactions between students from different backgrounds and with different experiences to stimulate both academic and non-academic learning. [Oct. 23 Tr. 39:3–17; Oct. 30 Tr. 25:11–26:6, 27:20–28:8]. As examples, student living assignments, the available extracurricular opportunities, and Harvard's athletic programs

[4] "DX" refers to an exhibit offered by Harvard.

are all intended to promote a sense of community and encourage exposure to diverse individuals and viewpoints. [Oct. 23 Tr. 39:18–41:23].

Harvard has evaluated and affirmed its interest in diversity on multiple occasions. See [Oct. 17 Tr. 182:4–14]; see, e.g., [PX302; DX26; DX53].[5] Most recently, in 2015, Harvard established the Committee to Study the Importance of Student Body Diversity, which was chaired by Dean Rakesh Khurana[6] (the "Khurana Committee"). [Oct. 23 Tr. 34:12–22]. The Khurana Committee reached the credible and well-reasoned conclusion that the benefits of diversity at Harvard are "real and profound." [PX302 at 17]. It endorsed Harvard's efforts to enroll a diverse student body to "enhance[] the education of [its] students of all races and backgrounds [to] prepare[] them to assume leadership roles in the increasingly pluralistic society into which they will graduate," achieve the "benefits that flow from [its] students' exposure to people of different backgrounds, races, and life experiences" by teaching students to engage across differences through immersion in a diverse community, and broaden the perspectives of teachers, to expand the reach of the curriculum and the range of scholarly interests. [PX302 at 1–2, 6]; see also [Oct. 23 Tr. 37:14–38:17]. The Khurana Committee "emphatically embrace[d] and reaffirm[ed] the University's long-held view that student body diversity – including racial diversity – is essential to [its] pedagogical objectives and institutional mission." [PX302 at 22].

2. Admissions Office's Efforts to Obtain a Diverse Applicant Pool

Harvard's Office of Admissions and Financial Aid (the "Admissions Office") is tasked with deciding which students to accept to the College and which to reject or waitlist. [Oct. 15

[5] "PX" refers to an exhibit offered by SFFA.

[6] Dean of Harvard College Rakesh Khurana attended SUNY-Binghamton and Cornell University for his undergraduate studies. He received a Ph.D. in organizational behavior from Harvard University. [Oct. 22 Tr. 192:17–193:11].

Tr. 64:1–70:8]. Deciding which applicants to admit is challenging given the overall talent and size of the applicant pool. For example, there were approximately 35,000 applications for admission to the class of 2019. [Oct. 17 Tr. 184:2–4]. Harvard, targeting a class size of roughly 1,600 students, admitted only about 2,000 of those applicants, based on its expectation that approximately 80% of admitted students would matriculate. [Id. at 184:22–185:11].[7] Among the applicants for that class, approximately 2,700 had a perfect verbal SAT score, 3,400 had a perfect math SAT score, and more than 8,000 had perfect GPAs. [Id. at 184:14–21]. Clearly, given the size and strength of its applicant pool, Harvard cannot admit every applicant with exceptional academic credentials. To admit every applicant with a perfect GPA, Harvard would need to expand its class size by approximately 400% and then reject every applicant with an imperfect GPA without regard to their athletic, extracurricular, and other academic achievements, or their life experiences. Because academic excellence is necessary but not alone sufficient for admission to Harvard College, the Admissions Office seeks to attract applicants who are exceptional across multiple dimensions or who demonstrate a truly unusual potential for scholarship through more than just standardized test scores or high school grades. [Id. at 181:12–183:7].

To help attract exceptionally strong and diverse annual applicant pools, Harvard engages in extensive and multifaceted outreach efforts. Each year, roughly 100,000 students make it onto Harvard's "search list" through data, including test scores, that the college purchases from ACT[8] which administers the ACT, and the College Board, which administers the PSAT and the SAT.

[7] Harvard admitted 5.8% of applicants to its class of 2017 and 5.7% to its class of 2018. [Oct. 15 Tr. 157:21–25].

[8] The American College Testing Company changed its name to ACT in the 1990s.

[Oct. 15 Tr. 130:2–131:1; Oct. 17 Tr. 146:2–16]. High school students who make the search list receive a letter that encourages them to consider Harvard and may also receive follow-up communications. See [Oct. 15 Tr. 131:5–134:16; Oct. 17 Tr. 146:3–12; PX55]. Harvard also uses the search list to target students as part of its extensive in-person recruiting efforts, which includes Harvard admissions officers travelling to over 100 locations across the United States to speak with potential applicants and encourage them to consider Harvard. [Oct. 15 Tr. 131:13–20; Oct. 17 Tr. 146:7–12, 179:8–21]. The search list is also sent to Harvard's "schools committee," which is comprised of more than 10,000 alumni who help recruit and interview applicants and help persuade admitted students to attend Harvard. [Oct. 15 Tr. 131:21–132:7].

In addition to recruiting students based largely on test scores, Harvard places particular emphasis on communicating with potential low-income and minority applicants whose academic potential might not be fully reflected in their scores. Since the 1970s, Harvard has recruited minority students, including Asian Americans, through its Undergraduate Minority Recruitment Program ("UMRP"). [Oct. 24 Tr. 95:15–21]. The UMRP writes letters, calls, and sends current Harvard undergraduates to their hometowns to speak with prospective applicants. [Id. at 95:12–102:3]. The program, led by a full-time director and an assistant director, employs between two and ten Harvard students for most of the year, with twenty-five to thirty students working for the program during its peak season. [Id. at 201:1–204:22].

Despite these efforts, African American and Hispanic applicants remain a relatively modest portion of Harvard's applicant pool, together accounting for only about 20% of domestic applicants to Harvard each year, even though those groups make up slightly more than 30% of the population of the United States. See [PX623; DX713]; U.S. Census Bureau, QuickFacts, Census.gov, https://www.census.gov/quickfacts/fact/table/US/RHI225218. In contrast, Asian

American high school students have accounted for approximately 22% of total applicants in recent years, although Asian Americans make up less than 6% of the national population. See [DX713]; U.S. Census Bureau, QuickFacts, Census.gov, https://www.census.gov/quickfacts/fact/table/US/RHI225218.

Harvard's recruiting efforts also target low-income and first-generation college students irrespective of racial identity through a recruiting program that operates in conjunction with the Harvard Financial Aid Initiative ("HFAI"). Harvard's financial aid program guarantees full funding of a Harvard education for students from families earning $65,000 or less per year and also caps contributions at 10% of income for families making up to $150,000 per year. [Oct. 24 Tr. 102:10–104:19; PX316 at 6]. Harvard, through the HFAI recruitment program, employs students who return to their hometowns and visit high schools to talk about the affordability of Harvard and other colleges with need-blind admissions programs. [Oct. 24 Tr. 144:1–22]. Today, more than half of Harvard students receive need-based aid. [Id. at 150:3–6].

B. The Admissions Process

Several Harvard admissions officers testified generally about reviewing application files as well as about their review of specific files. The Court credits this testimony. They each described a time-consuming, whole-person review process where every applicant is evaluated as a unique individual. See, e.g., [Oct. 17 Tr. 205:6–223:10; Oct. 24 Tr. 174:19–175:23]; see also [DD1].[9] Admissions officers attempt to make collective judgments about each applicant's personality, intellectual curiosity, character, intelligence, perspective, and skillset and to evaluate each applicant's accomplishments in the context of his or her personal and socioeconomic circumstances, all with the aim of making admissions decisions based on a more complete

[9] "DD" refers to demonstrative evidence presented by Harvard.

understanding of an applicant's potential than can be achieved by relying solely on objective criteria. [Oct. 16 Tr. 16:15–22; Oct. 17 Tr. 182:17–183:7, 209:16–223:10]; see, e.g., [Oct. 18 Tr. 22:9–48:4; DX293].

1. The Application

Students apply to Harvard either through the early action program or the regular decision program.[10] All applications are reviewed in the same way regardless of whether a student has applied for early action or regular decision. [Oct. 18 Tr. 15:5–10]; see [PX1]. The Admissions Office may accept, reject, or waitlist applicants, or, in the case of early action applicants, defer them into the regular decision applicant pool. [Oct. 18 Tr. 124:14–125:9]. Students who apply for early action are admitted at a higher rate than regular decision applicants. [Oct. 25 Tr. 242:19–243:17].

Students apply to Harvard by submitting the Common Application or the Universal College Application. [Oct. 17 Tr. 186:1–10; Nov. 1 Tr. 27:13–19]. A complete application generally includes standardized test scores, high school transcript(s), information about extracurricular and athletic activities, intended concentration and career, a personal statement, supplemental essays, teacher and guidance counselor recommendations, and other information about the applicant, including high school and personal and family background, such as place of birth, citizenship, disciplinary or criminal history, race, siblings' names and educations, and

[10] Harvard eliminated its early action program for the classes of 2012 through 2015, in part to improve the socioeconomic diversity of its students. [PX316 at 15]; see [DX728]. Eliminating early action, however, did not have the expected effect on class diversity, and Harvard's peer institutions largely continued with their early action and early decision programs. [PX316 at 15]. Harvard became concerned that it was losing some of the most competitive applicants to other colleges that offered early decision or early action and decided to reverse course and reinstate its early action program for the class of 2016. [Oct. 17 Tr. 163:9–164:1; Oct. 18 Tr. 89:13–91:19; Oct. 22 Tr. 100:6–101:15, 185:2–186:8; Oct. 23 Tr. 158:14–160:19; DX39 at 4].

parents' education, occupation, and marital status. See, e.g., [DX195, DX262, DX276, DX293, DX527, SA1, SA2, SA3, SA4].[11] Applicants can also supplement their applications with samples of their academic or artistic work, which may be reviewed and evaluated by Harvard faculty. [Oct. 17 Tr. 189:5–14; Oct. 18 Tr. 31:21–32:13]; see, e.g., [DX276 at 41; DX293 at 42]. Applicants may, but are not required to, identify their race in their application by discussing their racial or ethnic identity in their personal statement or essays or by checking the box on the application form for one or more preset racial groups (*e.g.* American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or White) and may also select or indicate a subcategory of these groups. See [Oct. 18 Tr. 52:8–14; Oct. 26 Tr. 98:2–6; SA2 at 4; SA3 at 8].[12] If applicants disclose their racial identities, Harvard may take race into account, regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are. [Oct. 26 Tr. 91:17–92:1].

2. Alumni and Staff Interviews

Most applicants interview with a Harvard alumnus. [Oct. 15 Tr. 128:2–6]. Harvard selects alumni to interview candidates based predominantly on geographic considerations. Alumni interviewers are provided with an Interviewer Handbook that describes the admissions process. [Id. at 127:9–128:1]; see [DX5]. Although interviewers have broad discretion in deciding where to conduct the interview, what information to request in advance, and what to

[11] "SA" refers to evidence offered by student amici.

[12] Harvard could elect not to receive information about applicants' race for all applicants or some racial subgroups. In fact, Harvard no longer receives information about applicants' religious affiliation, [Oct. 19 Tr. 186:7–187:18], although it does continue to receive some information about applicants' religions and beliefs from applicants who choose to write about their religious identities in their essays or their personal statements, [id. at 246:25–247:17].

ask, Harvard specifies several questions that alumni interviewers should not ask and also instructs alumni not to advise applicants on their chances of admission, given that "this analysis can only be accomplished with full access to all the material in an applicant's file and through the extensive discussions shared and comparisons made through the Committee process." [DX5 at 30–34]. Alumni interviews generally last from 45 minutes to an hour. [Oct. 17 Tr. 218:25–219:9].

Alumni interviewers do not have all of the information that is available to admissions officers at the time of admissions decisions, but their evaluations can be uniquely helpful to admissions officers, as alumni interviews are often an applicant's sole in-person interaction with a Harvard representative. [Id. at 219:17–220:10].[13] Alumni interviewers complete an evaluation form that requests numerical ratings for applicants in academic, personal, and overall categories that align with the rating categories later used by Harvard admissions officers. See [PX88 at 50–52].[14] Alumni interviewers also score applicants in a single category that captures extracurricular and athletic activities, community involvement, employment, and family commitments, while admissions officers score applicants in separate extracurricular and athletic categories. See [PX88 at 51; SA1 at 29]; see also infra Section III.B.3. Ratings generally fall between 1 and 4, with 1 being the strongest. The ratings criteria used by alumni (*i.e.* when to

[13] Alumni interviewers may ask students about their standardized test scores, interests, and high schools, but alumni generally do not have access to teacher recommendations, counselor reports, and transcripts, all of which are critical to admissions officers' evaluation of applicants. [Oct. 17 Tr. 218:25–219:9].

[14] Alumni ratings for applicants' personal and overall qualities may be reprinted by admissions officers on the summary sheets that sit at the front of application files. See [Oct. 17 Tr. 219:10–13; DD1 at 15]; e.g. [DX276 at 1]. Some applicants are scored by admissions officers before alumni ratings are available. See [Oct. 24 Tr. 119:7–25].

rate applicants 1, 2, 3, 4, or worse for the various rating categories) roughly correspond to the criteria used by the admissions officers. Compare [PX1 at 5–7], with [PX88 at 50–52].

Beyond providing numerical ratings, alumni interviewers write comments explaining their ratings on the interview evaluation form, which is then placed in the applicant's file. See, e.g., [SA1 at 29]. Although the Interviewer Handbook contains a section on distinguishing excellences including "ethnic . . . factors," alumni interviewers are not explicitly told to boost the ratings they assign to applicants based on race or ethnicity. [DX5 at 11]. Alumni interviewers are, however, told to "[b]e aware of, and suspect, your own biases" and that awareness of one's biases is important because "no one can really be 'objective' in attempting to evaluate another person . . . ." [Id. at 35].

In addition to alumni interviews, which are offered to most applicants, a small percentage of applicants interview with an Admissions Office staff member. [Oct. 19 Tr. 177:14–19]. Although some staff interviews are offered on a first come, first served basis, many applicants secure staff interviews because they are well-connected or particularly attractive candidates, or because they are from a part of the country where an alumni interview may be unavailable. [Oct. 17 Tr. 219:14–220:12; Oct. 19 Tr. 175:8–181:14]. Students who have staff interviews tend to be among the strongest applicants and are admitted at a comparatively high rate. See [Oct. 19 Tr. 178:24–182:18].[15] Asian American applicants are less likely to have a staff interview than white, African American, or Hispanic applicants. [PX619]. Among applicants who receive a staff interview, 59% of African Americans, 48% of Hispanics, 53% of whites and 44% of Asian

[15] Less than 3% of all applicants, but more than 20% of recruited athletes, legacies, applicants on the dean's or director's interest lists, and children of faculty or staff ("ALDCs") receive a staff interview. [PX619]. Approximately 52% of all applicants and 79% of ALDC applicants who receive staff interviews are admitted. [Id.].

Americans are admitted. [Id.]. The lower admission rate for staff-interviewed Asian Americans is driven primarily by the fact that Asian American applicants are less likely than African American and Hispanic applicants, and far less likely than white applicants, to be recruited Athletes, Legacies, on the Dean's or Director's interest list, or Children of faculty and staff ("ALDCs"), all of whom are advantaged in Harvard's admissions process. See [id.].[16]

3. Application Review Process

i. Admissions Office and Personnel

The Admissions Office is tasked with deciding which applicants to admit and which to reject or waitlist. See [Oct. 19 Tr. 160:1–11]. Dean of Admissions and Financial Aid William Fitzsimmons,[17] Admissions Director Marlyn McGrath,[18] and Financial Aid Director Sally Donahue[19] oversee the Admissions Office, which has approximately seventy employees, including the forty admissions officers who read applicant files and directly participate in the process of deciding which applicants to admit (the "Admissions Committee"). [Oct. 17 Tr. 180:3–13; Oct. 19 Tr. 232:18–20]. Harvard's admissions staff is a diverse group of individuals that includes Asian Americans. [Oct. 18 Tr. 20:22–21:2]. Several admissions officers testified at trial and forcefully denied the suggestion that racial animus or conscious prejudice against

[16] ALDCs are disproportionately white, with 8% of white applicants being ALDCs compared to 2.7% of African American, 2.2% of Hispanic, and 2% of Asian American applicants. [PX619].

[17] Dean Fitzsimmons began working in the Admissions Office in 1972 as an Assistant Director of Admissions. He later served as Director of Admissions and worked for the Harvard Fund, before becoming Dean of the Admissions Office in 1986. [Oct. 15 Tr. 123:6–124:13].

[18] Director McGrath received a Ph.D. in 1978 and became a Residential Dean at Harvard the same year. She also worked in academic planning for the Faculty of Arts and Sciences at Harvard, before becoming the Director of Admissions in 1987. [Oct. 19 Tr. 156:6–157:8].

[19] Director Donahue recently retired from her leadership role but continues to assist the Admissions Office, including by reading applications. [Oct. 19 Tr. 242:11–17]. Director Donahue did not testify at trial.

Asian Americans infect Harvard's admissions process. See, e.g., [Oct. 24 Tr. 175:11–17]. Consistent with this, the Court finds no persuasive documentary evidence of any racial animus or conscious prejudice against Asian Americans.

There is significant turnover in the Admissions Office, which frequently hires relatively young admissions officers who leave to pursue other opportunities after a few years. [Oct. 19 Tr. 233:4–240:3]; see [DX25 at 117–20]. New admissions officers go through an orientation process that includes training on evaluating applicants and how to consider race. [Oct. 18 Tr. 187:13–188:18; Oct. 19 Tr. 43:18–44:2; Oct. 24 Tr. 139:7–24, 222:12–223:14]. The training utilizes a casebook that contains lightly edited application files from past years, and new admissions officers are guided on how to evaluate and score applicants based on those files. See [Oct. 19 Tr. 257:2–20]. The first fifty or one hundred application files reviewed by a new admissions officer are also reviewed by a more senior admissions officer who gives feedback to the less-experienced colleague as part of the training process. See [Oct. 16 Tr. 13:16–20; Oct. 24 Tr. 139:18–22]. The Admissions Office holds an annual retreat that sometimes includes professional development sessions on evaluating applicants, and admissions officers receive an annual training from Harvard's general counsel that covers the permissible use of race in the admissions process. [Oct. 19 Tr. 45:12–47:10]. The Admissions Office has not historically provided new admissions officers with any written guidance on how to consider race in the admissions process, although Harvard amended its admissions reading procedures in 2018 for the class of 2023 to explicitly instruct admissions officers that they "should not take an applicant's race or ethnicity into account in making any of the ratings other than the Overall rating" and that for the overall rating "[t]he consideration of race or ethnicity may be considered only as one factor among many." [PX723 at 3 (emphasis omitted)]; see [Oct. 16 Tr. 19:12–17].

ii. Reading Procedures

Applications are divided into geographic dockets based on high school location. [Oct. 16 Tr. 8:2–20; DX5 at 16]. A subcommittee of the full Admissions Committee is responsible for the initial evaluation of applications within each docket. [DX5 at 16–17]. Docket subcommittees generally include a senior admissions officer who serves as docket chair and three to six additional admissions officers. [Id. at 17]. Each subcommittee member is responsible for reading all applications from a subset of the docket's high schools. [Oct. 17 Tr. 204:6–205:5]. Because the same reader and subcommittee review all applicants from the same high school, admissions officers develop a familiarity with their respective high schools' grading practices, academic rigor, and recommendation styles, all of which help them to fairly and consistently evaluate applicants, both from particular high schools and across high schools within their docket. [Id.]; see [Oct. 24 Tr. 110:17–111:17].

Applications are initially reviewed by an admissions officer or "first reader" who assigns the applicant ratings based on reading procedures that are updated on an annual basis. See [PX1; DX5 at 17]. Except for the recent changes to the reading procedures to provide more explicit guidance on the use of race, the substantive guidance on rating applicants has remained largely the same in recent years. [Nov. 1 Tr. 123:19–124:21, 128:19–129:10, 168:16–172:25]; see [PX720; PX721; PX722; PX723; DX742; DX743; DX744]. First readers, and any subsequent readers, assign an overall rating; four profile ratings: (1) academic, (2) extracurricular, (3) athletic, and (4) personal; and at least three school support ratings that reflect the strength of each teacher and guidance counselor recommendation submitted on behalf of an applicant. [Oct. 17 Tr. 206:14–209:8, 217:15–218:3]. Application readers may also rate the strength of any additional recommendations submitted by an applicant. [Id. at 218:4–10]. The ratings generally

range from 1 to 4, with 1 being the strongest rating. [Oct. 16 Tr. 10:19–11:17; Oct. 17 Tr. 207:13–16]. Ratings of 5 and 6 are also available and indicate either weakness or special circumstances, for example where family responsibilities prevent the applicant from participating in extracurricular activities. [Oct. 16 Tr. 10:21–11:1; PX1 at 5–7]. Admissions officers may also use "+" (stronger) and "–" (weaker) signs to fine tune a rating, with a rating of 2+ being stronger than a rating of 2, which is stronger than a rating of 2–. [Oct. 16 Tr. 11:11–17]; see [Oct. 18 Tr. 31:2–8]. Each of the profile ratings assigned by the first reader and any subsequent readers are preliminary and used as a starting point for any later consideration of the applicant by a docket subcommittee or the full Admissions Committee. [Oct. 17 Tr. 221:6–19].

The academic rating reflects the applicant's academic strength and potential based on grades, standardized test scores, letters of recommendation, academic prizes, any submitted academic work, and the strength of the applicant's high school. See [id. at 209:16–210:14; Oct. 19 Tr. 55:4–9; Oct. 24 Tr. 113:5–12]. An academic rating of 1 indicates *summa cum laude* potential, a genuine scholar, and near-perfect scores and grades (in most cases) combined with unusual creativity and possible evidence of original scholarship; an academic rating of 2 indicates *magna cum laude* potential, superb grades, and mid- to high-700 SAT scores or a score above 33 on the ACT; an academic rating of 3 indicates *cum laude* potential, excellent grades, and mid-600 to low-700 SAT scores or an ACT score of 29 to 32; and an academic 4 indicates adequate preparation, respectable grades, and low- to mid-600 SAT scores or an ACT score of 26 to 29. [PX1 at 5–6].

The extracurricular rating is an assessment of an applicant's involvement in activities during high school and his or her potential to contribute to the extracurricular student life at Harvard. [Oct. 17 Tr. 212:4–213:1]. It may also account for family or personal circumstances

that have limited the applicant's participation in extracurricular activities. [Id. at 207:13–23]. An extracurricular rating of 1 indicates national-level, professional or other truly unusual achievement that suggests an applicant may be a major contributor at Harvard; an extracurricular rating of 2 indicates strong contributions to an applicant's high school in one or more areas, such as being class president or achieving recognition for extracurricular accomplishments on a local or regional level; an extracurricular rating of 3 indicates solid participation but without special distinction; and an extracurricular rating of 4 indicates little or no participation. [PX1 at 6].

An athletic rating of 1 indicates that an applicant is a recruited athlete, an athletic rating of 2 indicates strong high school contribution and possibly leadership roles in athletics, an athletic rating of 3 indicates active participation, and an athletic rating of 4 indicates little or no participation in athletics. [Id.].

The personal rating reflects the admissions officer's assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities. [Oct. 17 Tr. 213:22–216:1; Oct. 18 Tr. 39:1–25]. Although the reading procedures have not historically provided detailed guidance on what qualities should be considered in assigning a personal rating, relevant qualities might include integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit. See [Oct. 17 Tr. 213:22–214:19; Oct. 19 Tr. 227:6–228:2; Oct. 24 Tr. 117:4–24]. For the application cycles that were the subject of the statistical analysis performed in this case, the reading procedures specified that a personal rating of 1 meant "outstanding," 2 meant "very strong," 3 meant "generally positive," and 4 meant "bland or somewhat negative or immature." [PX1 at 6; PX71 at 6]. The personal rating criteria, perhaps in response to this lawsuit, were overhauled for the class of 2023, and the reading procedures now explicitly state that "an applicant's race or

ethnicity should not be considered in assigning the personal rating" and encourage admissions officers to consider "qualities of character" such as "courage in the face of seemingly insurmountable obstacles," "leadership," "maturity," "genuineness, selflessness[,] humility," "resiliency," "judgment," "citizenship," and "spirit and camaraderie with peers." [PX723 at 5].

The overall rating reflects the admissions officer's impression of the strength of the application, taking account of all information available at the time the rating is assigned. [Oct. 18 Tr. 186:12–15; Oct. 19 Tr. 49:3–15; PX1 at 5]. An overall rating of 1 is exceptional and a clear admit, an overall 2 reflects strong credentials, an overall 3 indicates good credentials, and an overall 4 indicates respectable credentials. [PX1 at 5; DX744 at 3].[20] Admissions officers are permitted to take an applicant's race into account when assigning the overall rating. [Oct. 17 Tr. 221:3–5].

Applicants are also assigned school support ratings that indicate the strength of their teacher and guidance counselor recommendations. [Oct. 17 Tr. 217:15–218:10; Oct. 18 Tr. 204:3–22]. A school support rating of 1 indicates strikingly unusual support, a 2 indicates very strong support, a 3 indicates above average positive support, and a 4 indicates somewhat neutral or slightly negative support. [PX1 at 7]. Teacher and guidance counsel recommendations may inform the profile ratings, for example if a teacher discusses a student's academic or extracurricular commitments, but the school support ratings are distinct from the profile ratings and do not impact the profile ratings in a formulaic manner. See [Oct. 31 Tr. 36:10–37:16].

Harvard also considers whether applicants will offer a diverse perspective or are exceptional in ways that do not lend themselves to quantifiable metrics. Harvard may give

[20] The summaries here reflect the Class of 2018 reading procedures. Although the ratings guidelines are routinely revised, the guidelines and reading procedures for the classes of 2014 through 2019 do not differ in material respects.

applicants a "tip" for "distinguishing excellences," such as capacity for leadership, creative ability, and geographic, economic, and racial or ethnic factors. See [Oct. 17 Tr. 191:8–200:20; DX5 at 9–11]. The Admissions Committee gives some applicants large tips for non-academic reasons where an individual's talents or background suggests that admitting them will be especially beneficial to the Harvard community. See [DX5 at 11]. ALDCs are the four most notable groups of applicants, other than racial minorities, who receive such tips. [Oct. 17 Tr. 12:10–14:23, 198:22–201:17; Oct. 18 Tr. 48:14–21; Oct. 23 Tr. 204:10–16; PX104; PX106; PX111]. Recruited athletes receive a tip in the admissions process because they are being recruited by one of Harvard's varsity sports teams and are presumably exceptionally talented, but legacy applicants, those on the dean's or director's interest lists, and children of faculty and staff obtain an admissions tip that is primarily or exclusively a product of family circumstances. Harvard's objective in giving tips to applicants based on criteria other than individual merit, such as to legacies and the children of its faculty and staff, is to promote the institution and is unrelated to the racial composition of those applicant groups. [Oct. 17 Tr. 198:22–200:11].

When reviewing an application, "first readers" generally begin with the application summary sheet, which is a two to three page document that is prepopulated with much of the key information about an applicant, including the applicant's high school, citizenship, test scores, GPA, class rank, and race. E.g. [DX195 at 2]. The summary sheet also contains blank spaces for ratings and notes, to be filled in by the first reader and a potential second reader. [Oct. 18 Tr. 22:18–23:3]; e.g. [DX195 at 2–4]. After reviewing an application file, the first reader rates the strength of the teacher and guidance counselor letters of recommendation, assigns the academic, extracurricular, athletic, personal, and overall ratings to the applicant, and writes any notes about the applicant. [Oct. 17 Tr. 206:24–207:12]. The reader then sends the application to the docket

chair if it merits further review, at which point the docket chair will review the file, record his or her own ratings of the applicant based on the same criteria, and add written comments. See [Oct. 19 Tr. 250:12–251:2]; e.g. [DX195 at 2–3]. Even if the first reader does not pass an application on for further review, the application and the first reader's scoring remain available to all admissions officers and may be discussed later in the admissions process. [Oct. 18 Tr. 12:1–13, 16:7–17:5]. Although docket chairs are frequently the "second reader," other admissions officers may also serve as a second reader as circumstances require, for example when the first reader is new to the Admissions Office. [Oct. 17 Tr. 206:1–13].

iii. Committee Meetings and Admissions Decisions

After the application files for the early action or regular decision cycle have been reviewed by the early readers, the docket subcommittees meet as a group to collectively evaluate the applications in their dockets and come up with a list of recommended admits for the full Admissions Committee. [Id. at 204:10–12; Oct. 18 Tr. 12:14–13:5]. The subcommittees consider early admission applicants in November and meet again to consider regular decision applicants in late January or February. See [DX41]. First readers act as the advocate for the applicants whose applications they initially reviewed. [Oct. 16 Tr. 8:7–9:2; Oct. 17 Tr. 204:10–12]. Subcommittees generally go through their docket of applications high school by high school, with the first readers for each high school presenting the applicants they view as legitimate contenders for admission. [Oct. 18 Tr. 9:20–10:7]. All applications on a subcommittee's docket, including those that the first readers view as legitimate contenders and those that they do not intend to present to the subcommittee, are included in a binder which helps the subcommittee members compare and contrast applicants. [Id. at 108:8–11:25]. In some subcommittee meetings, summary information about the applicant under discussion, including

race, is projected on a screen so that it can be easily viewed by all subcommittee members during the discussion of that applicant. [Oct. 24 Tr. 191:23–192:24]. The subcommittees make recommendations on applicants, including to admit, waitlist, and reject, and may also place applications on hold to await additional information or defer an early decision applicant to the regular admissions pool. [Oct. 18 Tr. 12:14–13:5]. Subcommittees may take race into account in making these initial recommendations. [Oct. 24 Tr. 128:12–25]. The initial recommendations are not final, and the application review process is fluid. It is common for some applicants who are not initially recommended for admission by a subcommittee to be admitted, and for some applicants who are initially recommended for admission to be waitlisted or rejected, especially where more information about an applicant becomes available later in the admissions process. [Oct. 18 Tr. 13:6–15].

As the process progresses and after the subcommittees decide more definitively which applicants to recommend for admission, the full Admissions Committee, comprised of all forty admissions officers who read applications, meets to collectively decide which applicants to admit. [Id. at 13:18–21]. Additionally, there is a standing committee, which includes faculty members, that assists the Admissions Office in its review and evaluation of applications, and those faculty members are also invited to attend the full Admissions Committee meetings. [Id. at 13:19–14:8]. The full committee meets in late November and early December to discuss early action applicants and in March to consider regular decision applicants. [Id. at 14:9–11; DX41].

Almost all applicants who are recommended for admission by the subcommittees are discussed by the full committee. [Oct. 18 Tr. 15:17–19]. Additionally, every admissions officer has access to every application file and may call the full committee's attention to applicants who have not been recommended by a subcommittee. [Id. at 12:1–13, 16:7–9]. Applications are

projected on a screen while the full committee discusses the applicant, and the full application file is available to committee members electronically. [Id. at 17:6–11]. At the time of the full committee meeting, there is often more information available to the full committee than was available to the application's earlier readers and the applicable subcommittee because additional high school grades, alumni interview evaluations, and other information frequently becomes available later in the admissions process. [Id. at 17:12–20]. The full Admissions Committee makes decisions by in-person majority votes. [Id. at 17:21–18:2].

In making admissions decisions, Harvard's goal is to admit the best freshman class for Harvard College, not merely a class composed of the strongest applicants based solely on academic qualifications. [DX5 at 9–10]. Although the reading procedures reflect the traits that Harvard looks for in applicants, Harvard does not decide which applicants to admit based on any formula. See [Oct. 17 Tr. 221:20–223:6]. As the Interviewer Handbook describes:

> The Admissions Committee values objective criteria, but holds a more expansive view of excellence. Test scores and grades indicate students' academic aptitude and achievement. The Committee also scrutinizes applications for extracurricular distinction and personal qualities. Students' intellectual imagination, strength of character, and their ability to exercise good judgment—these are other, critical factors in the admissions process, and they are revealed not by test scores but by students' activity outside the classroom, the testimony of teachers and guidance counselors, and by alumni/ae interview reports. Seeking evidence of these three criteria—academic excellence, extracurricular distinction, and personal qualities—the Committee reads with care all the components of each applicant's file: the high school transcript, standardized test scores, extracurricular activities, personal statement, teacher and secondary school recommendations, and the personal interview report.
>
> Attempts to define and to identify precise elements of character, and to determine how much weight they should be given in the admissions process, require discretion and judiciousness. But the Committee believes that the "best" freshman class is more likely to result if we bring evaluation of character and personality into decisions than if we do not. We believe that a diversity of backgrounds, academic interests, extracurricular talents, and career goals among students who live and learn together affects the quality of education as much as a great faculty or vast material resources.

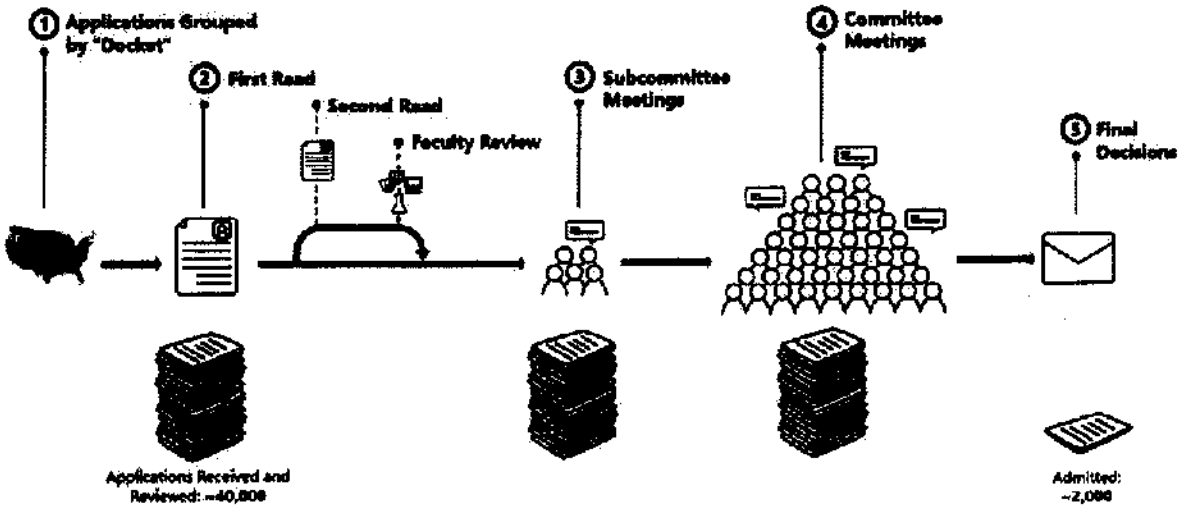
[DX5 at 10].

The Admissions Office sets a target number of students to admit based on the roughly 1,600 spots available each year and the expected matriculation or yield rate for admitted applicants. See [Oct. 15 Tr. 160:18–161:5]. After the full committee completes its review of all applicants recommended for admission, Harvard often needs to remove some students from the admit list to reach its target number of admitted students. [Oct. 23 Tr. 191:1–4]. When it becomes necessary to reduce the list of prospective "admits", the Admissions Committee uses a "lop process" in the closing days of the full committee meetings that involves discussing candidates again and then "lopping" some from the admit list. [Oct. 24 Tr. 130:22–131:10; Nov. 1 Tr. 244:3–245:15].[21] In aid of this, a potential lop list is prepared that may contain the HFAI status, athletic rating, legacy status, gender, and race of the applicants whom the committee is expected to consider lopping. [Oct. 24 Tr. 131:16–24]. Dean Fitzsimmons then informs the Admissions Committee of the characteristics of the admitted class, which may include racial composition, and the committee decides, as a group, which students to lop off the admit list based on many factors, which may include race. See [id. at 196:1–200:16].

After the Admissions Committee concludes the full committee meetings, applicants are notified whether they have been admitted, wait-listed, or rejected, or in the case of early action students, whether they have been deferred into the regular decision process. See [Oct. 18 Tr. 124:16–125:9]. Additionally, some applicants may be offered deferred admission or "z-listed," meaning they are offered a spot in the class following the class year for which they applied. [Oct. 19 Tr. 167:25–168:23].

[21] Some subcommittees engage in a similar lop process, as they select students to be recommended to the full committee for admission. [Oct. 24 Tr. 130:22–131:6].

Application Review Process [DD1 at 4].



4. Harvard's Use of Race in Admissions

Throughout the admissions process, the Admissions Office leadership tracks the racial composition of the applicant pool, the students recommended for admission to the full committee, and the students admitted by the full committee. The composition of applicants and admitted students helps the Admissions Office see how well its efforts to achieve a diverse class are working by showing, for example, whether Harvard is seeing increases in applications from students with the backgrounds that it has placed a special emphasis on recruiting, and whether minority students have been admitted in numbers that will likely lead to a racially diverse entering class. See [Oct. 18 Tr. 81:20–82:18].

To do this tracking, Dean Fitzsimmons, Director McGrath, and a few other admissions officers receive "one-pagers" that provide a snapshot of the projected class and compare it to the prior year. [Id. at 80:2–5; Oct. 23 Tr. 178:21–179:10]. The one-pagers contain statistics on applications and admission rates by gender, geography, academic interest, legacy status, financial aid circumstances, citizenship status, racial or ethnic group, and on recruited athlete status and applicants flagged as disadvantaged. [Oct. 18 Tr. at 77:5–78:2]; e.g. [PX165 at 2].

The racial breakdown shown on the one-pagers is provided based on three methodologies, the "old methodology," the "new methodology," and the federal government's "Integrated Postsecondary Educational Data System" ("IPEDS"), [Oct. 18 Tr. 78:3–13]; e.g. [PX165 at 3], with the Admissions Office preferring the new methodology.[22] [Oct. 18 Tr. 81:6–19, 85:5–7].

Dean Fitzsimmons shares the breakdown of the admitted class as reflected on the one-pagers with the full committee from time to time. [Id. at 80:6–18; Oct. 19 Tr. 195:21–196:16]. For example, at the start of the full Admissions Committee meetings, he usually states how many students are being recommended for admission by the subcommittees and how the breakdown of the class compares to the prior year in terms of racial identities and other demographics. [Oct. 24 Tr. 83:7–16; Oct. 26 Tr. 104:22–106:14]. The leadership of the Admissions Office monitors the breakdown of the class as the full committee meetings progress and through the lop process. See [Oct. 23 Tr. 181:4–23]. Although there are no quotas for subcategories of admitted students, if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group. [Oct. 19 Tr. 198:23–200:10].[23]

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[22] The new methodology better reflects the racial diversity that results from students who identify with multiple racial groups than the IPEDS methodology. [Oct. 18 Tr. 83:17–84:9]. Harvard has found the IPEDS methodology less reflective of the actual diversity of its class because, for example, it classifies all applicants who identify as Hispanic as only Hispanic irrespective of other racial groups they may also identify with. [Id. at 84:10–24]. This avoids double counting but results in the underreporting of the representation of minority racial and ethnic groups because many students identify with two or more racial groups. [Id. at 84:10–85:7].

[23] Harvard also shares statistics on admissions by race with the Association of Black Admission and Financial Aid Officers at the Ivy League and Sister Schools to learn about the practices of other schools. [Oct. 24 Tr. 83:17–85:17].

In addition to giving the Admissions Office some perspective on whether it is admitting a diverse class, the collective racial composition of applicants and admitted students helps Harvard better forecast its overall yield rate because different racial groups historically accept offers to attend Harvard at differing rates. [Oct. 15 Tr. 160:18–162:7]. As examples, admitted Asian American students usually matriculate at a higher rate than white students, while admitted Hispanic, African American, Native American, and multiracial applicants matriculate at a lower rate. [Oct. 18 Tr. 80:21–81:5]; see [PX324]. Because of these variations in yield rates by racial group, Harvard uses the racial makeup of admitted students to help determine how many students it should admit overall to avoid overfilling or underfilling its class. See [Oct. 15 Tr. 162:1–15].

In addition to monitoring the likely racial makeup of the admitted class, admissions officers use race in evaluating applicants and assigning an overall rating. [Oct. 17 Tr. 221:3–5; Oct. 18 Tr. 49:20–50:3, 186:16–25]. Although race may act as a tip or plus factor when making admissions decisions, it is only ever one factor among many used to evaluate an applicant. [Oct. 18 Tr. 49:10–16, 167:2–169:24]; see [DX5 at 11]. Race is only intentionally considered as a positive attribute. [Oct. 16 Tr. 22:18–23:4; Oct. 18 Tr. 197:5–11]; see [Oct. 30 Tr. 80:1–23].

Admissions officers are not supposed to, and do not intentionally, take a student's race directly into account when assigning ratings other than the overall rating, but Harvard's reading procedures did not instruct readers not to consider race in assigning those ratings until 2018, when Harvard amended the reading procedures for the class of 2023 to provide more explicit guidance on the appropriate use and non-use of race. See [Oct. 18 Tr. 49:20–50:3; Oct. 19 Tr. 252:21–253:13; Oct. 24 Tr. 121:21–122:4, 140:6–25; Nov. 1 Tr. 124:3–125:11; PX723 at 1, 3]. Further, some admissions officers may take an applicant's race into account indirectly, for

example when an applicant's race has influenced other personal qualities that the admissions officer believes will add to the Harvard community. [Oct. 19 Tr. 48:11–49:1; Oct. 24 Tr. 138:1–10].

No admission officer who testified perceived Harvard to be engaged in discrimination against Asian Americans. For example, Senior Admission Officer Charlene Kim[24] was asked what her reaction was to the allegation that Harvard discriminated against Asian Americans. She responded:

> I think now just concern. It's not what I know our office to be. It's not who I am. . . . I would never be part of a process that would discriminate against anybody, let alone people that looked like me, like my family, like my friends, like my daughter. And so I'm actually really grateful to be able to be here to share my little bit of my experience on the admissions committee . . . . I'm not here to say that it's perfect, but I know that we don't discriminate against anyone.

[Oct. 24 Tr. 175:11–22].

To summarize the use of race in the admissions process, Harvard does not have a quota for students from any racial group, but it tracks how each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity that will provide its students with the richest possible experience. It monitors the racial distribution of admitted students in part to ensure that it is admitting a racially diverse class that will not be overenrolled based on historic matriculation rates which vary by racial group. Although racial identity may be considered by admissions officers when they are assigning an applicant's overall rating, including when an applicant discloses their race but does not otherwise discuss it in their application, race has no specified value in the admissions process and is never viewed as a negative attribute.

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[24] Ms. Kim is a senior admissions officer, the assistant director of financial aid, and the director of Harvard's first-generation program. She graduated from the University of California at Berkeley and received a master's degree from New York University. She began working in the Admissions Office in 2008. [Oct. 24 Tr. 125:12–25, 141:18–142:1].

Admissions officers are not supposed to, and do not intentionally, consider race in assigning ratings other than the overall rating.

C. Prelude to this Lawsuit

1. The Unz Article

This lawsuit followed magazine and news articles that raised the specter of Asian American students being penalized in college admissions based on their racial identity. Harvard's response to that controversy demonstrates Harvard's concern about the perception that its admissions process was racially biased but also the complexity of the statistical evidence upon which the allegations here are based.

On or about November 28, 2012, Ron Unz, a Harvard alumnus, published an article titled "The Myth of American Meritocracy" in *The American Conservative* (the "Unz Article"). [PX218]. Unz asserted that elite universities were biased against Asian Americans and employed "*de facto* Asian quotas" as evidenced by a gap between Asian American representation among America's most academically accomplished high school students and their comparatively low representation at elite colleges. [Id. at 9]. The Unz Article, which itself included language that suggested certain unsavory biases,[25] did not attract much attention until approximately one month later when David Brooks of the *New York Times* published an article that promoted the Unz Article as one of the best magazine articles of the year and argued that stagnant Asian American representation at Harvard between 1995 and 2011 smelled like a quota system. See [Oct. 17 Tr. 24:19–25:17]. The two articles together and their allegations of racial

[25] The article relies in part on data based on perceptions about the proportion of national merit scholarship semifinalists from California whose "names seem to be Jewish." [PX218 at 12]. Although the Court recognizes that this article might have interested some sociologists, it was not unreasonable for some Harvard admissions officials to view the article as "profoundly anti-Semitic" and, as a result, to view it as less than serious scholarship. [Oct. 17 Tr. 158:2–159:10].

bias sparked concern among Harvard's leadership and some of its alumni, who encouraged Harvard to respond to the allegations. See [id. at 25:8–37:25; PX227; PX238].

2. Analysis by Office of Institutional Research

i. Mark Hansen's Admissions Models

Following the 2012 Christmas and 2013 New Year's holidays, Dean Fitzsimmons attempted to develop a response to the Unz Article, including soliciting input from Harvard's Office of Institutional Research ("OIR"). [Oct. 17 Tr. 37:14–38:16; Oct. 23 Tr. 208:13–209:21; PX230; PX236; PX238].[26] As part of OIR's initial evaluation of the statistical evidence, research analyst Mark Hansen[27] prepared four rough logistic regression models, using data on applicants and admission outcomes for the classes of 2007 through 2016, to project Harvard's admitted classes using a limited set of variables, including applicants' race. [Oct. 24 Tr. 14:5–

[26] OIR is a university-wide office that provides statistical analysis in response to requests from across Harvard University and sometimes on its own initiative when it anticipates a need for such work. During the relevant time period, the office typically had approximately 30 ongoing projects and received numerous additional *ad hoc* requests each year. [Oct. 19 Tr. 126:5–23]. OIR's objective was and remains to offer accurate, timely, and digestible research that is tailored to diverse audiences with the goal of promoting informed decision-making and furthering the core missions of the university. [Oct. 18 Tr. 210:9–14; PX465].

[27] Mr. Hansen studied mathematics at Boston University before obtaining a master's degree from Harvard's Graduate School of Education. He was hired as a management fellow by OIR in the summer of 2010 and was promoted to research analyst in 2011. He left OIR in the summer of 2013 to work for MIT's Office of Institutional Research. [Oct. 24 Tr. 10:19–11:25].

24]; see [PX12 at 32–35].[28] His most expansive model used applicants' academic index,[29] academic rating, legacy and recruited athlete status, personal rating, extracurricular rating, gender, and race as inputs to predict the admitted class. See [PX12 at 33]. The classes projected by this model had racial demographics that approximated the actual class based on the probability of admission assigned to applicants by the model. See [id. at 34–35]. Mr. Hansen's less complete models, which did not include variables for racial identities, projected admitted classes with far more Asian students than Harvard's actual admitted classes, suggesting either that racial tips resulted in fewer Asian students being admitted or that factors correlated with Asian identity that were not included in Mr. Hansen's models were significantly affecting which applicants Harvard chose to admit. See [id. at 33–34].

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[28] At trial, SFFA emphasized a 17-page draft presentation, replete with blank spaces and typographical errors, that Mr. Hansen prepared in February 2013 but did not circulate to others. See [PX9]. In this draft presentation, Mr. Hansen summarized his findings as follows:

- Athletes and Legacies explain the difference in raw admit rates for Asian and White applicants.
- Asian applicants have higher average ratings and test scores (excluding the personal rating).
- Differences exist in the raw admit rates of Asian and White students with similar test scores and academic indices. Even top scores and ratings don't guarantee admission.
- Personal rating is important in models of the admissions process and drive some of the demographic differences we see.

[Id. at 2]. Much of the information in the draft presentation, including the above summary, was never shared with the Admissions Office. See [PX12]. Further, it does not appear that anyone affiliated with Harvard other than Mr. Hansen, saw the draft report prior to this litigation. [Oct. 19 Tr. 111:14–22; Oct. 24 Tr. 50:9–14].

[29] The academic index is a metric that provides an indication of overall strength by taking account of standardized test scores and high school grades. [Oct. 16 Tr. 84:9–23].

Mr. Hansen's models could lead a casual observer to conclude that race plays a significantly larger role in Harvard's admissions process than it actually does. The models incorporate far fewer variables than those prepared by the parties' economic experts for this litigation and omit many variables that are important to the admissions process. Compare [PX12 at 33], with [PD38 at 26].[30] Even Mr. Hansen's most complete model almost certainly suffers from considerable omitted variable bias in light of the likely correlation between race and important variables that Mr. Hansen did not include. Most notably, his models contain no controls for socioeconomic and family circumstances that correlate with race and also affect admissions decisions. See [PX12 at 33]. Given these deficiencies in the models, they are entitled to little weight for the purpose of determining whether Harvard discriminates against Asian American applicants, particularly given the availability of the experts' far more comprehensive models and the testimony offered by fact witnesses in this case. See [Oct. 19 Tr. 19:19–20:8]. Mr. Hansen's models do suggest, consistent with other evidence, that Asian Americans applicants excel in academic metrics; that tips for legacies and recruited athletes result in more white students being admitted; that a projection of Harvard's class based only on the profile ratings, academic metrics, and athlete and legacy statuses is incomplete and results in a projected class that is vastly less racially diverse than the one Harvard achieves; and that, absent any consideration of race, Harvard's classes would have drastically fewer African American and Hispanic students. See [PX12 at 33–34].[31]

[30] "PD" refers to demonstrative evidence presented by SFFA.

[31] The Court notes that Mr. Hansen's models suggest that any increase in Asian American admits would come largely at the expense of African Americans and Hispanics.

A limited selection of slides depicting Mr. Hansen's logistic regression models were included in a February 25, 2013, presentation for Dean Fitzsimmons that focused on and included much more information on the reintroduction of Harvard's early action program and an analysis of issues related to the accessibility and affordability of a Harvard education. [Oct. 17 Tr. 83:24–84:16; PX12 at 32–37]. The slides on Mr. Hansen's models that were shared with Dean Fitzsimmons included a statement that they were "preliminary and for discussion," and they were not presented or understood as evidence of discrimination. See [Oct. 17 Tr. 83:24–84:16; PX12 at 32–36]. Dean Fitzsimmons concluded that Mr. Hansen's models were incomplete, and he elected not to discuss those slides or the information they contained with Harvard's leadership at that time. [Oct. 17 Tr. 84:3–85:1]. More than a year later, Mr. Hansen's models were shared with Dean Khurana, shortly after he became the dean, in advance of a "high-level meet-and-greet type meeting" that was intended to generally familiarize Dean Khurana with OIR's work. [Oct. 23 Tr. 44:3–8, 45:6–10, 46:12–17]; see [PX41 at 50]. Dean Khurana also found Mr. Hansen's models incomplete and viewed them as a puzzling approach to understanding Harvard's admissions process. [Oct. 23 Tr. 47:4–49:18].

ii. Low-Income Admissions Models

Following the February 2013 meeting with OIR, Dean Fitzsimmons requested that Dr. Erin Driver-Linn[32] and Ms. Erica Bever[33] further analyze the effect of low-income status, which Dean Fitzsimmons hoped and expected would confirm that Harvard was providing a tip to low-income applicants. [Oct. 17 Tr. 172:22–173:21]. This analysis was intended to respond, at least

[32] During the relevant period, OIR was led by Dr. Driver-Linn, who holds a Ph.D. in social psychology from Harvard. [Oct. 19 Tr. 69:9–70:7].

[33] Ms. Bever joined OIR in 2007 and transitioned to the Admissions Office where she now serves as a senior admissions officer and the director of research. [Oct. 18 Tr. 200:7–201:1].

in part, to criticism that elite colleges, like Harvard, were not doing enough to attract low-income students. See [PX26 at 2]. On May 1, 2013, Ms. Bever, Dr. Driver-Linn, and Mr. Hansen sent Dean Fitzsimmons a summary of their initial findings in a memorandum titled "Harvard College Admissions and Low Income Students." [Id.]. Their analysis found that Harvard students from lower income backgrounds generally have lower SAT scores but that they are admitted at higher rates when controlling for their SAT scores. [Id. at 2–3, 6–7].

After reviewing the distribution of SAT scores by family income, OIR's memorandum discussed the need to model the admissions process to better evaluate whether the Admissions Office was providing a tip to low-income students, given that the relationship between income and admission, controlling only for SAT scores, could have been the result of a relationship between income and other factors, such as race. [PX26 at 3–4]; see [PX28 at 4 (indicating that applicants with family incomes of less than $60,000 accounted for 25% of Hispanic, 24% of African American, 18% of Asian American, and 10% of white applicants)]. As OIR's memo to Dean Fitzsimmons summarized:

> The differences [in students' SAT scores by income] could be related to other factors important in the admissions process. In order to control for those potential issues, we implement a logistic regression model to predict the probability of admission, controlling for demographic characteristics and a variety of metrics used to asses qualification for admission. Demographic characteristics include gender and race/ethnicity. Qualifications used in admission include academic index, academic rating, extracurricular rating, personal rating, athletic rating, and legacy status.
>
> This approach has several limitations; we picked a small set of variables that would factor in admissions decisions. The selection of a wider set of variables might result in a better fitting model, one that accounts for more of the variation in individual applicants and their potentially unique contributions to the entering class. For example, the model does not capture exceptional talent in art or music explicitly (although ratings may capture some aspect of these attributes). In addition, our model is limited to main effects, not examining interactions between variables. Our analysis should not be considered exhaustive.

[PX26 at 3]. To the extent that OIR's initial analysis suggested that Harvard was providing an admissions tip to applicants from low-income backgrounds, that tip appeared less significant than tips for legacies and recruited athletes. See [id. at 8–9]. OIR explained that:

> To get a sense of the size of the admissions advantage conferred to low-income applicants relative to other groups of applicants, the so-called "thumb on the scale," we include low-income status in a second logistic regression model. . . . The variables with the largest effects on the probability of admission are athletic rating, personal rating, and legacy status. Compared to athletes and legacies, the size of the advantage for low income students is relatively small.

[Id. at 3].

The memorandum also noted that "Asian applicants with an academic 1 or 2 are admitted 12% of the time compared against an admit rate of 18% for non-Asian applicants" and provided a chart illustrating this disparity. [Id. at 4, 9]. Further, the memo stated that certain "issues" should be considered before sharing the analysis publicly, including that there are "demographic groups that have negative effects," although the only demographic group for which OIR's analysis returned a negative coefficient was "Asian." [Id. at 4]. Although the model returned a negative coefficient for Asian applicants, neither OIR nor Dean Fitzsimmons viewed the report as indicative of discrimination. [Oct. 17 Tr. 109:15–19; Oct. 19 Tr. 152:22–153:15].

After receiving the May 1, 2013 memorandum, Dean Fitzsimmons asked OIR to examine the effect of Asian racial identity on admissions outcomes to confirm that the low-income tip was being fairly and consistently applied to all groups, but he did not ask OIR to further examine the effect of being Asian on admissions outcomes across the board. [Oct. 17 Tr. 127:22–128:12, 129:13–17]. OIR added an interaction term for Asian and Low Income which allowed the model to return coefficients that accounted for the possibility that the tip for low income varied by race. See [PX28 at 7–8]. On June 3, 2013, OIR shared with Dean Fitzsimmons its additional analysis, [Oct. 17 Tr. 129:13–130:13], which showed a coefficient for the interaction term of "Asian and

Low Income" that was positive and statistically significant but of a lesser magnitude than the negative coefficient for Asian identity, see [PX28 at 7; PX29]. This updated analysis suggested that although low-income Asian American applicants were provided a tip relative to their higher income Asian American peers, the magnitude of that tip might not overcome the negative relationship between Asian racial identity and admissions outcome, when holding constant some variation in the profile ratings, gender, and applicants' academic index. [Id. at 7]; see also [DD10 at 27]. Nevertheless, the data reassured Dean Fitzsimmons that the Admissions Office was "treating Asian Americans in an evenhanded manner." [Oct. 17 Tr. 134:3–11]. As with Mr. Hansen's February 2013 models, OIR's May 2013 models suffer from significant omitted variable bias, and the magnitude of the negative coefficient for Asian applicants is relatively modest considering the number and significance of omitted observable and unobservable factors. See [PX28 at 7]. As a result, the OIR analysis is weak evidence of bias against Asian American applicants, particularly relative to the more thorough econometric analysis that has been done by the parties' economic experts in connection with this litigation.

Dean Fitzsimmons' non-inference of actual discrimination based on the relatively modest negative Asian coefficient was reasonable given the limitations of OIR's model and his own experience with and confidence in the Admissions Office's process. Dean Fitzsimmons did not ask for additional analysis based on OIR's results, nor did he make any changes to Harvard's admissions process in response to that analysis, because his review of the data did not lead him to believe that the Admissions Office was biased against Asian American applicants. [Oct. 17 Tr. 137:11–17, 138:7–24].

3. The Ryan Committee

In April 2014, Harvard learned of a website that had launched with the url harvardnotfair.com. Harvard's staff recognized that the website was being promoted by some of

the same individuals who had financed Fisher v. University of Texas at Austin, 570 U.S. 297 (2013) ("Fisher I"), and 136 S. Ct. 2198 (2016) ("Fisher II"). [Oct. 23 Tr. 211:7–15]; see [PX283]. Apparently in response to the prospect of litigation, Harvard University formed a committee to examine race-neutral alternatives to its race-conscious admissions practices (the "Ryan Committee"). See [Oct. 22 Tr. 13:14–19, 129:13–130:17]. The Ryan Committee, chaired by Jim Ryan, the Dean of the Graduate School of Education, included more than two dozen members from across the university. [Oct. 16 Tr. 69:3–7; Oct. 22 Tr. 13:20–14:2]; see [PX300; PD19]. The committee's work never really got "off the ground," owing at least in part to its broad membership and the conflicting scheduling demands of many committee members. [Oct. 16 Tr. 69:10–70:15; Oct. 19 Tr. 76:8–77:10]. After meeting only a few times, it disbanded in December 2014, shortly after this lawsuit was filed. [Oct. 16 Tr. 70:2–6; PX316 at 2]; see [ECF No. 1]. No substantive analysis of any race-neutral alternatives examined by the Ryan Committee was entered into evidence. See [Oct. 19 Tr. 77:14–24 ("I believe the team did some work, under privilege. . . . Under direction of counsel.")].

4. The Khurana Committee

In 2015, following the filing of this lawsuit and the disbandment of the Ryan Committee, Harvard established the Khurana Committee, officially titled "the Committee to Study the Importance of Student Body Diversity," which was chaired by Dean Khurana.[34] [Oct. 22 Tr. 210:23–211:21; PX302 at 22]. The Khurana Committee "sought to examine and restate the

[34] In addition to Dean Khurana, the members of the Committee to Study the Importance of Student Body Diversity included Mahzarin R. Banaji, the Richard Clarke Cabot Professor of Social Ethics; Emma Dench, the McLean Professor of Ancient and Modern History and of the Classics; Yukio Lippit, the Harris K. Weston Associate Professor of the Humanities; David R. Pilbeam, the Henry Ford II Professor of Human Evolution; and, Jonathan L. Walton, the Plummer Professor of Christian Morals and Pusey Minister of the Memorial Church. [Oct. 23 Tr. 35:14–18; PX302 at 22].

benefits that the College derives – as an institution, and for its students and faculty – from student body diversity of all kinds, including racial diversity." [PX302 at 1]. The Khurana Committee's report, referenced supra at Part III.A, was prepared with the assistance of counsel and in the face of litigation, but nonetheless reflects an extensive and thoughtful examination of the benefits of diversity to Harvard College. [Oct. 22 Tr. 211:10–212:11]. The committee concluded its report by stating:

> We emphatically embrace and reaffirm the University's long-held view that student body diversity – including racial diversity – is essential to our pedagogical objectives and institutional mission. It enhances the education of all of our students, it prepares them to assume leadership roles in the increasingly pluralistic society into which they will graduate, and it is fundamental to the effective education of the men and women of Harvard College.

[PX302 at 22]. In February 2016, Harvard's Faculty of Arts and Sciences voted unanimously to adopt the report. [Nov. 1 Tr. 198:19–24]. Although the Khurana Committee was keenly aware that it was addressing a question that "the Supreme Court has asked public institutions of higher education to answer in connection with the consideration of an applicant's race in the admissions processes as one factor among many in an individualized review," its focus was limited to Harvard's interest in diversity, rather than the viability of race-neutral alternatives. See [PX302 at 1].

5. The Smith Committee

In June 2017, Harvard established the "Committee to Study Race Neutral Alternatives in Harvard College Admissions," chaired by Michael Smith, the Dean of the Faculty of Arts and Sciences, with Dean Fitzsimmons and Dean Khurana serving as the other committee members (the "Smith Committee"). [PX316 at 1, 3]. The Smith Committee evaluated whether race-neutral means, singly or in combination, would enable Harvard to achieve its diversity-related educational objectives. [Id. at 8–9]. Prior to 2017, Harvard had repeatedly expressed the

importance of its race-conscious admissions policy and its understanding that diversity across multiple dimensions was critical. See generally [id.]. Harvard had not, however, conducted a detailed empirical analysis of the viability of race-neutral alternatives for at least fifteen years. See [Oct. 16 Tr. 66:21–67:6; Oct. 19 Tr. 194:3–195:3].

The Smith Committee worked with Harvard's attorneys and had access to the analyses done by the experts in this case. [PX316 at 3]. The committee held seven meetings between August 2017 and April 2018 and then issued a report that was drafted by Harvard's attorneys. [Oct. 23 Tr. 65:20–66:4; PX316 at 1, 3]. It examined all of the race-neutral alternatives proposed by SFFA, and additionally considered eliminating preferences for athletes and the use of test scores in the admissions process. See [PX316 at 6–18]. The Smith Committee concluded that no workable race-neutral admissions practices could, at that time, promote Harvard's diversity-related educational objectives while also maintaining the standards of excellence that Harvard seeks in its student body through its whole-person, race-conscious admissions program, and recommended that Harvard reexamine the issue in five years. [Oct. 22 Tr. 133:21–134:15; Oct. 23 Tr. 126:25–127:6, 134:15–19; PX316 at 18–19].

IV. FINDINGS OF FACT: NON-STATISTICAL EVIDENCE OF DISCRIMINATION

As will be more fully discussed, the parties rely heavily on statistical evidence related to the admissions process. Additionally, to corroborate its statistical evidence, SFFA makes several other arguments in support of its contention that Harvard discriminates against Asian American applicants.

A. Sparse Country

First, as discussed above, Harvard uses a search list, which is primarily compiled based on potential applicants' ACT, SAT, or PSAT test scores to help Harvard market itself to a diverse array of high school students. The ACT, SAT, or PSAT score that students need to make

the search list varies by gender, high school GPA, geography, and race. See [Oct. 15 Tr. 136:5–139:21; PX2]. For example, to make Harvard's class of 2018 search list, a white male high school student from outside "sparse country"[35] needed an SAT score of 1380, while black, Chicano, Hispanic, Native American, and Puerto Rican students needed only an 1100. See [PX2]; see also [PX50].

As SFFA points out, there are some anomalies in the search list selection criteria that are difficult to explain. As an example, assuming an applicant reported a sufficiently high GPA, for the class of 2018, Harvard lowered the SAT score required to make the search list to 1310 for students from "sparse country" who identified their race as white, other, or unidentified while not simultaneously lowering the required score for Asian American students from the same states to the same level. Consequently, Asian American students from the same states needed to score 1350 or 1380, depending on their gender, to make the search list. See [Oct. 15 Tr. 150:3–9; PX2; PX50]. Some Asian American students therefore did not make the search list, when white students from the same area who had similar grades and SAT scores did. See [Oct. 15 Tr. 151:22–152:2]. SFFA, while recognizing that the list is a marketing tool, would have the Court consider this "sparse country" disparity between the scores required for Asian Americans and whites to make the search list as evidence of Harvard's intent to impose more selective admissions criteria on Asian Americans for the purpose of artificially suppressing Asian American representation at Harvard.

[35] Sparse country for the purposes of the PSAT search includes twenty predominantly rural states: Alabama, Alaska, Arizona, Arkansas, Idaho, Louisiana, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont, West Virginia, and Wyoming. [Oct. 15 Tr. 144:25–147:20; PX2].

Notably, however, in some of the same years that Harvard did not lower the sparse country SAT search list score for Asian Americans commensurate with the lower requirement for whites, it selected Asian Americans for the search list based on lower ACT scores than similarly situated white students from more urban states. See [Oct. 17 Tr. 151:13–152:4; PX2]. Overall, the inconsistencies in the search criteria do not seem to be linked to efforts to advantage or disadvantage any particular racial group, and it was unclear from the testimony at trial whether these variations were accidental or intentional. At root, although being placed on the search list results in recruitment and is correlated with a higher likelihood of admission, the search list is fundamentally a marketing tool that does not affect individual admissions decisions. [Oct. 15 Tr. 129:24–132:25].

B. The OCR Report

SFFA next points out that the specter of Harvard discriminating against Asian Americans in its admission process has been raised before. The argument is, at least in part, that repeated instances of smoke should heighten concerns about a fire.

In the late 1980s, Harvard faced allegations of bias against Asian American applicants in its admissions process that culminated in a 1990 report by the United State Department of Justice Office of Civil Rights ("OCR") ("OCR Report"). [PX555 at 2, 15–16]. The OCR Report reached an "overall conclusion that Harvard did not discriminate against Asian American applicants to its undergraduate program in violation of Title VI of the Civil Rights Act," but its findings indicated that some admissions officers took race into account when assigning the personal rating during the period preceding the 1990 report. See [id. at 45–46]. Further, The OCR Report found recurring characterizations of Asian American applicants that were broadly consistent with stereotypes, noting that:

In addition to examining the ethnic reader's comments, OCR's concern for the potential stereotyping of Asian American applicants prompted a review of reader comments for negative characterizations which could have an impact on the admissions decision and ratings. On its face, reader comments revealed several recurring characterizations attributed to Asian American applicants. Quite often Asian American applicants were described as being quiet/shy, science/math oriented, and hard workers. For example, one reader's comment embraced all of these in describing an Asian American applicant when she wrote:

> "[A]pplicant seems like a reserved, hard-working, aspiring woman scientist/doctor."

While such descriptions may not seem damaging, OCR was conscious that problems of "model minority" stereotypes could negatively impact Asian American applicants as a whole. This concern was also raised when OCR's file review came upon comments such as:

> "He's quiet and, of course, wants to be a doctor . . ."

suggesting that most or all Asian American applicants "want to be a doctor." Or more pointedly:

> "[A]pplicant's scores and application seem so typical of other Asian applications I've read: extraordinarily gifted in math with the opposite extreme in English."

OCR noted that in a number of cases, Asian American applicants were described as "quiet, shy, reserved, self-contained, soft spoken" and that these characteristics were underlined for added emphasis by the reader. While white applicants were similarly described, OCR found such descriptions ascribed to Asian American applicants more frequently. In some cases these comments actually originated from the interviews, teacher or counselor recommendations, or self-descriptions given by the applicant.

. . . .

OCR recognized that reader comments were also sometimes echoes of other reviewers' commentaries related to the applicant. OCR also noted a few cases in which the readers referred to an applicant as "a classic V.N. [Vietnamese] bootstrap case" or "a classic BC/NC (blue collar/non-college background) Asian American from the inner-city." While it was clear from the context of the statement that the readers were not criticizing the applicants, and that there was no negative intention, the comments do suggest a tendency to stereotype by calling the applicants "classic."

[Id. at 24–25]. Following the conclusion that Harvard did not discriminate against Asian American applicants and despite some of the specific findings, Harvard did not hold a meeting or

otherwise require that its admissions officers modify their evaluation practices to avoid actual stereotyping or the appearance of stereotyping. [Oct. 16 Tr. 59:17–24].

In the instant case, the admissions officers who testified at trial uniformly asserted that they do not and have not directly considered race in assigning ratings, other than the overall rating.[36] The Court credits the admissions officers' testimony and concludes that Harvard has made clear to its admissions officers in more recent years that they should not use race in assigning the profile ratings. Harvard perhaps should have instituted an explicit written policy stating which ratings could take race into account before 2018, but that error has now been remedied. See [PX723 at 3, 5].

C. More Recent Allegations of Stereotyping and Bias

SFFA also points to more recent examples of admissions officers referring to Asian American applicants as "quiet," "hard worker," "bright," but "bland," "flat," or "not exciting." See, e.g., [DX50 at 186, 178, 693, 1040, 1062].

Harvard's admissions officers are tasked with carrying out a particularly delicate job in that they are instructed to consider race in the admissions process, including for applicants who

[36] Senior Admissions Officer Christopher Looby's deposition testimony is the sole instance in which an admissions officer allegedly admitted that race was directly used in assigning a personal rating between the 1990 OCR Report and the present. SFFA relied on Mr. Looby's deposition testimony in its opening argument, stating, "he'll tell the truth that he's been using race in the personal rating for ten years." [Oct. 15 Tr. 27:22–24]. Mr. Looby joined Harvard's financial aid office in 2008 and has been reading admissions files since approximately 2010. See [Oct. 18 Tr. 148:16–25]. When asked during his deposition if he would "take a student's race into account when assessing his or her personal qualities," Mr. Looby answered that "just like with the academic rating, it's one factor of many I consider." [Id. at 182:8–19]; see also [Looby Dep. 51:12–17, June 30, 2017]. Mr. Looby testified at trial that he misunderstood the deposition question, and that he meant to state that he used race as one factor in assessing an applicant's overall rating just as he considered the academic rating in assigning the overall rating. [Oct. 18 Tr. 185:19–23]. His response to the deposition question appears to have been a misstatement, and the Court concludes that Mr. Looby meant to indicate at his deposition that he would consider the academic rating and race in assigning the overall rating, not the personal rating. See [id. at 182:18–184:8].

have indicated a race or ethnicity but have not elaborated on the importance of that identity, without engaging in unlawful discrimination. This job is especially sensitive due to the lengthy history of discrimination against many racial minorities in the United States, including Asian Americans, as well as Harvard's own history of discriminating against Jewish applicants beginning in the 1920s. [Oct. 24 Tr. 188:17–25; Oct. 29 Tr. 34:22–35:13, 161:17–162:16]; see Korematsu v. United States, 323 U.S. 214 (1944), abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018).

It is true that Asian American applicants continue to face both positive and negative stereotypes, such as perceptions that they are timid, hard-working, and are inclined towards medicine and science. See [Oct. 29 Tr. 56:1–56:20]. It is also true that Asian Americans have significantly higher median incomes (perhaps indicative of the strong work ethic in many Asian American communities)[37] and are more likely to hold science, technology, engineering, and mathematics occupations than the United States population more broadly.[38] Therefore, in reviewing applicant files and comments made by admissions officers, the Court is sensitive to the challenge of differentiating among discriminatory comments that evidence actual stereotyping, animus, or racism and comments about a particular applicant that may incidentally

[37] Although Asian Americans tend to have higher incomes than Americans with other racial identities, the evidence suggests that Asian American applicants to Harvard are more likely to come from modest socioeconomic backgrounds than white applicants. [PX28 at 2–5].

[38] See Anthony Martínez & Asiah Gayfield, The Intersectionality of Sex, Race, and Hispanic Origin in the STEM Workforce 8 (U.S. Census Bureau, Social, Econ., and Hous. Statistics Div., Working Paper No. 2018-27, Feb. 2019), https://www.census.gov/content/dam/Census/library/working-papers/2019/demo/sehsd-wp2018-27.pdf; Kayla Fontenot, Jessica Semega & Melissa Kollar, Income and Poverty in the United States: 2017 at 2–5, (U.S. Census Bureau Current Population Reports, Sept. 2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf; Liana C. Landivar, Disparities in STEM Employment by Sex, Race and Hispanic Origin at 2, 7, 12, 16 (U.S. Census Bureau Am. Cmty. Survey Reports, Sept. 2013), https://www2.census.gov/library/publications/2013/acs/acs-24.pdf.

reference a stereotypical characteristic, like "hard working," but which may also reflect an actual strength or weakness of that particular applicant.

SFFA has not shown that any applicant was referred to by these types of descriptors because of their race or that there was any sort of systemic reliance on racial stereotypes. The docket binder that contains notes to the effect that several Asian American applicants were "quiet" or "flat" also includes notes for white, African American, and Hispanic applicants who were also described as "quiet," "shy," or "understated." [DX50 at 620, 975, 1054]. In the absence of a pattern or a more pervasive use of stereotypes, the Court accepts that there are Asian American applicants who were "quiet" and that the use of this word with regard to such an applicant would be truthful and accurate rather than reflective of impermissible stereotyping.

In addition to SFFA's concerns about Asian American applicants being referred to as "quiet" and the like, SFFA also points out that there is a statistical relationship between race and the use of the term "standard strong," which some admissions officers use to indicate a strong applicant who is nonetheless unlikely to be admitted because he or she is not sufficiently distinguished within Harvard's exceptional applicant pool. [Oct. 25 Tr. 133:20–134:1]. Asian Americans were labeled "standard strong" more frequently than white applicants, and significantly more frequently than African American or Hispanic applicants. See [id. at 135:4–10]. In a sample of 10% of the applicants to the class of 2018, admissions officers noted that 255 students were "standard strong." [Id. at 134:6–11]. Not one of the 255 standard strong applicants in the sample was admitted. [Id. at 135:16–18]. The standard strong applicants included 126 white applicants, 114 Asian American applicants, 12 Hispanic applicants, and 3 African American applicants. [Id. at 134:23–135:3]. Approximately 15% of Asian American applicants in the original 10% sample were labeled standard strong, compared to 12% of white

applicants, 4% of Hispanic applicants, and 1% of African American applicants. [Id. at 135:4–10; PD38 at 41]. Additionally, the Asian American applicants considered standard strong averaged higher academic indexes, math SAT scores and academic ratings than standard strong applicants from other racial groups. See [Oct. 25 Tr. 135:4–136:9]; see also [PD38 at 41].

These statistics on the use of "standard strong" are consistent with the profile ratings Harvard admissions officers assigned to Asian American applicants and white applicants, which show that Asian American applicants excelled, on average, on academic and extracurricular ratings, but were weaker when evaluated on personal and athletic criteria. See [PX621; PX622]. There is not a significant difference, however, between the white and Asian American applicants who were labeled "standard strong" as reflected by the sum of their profile ratings. See [Oct. 31 Tr. 94:16–97:18]; see also [DX709]. Further, the higher proportion of standard strong Asian American applicants is consistent with the fact that Asian American applicants to Harvard's class are disproportionately unlikely to be among the weakest applicants: less than 21% of Asian American applicants received an overall rating of 4 or worse, compared to 24% of white applicants, 41% of Hispanic applicants, and 52% of African American applicants. [PX621]. As such, it is not surprising that a higher proportion of Asian Americans than white applicants were labeled standard strong.

In addition to the use of phrases that align with stereotypes of Asian American applicants and the use of the words "standard strong," SFFA has identified a few instances in which Harvard's Admissions Office's leadership acted in a manner that SFFA argues shows some degree of racial bias. Although the Court concludes that none of these incidents reflects any actual bias against Asian Americans by Harvard's admissions officers, they do merit brief mention.

In April 2012, Director McGrath was asked to respond to a letter to President Drew Gilpin Faust from an elderly alumnus. See [PX461 at 3–6]. The alumnus' letter argued that Harvard should be admitting more students from Massachusetts, proposed admissions quotas based on religious affiliation and skin color, and stated that Harvard has "a large number of oriental students." [Id. at 5]. Director McGrath wrote a polite response, stating that the alumnus' "comments on the importance of attracting a strong representation of students from Massachusetts resonates well in the Admissions Committee," but also that Harvard "has become more representative of the ethnic and economic diversity of the country and, the University believes, better positioned to make significant contributions to the country." [Id. at 1]. Director McGrath's carefully crafted response rejected a proposal that was inconsistent with Harvard's values and did not endorse the suggestions made in the letter, while seemingly trying not to alienate its author.

In a January 2014 exchange, Director McGrath sent her daughter, who served as an alumni interviewer for Harvard, a list of the top applicants from Utah prepared by the alumni interviewers for that state, noting that she was "sending this along for your amusement. Pure Utah." [PX265]. In responding, Director McGrath's daughter wrote back, "Hahaha. Very Thorough!! I also love that the top-tier list is, as you've told me before, all Asians except for a couple . . . ." [Id.]. The email, which reflects amusement at the unusual degree of thoroughness of the Utah alumni interviewers, does not reflect a negative view of Asian Americans.[39]

[39] Director McGrath testified that she thought it notable that the Utah schools committee put all Asian Americans at the top of their list because it "confounds the stereotype that many people have of the population of Utah." [Oct. 19 Tr. 221:3–11].

In sum, comments on application files and Admissions Office correspondence do not suggest any pervasive bias against Asian Americans among Harvard's admissions officers or its admissions leadership, nor has the Court identified any individual applicant whom it can determine was discriminated against or intentionally stereotyped by an admissions officer, including by the use of the words "standard strong."

V. FINDINGS OF FACT: STATISTICAL ANALYSIS

A. Sources of Statistical Evidence

In addition to testimony based on the lived experiences of witnesses, the parties introduced statistics and econometric models through expert witnesses. This statistical evidence is perhaps the most important evidence in reaching a resolution of this case, given SFFA's heavy reliance on the data to make out its claims. Harvard presented its statistical evidence primarily through Professor David Card, and SFFA presented its statistical evidence primarily through Professor Peter Arcidiacono.[40] Both Professors Card and Arcidiacono are very well-qualified experts, but they fundamentally disagree about whether the statistics show that Asian Americans are discriminated against in the Harvard admissions process. Their disagreement results from differences in their respective statistical models of admissions outcomes, based on their inclusion of different applicants and use of different control variables. Therefore, decisions by the Court as to which applicants and control variables belong in the admission outcome model are pivotal.

[40] Harvard's expert, Professor David Card, and SFFA's economist, Professor Peter Arcidiacono, are both highly respected economists. Professor Card is an economics professor at the University of California at Berkeley, where he teaches undergraduate and graduate level economic courses. He has published numerous articles and books and is a winner of the John Bates Clark Prize. [Oct. 30 Tr. 73:7–76:2; DX133]. Professor Arcidiacono is a professor of labor economics at Duke University. He teaches undergraduate and graduate-level economic courses and has published numerous peer-reviewed articles. His research is focused on labor economics, and more narrowly, higher education. [Oct. 25 Tr. 14:7–17:14].

In sum, as discussed more fully below, Professor Arcidiacono excludes ALDCs from his model despite the fact that they make up about 30% of each admitted class, analyzes the data in aggregate rather than independently modeling each admissions cycle, excludes certain variables that he contends are unreliable and have unexpected effects on the model, selectively interacts certain variables, omits the personal rating based on his finding that it is influenced by race, and then, based on that data and approach, concludes that Asian Americans are discriminated against in the admissions process. See [Oct. 26 Tr. 62:9–63:25; Oct. 30 Tr. 145:15–148:11; DX695; PD38 at 45]. Professor Card creates an independent model for each admissions cycle, includes the personal rating because he concludes that it does not reflect race and, in any event, includes information that is important to the admissions process such that omitting it skews the outcome, includes the other variables that Professor Arcidiacono omits, and does not interact variables. Using this approach, he comes out with a very slight, and not statistically significant, negative coefficient for Asian American identity and concludes, based on that data and approach, that Asian Americans are not discriminated against in Harvard's admissions process. See [Oct. 31 Tr. 172:19–173:15; DX695; DD10 at 34–35].

The statistics and econometric models used by Professors Arcidiacono and Card were generated using primarily data produced by Harvard in this litigation. Consistent with this Court's orders, Harvard provided applicant-by-applicant admissions data for more than 150,000 domestic applicants to Harvard's classes of 2014 through 2019,[41] as well as aggregate

[41] Because this lawsuit concerns only allegations of discrimination against United States citizens or permanent residents, foreign applicants were removed from the data set. Further, transfer applicants and those who submitted incomplete applications or for whom Harvard's database was for some other reason incomplete were also removed. [Oct. 25 Tr. 25:3–26:24; Nov. 1 Tr. 99:12–100:10]. Statistics on "applicants" referred to by these findings of fact are therefore based on data for the approximately 150,000 domestic applicants to Harvard's 2014 to 2019 classes for whom Harvard's database contained a single, complete record. See [PD38 at 1].

information for the classes of 2000 through 2017, and a sample of actual application files and summary sheets from the classes of 2018 and 2019. [Oct. 25 Tr. 23:8–26:13; PD38 at 1]. For each applicant to the classes of 2014 through 2019, Harvard's database includes hundreds of variables relating to each applicant's demographic characteristics, personal background, geographic information, test scores, high school grades, ratings assigned by Harvard's admissions officers, and Harvard's admissions decision. [Oct. 25 Tr. 23:16–24:8; Oct. 26 Tr. 73:22–74:2]. On behalf of SFFA, Professor Arcidiacono supplemented this data by merging it with College Board data on applicants' high schools and neighborhoods. [Oct. 25 Tr. 24:9–12].

The parties dispute whether ALDC applicants should be included when computing admissions statistics and modeling Harvard's admissions process. ALDC applicants are admitted at higher rates than the applicant pool more broadly. SFFA argues that because ALDC applicants are granted significant tips that are not available to most applicants, they are not typical. [Id. at 27:2–25, 29:4–30:7]. SFFA therefore presented numerous statistics based on non-ALDC applicants which it identifies as the "Baseline Dataset." [Id. at Tr. 27:2–25]. The Baseline Dataset excludes approximately 7,400 ALDCs, leaving a total of 142,728 applicants in the dataset. [Oct. 25 Tr. 30:8–31:3; PD38 at 1–2]. SFFA has also presented data based on a subgroup of dataset applicants that include legacies, dean's and director's list applicants, and children of faculty and staff ("LDCs"), but not recruited athletes, which SFFA refers to as the "Expanded Dataset." [Oct. 25 Tr. 40:17–41:7].

Although ALDCs represent only a small portion of applicants and are admitted or rejected through the same admissions process that applies to other applicants, they account for approximately 30% of Harvard's admitted class. [Oct. 30 Tr. 153:6–154:8, DX706; DD10 at 38, 40]. For reasons discussed more fully infra at Section V.F, the Court agrees with Professor Card

that including ALDCs in the statistics and econometric models leads to more probative evidence of the alleged discrimination or lack thereof. Nevertheless, the Court has referenced numerous statistics based on data that excludes some or all ALDCs because SFFA used those metrics at trial.

In addition to statistics based on Harvard's admissions database, Harvard presented statistics on the racial make-up of its admitted classes from 1980 to 2019, [Oct. 31 Tr. 119:23–124:6; DX711; DX713; DD10 at 100–04], and SFFA used statistics based on an analysis of 480 sample application files, two-thirds of which were selected by SFFA and one-third by Harvard, [Oct. 25 Tr. 24:21–24]. Both Harvard and SFFA also relied on statistics and models that were prepared by OIR before this lawsuit was filed. See, e.g., [PX9; PX12; PX21].

B. Admission Rates and Ratings by Race

Asian Americans were admitted to Harvard at slightly lower rates than white applicants in the years leading up to this lawsuit, with between 5% and 6% of Asian American and between 7% and 8% of white applicants being admitted to the classes of 2014 through 2017. See [PX319 at 15–16]; see also [PD38 at 20].[42] The admissions rates differ more significantly among certain subgroups, but the admissions rates for Asian American ALDCs are generally similar to or higher than those for white ALDCs. 88.6% of Asian American recruited athletes, 48.1% of Asian American children of faculty or staff, and 47.7% of Asian Americans on the dean's or director's interest lists are admitted, compared to 88.1%, 47.9%, and 43.1% of white applicants in those groups, respectively. [PX634]. Asian American legacies are admitted at a rate of

[42] Overall admission rates for Asian American applicants are lowered slightly because they are underrepresented among ALDCs, who are admitted at a rate of 43.6% or nearly eight times the 5.5% admissions rate for non-ALDC applicants. [Oct. 30 Tr. 154:17–155:19; DX679; DD10 at 39].

35.2%, as are white legacies. [Oct. 25 Tr. 121:7–122:4; PX634]. SFFA's economic expert, Professor Arcidiacono, acknowledges that Asian American ALDCs were likely not discriminated against.[43] [Oct. 25 Tr. 122:16–123:17, 126:1–8]. Non-ALDC Asian American applicants have admission rates that are similar to white applicants, although the admission rates relative to whites varies by year from between 0.2 percentage points lower to 0.9 percentage points higher. [Id. at 68:2–70:2; PD38 at 20].[44] With the exception of 2019 where the admission rates favored Asian American applicants, the differences in admission rates for non-ALDC white and Asian American applicants was not statistically significant. See [PD38 at 20]. The gist of SFFA's argument, however, is not that Asian Americans were excluded altogether, but rather that the non-ALDC Asian American applicants were stronger than the non-ALDC white applicants and should have been admitted at a higher rate.[45]

[43] Although its expert agrees that Asian American ALDCs were not discriminated against, SFFA continues to argue that they were, but that the strength of their applications overcame the bias. The Court ultimately finds that excluding ALDCs distorts the analysis.

[44] The highest annual admissions rate for Asian American applicants relative to white applicants, and the only year for which the admission rates for Asian American and white applicants differed to a statistically significant degree, was the class of 2019, which was selected after the allegations of discrimination that led to this lawsuit emerged. [Oct. 25 Tr. 68:2–22; PD38 at 20].

[45] As reflected by the data, Harvard does not systematically exclude Asian Americans, nor does SFFA claim that it does. As of 2016, the United States population was approximately 60% white and 5.9% Asian. U.S. Census Bureau, Quick Facts, Census.gov, https://www.census.gov/quickfacts/fact/table/US/RHI225218. Among applicants to Harvard's class of 2019, 21.2% were Asian American and 57.6% were white. [DX713]. Among those domestic applicants who Harvard admitted, 40% of the class identified as white and 24% identified as Asian American. It is entirely possible, and not without historical precedent, that an admissions process could discriminate against Asian Americans (or Jews) despite their over-representation in a class as compared to the general population. The Court nonetheless includes these numbers to give some context to the overall admissions data.

Asian Americans would likely be admitted at a higher rate than white applicants if admissions decisions were made based solely on the academic and extracurricular ratings. Among Expanded Dataset applicants, more than 60% of Asian American applicants received academic ratings of 1 or 2, compared to 46% of white applicants, 9% of African American applicants, and 17% of Hispanic applicants. [Oct. 25 Tr. 49:17–50:5; PX623]. Overall, strong academic applicants are particularly abundant, with a higher percentage of applicants (42%) scoring a 1 or 2 on the academic rating as compared to the percent that score a 1 or 2 on any other rating. [DD10 at 4].[46] Asian American applicants' stronger academic ratings broadly align with their stronger performance across a range of qualitative indicators of academic strength. [Oct. 25 Tr. 41:18–46:9; PD38 at 4–7]. Asian American applicants also average relatively high extracurricular ratings. More than 28% of Expanded Dataset Asian American applicants receive an extracurricular rating of 1 or 2, compared to 25% of white applicants, 16% of African American applicants, and 17% of Hispanic applicants. [Oct. 25 Tr. 52:12–22; PX623].

Although Harvard admissions officers do not believe that Asian American applicants, as a group, have worse personal qualities than other applicants and Harvard alumni interviewers assign personal ratings of 1 or 2 to Expanded Dataset Asian American and white applicants with a similar frequency, [Oct. 23 Tr. 204:1–9; Oct. 24 Tr. 138:11–16; Oct. 25 Tr. 55:7–12], Harvard admissions officers assign Asian American applicants personal ratings that are, on average, slightly weaker than those assigned to applicants from other racial groups, [PX623]. Among Expanded Dataset applicants, 22.6% of white applicants receive a personal rating of 1 or 2, compared to 18% of Asian Americans, 19.4% of African Americans, and 19.1% of Hispanics.

[46] 24% of applicants receive an extracurricular rating of 1 or 2, 21% of applicants receive a personal rating of 1 or 2, and 10% of applicants receive an athletic rating of 1 or 2. [Oct. 30 Tr. 86:25–88:2; DD10 at 4].

[Id.]. The statistics are similar for Baseline Dataset applicants, with 17.6% of Asian Americans receiving a personal rating of 1 or 2, compared to 18.7% of Hispanics, 19% of African Americans, and 21.3% of whites. [Oct. 25 Tr. 55:13–22; PX621].

At least a partial cause of the disparity in personal ratings between Asian American and white applicants appears to be teacher and guidance counselor recommendations, with white applicants tending to score slightly stronger than Asian Americans on the school support ratings. [PX621; PX623; PD38 at 4–5, 8–10]. Among Expanded Dataset applicants, 31.9% of white applicants received a "teacher 1" rating (the rating for the first of two teacher recommendations submitted) of 1 or 2 compared to 31.6% of Asian American applicants. [PX 623]. For the "teacher 2" rating (the rating for the second teacher recommendation), 33.6% of white applicants received a rating of 1 or 2 compared to 32.3% of Asian American applicants. [Id.]. In the Expanded Dataset, 27.4% of white applicants and 26.4% of Asian American applicants receive a guidance counselor rating of 1 or 2. [Id.]. Although these differences may appear slight, they are significant in that the stronger high school academic and extracurricular performance of Asian American applicants on average would lead one to expect that those applicants would receive stronger teacher and guidance counselor recommendations than white applicants.

On average, Asian American applicants are also assigned lower athletic ratings, particularly compared to white applicants, who average especially strong athletic ratings. See [PX621; PX623; DX692 at 2]. Among non-recruited athlete applicants, only 5% of Asian Americans received an athletic rating of 2, compared to 14% of whites, 7% of African Americans, and 8% of Hispanics. [PX623]. When recruited athletes are included in the calculation, the disparity between white and Asian American applicants receiving strong athletic

ratings increases, with white applicants receiving athletic ratings of 1 or 2 at roughly three times the rate of Asian American applicants. [Oct. 30 Tr. 96:25–97:19; DX692 at 2; DD10 at 10].

C. Descriptive Statistics

In addition to the regression analyses used in this case, Professors Card and Arcidiacono also offered descriptive statistics that support their respective arguments on the question of discrimination. In constructing these statistics, both experts used the same dataset consisting of applicants to the classes of 2014 through 2019 (except that Professor Arcidiacono prefers to remove ALDCs). Professor Card uses the dataset to compare admission rates by racial group for applicants who scored 1s and 2s across similar numbers of profile ratings. He, on behalf of Harvard, uses this multidimensionality analysis to argue that the statistical evidence does not support a conclusion that Harvard discriminates against Asian Americans relative to whites. Meanwhile, Professor Arcidiacono uses an academic decile analysis in which he divides applicants into deciles based on applicant academic index score and then shows that Asian Americans in the top academic deciles are receiving strong personal and overall ratings at lower rates than applicants from other racial groups with similar academic qualifications. He, on behalf of SFFA, argues that the lower average overall and personal ratings for Asian American applicants who have similar levels of academic strength to non-Asian American applicants suggest that Harvard is engaged in a discriminatory admissions process.

1. Professor Card's Multidimensionality Analysis

Professor Card's statistical analysis shows that the students most likely to be admitted to Harvard are those that do well across the profile and school support ratings, rather than merely excelling on just one rating. In coming to this conclusion, Professor Card analyzed the relationship between race and applicant strength across multiple profile ratings, which he terms an analysis of "multidimensional accomplishments." [Oct. 30 Tr. 89:3]. Only 7,000 applicants

per year, or roughly 27%, receive a rating of 1 or 2 in at least two profile ratings, and only 7% of applicants receive ratings of 1 or 2 in three or all four profile ratings. [Id. at 89:19–90:17; DX672; DD10 at 5]. The 7% of applicants who score highly in three or four of the four profile ratings are seemingly the most multidimensional under Harvard's scoring system; 70% of those applicants are admitted and make up 46% of all admitted applicants. [Oct. 30 Tr. 93:15–94:12; DX672; DD10 at 8]. The 20% of applicants who receive two profile ratings of 1 or 2 account for 38% of admitted students. [Oct. 30 Tr. 93:15–94:12; DX672; DD10 at 8]. Meanwhile, applicants with one or no ratings of 1 or 2 account for 73% of applicants but only 15% of admitted students. [DX672; DD10 at 8]. White applicants are slightly more likely than Asian American students to receive three profile ratings of 1 or 2, with approximately 900 or 9% of all white applicants receiving three such scores relative to 500 or 8% of all Asian American applicants. [Oct. 30 Tr. 95:18–96:10; DX692 at 2; DD10 at 9].

Professor Card has also offered support for his conclusion that white applicants are disproportionately strong in non-academic traits by removing all academic inputs from his model of admissions probability to rank applicants to Harvard. See [Oct. 31 Tr. 69:20–71:5; DD10 at 77]. By doing so, he creates a "non-academic index," and his analysis shows that white students do disproportionately well in this metric, with 12% of white applicants ranking in the top decile compared to only 7.8% of Asian American applicants. See [Oct. 31 Tr. 70:17–19; DD10 at 77]. Professor Card's multidimensionality analysis thus suggests that a partial cause of the race-related disparities in admission rates, when controlling for academic performance, is that Asian American applicants' disproportionate strength in academics comes at the expense of other skills and traits that Harvard values. See [DX692 at 2–4].

The Court notes, however, that the profile ratings are not equally distributed in terms of the number of 1s, 2s, 3s, or 4s assigned, nor are they equally correlated with an applicant's chances of admission. For example, being a recruited athlete (and therefore receiving an athletic rating of 1) vastly improves an applicant's odds of admission, with 86% of recruited athletes typically admitted and Asian Americans especially underrepresented in that group. [Oct. 25 Tr. 31:11–23; PD38 at 2]. Although Harvard highly values applicants who will contribute to its varsity sports, it also admits a significant number of applicants who do not participate in high school athletics, and who therefore receive an athletic rating of 4 or lower. [Oct. 25 Tr. 28:21–29:8, 31:11–23; PD38 at 10]. Academic, extracurricular, or personal ratings of 4 or lower are relatively rare and more likely to result in rejection than an athletic rating of 4 or lower. [Oct. 25 Tr. 52:6–54:12; PD38 at 8–10]. 39% of admitted non-ALDC applicants are scored as athletic 4s or lower, while less than 1% of admitted Baseline Dataset applicants are scored as academic, extracurricular, or personal 4s. [Oct. 25 Tr. 52:23–53:13; PD38 at 10]. Further, personal ratings of 1 are exceptionally rare and are awarded to fewer than 10 applicants in a typical year, whereas athletic, extracurricular, and academic ratings of 1 are more common, though they are still each awarded to less than 1% of applicants. See [PX623; PD38 at 2].

Although the profile ratings are not of equal importance, are not assigned on a set curve, and do not have any assigned mechanical weight, receiving multiple ratings of 1 or 2 is strongly correlated with admission. [Oct. 30 Tr. 88:12–89:3, 90:18–92:12; DX672; DD10 at 6, 8]. Because the number of 1s and 2s awarded in each of the four profile ratings every year vastly exceeds the number of students Harvard can admit, Harvard tends to admit applicants with multiple profile ratings of 1 or 2 who are also significantly distinguished in some other way—which, as discussed supra at Part III.B.3, may include accomplishments or characteristics that are

remarkable even when measured against a very accomplished applicant pool or that are likely to be underrepresented in Harvard's class.

To summarize, Professor Card uses his multidimensionality analysis to show that the Harvard admissions process favors applicants who score well across the profile and school support ratings and to counter the argument that Harvard's admissions process is biased based on a comparison of admission rates for students who are similarly-situated academically. Professor Card is correct that an analysis predicated on an applicant's academic profile ignores statistical disparities between racial groups across other dimensions that favor non-Asian American applicants. Most notably, white applicants are significantly more likely to have made strong high school contributions to athletics, and this disparity counteracts the effect that Asian American applicants' relative academic and extracurricular strength would otherwise have on their admission rate. Professor Card's analysis shows that strength across multiple dimensions is highly correlated with admission to Harvard and results in fewer admitted Asian American applicants.

That being said, because Professor Card's multidimensional analysis gives equal weight to each profile rating, it overvalues the athletic rating which favors white applicants, despite the fact that it is seemingly less important than the academic, personal, and extracurricular ratings for obtaining admission to Harvard, at least for applicants who are not recruited athletes. See [DX692 at 2]. Further, because the multidimensionality analysis uses all the profile ratings, any bias in the ratings, including in the personal rating, is baked into his analysis.

2. Professor Arcidiacono's Academic Index Decile Analysis

In contrast, for his descriptive statistics analysis, Professor Arcidiacono compared applicants by analyzing the relationship between race and various ratings, including school support, academic, extracurricular, personal, and overall ratings for applicants who are

academically similarly-situated—that is who fall into the same academic index deciles. For this analysis, he splits Baseline Dataset applicants into ten equally sized groups based on their academic index, which reflects the strength of an applicant's standardized test scores and high school grades, with "Decile 10" containing the 10% of applicants to Harvard who had the strongest academic index scores and "Decile 1" containing the applicants with the weakest scores. See [PD38 at 6]. The deciles reflect only numerical academic metrics in contrast to the academic ratings assigned by Harvard, which incorporate an assessment of academic potential and other non-numerical factors. [Oct. 22 Tr. 137:12–24]. Professor Arcidiacono's deciles show that Asian American applicants are disproportionately represented in the top academic deciles. See [Oct. 25 Tr. 44:12–48:8; PX624; PX626; PD38 at 6–8]. More than a third of Baseline Dataset Asian American applicants fall in the strongest two academic index deciles, while African American and Hispanic applicants are underrepresented among applicants with the highest academic indexes. [Oct. 25 Tr. 47:22–48:5; PD38 at 8].

Professor Arcidiacono's academic decile analysis shows a racial disparity in applicants' personal and overall ratings that appears to favor white applicants based on a comparison of applicants within the same academic decile. See [PD38 at 16, 18–19]. For example, among Baseline Dataset applicants, 22.2% of Asian Americans in the top decile of applicants by academic index (*i.e.* those with the strongest high school GPA and standardized test scores) receive personal ratings of 1 or 2, compared to 29.6% of whites, 34.2% of Hispanics, and 47% of African Americans; similar variances by race are also present for students in the second and third strongest academic deciles. [Id. at 19]. Similarly, only 12.9% of Baseline Dataset Asian Americans in the top academic index decile receive an overall rating of 1 or 2, compared to 15.6% of whites, 27.4% of Hispanics, and 47% of African Americans. [Id.].

Professor Arcidiacono's decile analysis also shows that the disparities between Asian American and white applicants' school support ratings are magnified when comparing applicants within the same academic index deciles. Among non-recruited athletes, white applicants are only approximately 1 percentage point more likely to receive teacher or guidance counselor ratings of 1 or 2 than Asian American applicants. [PX623]. White applicants in the top academic deciles, however, receive school support ratings of 1 or 2 at a rate that is 4 to 6 percentage points higher than Asian Americans in the same academic deciles. [Oct. 26 Tr. 37:25–40:17].

In sum, Professor Arcidiacono bases his decile analysis on the academic index, which only accounts for test scores and grades—criteria in which Asian American applicants are, on average, especially strong. He argues that the personal rating is compromised, that the athletic rating is not that important, and that Asian American applicants do well on the limited measures that remain and should therefore be admitted at a higher rate than they are. This approach likely over emphasizes grades and test scores and undervalues other less quantifiable qualities and characteristics that are valued by Harvard and important to the admissions process.

D. Overview of Logistic Regression Models

Professors Card and Arcidiacono both believe that the descriptive statistics discussed above help to provide context, but also agree that logistic regressions are the most useful econometric tool in evaluating the probable effect of race and other traits on Harvard's admissions process. See [Oct. 25 Tr. 79:11–83:24; Oct. 30 Tr. 101:5–17]. Their respective logistic regression models seek to isolate the effects of race through models that include, and thereby control for, other variables that affect the modeled outcome. [Oct. 25 Tr. 215:12–19; Oct. 30 Tr. 176:18–179:3].

The Court notes at the outset that although logistic regression models are seemingly the best available econometric tool, they cannot capture all of the factors that Harvard considers and can therefore account for only part of the variation in admissions decisions, or other modeled outcomes. See [Oct. 25 Tr. 80:13–24; Oct. 30 Tr. 114:10–23]. Further, no model is perfect, and models can be affected by biases that are inherent in the control variables that they use. See [Oct. 25 Tr. 91:17–92:11, 215:16–19]. To limit the impact of variables affected by bias, variables that are themselves impacted by the independent variable of primary interest, which is race, should generally be excluded from regression models. Including such variables dilutes the implied effect of race by allowing that effect to be partially captured by the race-influenced variable itself. See [id. at 215:16–19; Nov. 1 Tr. 77:22–78:4]. Excluding variables for this reason may, however, make a model less accurate because it also results in the removal of information relevant to the modeled outcomes.

Here, although Professors Arcidiacono and Card both endorse the use of regression models, they disagree on whether the personal rating should be included as a control variable. Professor Arcidiacono contends that personal ratings are themselves affected by race and that they should therefore not be used in the admissions model. [Oct. 25 Tr. 99:11–18]. Professor Card argues that the personal rating variable should be included, and thereby implicitly contends that race correlates with personal qualities that affect personal ratings, but that race does not itself affect the personal ratings assigned by admissions officers, or at least that any causal effect of race on the personal rating is insignificant relative to the value of the variable in controlling for a race-correlated, but not directly race-caused, relationship. [Nov. 1 Tr. 79:9–14].[47] Further,

[47] Directly race-caused means a cause internal to the Harvard admissions process, as distinct from the potential for an effect of race on inputs to that process.

the personal rating captures other relevant characteristics unrelated to race that will not be taken into account at all by the modeling if the personal rating is excluded, such as the extent to which an applicant demonstrates character, leadership ability, self-confidence, grit, or other distinctive qualities that might benefit the Harvard community.

Logistic regressions result in two metrics that are relevant here: "coefficient" and "marginal effect." Coefficients indicate how much weight the model suggests each variable has in determining the modeled variable (here, admissions outcome or an assigned rating), holding the other included variables constant. [Oct. 25 Tr. 76:22–78:8]. To generate a coefficient for a discrete variable such as race (*e.g.* where an applicant is white, Asian American, African American, or Hispanic), a model omits one of those characteristics to create a baseline group (*e.g.* white applicants) and the coefficients that the model generates for the included groups (*e.g.* Asian American, African American, and Hispanic) then indicate the implied effect of each of those characteristics on the dependent variable (*e.g.* admissions outcome) relative to the baseline group, holding constant the control variables that are included in the model (*e.g.* academic rating, disadvantaged status, parental occupation, etc.). [Id. at 77:24–78:8]. In the experts' models, a positive coefficient is associated with a higher probability of admission or a stronger rating, and a negative coefficient is associated with a lower probability of admission or a weaker rating. [Id. at 77:3–78:23]. The Court has and will continue to note when race appears "statistically significant" in an analysis, which indicates that the coefficient for some racial group is of a magnitude that would occur infrequently due to random variation if race and the modeled variable were not related when controlling for the other variables included in the model. It is critical to understand that a statistically significant variable in an econometric model is not proof

of a causal relationship. A statistically significant coefficient may be the result of random variation, omitted variables, or other flaws in the model.

A marginal effect is a measurement of the change in the projected outcome of the model (*e.g.* odds of admission to Harvard) that is associated with changing a given variable, while holding other variables constant. The magnitude of the change in probability will depend on the other variables. For example, a model might not suggest a large effect on an applicant's probability of being admitted based on being African American, as opposed to being white, for a student who is academically unprepared (*i.e.* race won't make a difference for an unprepared student), but might imply a significantly increased probability of admission associated with being African American rather than white for an applicant who is well-prepared. See [id. at 78:24–80:6; PD38 at 25]. An "average marginal effect" is the average of the marginal effect associated with the variable of interest for that group. For example, one could calculate the average marginal effect of African American racial identity relative to white identity on the odds of admission or of achieving a given rating by averaging the probability changes attributable to the coefficient for African American identity in a relevant model. See [Oct. 25 Tr. 21:18–22:17, 80:8–12, 96:19–97:24; PD38 at 24–25, 31]. Again, it must be understood that the average marginal effect reflects an average statistical relationship between a variable of interest (such as race) and a modeled variable (such as admissions outcome), and that relationship may or may not be causal in nature.

Professors Card and Arcidiacono each prepared models of the admissions process in which the dependent variable is the admissions decision (admitted or rejected). [Oct. 25 Tr. 216:22–217:7; Oct. 30 Tr. 101:15–17]. Their admissions models are broadly similar and predict the probability of admission for domestic non-transfer applicants by accounting for a wide range

of observable variables including gender, disadvantaged status, first generation college applicant status, fee waiver, whether the applicant applied for financial aid, academic index, intended major, secondary school type, indicators of parental education, whether parents attended an Ivy League school, whether parents are alive, geographic indicators, and standardized test results. See [Oct. 30 Tr. 143:16–25]; see also [PD38 at 26].

There are, however, several critical differences in the structure and control variables utilized by Professor Card's and Professor Arcidiacono's respective models. As a result of these differences, Professors Card's model returns a coefficient for Asian American identity that is negative but not statistically significant, meaning that the model does not strongly suggest that Asian American as opposed to white racial identity affects an applicant's chances of admission, whereas Professor Arcidiacono's model returns a negative coefficient for Asian American identity that is statistically significant, meaning that his model suggests that Asian American identity is associated with a lower chance of admission, when controlling for the other variables he includes. [Oct. 25 Tr. 115:1–11; Oct. 30 Tr. 129:9–16, 132:21–134:11]. The modeling differences that result in these disparate conclusions are discussed infra at Section V.F.

Professor Arcidiacono also prepared a series of ordered logit estimates that SFFA contends show how well the ratings assigned for the academic, extracurricular, personal, overall, and school support ratings can be predicted. [Oct. 25 Tr. 90:10–91:23, 150:2–6; Oct. 30 Tr. 101:15–17; Oct. 31 Tr. 188:22–189:1; Nov. 1 Tr. 76:3–11, 79:15–19; PD38 at 28]. These models are similar to Professor Arcidiacono's model of admissions decisions, except that they are intended to be probative of the effect of race on the ratings assigned by admissions officers rather than the applicants' probability of admission. [Oct. 25 Tr. 90:16–91:10]. Professor Arcidiacono's preferred ordered logit models control for application year, application docket,

academic index, SAT scores, SAT II scores, high school GPA, extremely low-grade applicants, parental education level, including whether a parent attended an Ivy League school, whether the applicant's parents are alive, expected college major, gender, high school type, neighborhood, disadvantaged status, receipt of an application fee waiver, first generation college applicant status, whether the applicant applied for financial aid, profile ratings other than the dependent variable, teacher recommendation ratings, guidance counselor rating, alumni ratings, and certain interactions among those variables. See [id. at 82:13–85:3; PD38]. To the extent that Professor Arcidiacono's models imply that Asian American identity is associated with the ratings assigned by admissions officers, his models suggest that the magnitude and direction of the relationship (bonus or penalty) varies by rating and depends on whether an Asian American applicant is male or female and whether or not they are economically disadvantaged. See [PD38 at 28–35].

E. Regression Models of School Support, Profile, and Overall Ratings

Although the experts' models of admissions outcomes are most probative of whether Harvard has engaged in discrimination against Asian Americans relative to white applicants, there are also related statistical relationships between race and the profile and school support ratings. Because those ratings serve as inputs for the proposed admissions outcome models, the Court will briefly address the extent to which race might appear to impact the ratings assigned by admissions officers before turning to the admissions outcome models themselves.

1. Relationship Between Race and School Support Ratings

As discussed supra at Section V.C, Asian American applicants have lower average school support ratings than white applicants. There are several conceivable explanations for the disparity including actual differences in non-academic strengths, a correlation between the quality of the guidance counselor or teacher recommenders and the racial makeup of high schools, biased teachers and guidance counselors, or biased Harvard admissions officers.

Considering the testimony of Harvard's admissions officers and the admissions process itself, the Court views Harvard admissions officer bias as an unlikely explanation for the disparity in school support ratings and concludes that race-related variance in the school support ratings result from some combination of the other potential causes, all of which are beyond Harvard's control. Further, when considering regression analyses, because school support ratings can be included in admissions outcome models, any racial effect that impacts admissions decisions through the school support ratings can be controlled for.

Importantly, however, although the school support ratings themselves provide only an overall numeric evaluation of recommendations, the school support materials are in fact more nuanced and the substance of them informs perceptions about applicants across numerous dimensions. [Oct. 31 Tr. 36:16–37:16]. Considering the stereotypes and biases that favor and disfavor Asian American applicants in different evaluation dimensions, the impact of race on the school support ratings could be understood to suggest that the overall numeric score masks more subjective disparities in how applicants from different racial groups are presented by their recommenders. See [id.]. Therefore, to the extent Asian Americans are presented by guidance counselors and high school teachers as weaker in personal characteristics that Harvard values and those presentations inform the personal rating, omission of the personal rating results in an omitted variable bias that cannot be fully captured by including a school support rating control variable.

2. Relationship Between Race and Personal Ratings

Professor Arcidiacono's preferred model suggests that Asian American identity reduced a Baseline Dataset applicant's probability of receiving a personal rating of 2 or higher. The model implies that when holding constant nearly all of the available observable variables, Asian American identity is associated with a lower probability of being assigned a strong personal

rating by an admission officer. More precisely, his model suggests that an average Baseline Dataset Asian American applicant has a 17.8% probability of receiving a 2 or higher on the personal rating, which is lower than the 21.6% chance that the model suggests the applicant would have in the absence of any racial preference. [Oct. 25 Tr. 96:24–97:24; PD38 at 31]. Harvard did not offer a competing regression model to show that no statistically significant relationship between Asian American identity and the personal rating exists, and the Court therefore concludes that the data demonstrates a statistically significant and negative relationship between Asian American identity and the personal rating assigned by Harvard admissions officers, holding constant any reasonable set of observable characteristics.

The Court finds, however, that Professor Arcidiacono's preferred model likely overstates the direct effect of Asian American identity on the personal rating. First, as discussed supra at Section III.B.4, Harvard's witnesses credibly testified that they did not use race in assigning personal ratings (or any of the profile ratings) and did not observe any improper discrimination in the admissions process. [Oct. 18 Tr. 49:17–19; Oct. 19 Tr. 48:24–49:19, 253:4–17; Oct. 23 Tr. 50:24–51:4, 219:21–24; Oct. 24 Tr. 122:5–8; Nov. 1 Tr. 246:18–247:4, 253:18–25]. The uniformity of these observations is persuasive given the collective manner in which admissions decisions are made, with all members of the Admissions Committee participating in all decisions and having real-time visibility into the process for each applicant. Any causal relationship between Asian American identity and the personal rating must therefore have been sufficiently subtle to go unnoticed by numerous considerate, diligent, and intelligent admissions officers who were immersed in the admissions process.

Second, Professor Arcidiacono's model explains only a portion of the variation in personal ratings and likely suffers from considerable omitted variable bias. The model does not

include variables for several factors that influence personal ratings and may correlate with race, such as the extent to which applicants' essays and personal statements demonstrated their abilities to overcome obstacles or personal achievements that might reasonably be perceived as an indication of leadership ability or other personal strengths. [Oct. 31 Tr. 35:15–36:9].[48]

Third, as discussed supra at Section V.C, E, teacher and guidance counselor recommendations seemingly presented Asian Americans as having less favorable personal characteristics than similarly situated non-Asian American applicants, and the school support ratings do not fully reflect more subtle racial disparities. As the experts' analyses demonstrate, some race-correlated variation in teacher and guidance counselor recommendations is likely a cause of at least part of the disparity in the personal ratings. See supra at Sections V.C, E. Professor Card's analysis shows that the school support ratings for Asian American applicants are generally weaker than the ratings for white students when comparing white and Asian American students who receive the same academic rating. [DX692 at 4]; see [DD10 at 68]. For example, approximately 43% of white students who receive an academic score of 2 have school support ratings (from their two teacher and one guidance counselor recommendations) that sum

[48] Speculating on how unobserved variables may be influencing the model's implied effect of race on the personal ratings is fraught with difficulty. Although the Court has not received statistical evidence on the effect of race on specific high school achievements, it is likely that some high school achievements are themselves effected by racial biases. One might question the effect, positive or negative, of being Asian American on the probability of being selected to a leadership position such as class president, captain of a sports, math, or debate team, or the likelihood of being identified as an outspoken advocate, a natural leader, or an intellectual superstar. Professor Arcidiacono's models account for some of these considerations, to some degree, through inclusion of the school support ratings, but much of the variation in applicants' qualities cannot easily be boiled down to econometrically digestible variables. [Oct. 31 Tr. 35:15–36:9]. It is possible that Asian American applicants to Harvard are being disadvantaged by biases in their high schools that affect their college applications. Admissions officers have no easy mechanism to measure or correct for these biases, except to carefully review individual applicants in a holistic way and to recognize and consider applicants' accounts of how their racial identities have shaped their pre-college experiences.

to 7 or less (indicating very strong recommendations), while only about 37% of Asian American applicants with an academic score of 2 receive similarly strong school support ratings. [Oct. 31 Tr. 55:11–56:2]. Because teacher and guidance counselor recommendation letters are among the most significant inputs for the personal rating, the apparent race-related or race-correlated difference in the strength of guidance counselor and teacher recommendations is significant. See [id. at 54:6–56:2; DD10 at 67–68]. The Court reiterates that to the extent that disparities in the personal ratings are explained by teacher and guidance counselor recommendation letters, Harvard's admissions officers are not responsible for any race-related or race-correlated impact that those letters may have.

Additionally, correlation between race and the personal and school support ratings does not clearly demonstrate a causal relationship, given the correlation between race and numerous factors that likely influence teacher and guidance counselor recommendations and admissions officers' evaluation of personal and overall strength. For example, a privileged student and a disadvantaged student with the same academic performance may well not receive similar teacher and guidance counselor recommendations. Similarly, a student that works part time and a student that does not may receive different recommendations even with the same academic performance and without reference to race, but if working outside of school correlates to race and informs teacher, guidance counselor, and admissions officers' evaluation of applicants, the school support and personal ratings may correlate with race, although race might not be the cause of the differential. In other words, race-correlated disparities in personal ratings for applicants who have similar academic qualifications may reflect underlying differences in the backgrounds and experiences of applicants that happen to correlate with race but are not racially motivated. That being said, it is not clear that these sorts of considerations adequately explain the difference

in personal ratings between white and Asian American applicants in Professor Arcidiacono's decile analysis or the similar analysis Professor Card has offered.

Overall, the disparity between white and Asian American applicants' personal ratings has not been fully and satisfactorily explained. Because some of the disparity in personal ratings is due to teacher and guidance counselor recommendations, the issue becomes whether the remaining disparity reflects discrimination. The disparity in personal ratings between Asian American and other minority groups is considerably larger than between Asian American and white applicants and suggests that at least some admissions officers might have subconsciously provided tips in the personal rating, particularly to African American and Hispanic applicants, to create an alignment between the profile ratings and the race-conscious overall ratings that they were assigning. See [PD38 at 33]. It is also possible, although unsupported by any direct evidence before the Court, that part of the statistical disparity resulted from admissions officers' implicit biases that disadvantaged Asian American applicants in the personal rating relative to white applicants, but advantaged Asian Americans over whites in the academic rating.

Further, the Court cannot accurately estimate what portion of the difference in the personal ratings resulted from the strength of the personal qualities that Harvard seeks to measure or from differences in how Asian American applicants are presented to Harvard by high schools relative to other applicants, as opposed to being the effect of implicit biases. Taking account of all the available evidence, it is possible that implicit biases had a slight negative effect on average Asian American personal ratings, but the Court concludes that the majority of the disparity in the personal rating between white and Asian American applicants was more likely caused by race-affected inputs to the admissions process (*e.g.* recommendations or high school

accomplishments) or underlying differences in the attributes that may have resulted in stronger personal ratings.

3. Regression Models of the Academic, Extracurricular, and Overall Ratings

Unlike the personal ratings, the experts agree that the academic and extracurricular variables should be included in the admissions outcome model and that the overall rating should not be included because Harvard acknowledges that it is directly affected by racial identity. See [PD38 at 26; DD10 at 46–47]. Nevertheless, because the profile ratings may all be impacted by race in a very marginal manner, the Court will briefly discuss the econometric models of these variables. Professor Arcidiacono's logistic regression models for the academic, extracurricular, and overall ratings suggest a non-uniform effect of Asian American identity on those ratings. [Oct. 25 Tr. 91:11–92:20, 109:23–110:13; PD38 at 28–33]. The academic and extracurricular ratings models return positive coefficients for Asian American identity, while the overall rating model returns a negative coefficient for Asian Americans (with the exception of disadvantaged Asian American females). See [Oct. 25 Tr. 92:24–94:10, 107:8–13, PD38 at 29, 32–33].

A comparison between the strength of Asian American applicants on the observable characteristics included in Professor Arcidiacono's academic and extracurricular rating models and the coefficients for Asian American groups suggests that Asian Americans have traits, other than their racial identity, that make them likely to score well in academic and extracurricular ratings. [Oct. 25 Tr. 107:8–110:17; PD38 at 32–33]. This implies that the positive coefficients for Asian American identity in the academic and extracurricular ratings models are likely at least partially the result of unobservable characteristics that correlate with race, and Professor Arcidiacono has posited that is indeed likely the cause. [Oct. 25 Tr. 108:24–109:8, 110:14–17]. The Court finds, however, that although omitted variables are likely partially responsible for the positive coefficients for Asian American identity in Professor Arcidiacono's models for the

academic and extracurricular ratings, those coefficients could also partially be the result of slight implicit bias that favors Asian Americans in these areas.

Professor Arcidiacono's model of the overall rating yields negative coefficients for Asian American males and non-disadvantaged Asian Americans females. [PD38 at 29]. This suggests that Asian Americans who are not also disadvantaged females might receive lower overall ratings because of their racial identity relative to similarly-situated white applicants, see [Oct. 25 Tr. 92:20–94:10; PD38 at 29], but the result is subject to substantially the same criticism that Harvard lodges against Professor Arcidiacono's admissions outcome model, namely that Professor Arcidiacono's modeling choices do not fully reflect the actual admissions process and that his decision to exclude ALDC applicants was results-driven. Regardless, the Court finds it unnecessary to delve further into the overall rating disparity because it is the odds of admission, not an apparent disparity in the odds of receiving a high overall rating, that is primarily at issue, and Harvard acknowledges and intends that race may be factored into the overall rating. See [Oct. 18 Tr. 167:17–168:6].

F. Regression Models of Admissions Outcome

As noted supra at Section V.D, both Professors Arcidiacono and Card prepared models of domestic non-transfer applicants' probability of admission to Harvard based on a wide array of variables. [Oct. 25 Tr. 21:18–23:23, 215:12–15; Oct. 30 Tr. 176:18–177:7]. Professor Card's preferred model returns a negative coefficient for Asian American identity (suggesting a lower likelihood of admission), but the relationship is slight, not statistically significant, and is positive (suggesting an increased likelihood of admission) for some class years. [Oct. 30 Tr. 129:9–16,

132:21–134:11; DX685; DD10 at 30].[49] Professor Arcidiacono's preferred model returns a statistically significant negative coefficient for non-ALDC Asian American applicants, which implies a penalty for non-ALDC Asian American applicants relative to non-ALDC white applicants. [Oct. 25 Tr. 115:1–118:10; PD38 at 34].

Professors Card's and Professor Arcidiacono's preferred models differ in the following significant respects: (1) Professor Arcidiacono interacts race and disadvantaged status; (2) Professor Arcidiacono excludes the personal rating from the model; (3) Professor Arcidiacono excludes ALDC applicants; (4) Professor Arcidiacono pooled the 2014–2019 applicant data into a single model with effects for class years, whereas Professor Card used separate year-by-year models and thereby allowed the effect of variables to vary by admissions cycle; and (5) Professor Arcidiacono excludes parental occupation, intended career, and an indicator for whether applicants interviewed with a staff member. See [Oct. 31 Tr. 88:21–91:23; DD10 at 84]. For the reasons discussed below, the Court finds both experts' approaches to be econometrically defensible, but prefers Professor Arcidiacono's approach with respect to interacting race and disadvantaged status and prefers Professor Card's inclusion of ALDC applicants, use of year-by-year models, and inclusion of parental occupation, intended career, and staff interview variables, and finds models with and without the personal rating to be worthy of consideration.

Professor Arcidiacono reasonably interacted race and disadvantaged status. [Oct. 25 Tr. 150:11–19]. This approach is consistent with the approach taken by OIR in response to Dean

[49] Professor Card also modeled the admissions outcomes for two subgroups of Asian Americans: females and applicants from California. He found that Asian American identity within these subgroups returned positive coefficients that were not statistically significant. [Oct. 25 Tr. 154:7–155:3; Oct. 30 Tr. 136:8–137:8]. These models show that to the extent biases influenced the admissions process, those biases were not uniform across the Asian American applicant population.

Fitzsimmons' request and reflects the possibility of some interaction between race and disadvantaged status. See [Oct. 17 Tr. 127:22–129:17; Oct. 25 Tr. 150:11–151:1; PX26]. It was not unreasonable, however, for Professor Card not to interact the selected variables. The inclusion of these interaction terms has only a modest impact on the average marginal effects of Asian American identity generated by the admissions models, and their inclusion alone does not result in Asian American identity having a statistically significant effect when the terms are added to Professor Card's model. [Oct. 31 Tr. 89:11–18; DD10 at 84].

There is a reasonable econometric basis for removing the personal ratings from the admissions models given the possibility that the personal ratings are affected by race. See [Oct. 25 Tr. 91:17–92:1]. Removing the personal rating, however, expands the omitted variable bias because the relationship between race and the personal rating is likely partially reflective of biases external to the Admissions Office, characteristics that are correlated with race, and life experiences that are impacted by race. See supra at Section V.C. Therefore, although the Court believes that including the personal rating results in a more comprehensive analysis, models with and without the personal rating are econometrically reasonable and provide evidence that is probative of the effect of race on the admissions process.

Professor Card's inclusion of ALDCs in the admissions model is preferred by the Court. Although ALDCs benefit from sizable tips owing to their respective statuses as recruited athletes, legacies, dean's or director's list members, or children of faculty or staff, they are evaluated through the same basic admissions process as other applicants and their admission outcomes provide data that is probative of whether Harvard is discriminating against Asian Americans. [Oct. 17 Tr. 203:19–22; Oct. 25 Tr. 30:13–31:3, 233:25–234:3]. Including ALDCs in the model is particularly warranted where they account for approximately 30% of Harvard's

admitted students and therefore provide a significant portion of the datapoints for admitted students. [DX706, DD10 at 38].

Professor Arcidiacono acknowledges that Asian American ALDCs are not discriminated against. See [Oct. 25 Tr. 120:23–126:8]. His corresponding suggestion that only non-ALDC Asian Americans face discrimination in the admissions process is inadequately supported by non-statistical evidence. Further, it does not seem likely that Harvard would discriminate against non-ALDC Asian Americans, but not discriminate against ALDC Asian American applicants or that there would be a race-related explanation for treating the two groups differently, especially given the Court's conclusion based on the testimony of Harvard's admission officers that any race-related discrimination against Asian American applicants relative to white applicants is unintentional. Additionally, the tips that only ALDCs receive, for example for being recruited athletes, can be adequately accounted for through the inclusion of variables for those characteristics. See [Oct. 30 Tr. 157:24–158:14]. Overall, including ALDCs leads to a model that more accurately reflects how the admissions process works and takes into account a larger percentage of the admitted class. In the view of the Court, looking at only a portion of a class or carving out the segments where there is less likely to be discrimination distorts the analysis just as carving out the segments where there is mostly likely to be discrimination would do the same but to the benefit of the other party. [Id. at 166:21–167:20].

For similar reasons, Professor Card's modelling of each individual admissions cycle is preferable to Professor Arcidiacono's pooling of applicants from the six admissions cycles of available data. Professor Card's year-by-year approach conforms to the reality that the effect of various characteristics in the admissions process may change slightly between years, as Harvard's institutional interests or admissions policies shift or when the composition of the

applicant pool changes. [Id. at 167:25–170:15]; see, e.g., [DX703; DX704]. Further, modeling each annual admission cycle independently recognizes that having a class that is 30% African American one year and 0% the next is not the same as having 15% each of those years. Professor Arcidiacono pooled the admissions cycles to achieve a more precise estimate of the effect of Asian American racial identity, but Professor Card's model achieves a lower standard error, which is an indication of the precision of the model. [Oct. 30 Tr. 172:21–175:18; DD10 at 45].

Professor Arcidiacono omitted intended career, staff interview indicator, and parental occupation from his model. [Oct. 25 Tr. 145:21–148:12]. The Court prefers a model that includes these variables because they play a role in the admissions process. [Oct. 26 Tr. 8:25–9:21, 10:17–11:6; Oct. 31 Tr. 9:3–7]. Further, these variables correlate with race and therefore create a significant potential for omitted variable bias if excluded. [Oct. 31 Tr. 10:16–18, 11:15–12:21, 21:19–22:14; DX677; DX681; DD10 at 54]. Professor Arcidiacono excluded these variables primarily because of data issues, including unexplained year-to-year fluctuations in the distribution of parental occupation and intended career categorizations. [Oct. 25 Tr. 145:21–148:12; DD10 at 50–52, 56]. As examples, numerous parents who were categorized as having low-skill jobs for the class of 2014 would likely have been categorized as being self-employed for the class of 2015, and there is a substantial decrease in the number of parents categorized as unemployed among applicants to the class of 2017 versus the class of 2018. [Oct. 25 Tr. 146:4–147:9; DD10 at 51–52]. Although the data for parental education and intended career are not as consistent year-to-year as would be ideal, including the variables is preferable because their exclusion results in omitted variable bias that exaggerates the effect of race that is implied by the models. [Oct. 30 Tr. 146:18–147:6; DX695; DD10 at 35]. Professor Card's model deals

effectively with data categorization inconsistencies by treating each admission cycle separately, and SFFA has not shown that the data is unreliable within any admissions cycle. [Oct. 30 Tr. 169:12–24]. This data might well need to be excluded if using one data pool for all admission years, but there is no need to exclude it when modeling admissions decisions year-by-year.

Professor Card included a staff interview indicator variable, while Professor Arcidiacono excluded the indicator based on his conclusion that the score from an interview should matter, not whether an applicant was interviewed. [Oct. 25 Tr. 148:13–18]. Interviewing with an Admissions Office staff member seemingly affects an applicant's probability of admission to Harvard, perhaps because it provides an applicant with a potential advocate in the Admissions Office irrespective of how well the applicant performs in that interview, and the Court concludes that including the indicator variable is preferable. See [Oct. 31 Tr. 25:7–27:8].

The Court finds that Professors Card and Arcidiacono each presented a viable econometric model but will rely on Professor Card's model with the interaction terms utilized by Professor Arcidiacono and then consider results both with and without the personal rating variable included. This model would return a slightly negative coefficient and average marginal effect for Asian American identity, but that coefficient is only statistically significant in the version of the model where the personal rating variable is excluded. See [Oct. 30 Tr. 146:6–17; DD10 at 35]. In fact, without any modifications, Professor Card's model returns a slight positive average marginal effect for Asian American identity in three of the six admission cycles that the experts analyzed. [DD10 at 30]. Whether the personal rating variable is included or not, the lower probability of admission to Harvard that appears associated with Asian American identity is slight, with an average marginal effect of Asian American racial identity on admissions probability that is well below minus one percentage point (*i.e.* closer to zero). The model does

not demonstrate any intent by admissions officers to discriminate based on racial identity, and the implied effect is so slight that it is possible that the coefficient would be positive, at least with the personal rating included, if the model was better able to account for unobserved factors. It is also possible that the negative coefficient and average marginal effect reflect a very slight implicit bias that could have played a modest role in lowering Asian Americans' admissions probability in some of the 2014–2019 admissions cycles. If so, the effect was so slight that it went unnoticed by careful and conscientious observers within the Admissions Office. The implied effect varies by admissions cycle and, with the personal rating variable included, results in a positive, statistically insignificant effect for the 2019 class year, which suggests, even though the change is not statistically significant, that any implicit biases against Asian Americans dissipated or were eliminated after the Admissions Office was confronted with the allegations at issue here. See [Oct. 30 Tr. 163:22–164:22; DD10 at 41].

G. Absence of Statistical Support for Racial Balancing or Quotas

Harvard does not have any racial quotas and has not attempted to achieve classes with any specified racial composition. [Oct. 18 Tr. 112:1–21, 197:16–19; Oct. 19 Tr. 65:13–25, 197:14–20; Oct. 24 Tr. 123:15–18, 174:10–18, 210:2–9; Nov. 1 Tr. 249:24–250:6]. As discussed supra at Section III.B.4, Harvard evaluates the likely racial composition of its class and provides tips to applicants to help it achieve a diverse class. Those tips are necessary to achieve a diverse class given the relative paucity of minority applicants that would be admitted without such a tip. In trying to assure a diverse class, when reviewing an individual applicant, the admissions officers consider various qualitative and numerical indicators of diversity, including the racial composition of the group of students who are expected to be admitted.

Although Harvard tracks and considers various indicators of diversity in the admissions process, including race, the racial composition of Harvard's admitted classes has varied in a

manner inconsistent with the imposition of a racial quota or racial balancing. See [Oct. 31 Tr. 119:10–121:10; DX711]. As *Figures 1* and *2* show, there has been considerable year-to-year variation in the portion of Harvard's class that identifies as Asian American since at least 1980. See [DX711 at 2; DD10 at 100–101].

***Figure 1*: Percent Change in Year-to-Year Admittance of Students by Race. [DD10 at 100; DX711].**

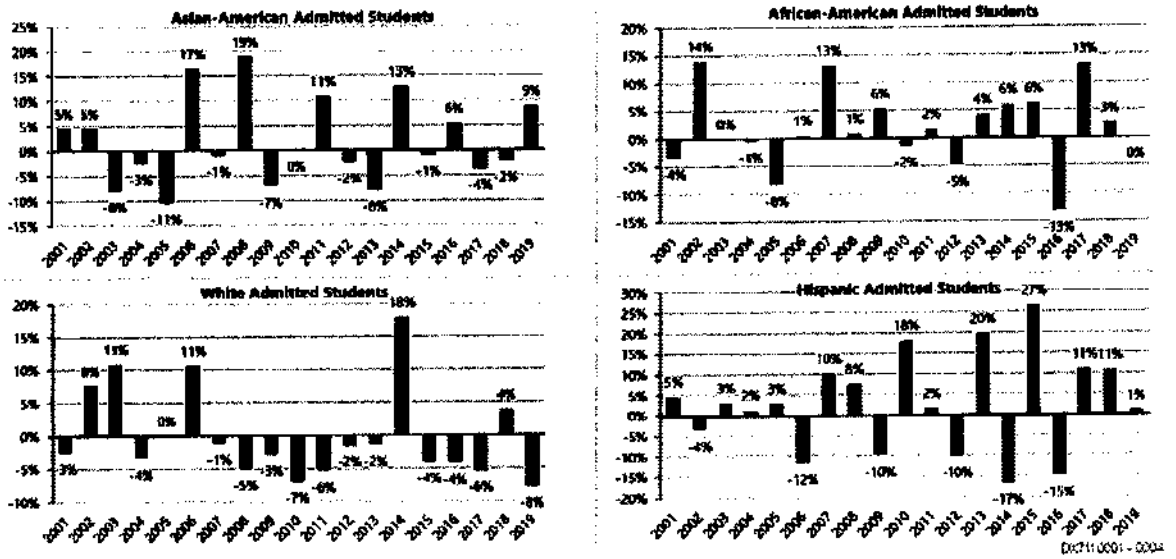
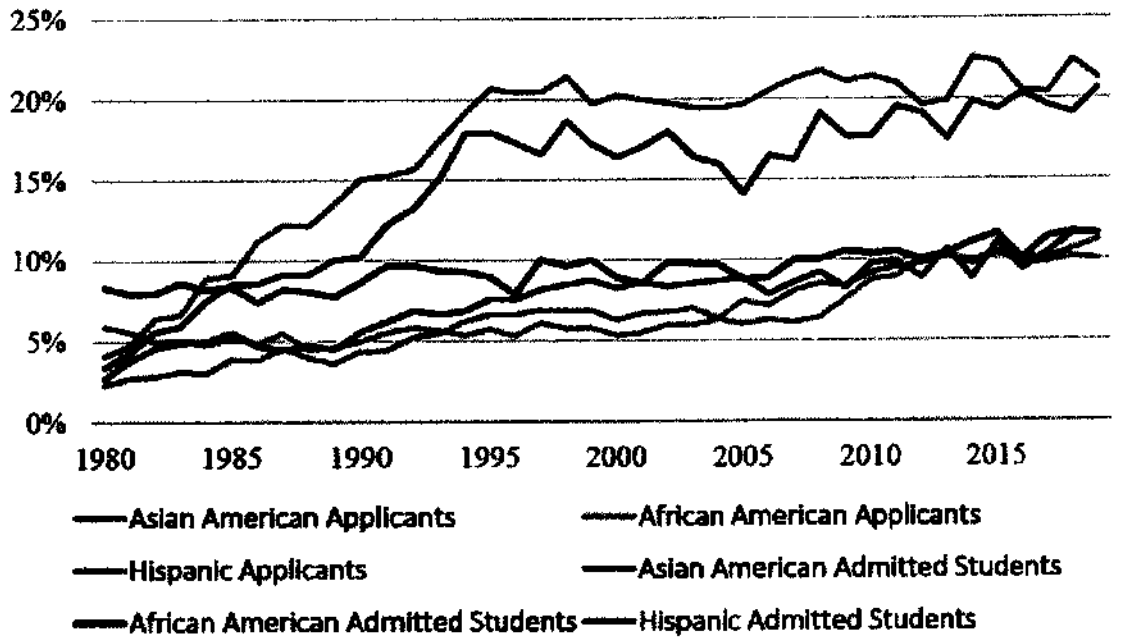


***Figure 2*: Percent of Applicants and Admitted Students by Race 1980 through 2019. [DD10 at 100; DX713].**



The demographic makeup of Harvard's classes from 1980 through 2019 show significant changes to the composition of each class, and there has been more year-to-year variation in admitted Asian American applicants than year-to-year variation in the number of applicants. [DX713; DD10 at 104]. From 1980 to 2019, Asian Americans went from 4.1% of applicants and 3.4% of admitted students to 21.2% of applicants and 20.6% of admitted students. [DX713]. Since 1980, the Asian American proportion of the admitted class has increased roughly five-fold, and since 1990 the Asian American proportion of the admitted class has increased roughly two-fold. [Id.]. SFFA did not offer expert testimony on racial balancing and instead asserts that the claim can be resolved without any expert analysis. [Oct. 25 Tr. 202:6–203:1; ECF No. 627 ¶ 84].

The Court finds that the statistical evidence shows that Harvard has not imposed racial quotas or otherwise engaged in impermissible racial balancing.

VI. FINDINGS OF FACT: RACE-NEUTRAL ALTERNATIVES

Under the strict scrutiny rubric established by the Supreme Court, Harvard may consider race to achieve diversity only if there is no workable race-neutral alternative to the consideration of race to ensure a sufficiently diverse class. SFFA introduced models on race-neutral alternatives through an expert, Richard Kahlenberg.[50] The Smith Committee's conclusions and the analysis performed by Professor Card and Mr. Kahlenberg all convincingly establish that no workable race-neutral alternatives will currently permit Harvard to achieve the level of racial diversity it has credibly found necessary for its educational mission.

Harvard's race-conscious admissions policy has a significant impact on the racial diversity of its class, with African American and Hispanic applicants being the primary beneficiaries in terms of their admissions probabilities. The policy of considering applicants' race may improve the admission chances of some Asian Americans who connect their racial identities with particularly compelling narratives, but overall results in fewer Asian American and white students being admitted. See [Oct. 31 Tr. 127:22–128:15]. Any race-neutral alternative will be deemed workable only if it would allow Harvard to achieve the benefits that it derives from its current degree of diversity within a given class year, while also being practicable, affordable, and not requiring a material decline in academic quality or any of the other measures of excellence valued by Harvard.

[50] Mr. Kahlenberg is a senior fellow at The Century Foundation, where he has worked for the last twenty years. He graduated from Harvard College in 1985 and received a juris doctor from Harvard Law School in 1989. Mr. Kahlenberg has published works on numerous socioeconomic subjects, including the use of race-neutral alternatives in college admissions. [Oct. 22 Tr. 7:15–12:10].

Currently, although always considered in conjunction with other factors and metrics, race is a determinative tip for approximately 45% of all admitted African American and Hispanic applicants. See [DX721 at 1]. At least 10% of Harvard's admitted class, including more than one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard's race-conscious admissions process. See [Oct. 31 Tr. 127:22–129:2; DX721; DD10 at 107].[51] In the absence of any other adjustments to Harvard's admissions policy, eliminating consideration of race would cause the African American representation at Harvard to decline from approximately 14% to 6% of the student population and Hispanic representation to decline from 14% to 9%. [Oct. 31 Tr. 126:21–129:2]. Over the course of four years, the number of African American and Hispanic students at Harvard would fall by nearly 1,000 students. See [Oct. 25 Tr. 167:20–168:4; PD38 at 39].

The Court notes that Harvard's current admissions policy does not result in under-qualified students being admitted in the name of diversity—rather, the tip given for race impacts who among the highly-qualified students in the applicant pool will be selected for admission to a class that is too small to accommodate more than a small percentage of those qualified for admission.[52] Therefore, removing attention to race, without a workable race-neutral alternative,

[51] The econometric models fail to fully reflect the number of students for whom race is determinative. Among other factors, the increased Asian American representation that the models project would likely not include all Asian American students who are admitted under the current race-conscious approach. In the total absence of a race-conscious policy, some Asian American applicants who excelled on academic, athletic, or other metrics of success would likely replace some number of Asian American students from disproportionately less advantaged backgrounds who tell compelling stories about their personal identities that require an understanding of their race. See, e.g., [Oct. 18 Tr. 52:19–56:21; Oct. 29 Tr. 147:6–152:12].

[52] Moreover, other tips in the admissions process, like so many facets of modern-day American life, disproportionately benefit individuals in the majority and more affluent group.

would cause a sharp decline in the percentage of African American and Hispanic students at Harvard without resulting in a particularly significant increase in the overall academic strength of the class.[53]

The parties' experts, as well at the Smith Committee, examined numerous race-neutral alternatives to determine if they, alone or in combination, could conceivably limit the decline in racial diversity in Harvard's class in the absence of a race-conscious admissions policy. See [Oct. 22 Tr. 18:1–11; Oct. 31 Tr. 129:3–130:4; PX316 at 6–18]. These alternatives included eliminating early action, tips for ALDC applicants, the practice of offering deferred admissions or z-listing applicants, and consideration of standardized test scores, as well as expanding recruiting and partnership efforts, admitting more transfer students, utilizing a place-based quota system, and expanding preferences for economically disadvantaged applicants. [Oct. 22 Tr. 33:15–49:8; Oct. 31 Tr. 130:5–130:23, 133:10–20; PX316 at 6–18; DD10 at 109]. As more fully set forth below, Harvard has demonstrated that none of these approaches, individually or in combination, would allow it to reach the level of racial diversity that it believes necessary to achieve its educational mission without significant consequences to the strength of its admitted class.

A. Eliminating Early Action

In an earlier effort to both increase diversity and level the admissions playing field for less advantaged applicants, Harvard eliminated its early action program for the classes of 2012 through 2015, believing that early action disproportionately benefitted affluent applicants and hoping that other elite colleges would follow its lead, which they largely did not. [PX316 at 15].

[53] Similarly, removing the tips for recruited athletes would result in a sharp decline in admitted athletes, removing the tips for children of faculty or staff would reduce their representation, and eliminating the tip for legacies would decrease their numbers as well. In other words, removing any tips changes the make-up of the admitted class, but not necessarily its overall quality.

This actually had the unintended consequence of decreasing matriculation rates among some categories of African American and Hispanic applicants, apparently because the most qualified of those prospective applicants were choosing to attend other colleges that offered early admission or early decision. [Oct. 23 Tr. 156:17–157:22; DX39 at 2–4]. As a result, Harvard reinstituted an early action program for the class of 2016. [PX316 at 15; DX39 at 4]. Harvard's actual experience is more probative of the probable result of such a change than econometric prognostications and shows that the likely effect of removing early action on African American and Hispanic enrollment is negative or near zero. [Oct. 31 Tr. 133:20–135:24; DX728 at 3]. As such, eliminating early action does not present a viable race-neutral option for achieving student body diversity.

B. ALDC Tips

Preferences or tips for ALDC applicants and related deferred admissions also disproportionately benefit socioeconomically advantaged applicants. See [PX316 at 16–17]. Although removing tips for these applicants would improve socioeconomic diversity at Harvard and increase the number of Asian American students, it would not significantly increase the number of African American and Hispanic students if implemented alone. [Oct. 31 Tr. 131:8–133:8; DX720; DD10 at 112]. Professor Card reasonably estimated that eliminating tips for race and ALDC status, along with eliminating deferred admissions, would cause African American enrollment to decline from 14% to 5% and Hispanic enrollment to decline from 14% to 9%. [Oct. 31 Tr. 132:15–133:19; DX720; DD10 at 112]. Eliminating tips for ALDC applicants would have the effect of opening spots in Harvard's class that could then be filled through an admissions policy more favorable to non-white students, but Harvard would be far less competitive in Ivy League intercollegiate sports, which would adversely impact Harvard and the student experience. [Oct. 30 Tr. 40:12–41:21]. Eliminating tips for legacies, applicants on the

dean's and director's interest lists, and children of faculty or staff would also come at considerable costs, and would adversely affect Harvard's ability to attract top quality faculty and staff and to achieve desired benefits from relationships with its alumni and other individuals who have made significant contributions to Harvard. [Oct. 23 Tr. 164:19–167:2; Oct. 30 Tr. 20:17–21:8, 35:25–43:13; PX316 at 16–17].

Therefore, eliminating tips for ALDC applicants and related deferred admissions practices is not alone an adequate race-neutral alternative given the limited probable impact on racial diversity and the likely adverse consequences for Harvard and student life. The Court notes that reasonable minds can differ on the importance of college athletics, alumni relations, and admitting the children of faculty and staff, but takes no position on these issues other than to note that these are topics best left to schools to figure out for themselves. As relevant here, eliminating these tips or preferences is largely unrelated to the goal of diversity or the issue of race, and in any event, is not a race-neutral alternative that would obviate the need for considering race in admissions.

C. Augmenting Recruiting Efforts and Financial Aid

Harvard looked at expanding recruiting and partnership efforts and providing more financial aid as a way to increase diversity without having to consider race in the application process. The college already makes significant outreach efforts and provides exceptionally generous financial aid. [PX316 at 9–11]. In addition to the HFAI and UMRP programs discussed supra at Section III.A.2, the Smith Committee's report describes additional community-based outreach efforts and considered but rejected the potential for pipeline programs that are inconsistent with Harvard's recruitment goals. [PX316 at 10]. Harvard has already reached, or at least very nearly reached, the maximum returns in increased socioeconomic and racial diversity that can reasonably be achieved through outreach and

reducing the cost of a Harvard education. See [Oct. 31 Tr. 158:15–161:2; PX316 at 10–11; DD10 at 131–133].

D. Increasing Diversity by Admitting More Transfer Students

Harvard might also increase diversity by admitting, as transfers, students who might not have applied or been accepted to Harvard at the outset. For example, it is conceivable that if Harvard expanded its efforts to attract and admit transfer students, it might be able to admit some transfer applicants who did not have the perspective to see attending Harvard as an option or who excelled during two years at another college, thereby demonstrating an academic prowess that might not have been evident right out of high school. Despite the facial appeal of these scenarios, Harvard has demonstrated that accepting an increased number of transfer applicants is also not a viable race-neutral alternative because these applicants are, on average, less diverse and less qualified than applicants to its freshman class. [Oct. 31 Tr. 146:24–149:21; DX730; DD10 at 124–125]. Further, Harvard operates as a four-year residential college and the number of transfer students that it can admit is constrained by the number of available beds, meaning that there is not room for transfer students unless other class members drop out. [PX316 at 12–13].

E. Eliminating Standardized Testing

Eliminating consideration of standardized testing is likewise not an adequate race-neutral alternative to considering race in the admissions process. Harvard considers standardized tests to be reflective of academic or intellectual strength and uses SAT and ACT test scores in assigning academic ratings. [PX721 at 4]. Harvard has demonstrated that eliminating consideration of standardized test scores in the admissions process would lead to a reduction in the academic qualifications of its admitted class, at least as measured by the criteria Harvard presently uses. [Oct. 31 Tr. 143:23–146:11; DX722 at 3; DD10 at 121]. As the Smith Committee found, standardized tests are "imperfect measures," but they can be a useful metric when considered in

tandem with an applicant's background. [PX316 at 18]. Although eliminating consideration of standardized test scores might improve diversity slightly, the effects on the academic strength of Harvard's admitted class makes eliminating the consideration of standardized test scores an unviable race-neutral alternative. See [Oct. 31 Tr. 153:4–154:17; DX723 at 3].

F. Place-Based Quotas

The Smith Committee considered place-based quotas, such as admitting the top student from each high school class or from each zip code. [PX316 at 11–12]. Harvard's evaluation and rejection of these ideas reflects the reality that Harvard is far too selective and high schools and zip codes in the United States too numerous for such an admissions policy to be even close to workable. [Oct. 22 Tr. 107:6–108:2].

Harvard could achieve somewhat improved racial diversity in the absence of a race-conscious admissions policy by increasing the tips for students from disadvantaged economic backgrounds and areas. Under any reasonable implementation, however, this race-neutral approach would result in fewer African Americans than are admitted under the current system and would also come at the expense of traditional measures of academic strength, such as SAT scores. See [Oct. 22 Tr. 125:6–10, 126:17–127:23; PD27; PD29; PD31; PD33].

Mr. Kahlenberg proposes a quota system where Harvard commits to enrolling students from broad neighborhood clusters constructed to generate more representation from racially diverse and disproportionately economically disadvantaged areas, [Oct. 22 Tr. 35:23–36:16], but given the logistical challenges of such an arrangement coupled with the questionable legality of any sort of quota system, as discussed infra at Section VII.G, place-based quotas are not an available and workable race-neutral alternative.

G. SFFA's Proposed Combinations of Various Race-Neutral Alternatives

Mr. Kahlenberg presented four simulations, labeled A, B, C, and D, that model the combined effect of various allegedly race-neutral alternatives on Harvard's class. [Oct. 22 Tr. 16:7–14, 29:20–47:6]. The simulations, using the admissions models developed by Professors Card and Arcidiacono with the models' implied racial tips removed, project the diversity of Harvard's class with various modifications to the models that are aimed at increasing racial diversity by increasing the tip given to economically disadvantaged applicants, further preferencing applicants from disadvantaged geographic areas, and by removing preferences currently used in Harvard's admissions process for ALDC students or LDC students that disproportionately benefit white applicants. [Oct 22 Tr. 27:11–27:7].[54] These simulations show that Harvard could achieve a significant increase in socioeconomic diversity and an increase in the total representation of African American, Hispanic and other (*i.e.* non-white and non-Asian American) students in its classes but only if it abandoned all preferences for legacies, applicants on the dean's or director's interest lists, and children of faculty or staff, and implemented a sizable tip based on economic and geographic indicators of disadvantage. See [PD27; PD29;

[54] In all of the simulations, the implied effects of tips given to LDCs are removed. [Oct. 22 Tr. 34:17–35:9; PD32]. Simulation B, which utilizes Professor Card's model and simulation, projects the effect of removing preferences for recruited athletes as well. [Id. at 41:3–42:9]. The simulations all impose some form of a socioeconomic and/or geographic status boost. [PD32]. Model A expands the boost associated with disadvantaged status such that it is half the magnitude of the tip that the model suggests is currently granted to recruited athletes and forces equal selection of applicants from 33 neighborhood clusters, [Oct. 22 Tr. 35:23–36:16]; Model B boosts for socioeconomically disadvantaged students based on census tract income, [id. at 41:20–42:1]; and Simulations C and D modify the socioeconomic and census tract boost used in Simulation B and consider whether an applicant attended a disadvantaged high school, [id. at 43:7–44:16]. Models A and C also remove the admissions models' implied preference for early action applicants, while models B and D include that preference. [Id. at 42:2–3, 46:10–12; PD32].

PD31; PD33]. For example, Simulation D projects that 49% of Harvard's class would be from an economically disadvantaged background, relative to the 12% in the class of 2019. [PD33].

Mr. Kahlenberg's changes to the admissions policy would come at significant costs. In addition to the loss of benefits provided by tips for ALDCs or LDCs, the simulations show a 53 to 71-point decline in average SAT scores. [PD27; PD29; PD31; PD33]. These declines in average SAT score would be associated with more significant declines in the expected strength of Harvard's class across the profile ratings, with the amount of the expected decline varying depending on the simulation selected. For example, under Simulation C, the portion of the admitted class achieving a 1 or 2 in each profile rating falls by between 13% and 26%. [DX729 at 11; DD10 at 141]. The simulations also imply substantial changes to the academic interests of Harvard's admitted classes that would pose administrative and staffing challenges. [DX729]. For example, Mr. Kahlenberg's models would likely lead to more students being admitted who indicated an intended concentration in engineering and fewer admitted students who intend to concentrate in the humanities, which would likely require Harvard to expand and contract its academic programs accordingly.

Finally, and perhaps most significantly for present purposes, Mr. Kahlenberg's simulations uniformly suggest that African American representation in Harvard's incoming class would fall nearly one-third to approximately 10% of the class. [Oct. 22 Tr. 127:16–23]. In order to achieve, without race-conscious policies, comparable numbers of African American students in its admitted classes to those Harvard currently achieves, Harvard would likely need to eliminate all ALDC preferences, eliminate consideration of standardized tests, significantly expand the tip for disadvantaged applicants, and find a way to increase the number of disadvantaged applicants so that more of those disproportionately minority applicants could be

admitted. [Oct. 31 Tr. 153:4–154:3; DX723 at 1]. These changes, even assuming they could be achieved, would result in a significant decline in the strength of Harvard's admitted classes across multiple dimensions, including its potential for academic and scholarly achievement. See [Oct. 31 Tr. 154:2–24; DX723 at 3; DD10 at 127].

Harvard plausibly concludes that reshaping its incoming classes in this way would have negative effects on Harvard's attractiveness to potential students, adversely affect the educational experience at Harvard generally, and that the resulting decrease in the number of African American students would exacerbate "feelings of isolation and alienation among racial minorities in Harvard's community." See supra at Section III.A.1; [PX316 at 8].

The Court therefore concludes that Harvard has demonstrated that there are no workable and available race-neutral alternatives, singly or taken in combination, that would allow it to achieve an adequately diverse student body while still perpetuating its standards for academic and other measures of excellence. This conclusion is corroborated by the work of the experts retained by both sides, none of whom have proposed alternatives that would allow Harvard to meet its diversity goals while not unduly compromising on its other legitimate institutional objectives.

VII. CONCLUSIONS OF LAW

A. Overview

The Court first affirms its previously expressed view that SFFA has standing and then turns to SFFA's four pending Title VI claims: impermissible racial balancing (Count II), failure to use race merely as a "plus factor" (Count III) the availability of race-neutral alternatives (Count V), and intentional discrimination (Count I). Ultimately, the Court finds that Harvard has met its burden of showing that its admissions process complies with the principles articulated by

the Supreme Court in Fisher II, 136 S. Ct. at 2208, and concludes that judgment must issue for Harvard on each of the remaining claims.

B. SFFA Has Standing

The constitutional extent of federal court jurisdiction is limited by Article III, which provides that "judicial power" extends to "Cases" and "Controversies" that, *inter alia*, arise "under this Constitution [or] the Laws of the United States." U.S. Const. Art. III § 2, cl. 1. "Over the years, [Supreme Court] cases have established that the irreducible constitutional minimum of standing contains three elements:" (1) "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations and modifying punctuation omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Id.

Under the doctrine of associational standing, "an association may have standing solely as the representative of its members even in the absence of injury to itself, in certain circumstances." Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 10 (1st Cir. 1986). As the Supreme Court has held:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

During this litigation, SFFA demonstrated that its members included individuals who had standing to pursue this litigation on their own, that this litigation was germane to SFFA's purpose, and that the injunctive relief SFFA seeks does not require the participation of those members in this lawsuit. See Students for Fair Admissions, 261 F. Supp. 3d at 110–11. Harvard argued at the summary judgment stage that the case had become moot because the SFFA members who the Court found had individual standing were no longer participating in the college admissions process or seriously interested in transferring. "Mootness usually results when a plaintiff has standing at the beginning of a case, but, due to intervening events, loses one of the elements of standing during litigation . . . ." Wild Earth Guardians v. Pub. Serv. Co. of Colo., 690 F.3d 1174, 1182 (10th Cir. 2012) (citing Arizonans for Official English v. Arizona, 520 U.S. 45, 68 n.22 (1997)). At summary judgment, the Court found that "Harvard ha[d] not established that the case ha[d] become moot based on the [members'] alleged disinterest in transferring." Students for Fair Admissions, 346 F. Supp. 3d at 191 (D. Mass. 2018). Harvard now asserts that the Court should have applied a more stringent standard, including requiring SFFA to show that its members control its conduct and possess certain "indicia of membership." [ECF No. 619 ¶¶ 326–30]. Harvard's standing arguments are preserved for appeal.

C. The Supreme Court and Race-Conscious Admissions

Although this Court, as it must, relies principally on the Supreme Court's most recent guidance as set forth in Fisher II, a brief synopsis of the case law which culminated in Fisher II follows.

The Supreme Court directly confronted the issue of affirmative action or race-conscious admissions in the context of higher education for the first time in Regents of University of California v. Bakke, 438 U.S. 265 (1978) (plurality opinion). In that case, the Supreme Court struck down an admissions policy at the University of California at Davis Medical School

pursuant to Title VI and the Equal Protection Clause. Bakke, 438 U.S. at 271 (1978). At that time, the Medical School admitted most of its minority students through a "special admissions program" that filled 16 of the class' 100 spots with economically or educationally disadvantaged applicants who were members of a minority group. Id. at 272–75. White applicants could compete for 84 of the seats in the Medical School's class, while all 100 seats were potentially open to minority students. Id. at 289.

Justices Brennan, White, Marshall, and Blackmun would have found Title VI coextensive with the Equal Protection Clause and upheld the medical school's policy on the basis that the government may use race to remedy disadvantages to minorities caused by past racial prejudice. Id. at 355, 324–79 (concurring in part and dissenting in part). Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist would have found the special admissions program in violation of Title VI, irrespective of the Equal Protection Clause. Id. at 408–21. Justice Powell, who announced the judgment of the Supreme Court, agreed with Justices Brennan, White, Marshall, and Blackmun that Title VI proscribes only those racial classifications that would violate the Equal Protection Clause, but unlike his fellow justices, concluded that diversity was an asserted state interest that could withstand strict scrutiny and that to satisfy strict scrutiny, the medical school's approach to diversity had to "encompass[a broad] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Id. at 315. Although no majority agreed on a particular rationale, the Supreme Court determined that the medical school's special admissions program was unconstitutional because it involved "the use of an explicit racial classification" that told "applicants who are not Negro, Asian, or Chicano that they [were] totally excluded from a specific percentage of the seats in an entering class." Id. at 319.

Nevertheless, a majority of the Supreme Court believed that race could be used in higher education admissions, and it was understood that Justice Powell's opinion in Bakke permitted the use of race or ethnic background as a "plus" factor to further the goal of diversity in education. Justice Powell attached the Harvard College Admissions Program as an appendix to his opinion in Bakke and used it as a basis to conclude that the "assignment of a fixed number of places to a minority group is not a necessary means toward" diversity. Id. at 316, 321–24. In contrast with Harvard's admissions process, which purported to treat "each applicant as an individual in the admissions process" and did not foreclose applicants from competing for the last available seat "simply because he was not the right color or had the wrong surname," id. at 318, the "fatal flaw" in the medical school's "preferential program" was its "disregard of individual rights," id. at 320.

Twenty-five years later, the Supreme Court revisited the subject of racial preferences in higher education admissions in a pair of cases concerning the University of Michigan's Law School and its College of Literature, Science, and the Arts. In Grutter v. Bollinger, 539 U.S. 306 (2003), the Supreme Court concluded that the admissions process at the University of Michigan Law School was constitutionally permissible. 539 U.S. at 325. The law school considered applicants with a focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them. Id. at 315. Admissions officials were required to consider all the information available in an applicant's file, including a personal statement, letters of recommendation, undergraduate grades, admissions test scores, and an essay describing the ways the applicant would contribute to the life and diversity of the law school. Id. at 315. While not restricting the types of diversity eligible for consideration or defining diversity solely in terms of racial or ethnic status, the law school was

committed to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against." Id. at 316.

In deciding Grutter, the Supreme Court clarified that strict scrutiny applies to the use of race in college admissions, agreed that the law school had a compelling interest in obtaining the educational benefits that flow from a diverse student body, and concluded that the law school's race-conscious admissions process was sufficiently narrowly tailored. Id. at 333–34. The Supreme Court found that the law school's goal of "enroll[ing] a critical-mass of minority students," did not run afoul of the requirement that a school not attempt to attain "some specified percentage of a particular group merely because of its race or ethnic origin," which would "amount to outright racial balancing" and be "patently unconstitutional." Id. at 329–30 (quoting Bakke, 438 U.S. at 307). Instead, as distinct from a quota, the concept of "critical mass [was] defined by reference to the educational benefits that diversity is designed to produce," including racial understanding, breaking down stereotypes, advancing learning outcomes, and preparing students for a diverse workforce and society. Id. at 330. The Supreme Court noted that the law school's admissions program bore the hallmarks of a narrowly tailored plan: truly individualized consideration including the use of race in a "flexible, nonmechanical way," no quotas or separate admissions tracks for members of certain racial groups, and no insulating "applicants who belong to certain racial or ethnic groups from the competition for admission." Id. at 334.

In upholding the law school's admissions process in Grutter, the Supreme Court again approved of "the Harvard plan," as described by Justice Powell in Bakke. See id. at 335. Like Harvard, the University of Michigan Law School did not have a "quota," meaning "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" Id. (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989)

(plurality opinion)). Rather, the law school pursued a "permissible goal" that "require[d] only a good-faith effort to come within a range demarcated by the goal itself," and "permit[ed] consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'competes with all other qualified applicants.'" Id. (punctuation omitted) (first quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986) and then quoting Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 638 (1987)). The Court noted that the Harvard plan, previously endorsed by Justice Powell in Bakke, "certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind," but it reiterated that Justice Powell had "flatly rejected the argument that Harvard's program was 'the functional equivalent of a quota' merely because it had some 'plus' for race, or gave greater 'weight' to race than to some other factors, in order to achieve student body diversity." Id. (quoting Bakke, 438 U.S. 317–18, 323).

Further, like the Harvard plan, Michigan Law's admissions process was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." Id. (quoting Bakke, 438 U.S. at 317). Although race was given substantial weight in the admissions process, the law school also considered "the broad range of qualities and experiences that may be considered valuable contributions to student body diversity," including fluency in several languages, a history of overcoming personal adversity and family hardship, exceptional records of extensive community service, and successful careers in other fields, and "actually [gave] substantial weight to diversity factors besides race." Id. at 338.

While race may have been "'outcome determinative for many members of minority groups[]' who do not fall within the upper range of LSAT scores and grades," that possibility

was not dispositive given that "the same could be said of the Harvard plan discussed approvingly by Justice Powell in Bakke." Id. at 338 (quoting Grutter, 539 U.S. at 389 (Kennedy, J., dissenting)). The Supreme Court noted in Grutter that "all underrepresented minority students admitted by the Law School [had] been deemed qualified," although minority applicants were "less likely to be admitted in meaningful numbers on criteria that ignore[d]" race and experiences with racial inequality, which were of "particular importance to the Law School's mission." Id.

On the same day the Supreme Court decided Grutter, it held in Gratz v. Bollinger, 539 U.S. 244 (2003), that the admissions process at the University of Michigan College of Literature, Science, and the Arts violated Title VI and the Equal Protection Clause. Gratz, 539 U.S. at 275. The University of Michigan admitted or rejected applicants to the College of Literature, Science, and the Arts based on the number of points that an applicant scored under a rubric that offered points for high school GPA, standardized test scores, the academic strength of the applicant's high school, the applicant's high school curriculum, in-state residency, alumni relationship, personal essay, and other achievements. Id. at 255. Underrepresented minority applicants received an additional 20 points scored in a "miscellaneous" category which provided a significant bump towards the 75 to 100 points that were, depending on the year and the applicant's in-state residency status, generally required for admission. Id. at 255–56, & n.8. The Supreme Court in Gratz concluded that the admissions policy was impermissible under Justice Powell's opinion in Bakke because giving every underrepresented minority applicant 20 points did not provide the necessary "individualized consideration" and instead had "the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant." Id. at 271–72 (quoting Bakke, 438 U.S. at 317). The university's use of

race was therefore not narrowly tailored to achieve the asserted compelling interest in diversity and thus violated the Equal Protection Clause and Title VI. Id. at 275–76.

More recently, in the Fisher cases, the Supreme Court reviewed the undergraduate admissions program at the University of Texas at Austin ("UT Austin"), which considered race as one factor among many in assigning a personal achievement index which, together with an academic index, determined whether applicants who were not in the top 10% of their Texas high school class would be admitted or rejected. Fisher I, 570 U.S. at 304–07. In 2013 in Fisher I, the Supreme Court vacated the Fifth Circuit's decision upholding UT Austin's admissions program because the appeals court had not properly conducted the strict scrutiny analysis. Id. at 303. The Fifth Circuit had undertaken the narrow tailoring analysis with a degree of deference to the university, presuming that the school had made a good-faith decision to use race and then imposing the burden of rebutting that presumption on the plaintiff. Id. at 311–15. The Supreme Court concluded that no such deference to a university was permitted in undertaking the narrow tailoring analysis. Id.

Following remand, the Fifth Circuit found that UT Austin had demonstrated that the use of race in its admissions program was narrowly tailored to achieve the rich diversity that contributed to UT Austin's academic mission and once again affirmed the district court's judgment that UT Austin's admissions program did not violate the Equal Protection Clause. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 657, 659–61 (5th Cir. 2014). The Supreme Court granted certiorari once more, and in 2016 it affirmed the Fifth Circuit's ruling. Fisher II, 136 S. Ct. at 2214–15.

In Fisher II, the Supreme Court stated the following three controlling principles:

> First, because racial characteristics so seldom provide a relevant basis for disparate treatment, race may not be considered . . . unless the admissions process

> can withstand strict scrutiny. Strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose.
>
> Second, . . . the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper. A university cannot impose a fixed quota or otherwise define diversity as some specified percentage of a particular group merely because of its race or ethnic origin. Once, however, a university gives a reasoned, principled explanation for its decision, deference must be given to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.
>
> Third, . . . no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. A university . . . bears the burden of proving a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense. Though narrow tailoring does not require exhaustion of every conceivable race-neutral alternative or require a university to choose between maintaining a reputation for excellence and fulfilling a commitment to provide educational opportunities to members of all racial groups, it does impose on the university the ultimate burden of demonstrating that race-neutral alternatives that are both available and workable do not suffice.

Id. at 2208 (citations and modifying punctuation omitted).

In applying these principles in Fisher II, the Supreme Court determined that UT Austin had provided a reasoned and principled articulation of concrete and precise goals for its race-conscious admissions program, including destroying racial stereotypes, promoting cross-racial understanding, preparing the student body for an increasingly diverse workforce and society, cultivating leaders with legitimacy in the eyes of the citizenry, providing an educational environment that fosters the robust exchange of ideas, exposure to different cultures, and the acquisition of the competencies required of future leaders. Id. at 2211. The Supreme Court noted "that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan," but found that UT Austin had engaged in good faith studies from which it reasonably "concluded that '[t]he use of race-neutral

policies and programs ha[d] not been successful in achieving' sufficient racial diversity at the University," and that this position was supported by both statistical and anecdotal evidence. Id. at 2211–12 (quoting the record). Lastly, none of the plaintiff's proposed race-neutral alternatives, or any of the other proposals discussed in the course of the litigation, was shown to have been an "'available' and 'workable' means through which the University could have met its educational goals, as it then understood and defined them" without considering race, because "the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence." Id. at 2213–14 (quoting Fisher I, 570 U.S. at 312).

Most significantly, the controlling principles articulated by the Supreme Court in Fisher II reflect the sum of its holdings in cases concerning higher education admissions over the last forty years and now guide the application of Title VI in this case.

D. Harvard's Admission Program and Strict Scrutiny

Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. In the higher education admissions context, the contours of Title VI claims are largely shaped by the Equal Protection Clause of the Fourteenth Amendment. The "intentional discrimination proscribed by Title VI is discrimination that violates the Equal Protection Clause of the Fourteenth Amendment." Weser v. Glen, 190 F. Supp. 2d 384, 396 (E.D.N.Y.), aff'd, 41 F. App'x 521 (2d Cir. 2002); see Bakke, 438 U.S. at 284, 286 (noting that Title VI reflects a "congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution," but "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); see also

Grutter, 539 U.S. at 343 (adopting reasoning in Bakke); Gratz, 539 U.S. at 276 n.23 ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." (first citing Alexander v. Sandoval, 532 U.S. 275, 281 (2001), then citing United States v. Fordice, 505 U.S. 717, 732, n.7 (1992), and then citing Alexander v. Choate, 469 U.S. 287, 293 (1985))).

Although Harvard is not a state actor, Harvard College is a component of Harvard University which receives federal funds and intentionally provides tips in its admissions process based on students' race. See [ECF No. 570 at 9–10]. Harvard College is therefore subject to the same standards that the Equal Protection Clause imposes upon state actors for the purposes of a Title VI claim. See Students for Fair Admissions, 346 F. Supp. 3d at 192 n.16 ("Harvard does not identify any specific reasons for distinguishing public universities from federally-funded private universities, or explain how the analytical framework would differ for private versus public litigants . . . ."). Under Grutter, "strict scrutiny must be applied to any admissions program using racial categories or classifications." Fisher I, 570 U.S. at 310; see also Grutter 539 U.S. at 326. Because Harvard both accepts federal funds and uses race in making admissions decisions, its admissions program is subject to strict scrutiny.

Harvard argues that the test for a "facially neutral policy" should be applied,[55] but Harvard's admissions process is not facially neutral. Fisher I, 570 U.S. at 307 ("It is . . .

[55] The analysis of a facially neutral policy that has a disparate impact by race is different from the analysis of a policy that admittedly considers race. "In reviewing a uniformly applied facially neutral policy, '[d]etermining whether invidious discriminatory purpose was a motivating factor [in its adoption] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174, 193 (D. Mass. 2018) (quoting Anderson ex rel.

irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny."). Although Harvard's reading procedures do not explicitly preference particular racial groups, Harvard pursues its interest in diversity in part by considering the race of applicants, and its admissions officers may take an applicant's race into account when making an admissions decision even when the applicant has not discussed their racial or ethnic identity in their application. [Oct. 18 Tr. 52:15–53:13; 167:10–168:11].

Harvard's acknowledged consideration of race is unlike a facially neutral policy which requires plaintiffs to prove racial discrimination. Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977) (plaintiffs "failed to carry their burden of proving that discriminatory purpose was a motivating factor" for a rezoning decision that did not explicitly rely on race). Here, the use of race in and of itself is admitted, and the issue becomes whether it is permissible given the justification and the means used to achieve the sought-after diversity—in other words, whether Harvard's use of race survives strict scrutiny. Notably, the Supreme Court has consistently used strict scrutiny when reviewing school admissions programs that consider race.[56]

Dowd v. City of Boston, 375 F.3d 71, 83 (1st Cir. 2004)). Policies that do not explicitly consider race are facially neutral and violate the Equal Protection Clause based on statistical evidence only where they form a clear pattern, unexplainable on grounds other than race. See Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (finding unconstitutional the administration of a facially neutral policy for licensing laundries where permits had been denied to 200 Chinese applicants but granted to all but one of 80-odd others permit applicants who were not Chinese); see also Gomillion v. Lightfoot, 364 U.S. 339 (1960) (finding unconstitutional an alteration to the shape of Tuskegee, Alabama "to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident"). A policy that relies on race at least in part is subject to strict scrutiny regardless of its impact. Therefore, cases like Gomillion v. Lightfoot, 364 U.S. 339, 340–41 (1960) and Yick Wo v. Hopkins, 118 U.S. 356 (1886) are inapposite.

[56] Where a school admissions program is subject to strict scrutiny, the Court understands this to mean that the admissions program in its entirety is subject to strict scrutiny and not just the admissions decisions that involve the students that it seeks to advantage. Here, Harvard presses

Strict scrutiny requires that classifications used by Harvard in its admissions program be narrowly tailored to further a compelling interest.[57] See id. ("Strict scrutiny requires the

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the idea that its admissions program is facially neutral and should be evaluated by a less demanding standard than strict scrutiny. Harvard's admissions program is facially neutral in that it does not explicitly prioritize any particular racial group over any other and permits its admissions officers to evaluate the racial and ethnic identity of every student in the context of his or her background and circumstances. The policy cannot, however, be considered facially neutral from a Title VI perspective given that admissions officers provide tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip. In this circumstance, the standard for facially neutral policies could arguably be applied in evaluating any disparate outcomes as between whites and Asian Americans, keeping in mind that the purpose of strict scrutiny is to ferret out inappropriate racial classifications, and given that there is no suggestion of a racially motivated classification involving whites and Asian Americans. See Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (noting that the purpose of subjecting a racial classification to strict scrutiny is to determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"); Grutter, 539 U.S. at 326 ("We apply strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool." (quotation marks omitted and modifying punctuation omitted)). In the case of a facially neutral policy, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Were that standard to be applied here, the Court would easily find in favor of Harvard on SFFA's claim of intentional discrimination as there has been no showing of discriminatory intent or purpose.

[57] SFFA contends that it may also succeed on its intentional discrimination claim by showing a "pattern or practice" of discrimination through statistically significant evidence of discrimination that then shifts to Harvard the burden of disproving the alleged pattern or practice. [ECF No. 620 ¶¶ 167–76]. This burden shifting framework, which is rooted in the statutory provisions of Title VII, see 42 U.S.C. § 2000e-6, is inapplicable to a non-class, private plaintiff such as SFFA, even assuming that it could apply in a Title VI case. See Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 149–50 (2d Cir. 2012) (holding "that the pattern-or-practice method of proof is not available to nonclass, private plaintiffs in cases such as the one before us" and noting that "all of our sister circuits to consider the question have held that the pattern-or-practice method of proof is not available to private, nonclass plaintiffs"); see also Semsroth v. City of Wichita, 304 Fed. Appx. 707, 715 (10th Cir. 2008); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 967–69 (11th Cir. 2008); Bacon v. Honda of Am. Mfg., 370 F.3d 565, 575 (6th Cir. 2004); Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56 (5th Cir. 2001), abrogated on other grounds by, Health v. Bd. of Supervisors for the S. Univ. of Agric. & Mech. Coll., 850 F.3d 731 (5th Cir. 2017); Gilty v. Vill. of Oak Park, 919 F.2d 1247, 1252 (7th Cir. 1990); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999).

university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'" (quoting Bakke, 438 U.S. at 305)).

1. Compelling Interest

In Bakke, Justice Powell found that student body diversity and the educational benefits that flow from a diverse student body was a compelling interest that could justify the consideration of race. 438 U.S. at 315 ("As the interest of diversity is compelling in the context of a university's admissions program," the remaining question is "whether the program's racial classification is necessary to promote this interest."). Importantly, he went on to explain that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Bakke, 438 U.S. at 315. Twenty-five years later, the Supreme Court, in Grutter, reaffirmed that "student body diversity is a compelling state interest that can justify the use of race in university admissions." Grutter, 539 U.S. at 325; see also Fisher I, 570 U.S. at 308–09 (reiterating that prior cases had found that "obtaining the educational benefits of student body diversity is a compelling state interest" (citation and internal quotation marks omitted)).

Here, for the reasons discussed supra at Section III.A.1, Harvard's interest in student body diversity is substantial and compelling. Its goals are not "elusory or amorphous," and are instead "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." Fisher II, 136 S. Ct. at 2211. These goals include "enhance[ing] the education of [its] students of all races and background [to] prepare them to assume leadership roles in the increasingly pluralistic society into which they will graduate," achieving the "benefits that flow from [its] students' exposure to people of different background, races, and life experiences" by teaching them to engage across differences through immersion in a diverse community, and

"broaden[ing] the perspectives of teachers[, and] thus tend[ing] to expand the reach of the curriculum and the range of scholarly interests of [its] faculty." [PX302 at 1–2, 9]. Harvard's goals are similar in specificity to goals the Supreme Court found "concrete and precise" in Fisher II. See 136 S. Ct. 2211. Racial categorizations are necessary to achieve those goals. In the absence of such categorizations, racial diversity at Harvard would likely decline so precipitously that Harvard would be unable to offer students the diverse environment that it reasonably finds necessary to its mission. See infra at Section VII.G.

2. Narrowly Tailored

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, a university is still "constrained in how it may pursue that end: 'The means chosen to accomplish the [university's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" Shaw v. Hunt, 517 U.S. 899, 908 (1996) (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280 (1986)). Therefore, to satisfy strict scrutiny, "a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that 'encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'" Fisher I, 570 U.S. at 308 (quoting Bakke, 438 U.S. at 315). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." Grutter, 539 U.S. at 327; see also J.A. Croson Co., 488 U.S. at 493 (plurality opinion) ("The purpose of strict scrutiny is to ensure that "the means chosen 'fit' . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.").

"To be narrowly tailored, a race-conscious admissions program cannot use a quota system," Grutter, 539 U.S. at 334, but instead must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," Fisher I, 570 U.S. at 309 (quoting Gratz, 539 U.S. at 337). "In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" Grutter, 539 U.S. at 334 (quoting Bakke, 438 U.S. at 317). Thus, individualized consideration in the context of a race-conscious admissions program is paramount. See id.; Bakke, 438 U.S. at 318 n.52 (identifying the "denial . . . of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

The Court finds that Harvard's admissions program "bears the hallmarks of a narrowly tailored plan" in that "race [is] used in a flexible, nonmechanical way" and considered "as a 'plus' factor in the context of individualized consideration of each and every applicant." Grutter, 539 U.S. at 334. Like the University of Michigan Law School in Grutter, Harvard "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," "this individualized consideration [is afforded] to applicants of all races," and its "race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." Id. at 337–38.

The nature of the allegations in this case however, requires that the analysis go further.[58] Given the "serious problems of justice connected with the idea of preference itself," Bakke, 438

[58] Even though Harvard has shown that its admissions policy must consider race to serve its substantial and compelling interests, the application of strict scrutiny requires a "a further

U.S. at 298, narrow tailoring further requires "that a race-conscious admissions program not unduly harm members of any racial group," Grutter, 539 U.S. at 341; see also Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting) (a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups").

The remaining issue is whether Harvard's admissions program unduly burdens Asian American applicants. Based on Professor Card's model and the Court's preferred model with the personal rating included, there is not a statistically significant difference between the chances of admission for similarly situated Asian American and white applicants. Under this rubric, the lack of a statistically significant penalty against Asian American applicants relative to white applicants suggests that the burden Harvard's race-conscious admissions policy places on Asian American applicants is not undue. However, Professor Arcidiacono's analysis, and the Court's preferred model with the personal rating excluded, imply that Asian American applicants are disadvantaged relative to white applicants. The questions in the context of this case then become: why do Asian American applicants score lower on the personal rating, does it unfairly affect their chances of admission, and if so, is this an undue burden on them when measured against Harvard's compelling interest in diversity?

It is possible that the self-selected group of Asian Americans that applied to Harvard during the years included in the data set used in this case did not possess the personal qualities that Harvard is looking for at the same rate as white applicants, just as it is possible that the self-selected white applicants tend to have somewhat weaker academic qualifications than Asian

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judicial determination that the admissions process meets strict scrutiny in its implementation." Fisher I, 570 U.S. at 311. Strict scrutiny affords a plaintiff "close analysis to the evidence of how the [admission] process works in practice." Id. at 312–13.

American applicants. In other words, assuming Asian American and white applicants have the same academic and extracurricular potential and the same quality of personal attributes as demographic groups, it could be that asymmetric portions of each of these groups apply to Harvard. This would explain why Asian American applicants to Harvard did better than white applicants on the academic and extracurricular ratings and why white applicants to Harvard did better on the personal rating despite the likelihood that Asian Americans are not inherently more intelligent and white applicants are not inherently more personable. This scenario has little evidentiary support, but it, like Professor Card's model and the Court's preferred model including the personal ratings, would result in a finding of no undue burden and a narrowly tailored process that satisfied strict scrutiny.[59]

Alternatively, it may be that there is overt discrimination or implicit bias at work to the disadvantage of Asian American applicants. To begin at the end, the Court sees no evidence of discrimination in the personal ratings save for the slight numerical disparity itself. The statistical disparity is relatively minor and can be at least partially explained by a variety of factors including race-correlated inputs to the rating such as teacher and guidance counselor recommendations. Just as the Court cannot explain the variations in the academic and extracurricular ratings, it cannot definitively explain the difference in the personal ratings, but it

[59] There may be little evidentiary support for this hypothesis because it was not in the interest of either party to develop this scenario. SFFA was wedded to the idea that the Asian American applicants were superior in two profiles and discriminated against on a third, while Harvard was unwilling to overtly argue that Asian American applicants were actually weaker in personal criteria, notwithstanding their stronger average academic performance and Harvard's acknowledgment that Asian American applicants tend to be stronger in their extracurricular pursuits. The Court does not think, however, that demonstrable, disproportionate strength of a racial group in one area necessarily implies that the same racial group should be strong in all areas. If one assumes that raw talent and race are unrelated, it would be unsurprising to find that applicants that excel in one area, tend to be somewhat weaker in other areas.

finds that the disparity is small and reflects neither intentional discrimination against Asian American applicants nor a process that was insufficiently tailored to avoid the potential for unintended discrimination.

Even if there is an unwarranted disparity in the personal ratings, the Court is unable to identify any individual applicant whose admissions decision was affected and finds that the disparity in the personal ratings did not burden Asian American applicants significantly more than Harvard's race-conscious policies burdened white applicants. Further, there is no evidence of any discriminatory animus or conscious prejudice. To the contrary, certain statistics can be interpreted to suggest that Harvard's admissions process unintentionally favored some subsets of Asian Americans, including the ALDCs and certain other discrete demographic groups like disadvantaged Asian females. The most likely causes of these statistical findings, however, is random variation in the admissions process or omitted variable biases, not selective discrimination that favored some Asian Americans and disfavored others.

In terms of burden, it is likely that eliminating consideration of race would significantly disadvantage at least some Asian American applicants, as evidenced by the testimony of the *amici* at trial, all of whom viewed their race or ethnicity as a critical aspect of their life experiences and applications to Harvard. Further, it is vital that Asian Americans and other racial minorities be able to discuss their racial identities in their applications. As the Court has seen and heard, race can profoundly influence applicants' sense of self and outward perspective. See, e.g., [Oct. 29 Tr. 30:23–33:17, 81:16–82:14, 85:24–90:3. 113:23–117:6, 140:9–148:3, 166:19–172:18, 199:18–204:9]. Removing considerations of race and ethnicity from Harvard's admissions process entirely would deprive applicants, including Asian American applicants, of their right to advocate the value of their unique background, heritage, and perspective and would

likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background. Further, throughout this trial, SFFA did not present a single admissions file that reflected any discriminatory animus, or even an application of an Asian American who it contended should have or would have been admitted absent an unfairly deflated personal rating. There thus remains the distinct possibility that a review of the available applications did not turn up a rejected Asian American applicant who was clearly more qualified than the white applicants who were admitted, or an applicant who received an obviously unjustified personal rating. This would strongly suggest that Asian American applicants were not discriminated against relative to white applicants and were therefore not unduly burdened by Harvard's admissions program.

Although the Court evaluates each of SFFA's four counts separately below, it concludes that Harvard's admissions program has been designed and implemented in a manner that allows every application to be reviewed in a holistic manner consistent with the guidance set forth by the Supreme Court. Further, the Court concludes that while the admissions process may be imperfect, the statistical disparities between applicants from different racial groups on which SFFA's case rests are not the result of any racial animus or conscious prejudice and finds that Harvard's admissions program is narrowly tailored to achieve a diverse class and the benefits that flow therefrom.

E. Count II: Harvard Does Not Engage in Racial Balancing

Count II alleges that Harvard engaged in impermissible racial balancing, that is, racial balancing that does not adhere to the parameters established by the Supreme Court. To maintain a permissible race-conscious admissions policy, Harvard may not "impose a fixed quota," Fisher II, 136 S. Ct. at 2208, or otherwise "'assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin,'" as such a practice "would amount

to outright racial balancing, which is patently unconstitutional" under the Equal Protection Clause and therefore prohibited by Title VI. Grutter, 539 U.S. at 329–30 (quoting Bakke, 438 U.S. at 307). The requirement that colleges and universities that accept federal funds abstain from such quota systems stems from the "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)). Quota systems are impermissible because they insulate some "category of applicants with certain desired qualifications from competition with all other applicants." Grutter, 539 U.S. at 334 (quoting Bakke, 438 U.S. at 315); see Wessmann v. Gittens, 160 F.3d 790, 798 (1st Cir. 1998) ("A single-minded focus on ethnic diversity 'hinder[s] rather than further[s] attainment of genuine diversity.'" (quoting Bakke, 438 U.S. at 315)).

Harvard's admissions program intends to treat every applicant as an individual. Harvard does not employ a race-based quota, set aside seats for minority students, or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" Fisher I, 570 U.S. at 311 (quoting Bakke, 438 U.S. at 307). Every applicant competes for every seat. See [Oct. 18 Tr. 112:1–21]. Although a university could run afoul of Title VI's prohibition on quotas even where it stopped short of defining a specific percentage and instead allowed some fluctuation around a particular number, see Parents Involved, 551 U.S. at 712 (striking down school district student allocation plan that allowed for 10% variation from the district's overall white/nonwhite racial balance), Harvard's admissions policy has no such target number or specified level of permissible fluctuation. As Justice Powell recognized in Bakke and as was affirmed in Grutter, "minimum *goals* for minority enrollment . . . [without a] specific

number firmly in mind" did not make Harvard's program "the functional equivalent of a quota merely because it had some 'plus' for race, or gave greater 'weight' to race than to some other factors, in order to achieve student body diversity." Grutter, 539 U.S. at 335 (quoting Bakke, 438 U.S. 317–318, 323). As the Court also held in Grutter:

> The . . . goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted."

Id. at 335–36 (quoting Bakke, 438 U.S. at 323).

SFFA argues that its racial balancing claim is supported by non-statistical evidence, principally that Harvard's admissions leadership too frequently looked at the "one-pagers" that showed the racial composition of admitted applicants or applicants whom Harvard was likely to admit and that Harvard placed students on its "search list" and sent recruitment letters to applicants based on criteria that disfavored Asian American applicants. The recruitment letters, however, did not affect admissions decisions, and SFFA cannot maintain a viable claim for intentional discrimination based merely on the allegation that some limited number of Asian American applicants did not receive certain pieces of marketing mail. See Weser, 190 F. Supp. 2d at 399 (holding that race-conscious recruiting efforts do "not constitute discrimination"); see also Allen v. Ala. State Bd. of Educ., 164 F.3d 1347, 1352 (11th Cir. 1999), vacated per stipulation, 216 F.3d 1263 (11th Cir. 2000) ("[W]here the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable."); Lutheran Church-Mo. Synod v. FCC, 154 F.3d 487, 492 (D.C. Cir. 1998) (noting that "broad outreach to, as opposed to the actual hiring of, a particular race" would not necessarily trigger strict scrutiny); Honadle v. Univ. of Vt. and State Agric. Coll., 56 F. Supp. 2d

419, 428 (D. Vt. 1999) (distinguishing "'inclusive' forms of affirmative action, such as recruitment and other forms of outreach" from "'exclusive' forms of affirmative action, such as quotas, set asides and layoffs" and holding that monitoring racial composition and encouraging recruitment of diverse candidates were not discriminatory practices subject to strict scrutiny). Even if non-receipt of an invitation to apply to Harvard could constitute discrimination, there was no evidence presented at trial that any SFFA member fell into the group of Asian American applicants who did not receive such an invitation because of their race, nor is there any evidence that they suffered an injury as a result.

Further, as in Grutter, consulting the one-pagers "which keep track of the racial and ethnic composition of the class" (among other statistics) does not "sugges[t] there was no further attempt at individual review save for race itself during the final stages of the admissions process." 539 U.S. at 336 (quotation marks omitted). Throughout the process, Harvard remains committed to its holistic evaluation and its whole person review. Harvard's use of the one-pagers as part of its admissions process and to evaluate whether it would be able to achieve its "*goals* for minority enrollment" is permissible and does not establish the existence of a quota or impermissible racial balancing. Id. at 335 (emphasis in original). As the Supreme Court has held, "'[s]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota." Id. at 336 (quoting Bakke 438 U.S. at 323).[60]

[60] In fact, the law requires a "reasoned, principled explanation" for a decision to use race in admissions, and courts examine numerical evidence when evaluating whether race-conscious plans are narrowly tailored to serve a compelling interest. See, e.g., Fisher II, 136 S. Ct. at 2211–12 (considering "anecdotal evidence" including racial representation in enrolled classes and "more nuanced quantitative data" reflecting African American and Hispanic representation in undergraduate classes).

Further, it may well be necessary to give attention to numerical indicators of racial diversity when an institution elects to adopt a race-conscious admissions program so as to remain compliant with the dictates of strict scrutiny, including monitoring the ongoing need for a race-conscious admissions process and the availability of race-neutral alternatives. See Fisher II, 136 S. Ct. at 2214–15 (requiring UT Austin to "continue to use [] data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary"). Harvard's awareness and consideration of the number of minority students likely to enroll throughout its annual admissions cycle is consistent with the fact that there is "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." Grutter, 539 U.S. at 336 (quoting Bakke 438 U.S. at 323). Additionally, Harvard also considers the racial distribution of its admitted students to assist it in predicting its yield rate and thereby avoid overenrolling its freshman class because students from some racial groups historically matriculate at higher rates than others. These practices do not violate Title VI.

As Justice Powell did in 1978, the Court "flatly reject[s] the argument that Harvard's program [is] 'the functional equivalent of a quota'" system or an otherwise impermissible means of racial balancing. Id. at 335 (quoting Bakke 38 U.S. at 317–18). Accordingly, judgment for Harvard shall enter on Count II, racial balancing.

F. Count III: Harvard Uses Race as a Non-Mechanical Plus Factor

Count III alleges that Harvard fails to use race merely as a "plus" factor in admissions decisions. Consistent with what is required by Supreme Court precedent, Harvard has demonstrated that it uses race as a factor that can act as a "plus" or a "tip" in making admissions

decisions, and that its admissions program is "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." Grutter, 539 U.S. at 334 (quoting Bakke, 438 U.S. at 317). Although race is an important consideration in deciding to admit many African American and Hispanic applicants, it remains an "individualized consideration in the context of [Harvard's] race-conscious admissions program" and never becomes "the defining feature" of applications. Id. at 337 (citing Bakke, 438 U.S. at 318 n.52).

Admissions policies that fail to use race only as a plus factor typically either employ a quota system or assign some specified value to applicants' racial identity, and thereby use race in a rigid and mechanical manner that deprives applicants of the truly individualized consideration required by the Supreme Court. See Gratz, 539 U.S. at 270 (finding unconstitutional "the University [of Michigan]'s . . . policy, which automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race"); Bakke, 438 U.S. at 272 (striking down quota system); Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1254 (11th Cir. 2001) (finding University of Georgia's admissions policy not narrowly tailored where it employed a rigid, mechanical approach that awarded "every non-white applicant [] a 0.5 point bonus, regardless of his or her background and regardless of whether a white applicant with a far more 'diverse' background" was available). Although the parties' experts have estimated the average magnitude of Harvard's race-related tips based on past admissions decisions and the effect those tips have on the diversity of its classes, the magnitude of the tip for an individual applicant cannot be precisely determined because race is considered in a contextual manner as part of Harvard's holistic evaluation of each

applicant. The estimated average magnitude of the tips and the impact of the race-related tips or plus factors on the racial composition of Harvard's classes, however, are comparable to the size and effect of tips that have been upheld by the Supreme Court.

For example, in Fisher II, the Supreme Court noted that the proportion of Hispanic and African American applicants admitted through UT Austin's holistic review process in 2007, when race was considered, had increased 54% and 94%, respectively, relative to 2003, when the holistic review process had been race-neutral. Fisher II, 136 S. Ct. at 2212. Those figures showed that "race has had a meaningful, if still limited, effect on the diversity of the University's freshman class." Id. The impact of UT Austin's holistic process is comparable to the decline in combined African American and Hispanic enrollment that Harvard would likely experience in the absence of the consideration of race, which is estimated to be approximately 45%, absent alternative measures.

In addition, the Supreme Court upheld the University of Michigan Law School's admissions program where "underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent," and African American applicants to the law school were "nearly guaranteed admissions if they score above 155 on the LSAT," while "[w]hites scoring [below] 167 . . . on the LSAT [were] routinely rejected." Grutter, 539 U.S. at 320, 377 (Thomas, J., dissenting). The plus-factor or tips that Harvard employs to achieve racial diversity for its educational mission are not nearly as large. Additionally, the magnitude of race-based tips is not disproportionate to the magnitude of other tips applicants may receive. The effect of African American and Hispanic racial identity on an applicant's probability of admission has been estimated at a significantly lower magnitude than tips offered to recruited athletes, and is comparable to tips for legacies, applicants on the dean's

or director's interest lists, children of faculty or staff, and strengths that are reflected by Harvard's profile ratings.

Finally, the magnitude of race-based tips as indicated by the relative academic qualifications of admitted minority students at Harvard is modest. Every student Harvard admits is academically prepared for the educational challenges offered at Harvard, and a majority of admitted applicants from every major racial group scores in the 2 range on Harvard's academic ratings. [PX623].[61] In other words, most Harvard students from every racial group have a roughly similar level of academic potential, although the average SAT scores and high school grades of admitted applicants from each racial group differ significantly.

Accordingly, judgment for Harvard shall enter on Count III, using race as a non-mechanical plus factor.

G. Count V: No Adequate, Workable, and Sufficient Fully Race-Neutral Alternatives Are Available

Count V alleges that Harvard, in constructing an admissions process that considers race to ensure a diverse class, failed to consider and adopt race-neutral alternatives that would allow it to achieve diversity. Strict scrutiny requires that the Court "verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." Fisher I, 570 U.S. at 312 (quoting Bakke, 438 U.S. at 305). "This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although '[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,'" id. (quoting Grutter, 539 U.S. at 339–40), or choosing "between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all

[61] An academic rating of 2 indicates *magna cum laude* potential, superb grades, and mid- to high-700 SAT scores or a score above 33 on the ACT. See supra at Section III.B.3.ii. The "2 range" includes applicants who were assigned a "2+" or "2-."

racial groups," Grutter, 539 U.S. at 339, "strict scrutiny does require a court to examine with care, and not defer to, a university's 'serious, good faith consideration of workable race-neutral alternatives,'" Fisher I, 570 U.S. at 312 (quoting Grutter, 539 U.S. at 339–340). "Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity." Id. If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,' . . . then the university may not consider race." Id. (citation omitted). In considering the proffered race-neutral alternatives, the Court is mindful of Justice Ginsburg's astute observation that "only an ostrich could regard the supposedly neutral alternatives as race unconscious." Id. at 335 (Ginsburg, J., dissenting).

Here, as more fully discussed in Section VI, Harvard has demonstrated "that 'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.'" Fisher II, 136 S. Ct. at 2208. In sum, eliminating early action and tips for ALDCs, increasing outreach and community partnerships, offering more financial aid, or admitting more transfer students are all "available" and "workable" in some form and at varying costs, but they would likely have no meaningful impact on racial diversity. Further, any minimal effect that these alternative admissions practices might have on racial diversity, if implemented individually or in combination, would be offset by the decline in African American and Hispanic students that would result if race-conscious admissions practices were eliminated. Several other conceivable alternatives, such as admitting only students who rank at top of their high school class after their junior year or admitting the top student from each zip code, are not workable for Harvard because such programs would vastly over enroll its class. See supra at Section III.A.2; see also Fisher II, 136 S. Ct. at 2213 ("Class

rank is a single metric, and like any single metric, it will capture certain types of people and miss others. . . . [P]rivileging one characteristic above all others does not lead to a diverse student body.").

SFFA's expert, Mr. Kahlenberg, proposes a geographic-based quota system using "neighborhood clusters" that is seemingly designed to achieve racial diversity based on socioeconomics rather than attention to race. This proposal has some of the earmarks of impermissible racial balancing, albeit without an explicit, articulated reliance on race. Further, it poses significant logistical challenges, such as how to form the clusters, and how to account for wealthy households in a generally lower income cluster, as well as difficult institutional and philosophical questions such as whether economics can fairly be considered a proxy for race.

These issues aside, although Harvard could theoretically impose some form of geographic, place-based quota system, it could not achieve comparable racial diversity through such a program without a significant decline in the academic strength of its class. Further, the legality of the proposed place-based quota system is uncertain. In Fisher II, the Supreme Court upheld the constitutionality of UT Austin's holistic review program but did not speak to the overall permissibility of place-based admissions policies. 136 S. Ct. at 2213–15. Unlike Harvard's holistic process which considers every applicant individually, UT Austin admitted most of its class by automatically admitting applicants who graduated in the top 10% of their Texas high school class pursuant to a state law requiring it to admit those students. Id. at 2209. The plaintiff advocated the expansion of the automatic admission percentage, claiming it to be a race-neutral way of increasing diversity. Id. at 2213. The Supreme Court refused to require the expansion of the program, stating, "'It is race consciousness, not blindness to race, that drives such plans.' Consequently, petitioner cannot assert simply that increasing the University's

reliance on a percentage plan would make its admissions policy more race neutral." Id. at 2213 (citation omitted) (quoting Fisher I, 570 U.S. at 335–36 (Ginsburg, J., dissenting)). Here, just as in Fisher II, the Court is not persuaded that such a plan would actually be "more race neutral," id. at 2213. Place-based plans therefore do not suffice, pose complex challenges, and may not even qualify as available race-neutral alternatives.

Harvard could adopt a more significant tip for economically disadvantaged students, but every such proposal presented to the Court would result in a significant decline in African American representation. Achieving even roughly comparable levels of combined African American and Hispanic representation to those Harvard presently achieves would require Harvard to sacrifice the academic strength of its class and forgo other admissions policies from which it derives financial, reputational, and academic benefits. See supra at Section III.B.3. As such, Harvard would compromise some degree of its reputation for academic excellence and still be less diverse than it is currently. Title VI does not require such an outcome. See Fisher II, 136 S. Ct. at 2213 (explaining that the Supreme "Court's precedent [makes] clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence").

Harvard has demonstrated that no workable and available race-neutral alternatives would allow it to achieve a diverse student body while still maintaining its standards for academic excellence. Judgment shall therefore enter in Harvard's favor on Count IV, race-neutral alternatives.

H. Count I: Harvard Does Not Intentionally Discriminate

SFFA's intentional discrimination claim, Count I, requires the Court to determine whether Harvard's admissions program violates Title VI through intentional discrimination against Asian Americans notwithstanding the Court's conclusion that Harvard has shown that its

admissions program serves its compelling interest in diversity, that some racial categorizations are necessary to serve that interest, that it does not engage in proscribed racial balancing, and that no workable and available, fully race-neutral alternatives would suffice to meet Harvard's goals. SFFA is not claiming that Harvard excludes Asian Americans and in fact, Asian Americans are admitted at virtually the same rate as white applicants. What it does claim is that, based solely on the quantifiable aspects of admissions, Asian Americans should be admitted at an even higher rate and that, if the personal ratings were not depressed, there would be more Asian Americans admitted.

In undertaking its analysis, the Court begins with certain fundamentals. First, "given the important purposes of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Grutter 539 U.S. at 328–29. Second, a university is free to "make its own judgments as to . . . the selection of its student body." Id. at 329 (quoting Bakke, 438 U.S. at 312). And third, although deference is owed to a university's decision to pursue the educational benefits that flow from diversity, the university must show that its use of race is narrowly tailored to achieve its permissible goals. Fisher II, 136 S. Ct. at 2208.

To these, the Court reiterates the following findings specific to this case:

1. Throughout this trial and after a careful review of all exhibits and written submissions, there is no evidence of any racial animus whatsoever or intentional discrimination on the part of Harvard beyond its use of a race conscious admissions policy, nor is there

evidence that any particular admissions decision was negatively affected by Asian American identity.[62]

2. A race-conscious admissions program allows Harvard to achieve a level of robust diversity that would not otherwise be possible, at least at this time.
3. The Court firmly believes that Asian Americans are not inherently less personable than any other demographic group, just as it believes that Asian Americans are not more intelligent or more gifted in extracurricular pursuits than any other group.
4. There is a statistical difference in the personal ratings with white applicants faring better that Asian American applicants. Asian American applicants, however, do better on the extracurricular and academic ratings than their white counterparts. All three ratings incorporate subjective and objective elements, and while implicit biases may be affecting

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[62] The Court notes that under the Title VI standard applicable outside the higher education admissions context, SFFA's intentional discrimination claim would fail because SFFA has not shown, by a preponderance of the evidence, that (1) Harvard discriminated on the basis of race, (2) that the discrimination was intentional, and (3) that the discrimination was a substantial or motivating factor for admissions decisions. See Goodman v. Bowdoin Coll., 380 F.3d 33, 43 (1st Cir. 2004) (citing Tolbert v. Queens Coll., 242 F.3d 58, 69 (2d Cir. 2001)). The requirement for a "substantial or motivating factor" requires "evidence of racial animus," id. at 43, and no racial animus was present here.

Further, under the standard articulated in Goodman v. Bowdoin College, 380 F.3d 33 (1st Cir. 2004), the Court would enter judgment for Harvard because it has shown that its admissions program was employed to promote diversity, which is not an invidious discriminatory purpose. See supra at Section III.D. Admissions decisions are made only after a careful process that considers and appreciates the diversity that applicants from diverse racial backgrounds, including Asian Americans, provide at Harvard. Harvard's only intentional consideration of race views increased racial diversity as a positive attribute of its admitted class, which it achieves by considering an individual's race through an individualized, holistic evaluation of every applicant in the manner envisioned by the Supreme Court. Further, the Court feels confident stating that the statistical disparities in personal ratings and admissions probabilities that have been identified are the result of some external race-correlated factors and perhaps some slight implicit biases among some admissions officers that, while regrettable, cannot be completely eliminated in a process that must rely on judgments about individuals.

Harvard's ratings at the margins, to the extent that the disparities are the result of race, they are unintentional and would not be cured by a judicial dictate that Harvard abandon considerations of race in its admission process.

5. Harvard's admissions program is conceptually narrowly tailored to meet its interest in diversity. In practice, as more fully discussed above, it does not seem to unduly burden Asian Americans despite the fact that some percentage of Asian American applicants have received lower personal ratings than white applicants who seem similarly situated. The reason for these lower scores is unclear, but they are not the result of intentional discrimination. They might be the result of qualitative factors that are harder to quantify, such as teacher and guidance counselor recommendations, or they may reflect some implicit biases. Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population. Here, any relative burden on Asian Americans (and it is not clear that there is a disproportionate burden) is not enough to warrant a finding that Harvard's admissions process fails to survive strict scrutiny or to require it to move to an admissions model that foregoes diversity in favor of parity based solely on quantifiable metrics.

The testimony of the admissions officers that there was no discrimination against Asian American applicants with respect to the admissions process as a whole and the personal ratings in particular was consistent, unambiguous, and convincing. Not one of them had seen or heard anything disparaging about an Asian American applicant despite the fact that decisions were made collectively and after open discussion about each applicant in the docket and full committee meetings. Similarly, there is no credible evidence that corroborates the improper

discrimination suggested by Professor Arcidiacono's statistical model. Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes, up from 3.4% in 1980. Although Asian Americans can and do bring important and diverse perspectives to Harvard, because only about 6% of the United States population is Asian American compared to nearly a quarter of Harvard's class, it is reasonable for Harvard to determine that students from other minority backgrounds are more likely to offer perspectives that are less abundant in its classes and to therefore primarily offer race-based tips to those students. Finally, SFFA did not present a single Asian American applicant who was overtly discriminated against or who was better qualified than an admitted white applicant when considering the full range of factors that Harvard values in its admissions process.

The statistics themselves are alone not enough to cause the Court to conclude that Harvard has engaged in improper intentional discrimination where Harvard has shown that its admissions policy uses race only in a permissible and narrowly tailored way. Further, although Professor Arcidiacono's statistics suggest discrimination against certain subsets of Asian American applicants, Professor Card's analysis of this same data suggests the opposite, thereby leaving the statistical analyses inconclusive. Even assuming that there is a statistically significant difference between how Asian American and white applicants score on the personal rating, the data does not clearly say what accounts for that difference. In other words, although the statistics perhaps tell "what," they do not tell "why," and here the "why" is critically important. Further, by its very nature, the personal score includes, and should include, aspects of an applicant and his or her application that are not easily quantifiable and therefore cannot be fully captured by the statistical data.

Harvard's admissions process survives strict scrutiny. It serves a compelling, permissible and substantial interest, and it is necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity. Consistent with the hallmarks of a narrowly tailored program, applicants are afforded a holistic, individualized review, diversity is understood to embrace a broad range of qualities and experiences, and race is used as a plus factor, in a flexible, non-mechanical way. See Fisher, 136 S. Ct. at 2214; Grutter, 539 U.S. at 337–38. The Admissions program also satisfies the other principles articulated in Fisher II in that it does not have a quota or use a fixed percentage and all applicants compete for all available seats. Further, Harvard has met its burden of showing that there are not currently any available or workable race-neutral alternatives. Finally, there is nothing about Harvard's admissions process that is at odds with the reason for subjecting racial classifications to strict scrutiny—to ensure "little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." J.A. Croson Co., 488 U.S. at 493. The use of race benefits certain racial and ethnic groups that would otherwise be underrepresented at Harvard and is therefore neither an illegitimate use of race or reflective of racial prejudice. Accordingly, judgment for Harvard shall enter on Count I, intentional discrimination.

VIII. CONCLUSION

Notwithstanding the fact that Harvard's admissions program survives strict scrutiny, it is not perfect. The process would likely benefit from conducting implicit bias trainings for admissions officers, maintaining clear guidelines on the use of race in the admissions process, which were developed during this litigation, and monitoring and making admissions officers aware of any significant race-related statistical disparities in the rating process. That being said, the Court will not dismantle a very fine admissions program that passes constitutional muster, solely because it could do better. There is always the specter of perfection, but strict scrutiny

does not require it and a few identified imperfections, after years of litigating and sifting through applications and metrics, do not alone require a finding that Harvard's admissions program is not narrowly tailored.

Further, the Court emphatically repeats what the Supreme Court said in Fisher II:

> The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.
>
> The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

136 S. Ct. at 2213–15.

The Court here stops well short of requiring an admissions process that is overly data driven. Using statistics to ensure that the distribution of profile ratings or any other measure is exactly even among various groups would potentially run afoul of the prohibition on quotas and, more importantly, defeat the purpose of a comprehensive, holistic review process that allows the admission of applicants with virtues that are not always quantifiable. But now that Harvard and other schools can see how statistical analyses can reveal perhaps otherwise imperceptible statistical anomalies, these sorts of statistics should be used as a check on the process and as a way to recognize when implicit bias might be affecting outcomes.

It was always intended that affirmative action programs be limited in duration. In 2003, the Supreme Court articulated its expectation that in twenty-five years, it would not be necessary to use racial preferences to achieve a diverse student body. Grutter, 539 U.S. at 343. As time marches on and the effects of entrenched racism and unequal opportunity remain obvious, this

goal might be optimistic and may need to change, but it remains imperative that Harvard and other schools that make use of racial preferences to achieve a diverse learning environment ensure, through data and experience, that "race plays no greater role than is necessary to meet its compelling interest" in diversity and to keep in mind that "racial classifications may sometimes fail to capture diversity in all of its dimensions." Fisher II, 136 S. Ct. at 2210.

The wise and esteemed author Toni Morrison observed, "Race is the least reliable information you can have about someone. It's real information, but it tells you next to nothing." Emily Langer, From heart of black America, a voice for the voiceless, Boston Globe, Aug. 7, 2019, at C11 (quoting Paul Gray, Books: Paradise Found, Time (Jan. 19, 1998), http://content.time.com/time/subscriber/article/0,33009,987690-5,00.html). Although this has been said, it must become accepted and understood before we close the curtain on race conscious admissions policies. The rich diversity at Harvard and other colleges and universities and the benefits that flow from that diversity will foster the tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete.

As President Ruth Simmons said from the witness stand in this case when asked about the importance of diversity:

> It's very hard for me to overstate my conviction about the benefits that flow to all of these areas from a diverse undergraduate student body. I know something about the lack of diversity in one's education. . . . My father was a janitor, my mother was a maid. They had been sharecroppers, they had few opportunities. I lived through that. I remember it. So to me, the benefits that flow to students is they get a better education, a deeper education, a truer education to deal with what they're going to have to deal with in life.
>
> To the institution, it makes for not just an enhanced learning environment but for the opportunity to be unparalleled in their standing because they offer something that is so indispensable for society.
>
> And for society, my goodness, I've spoken about the conflicts in society, how deeply they run, how they resurface from time to time. How can we imagine a world in which we are not creating leaders and citizens who have the capacity to

> mediate those differences? I cannot imagine it. And so it's with great conviction that I say that we must continue to offer diverse undergraduate education to our young people to save our nation.

[Oct. 30 Tr. 54:11–55:15].

That eloquent testimony captures what is important about diversity in education. For purposes of this case, at least for now, ensuring diversity at Harvard relies, in part, on race conscious admissions. Harvard's admission program passes constitutional muster in that it satisfies the dictates of strict scrutiny. The students who are admitted to Harvard and choose to attend will live and learn surrounded by all sorts of people, with all sorts of experiences, beliefs and talents. They will have the opportunity to know and understand one another beyond race, as whole individuals with unique histories and experiences. It is this, at Harvard and elsewhere that will move us, one day, to the point where we see that race is a fact, but not the defining fact and not the fact that tells us what is important, but we are not there yet. Until we are, race conscious admissions programs that survive strict scrutiny will have an important place in society and help ensure that colleges and universities can offer a diverse atmosphere that fosters learning, improves scholarship, and encourages mutual respect and understanding.

SO ORDERED.

September 30, 2019

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Johnson v. Board of Regents of University of Georgia, 11th Cir.(Ga.), August 27, 2001

98 S.Ct. 2733
Supreme Court of the United States

REGENTS OF the UNIVERSITY OF CALIFORNIA, Petitioner,
v.
Allan BAKKE.

No. 76-811.
|
Argued Oct. 12, 1977.
|
Decided June 28, 1978.

Synopsis
White male whose application to state medical school was rejected brought action challenging legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "disadvantaged" minority students. School cross-claimed for declaratory judgment that its program was legal. The trial court declared the program illegal but refused to order the school to admit the applicant. The California Supreme Court, 18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, affirmed the finding that the program was illegal and ordered the student admitted and the school sought certiorari. The Supreme Court, Mr. Justice Powell, held that: (1) the special admissions program was illegal, but (2) race may be one of a number of factors considered by school in passing on applications, and (3) since the school could not show that the white applicant would not have been admitted even in the absence of the special admissions program, the applicant was entitled to be admitted.

Affirmed in part and reversed in part.

Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall and Mr. Justice Blackmun filed an opinion concurring in the judgment in part and dissenting.

Mr. Justice White filed a separate opinion.

Mr. Justice Marshall filed a separate opinion.

Mr. Justice Blackmun filed a separate opinion.

Mr. Justice Stevens concurred in the judgment in part and dissented in part and filed an opinion in which Mr. Chief Justice Burger, Mr. Justice Stewart and Mr. Justice Rehnquist joined.

**2735 *265 *Syllabus* *

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering **2736 class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores,

letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority ***266** students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia,* that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have ****2737** been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, ***267** but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

18 Cal.3d 34, 132 Cal.Rptr. 680, 553 P.2d 1152, affirmed in part and reversed in part.

Mr. Justice POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2744–2747.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under

some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 2747–2764.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 2764.

Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 2768–2781.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 2782–2794.

Mr. Justice STEVENS, joined by THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 2809–2815.

Attorneys and Law Firms

***268** Archibald Cox, Cambridge, Mass., for petitioner.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for United States, as amicus curiae, by special leave of Court.

Reynold H. Colvin, San Francisco, Cal., for respondent.

Opinion

***269** Mr. Justice POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission ***270** of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth ****2738** Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.[**] ***271** It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, Mr. Justice STEWART, Mr. Justice REHNQUIST and Mr. Justice STEVENS concur in this judgment.

*272 I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I*

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class.[1] The special **2739 program consisted of *273 a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications,[2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*, at 63. About *274 one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. *Id.*, at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis.[3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Id.*, at 63–64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.*, at 163. On the 1973 application form, **2740 candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*, at 65–66, 146, 197, 203–205, 216–218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged *275 " was ever produced, *id.*, at 163–164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation.[4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974.[5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.*, at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. *Id.*, at 171–172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. *Id.*, at 164, 166.

From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, *276 and 37 Asians, for a total of 44 minority students.[6] Although disadvantaged whites applied to the special program in large numbers, see n. 5, *supra*, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

**2741 Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.*, at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.*, at 69. There were four special admissions slots unfilled at that time however, for which Bakke was not considered. *Id.*, at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *id.*, AT 259.

*277 Bakke's 1974 application was completed early in the year. *Id.*, at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.*, at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." *Id.*, at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.*, at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.*, at 64. In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.[7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California.[8] He sought mandatory, injunctive, **2742 and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the *278 school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment,[9] Art. I, § 21, of the California Constitution,[10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d.[11] The University cross-complained for a declaration that its special admissions program was lawful. The trial *279 court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another. Record 388 and 16 places in the class of 100 were reserved for them. *Id.*, at 295–296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal.3d 34, 39, 132 Cal.Rptr. 680, 684, 553 P.2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program.[12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. *Id.*, at 49, 132 Cal.Rptr., at 690, 553 P.2d, at 1162–1163. It then turned to the goals the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.*, at 53, 132 Cal.Rptr., at 693, 553 P.2d, at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or the federal

statutory grounds cited in the trial court's judgment, the California court held *280 that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." *Id.*, at 55, 132 Cal.Rptr., at 694, 553 P.2d, at 1166.

**2743 Turning to Bakke's appeal, the court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. [13] *Id.*, at 63–64, 132 Cal.Rptr., at 699–700, 553 P.2d, at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–17 (1970 ed., Supp. V), see, *e. g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 1267, 47 L.Ed.2d 444 (1976). 18 Cal.3d, at 63–64, 132 Cal.Rptr., at 700, 553 P.2d, at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 48. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19–A20. [14] The *281 California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal.3d, at 64, 132 Cal.Rptr., at 700, 553 P.2d, at 1172. That order was stayed pending review in this Court. 429 U.S. 953, 97 S.Ct. 573, 50 L.Ed.2d 321 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090, 97 S.Ct. 1098, 51 L.Ed.2d 535 (1977).

II

In this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900, 98 S.Ct. 293, 54 L.Ed.2d 186 (1977).

A

At the outset we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking **2744 the test set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). He contends *282 that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions, [15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action. [16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n. 11, *supra*, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U.S.C. § 2000d–1. [17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that *283 violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U.S.C. §§ 2000a–3(a), 2000b–2, 2000c–8, and 2000e–5(f) (1970 ed. and Supp. V). [18]

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434–435, 60 S.Ct. 670, 672–673, 84 L.Ed. 849 (1940). See also *Massachusetts v. Westcott*, **2745 431 U.S. 322, 97 S.Ct. 1755, 52 L.Ed.2d 349 (1977); *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 1163, 22 L.Ed.2d 398 (1969). Cf. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). We therefore do not address this difficult issue. Similarly, we need not pass *284 upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes

of this case, that respondent has a right of action under Title VI. See *Lau v. Nichols,* 414 U.S. 563, 571 n. 2, 94 S.Ct. 786, 790, 39 L.Ed.2d 1 (1974) (STEWART, J., concurring in result).

B

The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976), quoting *United States v. American Trucking Assns.,* 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1063–1064, 84 L.Ed. 1345 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme,[19] without regard to the reach of the Equal Protection ***285** Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n. 19, generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs.[20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, ****2746** Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:
"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food ***286** surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles.[21]

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.,* at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.,* at 13333. Other Senators expressed similar views.[22]

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure,[23] but proponents of the bill merely replied that the meaning of ***287** "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:
"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." *Id.*, at 6553.[24]

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, *e. g., Missouri ex rel. Gaines v. Canada,* 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Sipuel v. Board of Regents,* 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247 (1948); *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents,* 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, *e. g., Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); ****2747** *Lee v. Washington,* 390 U.S. 333, 334, 88 S.Ct. 994, 995, 19 L.Ed.2d 1212 (1968) (Black, Harlan, and Stewart, JJ., concurring); *United Jewish Organizations v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been ***288** applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer,* 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948).

En route to this crucial battle over the scope of judicial review,[25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.[26]

***289** This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.[27]

The guarantees of the Fourteenth Amendment extend to all persons. Its language ****2748** is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer, supra,* at 22, 68 S.Ct., at 846. Accord, *Missouri ex rel. Gaines v. Canada, supra,* 305 U.S., at 351, 57 S.Ct., at 237; *McCabe v. Atchison, T. & S.F.R. Co.,* 235 U.S. 151, 161–162, 35 S.Ct. 69, 71, 59 L.Ed. 169 (1914). The guarantee

of equal protection cannot mean one thing when applied to one individual and something else when *290 applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co., supra,* 304 U.S., at 152–153 n. 4, 58 S.Ct., at 783–784. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.[28] See, *e. g., Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); *Carrington v. Rash,* 380 U.S. 89, 94–97, 85 S.Ct. 775, 779–780, 13 L.Ed.2d 675 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, *e. g., Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (age); *San Antonio Independent School Dist. v. Rodriquez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973) (wealth); *Graham v. Richardson,* 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people *291 whose institutions are founded upon the doctrine of equality." *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385.
"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu,* 323 U.S., at 216, 65 S.Ct., at 194.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the **2749 oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71, 21 L.Ed. 394 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism."[29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, *e. g., Mugler v. Kansas,* 123 U.S. 623, 661, 8 S.Ct. 273, 297, 31 L.Ed. 205 (1887); *Allgeyer v. Louisiana,* 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, *e. g., Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). It was only as the era of substantive due process came to a close, see, *e. g.,* *292 *Nebbia v. New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, *e. g., United States v. Carolene Products,* 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); *Skinner v. Oklahoma ex rel. Williamson, supra.*

By that time it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities.[30] Each had to struggle[31] —and to some extent struggles still[32] —to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared

characteristic was a willingness to disadvantage other groups.[33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Truax v. Raich,* 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Austrian resident aliens); *Korematsu, supra* (Japanese); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in ***293** *Yick Wo,* "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S., at 369, 6 S.Ct., at 1070.

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra,* the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing ****2750** in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 296, 96 S.Ct. 2574, 2586, 49 L.Ed.2d 493 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon v. McCrary,* 427 U.S. 160, 192–202, 96 S.Ct. 2586, 2605–2609, 49 L.Ed.2d 415 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, *e. g.,* Cong.Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.,* at 2891–2892 (remarks of Sen. Conness); *id.,* 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60–63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of ***294** equal laws," *Yick Wo, supra,* 118 U.S., at 369, 6 S.Ct., at 1070, in a Nation confronting a legacy of slavery and racial discrimination. See, *e. g., Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Hills v. Gautreaux,* 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967), quoting *Hirabayashi,* 320 U.S., at 100, 63 S.Ct., at 1385.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign."[34] ***295** The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education, supra,* 347 U.S., at 492, 74 S.Ct., at 690; accord, *Loving v. Virginia, supra,* 388 U.S., at 9, 87 S.Ct., at 1822. It is far too late to argue that the guarantee of equal protection ****2751** to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.[35] "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Hernandez,* 347 U.S., at 478, 74 S.Ct., at 670.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance ***296** of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would

merit "heightened judicial solicitude" and which would not.[36] Courts would be asked to evaluate the extent of the prejudice and consequent *297 harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political **2752 analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.[37]

*298 Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See *United Jewish Organizations v. Carey*, 430 U.S., at 172–173, 97 S.Ct., at 1013. (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis v. Odegaard*, 416 U.S. 312, 343, 94 S.Ct. 1704, 1719, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate *299 racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra*, 430 U.S., at 173–174, 97 S.Ct., at 1013–1014 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from **2753 one generation to the next, a critical feature of its coherent interpretation. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 650–651, 15 S.Ct. 673, 716, 39 L.Ed. 759 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." A. Cox, The Role of the Supreme Court in American Government 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process.[38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S., at 22, 68 S.Ct., at 846; *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 351, 59 S.Ct., at 237.

*300 C

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. *E. g., Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement.[39] Moreover, the scope of the remedies was not permitted to exceed the extent of the ***301** violations. ****2754** *E. g., Dayton Board of Education v. Brinkman,* 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); see *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). See also *Austin Independent School Dist. v. United States,* 429 U.S. 990, 991–995, 97 S.Ct. 517–519, 50 L.Ed.2d 603 (1976) (POWELL, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination—not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary " 'to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.' " *Id.,* at 763, 96 S.Ct., at 1264, quoting *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E. g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission,* 482 F.2d 1333 (CA2 1973); *Carter v. Gallagher,* 452 F.2d 315 (CA8 1972), modified on rehearing en banc, *id.,* at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E. g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (C.A.3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971);[40] ***302** *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (C.A.1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); cf. *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). But we have never approved preferential classifications in the absence of proved constitutional or statutory violations.[41]

Nor is petitioner's view as to the applicable standard supported by the fact that ****2755** gender-based classifications are not subjected to this level of scrutiny. *E.G., Califano v. Webster,* 430 U.S. 313, 316–317, 97 S.Ct. 1192, 1194–1195, 51 L.Ed.2d 360 (1977); *Craig v. Boren,* 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practicalproblems ***303** present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, *e. g., Califano v. Goldfarb,* 430 U.S. 199, 212–217, 97 S.Ct. 1021, 1029–1032, 51 L.Ed.2d 270 (1977); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 645, 95 S.Ct. 1225, 1231, 43 L.Ed.2d 514 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau,* we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. 414 U.S., at 568, 94 S.Ct., at 789. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.,* we remanded for the fashioning of a remedial order.

***304** *Lau* provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices "which have the effect of subjecting individuals to discrimination," *ibid.* We stated: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.*, at 566, 94 S.Ct., at 788. Moreover, the "preference" approved did not result in the denial of the relevant benefit—"meaningful opportunity to participate in the educational program"—to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.*, at 570–571, 94 S.Ct., at 790 (STEWART, J., concurring in result).

In a similar vein,[42] petitioner contends that our recent decision in *United Jewish* ****2756** *Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power ***305** of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations*, like *Lau*, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process.

In this case, unlike *Lau* and *United Jewish Organizations*, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit—admission to the Medical School—they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *E. g., McLaurin v. Oklahoma State Regents*, 339 U.S., at 641–642, 70 S.Ct., at 853–854.

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721–722, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S., at 11, 87 S.Ct., at 1823; *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). The special admissions ***306** program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination;[43] (iii) increasing ****2757** the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

***307** A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E. g., Loving v. Virginia, supra*, 388 U.S., at 11, 87 S.Ct., at 1823; *McLaughlin v. Florida, supra*, 379 U.S., at 196, 85 S.Ct., at 290; *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, *e. g., Teamsters v. United States*, 431 U.S. 324, 367–376, 97 S.Ct. 1843, 1870–1875, 52 L.Ed.2d 396 (1977); *United Jewish Organizations*, 430 U.S., at 155–156, 97 S.Ct., at 1004–1005; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the ***308** extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations,[44] it cannot be ***309** said that ****2758** the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.[45] Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976); n. 41, *supra*. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e. g., Califano v. Webster*, 430 U.S., at 316–321, 97 S.Ct., at 1194–1197; ***310** *Califano v. Goldfarb*, 430 U.S., at 212–217, 97 S.Ct., at 1029–1032. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of ****2759** health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.[46] The court below addressed this failure of proof:

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority *311 communities than the average white doctor. (See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role* (1975) 42 U.Chi.L.Rev. 653, 688). Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal.3d, at 56, 132 Cal.Rptr., at 695, 553 P.2d, at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.[47]

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible *312 goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

" 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967):

**2760 "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, D.C., 52 F.Supp. 362, 372."

The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.[48] As the Court *313 noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to

the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S., at 634, 70 S.Ct., at 850, the ***314** Court made a similar point with specific reference to legal education:
"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. [49]

Ethnic diversity, however, is only one element in a range of factors a university ****2761** properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges—and the courts below have held—that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the ***315** program's racial classification is necessary to promote this interest. *In Re Griffiths*, 413 u.s., at 721–722, 93 s.ct., at 2854–2855.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity. [50]

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.
***316** The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:
"In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm

may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. [See Appendix hereto.] . . .

"In Harvard College admissions the Committee has not set target-quotas for **2762 the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many *317 types and categories of students." App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae* 2–3.

In such an admissions program,[51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a *318 particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[52]

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions **2763 program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U.S. 327, 329, 64 S.Ct. 1023, 1025, 88 L.Ed. 1304 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith *319 would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See *e. g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).[53]

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular,

including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred ***320** applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S., at 22, 68 S.Ct., at 846. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

With respect to respondent's entitlement to an injunction directing his admission ****2764** to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed. [54]

***321** APPENDIX TO OPINION OF POWELL, J.

Harvard College Admissions Program [55]

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational ***322** experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty—perhaps 150 or so out of an entering class of over 1,100—the Committee seeks—

variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104–105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result **2765 was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, *323 minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But *324 that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

Opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, concurring in the judgment in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of **2766 California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether government may use race-conscious programs to redress the continuing effects of past discrimination— *325 and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities

by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal.3d 34, 64, 132 Cal.Rptr. 680, 700, 553 P.2d 1152, 1172 (1976).

We agree with Mr. Justice POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. See *ante*, at 2738 n. **. Since we conclude that the affirmative admissions program at the Davis *326 Medical School is constitutional, we would reverse the judgment below in all respects. Mr. Justice POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future. [1]

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as **2767 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208, 47 S.Ct. 584, 585, 71 L.Ed. 1000 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" [2] status before the law, a status *327 always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (*Brown I*), and its progeny, [3] which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with "all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955). In 1968 [4] and again in 1971, [5] for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket [6] and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private

parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

*328 II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination. [7] We join Parts I and V–C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI. [8]

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a **2768 State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

A

The history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority *329 to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964. [9] *330 Representative Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action. "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong.Rec. 1519 (1964).
**2769 It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or federal control to invoke the Fourteenth or Fifth Amendments, was not placing new substantive limitations upon the use of racial criteria, but rather was designed to extend to such activities "the existing right to equal treatment" enjoyed by Negroes under those Amendments, and he later specifically defined the purpose of Title VI in this way:
"In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money *331 and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.

"It is for these reasons that we bring forth title VI. The enactment of title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions." *Id.*, at 2467.

Representative Celler also filed a memorandum setting forth the legal basis for the enactment of Title VI which reiterated the theme of his oral remarks: "In exercising its authority to fix the terms on which Federal funds will be disbursed . . ., Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*, at 1528.

Other sponsors of the legislation agreed with Representative Celler that the function of Title VI was to end the Federal Government's complicity in conduct, particularly the segregation or exclusion of Negroes, inconsistent with the standards to be found in the antidiscrimination provisions of the Constitution. Representative Lindsay, also a member of the Judiciary Committee, candidly acknowledged, in the course of explaining why Title VI was necessary, that it did not create any new standard of equal treatment beyond that contained in the Constitution:
"Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require ***332** States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?" *Id.*, at 2467.

He then explained that legislation was needed to authorize the termination of funding by the Executive Branch because existing legislation seemed to contemplate the expenditure of funds to support racially segregated institutions. *Ibid.* The views of Representatives Celler and Lindsay concerning the purpose and function of Title VI were shared by other sponsors and proponents of the legislation in the House. [10] Nowhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.

The Senate's consideration of Title VI reveals an identical understanding concerning the purpose and scope of the legislation. Senator Humphrey, the Senate floor manager, opened the Senate debate with a section-by-section analysis of the Civil Rights Act in which he succinctly stated the purpose of Title VI:
"The purpose of title VI is to make sure that funds of the United States are ****2770** not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A.4, 1963), [cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964)]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply ***333** designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544.

Senator Humphrey, in words echoing statements in the House, explained that legislation was needed to accomplish this objective because it was necessary to eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions. *Ibid.* Although Senator Humphrey realized that Title VI reached conduct which, because of insufficient governmental action, might be beyond the reach of the Constitution, it was clear to him that the substantive standard imposed by the statute was that of the Fifth and Fourteenth Amendments.

Senate supporters of Title VI repeatedly expressed agreement with Senator Humphrey's description of the legislation as providing the explicit authority and obligation to apply the standards of the Constitution to all recipients of federal funds. Senator Ribicoff described the limited function of Title VI:

"Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333.

Other strong proponents of the legislation in the Senate repeatedly expressed their intent to assure that federal funds would only be spent in accordance with constitutional standards. See remarks of Senator Pastore, *id.*, at 7057, 7062; Senator Clark, *id.*, at 5243; Senator Allott, *id.*, at 12675, 12677. [11]

**334 Respondent's contention that Congress intended Title VI to bar affirmative-action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:
"Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools.

**2771 "Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only or Negroes only. . . .

"In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions.

**335 "Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . .

". . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like." *Id.*, at 6543–6544.

See also the remarks of Senator Pastore (*id.*, at 7054–7055); Senator Ribicoff (*id.*, at 7064–7065); Senator Clark (*id.*, at 5243, 9086); Senator Javits (*id.*, at 6050, 7102). [12]

The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth **336 Amendments. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course, it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition of race-conscious action. But there are three compelling reasons to reject such a hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See *infra*, at 2781–2782.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment. [13] See § 602 of the Act, 42 U.S.C. § 2000d–1 (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. **2772 25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2355; 110 Cong.Rec. 13700 (1964) (Sen. Pastore); *id.*, at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely *337 affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that under certain circumstances the remedial use of racial criteria is not only permissible but is constitutionally required to eradicate constitutional violations. For example, in *Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.*, at 46, 91 S.Ct., at 1286. Surely Congress did not intend to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated *338 facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

"The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent." 110 Cong.Rec. 5612 (1964).

See also remarks of Representative Abernethy (*id.*, at 1619); Representative Dowdy (*id.*, at 1632); Senator Talmadge (*id.*, at 5251); Senator Sparkman (*id.*, at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied. **2773 See remarks of Senator Humphrey (*id.*, at 5253, 6553); Senator Ribicoff (*id.*, at 7057, 13333); Senator Pastore (*id.*, at 7057); Senator Javits (*id.*, at 5606–5607, 6050).[14] Indeed, there was a strong emphasis throughout *339 Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts.[15] This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56–29 vote, on the ground that federal administrators could be trusted to act reasonably and that there was no danger that they would prohibit the use of racial criteria under such circumstances. *Id.*, at 13695.

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the Equal Protection Clause to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the Fourteenth Amendment barred only *de jure* discrimination or in at least some circumstances reached *de facto* discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolutionary *340 change that constitutional law in the area of racial discrimination was undergoing in 1964.[16]

In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevalent use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that " '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' " *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543–544, 60 S.Ct. 1059, 1063–1064, 84 L.Ed. 1345 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the **2774 plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose.[17]

*341 **2775 B

Section 602 of Title VI, 42 U.S.C. § 2000d–1, instructs federal agencies to promulgate regulations interpreting Title *342 VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, *e. g.*, *343 *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations *requiring* affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and *authorizing* the voluntary undertaking of affirmative-action programs by federally funded institutions that have not been guilty of prior

discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.

Title 45 CFR § 80.3(b)(6)(i) (1977) provides:
"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Title 45 CFR § 80.5(i) (1977) elaborates upon this requirement:
"In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits ***344** fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI.[18] Of course, there is no evidence that the Medical School has been guilty of past discrimination and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title VI, however, much less from its legislative history, why the statute *compels* race-conscious remedies where a recipient institution has engaged in past discrimination but *prohibits* such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

****2776** Title 45 CFR § 80.3(b)(6)(ii) (1977) provides:
"Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted ***345** in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3(b)(6)(ii) contemplates includes the use of racial preferences:
"Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 CFR § 80.5(j) (1977).

This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an agency[19] responsible for achieving its objectives.[20]

***346** The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered. Cf. *Red Lion*

Broadcasting Co. v. FCC, 395 U.S., at 381, 89 S.Ct., at 1801; *Zemel v. Rusk*, 381 U.S. 1, 11–12, 85 S.Ct. 1271, 1278–1279, 14 L.Ed.2d 179 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use of race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that "[n]one of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age." 123 ***347** Rec. 19715 (1977). In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action and that this was a creation of the bureaucracy. *Id.*, at 19722. He explicitly stated, however, that ****2777** he favored permitting universities to adopt affirmative action programs giving consideration to racial identity but opposed the imposition of such programs by the Government. *Id.*, at 19715. His amendment was itself amended to reflect this position by only barring the *imposition* of race-conscious remedies by HEW:

"None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." *Id.*, at 19722.

This amendment was adopted by the House. *Ibid.* The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies and the Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill.[21] More significant for present purposes, however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational institutions voluntarily to extend preferences to racial minorities.

***348** Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year Congress enacted legislation[22] explicitly requiring that no grants shall be made "for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The statute defines the term "minority business enterprise" as "a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit compliance with the quota provisions of the legislation.[23]

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with ***349** the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises.[24] ****2778** It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprises. 123 Cong.Rec. 5327 (1977) (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during

the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative-action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 42 U.S.C. § 6709 (1976 ed.). Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute. *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 380–381, 89 S.Ct., at 1801–1802; ***350** *Erlenbaugh v. United States*, 409 U.S. 239, 243–244, 93 S.Ct. 477, 480–481, 34 L.Ed.2d 446 (1972). See also *United States v. Stewart*, 311 U.S. 60, 64–65, 61 S.Ct. 102, 105–106 85 L.Ed. 40 (1940).[25]

****2779** C

Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), the Court held that the failure of the San ***351** Francisco school system to provide English-language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon an HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR § 80.3(b)(2) (1977). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese-speaking students as to English-speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

Lau is significant in two related respects. First, it indicates that in at least some circumstances agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of color blindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking race-conscious action designed to remedy the exclusion of significant numbers ***352** of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession.[26] It would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good-faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors but a result of the lingering effects of past societal discrimination.

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau*'s implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our review that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent ***353** in the least. First, for the reasons discussed *supra*, at 2772–2779, regardless of

whether Title VI's prohibitions extend beyond the ****2780** Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, *Lau* itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

The Court has also declined to adopt a "color-blind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job.[27] More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent.[28] Finally, we have construed the Voting ***354** Rights Act of 1965, ****2781** 42 U.S.C. § 1973 *et seq.* (1970 ed. and Supp. V), which contains a provision barring any voting procedure or qualification that denies or abridges "the right of ***355** any citizen of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others.[29]

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to attain this objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the Equal Protection Clause of the Fourteenth Amendment.

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," *Edwards v. California*, 314 U.S. 160, 185, 62 S.Ct. 164, 172, 86 L.Ed. 119 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. In ***356** deed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964), could be found that would justify racial classifications. See, *e. g., ibid.; Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100–101, 63 S.Ct. 1375, 1385–1386, 87 L.Ed. 1774 (1943). More recently, in *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was *per se* invalid because it was not color-blind. And in *North Carolina Board of Education v. Swann* we held, again unanimously, that a statute mandating color-blind school-assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of *Brown [I].*" 402 U.S., at 45–46, 91 S.Ct., at 1286.

We conclude, therefore, that racial classifications are not *per se* invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial ****2782** classifications used by its program are reasonably related to what it tells us are its benign ***357** purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.[30] See, *e. g., San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 16–17, 93 S.Ct. 1278, 1287–1288, 36 L.Ed.2d 16 (1973); *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). But no fundamental right is involved here. See *San Antonio, supra,* 411 U.S., at 29–36, 93 S.Ct., at 1294–1298. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.,* at 28, 93 S.Ct., at 1294; see *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783, 82 L.Ed. 1234 (1938).[31]

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." *Hirabayashi, supra,* 320 U.S., at 100, 63 S.Ct., at 1385. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government ***358** behind racial hatred and separatism —are invalid without more. See *Yick Wo v. Hopkins,* 118 U.S. 356, 374, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886);[32] accord, *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1880); *Korematsu v. United States, supra,* 323 U.S., at 223, 65 S.Ct., at 197; *Oyama v. California,* 332 U.S. 633, 663, 68 S.Ct. 269, 283, 92 L.Ed. 249 (1948) (Murphy, J., concurring); *Brown I,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *McLaughlin v. Florida, supra,* 379 U.S., at 191–192, 85 S.Ct., at 287–289; *Loving v. Virginia, supra,* 388 U.S., at 11–12, 87 S.Ct., at 1823–1824; *Reitman v. Mulkey,* 387 U.S. 369, 375–376, 87 S.Ct. 1627, 1631–1632, 18 L.Ed.2d 830 (1967); *United Jewish Organizations v. Carey,* 430 U.S. 144, 165, 97 S.Ct. 996, 1009, 51 L.Ed.2d 229 (1977) (*UJO*) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); *id.,* at 169, 97 S.Ct., at 1011 (opinion concurring in part).[33]

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases.[34] " '[T]he mere ****2783** recitation of a benign, compensatory purpose is not an automatic shield ***359** hich protects against any inquiry into the actual purposes underlying a statutory scheme.' " *Califano v. Webster,* 430 U.S. 313, 317, 97 S.Ct. 1192, 1194, 51 L.Ed.2d 360 (1977), quoting *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975). Instead, a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " *Califano v. Webster, supra,* 430 U.S., at 317, 97 S.Ct., at 1194, quoting *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976).[35]

***360** First, race, like, "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn v. Shevin*, 416 U.S. 351, 357, 94 S.Ct. 1734, 1738, 40 L.Ed.2d 189 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano v. Webster, supra; Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin, supra*, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. *Schlesinger v. Ballard, supra*, 419 U.S., at 508, 95 S.Ct., at 577; *UJO, supra*, 430 U.S., at 174, and n. 3, 97 S.Ct., at 1014 (opinion concurring in part); *Califano v.* ****2784** *Goldfarb*, 430 U.S. 199, 223, 97 S.Ct. 1021, 1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment). See also *Stanton v. Stanton*, 421 U.S. 7, 14–15, 95 S.Ct. 1373, 1377–1378, 43 L.Ed.2d 688 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See *UJO, supra*, 430 U.S., at 172, 97 S.Ct., at 1013 (opinion concurring in part); *ante*, at 2753 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic, see *supra*, at 2781–2782, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or ***361** wrongdoing," *Weber, supra*, 406 U.S., at 175, 92 S.Ct., at 1407; *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual. See *UJO*, 430 U.S., at 173, 97 S.Ct., at 1013 (opinion concurring in part); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 566, 67 S.Ct. 910, 917, 91 L.Ed. 1093 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing process [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination." *UJO, supra*, 430 U.S., at 174, 97 S.Ct., at 1014 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, *e. g., Weber, supra*. Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736, 84 S.Ct. 1459, 1473, 12 L.Ed.2d 632 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be ***362** strict—not " 'strict' in theory and fatal in fact,"[36] because it is stigma that causes fatality—but strict and searching nonetheless.

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

**2785 A

At least since *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and its companion cases, *Davis v. School Comm'rs of Mobile County,* 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *McDaniel v. Barresi,* 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971), and *North Carolina Board of Education v. Swann,* 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), reiterated that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, *e. g., Charlotte-Mecklenburg, supra,* 402 U.S., at 28, 91 S.Ct., at 1282. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, *Charlotte-Mecklenburg, supra; Davis, supra; United States v. Montgomery County Board of Ed.,* 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969), and that local school boards could *voluntarily* adopt desegregation *363 plans which made express reference to race if this was necessary to remedy the effects of past discrimination. *McDaniel v. Barresi, supra.* Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. *Charlotte-Mecklenburg, supra,* 402 U.S., at 16, 91 S.Ct., at 1276. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green, supra,* 391 U.S., at 438, 88 S.Ct., at 1694, was recognized as a compelling social goal justifying the overt use of race.

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.,* at 357–362, 97 S.Ct., at 1865–1868. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See *Franks, supra.* In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants *364 vis-à-vis nonminority applicants, even if this means interpreting the qualifications of an applicant in light of his race. See *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 435, 95 S.Ct. 2362, 2380, 45 L.Ed.2d 280 (1975).[37]

These cases cannot be distinguished simply by the presence of judicial findings of **2786 discrimination, for race-conscious remedies have been approved where such findings have not been made. *McDaniel v. Barresi, supra; UJO*; see *Califano V. Webster,* 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Schlesinger v. Ballard,* 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin,* 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). See also *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.[38]

*365 Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. See *UJO,* 430 U.S., at 157, 97 S.Ct., at 1005 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN,

and STEVENS, JJ.);[39] *id.*, at 167, 97 S.Ct., at 1010 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.);[40] cf. *Califano v. Webster, supra*, 430 U.S., at 317, 97 S.Ct., at 1194; *Kahn v. Shevin, supra.* Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in *Franks v. Bowman Transportation Co., supra*, in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see *Franks, supra*, at 776, 96 S.Ct., at 1270, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, ***366** respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.[41]

Thus, our cases under Title VII of the Civil Rights Act have held that, in order to ****2787** achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination.[42]

***367** Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment.[43] Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions such as *Franks* and ***368** *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment ****2788** and therefore with the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 98, 65 S.Ct. 1483, 1489, 89 L.Ed. 2072 (1945) (Frankfurter, J., concurring).[44] We therefore ***369** conclude that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.

B

Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason

to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination. Until at least 1973, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites.[45] In 1950, for example, while Negroes *370 constituted 10% of the **2789 total population, Negro physicians constituted only 2.2% of the total number of physicians.[46] The overwhelming majority of these, moreover, were educated in two predominantly Negro medical schools, Howard and Meharry.[47] By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened: The number of Negroes employed in medicine remained frozen at 2.2%[48] while the Negro population had increased to 11.1%.[49] The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years 1955 to 1964. Odegaard 19.

Moreover, Davis had very good reason to believe that the national pattern of underrepresentation of minorities in medicine would be perpetuated if it retained a single admissions standard. For example, the entering classes in 1968 and 1969, the years in which such a standard was used, included only 1 Chicano and 2 Negroes out of the 50 admittees for each year. Nor is there any relief from this pattern of underrepresentation in the statistics for the regular admissions program in later years.[50]

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education *371 and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes.[51] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, *Brown I*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), that relegated minorities to inferior educational institutions,[52] and that denied them intercourse in the mainstream of professional life necessary to advancement. See *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. *Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81. See also *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately dissipated when *Brown I, supra,* announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in **2790 the professions. The generation of minority students applying to Davis Medical School since it opened in 1968—most of whom *372 were born before or about the time *Brown I* was decided—clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants;[53] many minority group members living in California, moreover, were born and reared in school districts in Southern States segregated by law.[54] Since separation of school-children by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown I, supra*, 347 U.S., at 494, 74 S.Ct., at 691, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), and yet come to the starting line with an education equal to whites.[55]

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see *supra,* at 2775–2776, has also reached the conclusion that race may be taken into account in situations ***373** where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See *supra,* at 2776, discussing 45 CFR §§ 80.3(b)(6)(ii) and 80.5(j) (1971). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See *supra,* at 2777–2778. Indeed, although an amendment to an appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See *ibid.* In these circumstances, the conclusion implicit in the regulations —that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities—deserves considerable judicial deference. See, *e. g., Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *UJO,* 430 U.S., at 175–178, 97 S.Ct., at 1014–1016 (opinion concurring in part).[56]

****2791** C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race ***374** is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage —less than their proportion of the California population[57]—of otherwise underrepresented qualified minority applicants.[58]

***375** Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

In addition, there is simply no evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. ****2792** Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of ***376** state-fostered discrimination. Once admitted, these students must satisfy

the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level. [59] For example, of a class of recent medical school applicants from families with less than $10,000 income, at least 71% were white. [60] Of all 1970 families headed by a *377 person *not* a high school graduate which included related children under 18, 80% were white and 20% were racial minorities. [61] Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites. [62] These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.

Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings, and such **2793 insistence here is misplaced. A case-by-case inquiry into the extent to which each individual applicant has been affected, either directly or indirectly, by racial discrimination, would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist. When individual measurement is impossible or extremely impractical, there is nothing to prevent a State *378 from using categorical means to achieve its ends, at least where the category is closely related to the goal. Cf. *Gaston County v. United States*, 395 U.S. 285, 295–296, 89 S.Ct. 1720, 1725–1726, 23 L.Ed.2d 309 (1969); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1731, 16 L.Ed.2d 828(1986). And it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. See *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

E

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year so long as the number of qualified minority applicants exceeds that number. There is no sensible,

and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.[63]

*379 The "Harvard" program, see *ante*, at 2762–2763, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

V

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that **2794 portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

Mr. Justice WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action *380 exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States v. Griffin*, 303 U.S. 226, 229, 58 S.Ct. 601, 602, 82 L.Ed. 764 (1938).[1] Furthermore, just as it is inappropriate to address constitutional issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it. Consequently, I address the question of whether respondent may bring suit under Title VI.

A private cause of action under Title VI, in terms both of *381 the Civil Rights Act as a whole and that Title, would not be "consistent with the underlying purposes of the legislative scheme" and would be contrary to the legislative intent. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). Title II, 42 U.S.C. § 2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other federal statutes had been construed to forbid. Both Titles carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U.S.C. § 2000b *et seq.*, and Title IV, 42 U.S.C. § 2000c *et seq.* (1970 ed. and Supp. V), dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilities and public education were already available under 42 U.S.C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each Title carefully provided that its provisions for public actions would not adversely affect pre-existing private remedies. §§ 2000b–2 and 2000c–8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, **2795 42 U.S.C. § 2000d, imposed the proscription that no person, on the grounds of race, color, or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible

if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI.

It is also evident from the face of § 602, 42 U.S.C. § 2000d–1, that Congress intended the departments and agencies ***382** to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review of agency action in accordance with established procedures. Section 602 provides for enforcement: Every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a sanction for noncompliance is authorized, but *only* after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted.[2] To allow a private ***383** individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress, ****2796** without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private as well as public agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was ***384** unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A.4 1963), cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964), throughout the congressional deliberations. See, *e. g.*, 110 Cong.Rec. 6544 (1964) (Sen. Humphrey). *Simkins* held that under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the Fourteenth Amendment. 323 F.2d, at 967. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not —and *Simkins* carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in 'state action,' " *ibid.*[3]—it is difficult ***385** to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law.

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of color blindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cutoff or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances legislators who played a major role in the ****2797** passage of Title VI explicitly stated that a private right of action under Title VI does not exist.[4] ***386** As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Cort v. Ash*, 422 U.S., at 78, 95 S.Ct., at 2088, clearer statements cannot be imagined, and under *Cort*, "an explicit purpose to *deny* such cause of action [is] controlling." *Id.*, at 82, 95 S.Ct., at 2090. Senator

Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced.[5] These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as Mr. Justice STEVENS and the three Justices who join his opinion apparently would. See *post*, at 2814–2815, n. 26. Indeed, it would be odd if they did, since the practical effect of either type of private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds and thereby escaping from the statute's jurisdictional predicate.[6] This is precisely the same choice as would confront recipients if suit were brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

***387** This Court has always required "that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974). See also *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 418–420, 95 S.Ct. 1733, 1737–1738, 44 L.Ed.2d 263 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test.

Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion that my Brothers BRENNAN, MARSHALL, and BLACKMUN and I have filed.[7]

Mr. Justice MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the ****2798** Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, ***388** the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.[1]

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that
"[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a *389 course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed Americans "proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks." Franklin 100.

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave **2799 Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1857), Holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri —was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United *390 States . . . ." *Id.*, at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ." *Id.*, at 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases*, 16 Wall. 36, 70, 21 L.Ed. 394 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed *391 in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme

Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, e. g., *Slaughter-House Cases, supra; United States v. Reese,* 92 U.S. 214, 23 L.Ed. 563 (1876); *United States v. Cruikshank,* 92 U.S. 542, 23 L.Ed. 588 (1876). Then in the notorious *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), ****2800** the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." *Id.*, at 10, 3 S.Ct., at 20. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.*, at 24–25, 3 S.Ct., at 31. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that ***392** state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ." *Id.*, at 25, 3 S.Ct., at 31. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . .—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61, 3 S.Ct., at 57.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544, 16 S.Ct., at 1140. Ignoring totally the realities of the positions of the two races, the Court remarked:
"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551, 16 S.Ct., at 1143.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560, 16 S.Ct., at 1147. He expressed his fear that if like laws were enacted in other ***393** States, "the effect would be in the highest degree mischievous." *Id.*, at 563, 16 S.Ct., at 1148. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens . . . ." *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy,* many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy,* the Charlestown News and Courier printed a parody of Jim Crow laws:
" 'If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be ****2801** Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss.' " Woodward 68.

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible." *Id.*, at 69.

Nor were the laws restricting the rights of Negroes limited ***394** solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was " 'not humiliating but a benefit' " and that he was " 'rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against.' " Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). See, *e. g., Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

***395 II**

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. [2] The Negro child's mother is over three times more likely to die of complications in childbirth, [3] and the infant mortality rate for Negroes is nearly twice that for whites. [4] The median income of the Negro family is only 60% that of the median of a white family, [5] and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites. [6]

****2802** When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, [7] and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. [8] A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. [9] Although Negroes ***396** represent 11.5% of the population, [10] they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors. [11]

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that
"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy . . .." *Slaughter-House Cases*, 16 Wall., at 72.

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the *397 Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see *supra*, at 2800. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons . . .." Cong.Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also *id.*, at 634–635 (remarks of Rep. Ritter); *id.*, at App. 78, 80–81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior . . . and gives them favors that the poor white boy in the North cannot get." *Id.*, at 401 (remarks of Sen. McDougall). See also *id.*, at 319 (remarks of Sen. Hendricks); *id.*, at 362 (remarks of Sen. Saulsbury); *id.*, at 397 (remarks of Sen. Willey); *id.*, at 544 (remarks of Rep. Taylor). The bill's supporters defended it—not by rebutting the claim of special treatment—but by pointing to the need for such treatment:
**2803 "The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal *398 objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong.Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 94, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school-assignment decisions. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41, 91 S.Ct. 1287, 1288, 28 L.Ed.2d 582 (1971). We noted, moreover, that a "flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial ***399** balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green v. County School Board*, 391 U.S. 430 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel v. Barresi, supra*, 402 U.S. at 41, 91 S.Ct. at 1289.

Only last Term, in *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed. 229 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, ****2804** *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was " 'the permissible one of redressing our society's longstanding disparate treatment of women.' " *Id.*, at 317, 97 S.Ct. at 1195, quoting*Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8, 97 S.Ct. 1021, 1028, 51 L.Ed.2d 270 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination.[12] It is true that ***400** in both *UJO* and *Webster* the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has ***401** not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases, supra,* the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S., at 25, 3 S.Ct., at 31, see *supra,* at 2800. We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," 109 U.S., at 53, 3 S.Ct., at 51 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in *Plessy v. Ferguson,* to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that ****2805** the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. 163 U.S., at 559, 16 S.Ct., at 1146. The majority of the Court rejected the principle of color-blindness, and for the next 58 years, from *Plessy* to *Brown v. Board of Education,* ours was a Nation where, *by law,* an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing ***402** to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take " '*affirmative action* to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin.' " Supplemental Brief for United States as *Amicus Curiae* 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative-action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now,* we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

Mr. Justice BLACKMUN.

I participate fully, of course, in the opinion, *ante,* p. 2766, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

***403** I

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination ****2806** of the type we address today will be an ugly feature of history that is instructive but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority ***404** members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84–16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception and not the rule.

II

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinctions ***405** where they are stereotypes are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where, as Mr. Justice POWELL states, *ante*, at 2750, quoting from the Court's opinion in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 2586, 49 L.Ed.2d 493 (1976), it embraces a "broader principle."

This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. **2807 Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), and in *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in *United Jewish Organizations* certainly complained bitterly of their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as Mr. Justice POWELL describes it, *ante*, at 2756. And surely in *Lau v. Nichols* we looked to ethnicity.

*406 I am not convinced, as Mr. Justice POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly. I need not go that far, for despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in *United Jewish Organizations*, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in *407 the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

**2808 A long time ago, as time is measured for this Nation, a Chief Justice, both wise and farsighted, said:
"In considering this question, then, we must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819) (emphasis in original).

In the same opinion, the Great Chief Justice further observed:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*, at 421.

More recently, one destined to become a Justice of this Court observed:
"The great generalities of the constitution have a content and a significance that vary from age to age." B. Cardozo, The Nature of the Judicial Process 17 (1921).

***408** And an educator who became a President of the United States said:
"But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age." W. Wilson, Constitutional Government in the United States 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a *Constitution*. The same principles that governed *McCulloch's* case in 1819 govern *Bakke's* case in 1978. There can be no other answer.

Mr. Justice STEVENS, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice REHNQUIST join, concurring in the judgment in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court.[1] It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The California Supreme Court upheld his challenge and ordered him admitted. If the ***409** state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the Medical School because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical importance.[2] Paragraph 3 declared that the University's ****2809** special admissions program violated the Fourteenth Amendment, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad ***410** prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of *Bakke's* application.[3] Because the University has since been ordered to admit Bakke paragraph 2 of the trial court's order no longer has any significance.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admissions program did not result in Mr. Bakke's failure to be admitted."[4] Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission.[5] Since that order superseded paragraph ***411** 2 of the trial court's judgment, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate. [6]

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, **2810 it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101. [7] The more important the issue, the more force *412 there is to this doctrine. [8] In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

III

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, provides:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. [9] The plain language of the statute therefore requires affirmance of the judgment below. A different result *413 cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," [10] and, with respect to Title **2811 VI, the federal funding of segregated facilities. [11] The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279, 96 S.Ct. 2574, 2578, 49 L.Ed. 493, [12] so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that *no person* . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." H.R.Rep.No.914, 88th *414 Cong., 1st Sess., pt. 1, p. 25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2401 (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act. [13]

Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation and then only by way of a discussion of the meaning of the word "discrimination." [14] The opponents feared that the term "discrimination ***415** " would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this possibility. [15] In response, the proponents of the legislation gave repeated assurances that the Act ****2812** would be "colorblind" in its application. [16] Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

"[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .

"The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else." 110 Cong.Rec. 5864 (1964).

"[I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." *Id.*, at 5866.

***416** In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government, [17] but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view. [18] As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution. [19]

***417** ****2813** As with other provisions of the Civil Rights Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not. [20] However, we need not decide the congruence—or lack of congruence—of the controlling statute and the Constitution ***418** since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage. [21] In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race. [22] As succinctly phrased during the Senate debate, under Title VI it is not "permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin." [23]

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined ***419** issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute. [24] Its view during state-court litigation was that a private cause of action does exist under Title VI. Because petitioner ****2814** questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672, 84 L.Ed. 849. Even if it were, petitioner's original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI. [25] The United States has taken the same position; in its *amicus curiae* brief directed to this specific issue, it concluded

that such a remedy is clearly available,[26] *420 and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action.[27] The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself.[28] In **2815 short, a fair consideration of *421 petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.

The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

All Citations

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Footnotes

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

** Mr. Justice STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post*, at 2809–2810. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of *any candidate's* application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

"In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." 18 Cal.3d 34, 54–55, 132 Cal.Rptr. 680, 693–694, 553 P.2d 1152, 1166 (1976) (footnote omitted).

This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by Mr. Justice STEVENS.

* Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join Parts I and V–C of this opinion. Mr. Justice WHITE also joins Part III–A of this opinion.

1 Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only *after* the applicant has been accepted and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available

to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program.

"Applications for Admissions are available from:

"Admissions Office
School of Medicine
University of California
Davis, California 95616"

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

2 For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.*, at 117. For the 1974 entering class, 3,737 applications were submitted. *Id.*, at 289.

3 That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. *Id.*, at 64.

4 The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.*, at 65–66.

5 For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.*, at 133–134.

6 The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

	Special Admissions Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	
1970....	5	3	0	8	0	0	4	4	12
1971....	4	9	2	15	1	0	8	9	24
1972....	5	6	5	16	0	0	11	11	27
1973....	6	8	2	16	0	2	13	15	31
1974....	6	7	3	16	0	4	5	9	25

Id., at 216–218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

7 The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

Class Entering in 1973

			MCAT (Percentiles)		
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke.....	3.44	3.46	96	94	97	72
Average of regular admittees.....	3.51	3.49	81	76	83	69
Average of special admittees.....	2.62	2.88	46	24	35	33

Class Entering in 1974

			MCAT (Percentiles)		
	SGPA	OGPA	Verbal	Quantitative	Science	Gen. Infor.
Bakke.....	3.44	3.46	96	94	97	72
Average of regular admittees.....	3.36	3.29	69	67	82	72
Average of special admittees.....	2.42	2.62	34	30	37	18

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.*, at 181, 388.

8 Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.*, at 259–269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views

were those of the Medical School or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

9 "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

10 "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." This section was recently repealed and its provisions added to Art. I, § 7, of the State Constitution.

11 Section 601 of Title VI, 78 Stat. 252, provides as follows:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

12 Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal.3d, at 44, 132 Cal.Rptr., at 687, 553 P.2d, at 1159.

13 Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

14 Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury—exclusion from the Medical School—will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722 (1917).
Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 243 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.
Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

15 See, *e. g.*, 110 Cong.Rec. 5255 (1964) (remarks of Sen. Case).

16 *E. g.*, *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851–852 (CA5), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967); *Natonabah v. Board of Education*, 355 F.Supp. 716, 724 (NM 1973); cf. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284–1287 (C.A.7 1977) (Title V of Rehabilitation Act of 1973, 29 U.S.C. § 790 *et seq.* (1976 ed.)); *Piascik v. Cleveland Museum of Art*, 426 F.Supp. 779, 780 n. 1 (N.D.Ohio 1976) (Title IX of Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1976 ed.)).

17 Section 602, as set forth in 42 U.S.C. § 2000d–1, reads as follows:
"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

18 Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964).

Accord, *id.*, at 7065 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

19 For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." *Id.*, at 6547. See also *id.*, at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

20 See, *e. g.*, *id.*, at 7064–7065 (remarks of Sen. Ribicoff); 7054–7055 (remarks of Sen. Pastore); 6543–6544 (remarks of Sen. Humphrey); 2595 (remarks of Rep. Donohue); 2467–2468 (remarks of Rep. Celler); 1643, 2481–2482 (remarks of Rep. Ryan); H.Rep.No.914, 88th Cong., 1st Sess., pt. 2, pp. 24–25 (1963), U.S.Code Cong. & Admin.News 1964, p. 2355.

21 See, *e. g.*, 110 Cong.Rec. 2467 (1964) (remarks of Rep. Lindsay). See also *id.*, at 2766 (remarks of Rep. Matsunaga); 2731–2732 (remarks of Rep. Dawson); 2595 (remarks of Rep. Donohue); 1527–1528 (remarks of Rep. Celler).

22 See, *e. g.*, *id.*, at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062–7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

23 See, *e. g.*, *id.*, at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

24 See also *id.*, at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606–5607 (remarks of Sen. Javits); 5253, 5863–5864, 13442 (remarks of Sen. Humphrey).

25 That issue has generated a considerable amount of scholarly controversy. See, *e. g.*, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723 (1974); Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum.L.Rev. 559 (1975); Kaplan, Equal Justice in an Unequal World: Equality for the Negro, 61 Nw.U.L.Rev. 363 (1966); Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va.L.Rev. 955 (1974); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va.L.Rev. 925 (1974); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup.Ct.Rev. 1; Redish, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 UCLA L.Rev. 343 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U.Chi.L.Rev. 653 (1975); Sedler, Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California, 17 Santa Clara L.Rev. 329 (1977); Seeburger, A Heuristic Argument Against Preferential Admissions, 39 U.Pitt.L.Rev. 285 (1977).

26 Petitioner defines "quota" as a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis the special admissions program does not meet petitioner's definition of a quota. The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal.3d, at 44, 132 Cal.Rptr., at 687, 553 P.2d, at 1159. Both courts below characterized this as a "quota" system.

27 Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–265, 97 S.Ct. 555, 562–563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976); see *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

28 After *Carolene Products*, the first specific reference in our decisions to the elements of "discreteness and insularity" appears in *Minersville School District v. Gobitis*, 310 U.S. 586, 606, 60 S.Ct. 1010, 1018, 84 L.Ed. 1375 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon v. Mitchell*, 400 U.S. 112, 295 n. 14, 91 S.Ct. 260, 349, 27 L.Ed.2d 91 (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. *E. g.*, *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

29 Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341, 381 (1949).

30 M. Jones, American Immigration 177–246 (1960).

31 J. Higham, Strangers in the Land (1955); G. Abbott, The Immigrant and the Community (1917); P. Roberts, The New Immigration 66–73, 86–91, 248–261 (1912). See also E. Fenton, Immigrants and Unions: A Case Study 561–562 (1975).

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32 "Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin." 41 CFR § 60–50.1(b) (1977).

33 *E. g.*, Roberts, *supra* n. 31, at 75; Abbott, *supra* n. 31, at 270–271. See generally n. 31, *supra*.

34 In the view of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e. g.*, *post*, at 2785. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

35 Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, The Morality of Consent 133 (1975).

36 As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, *infra*. But I disagree with much that is said in their opinion.

They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," *post*, at 2789 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." *Post*, at 2787.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants—nothing is said about Asians, cf., *e. g.*, *post*, at 2791 n. 57—would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social intercourse. See Part IV–B, *infra*.

37 Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. *Plessy v. Ferguson*, 163 U.S. 537, 549, 552, 16 S.Ct. 1138, 1142, 1143, 41 L.Ed. 256 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 620, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant

of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, *e. g., Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Terrace v. Thompson,* 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Oyama v. California,* 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249. This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194, and *Hirabayashi v. United States,* 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints." *DeFunis v. Odegaard,* 416 U.S. 312, 337–340, 94 S.Ct. 1704, 1716, 1717, 40 L.Ed.2d 164 (1974) (dissenting opinion) (footnotes omitted).

38 R. Dahl, A Preface to Democratic Theory (1956); Posner, *supra* n. 25, at 27.

39 Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann v. Nitkowski,* 378 F.2d 22 (C.A.2 1967); *Wanner v. County School Board,* 357 F.2d 452 (C.A.4 1966); *Springfield School Committee v. Barksdale,* 348 F.2d 261 (C.A.1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d, at 454. Cf. *United Jewish Organizations v. Carey,* 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). In *Barksdale* and *Offermann,* courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes v. School District No. 1,* 413 U.S. 189, 240–250, 93 S.Ct. 2686, 2713, 2718, 37 L.Ed.2d 548 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

40 Every decision upholding the requirement of preferential hiring under the authority of Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders Assn. v. Ogilvie,* 471 F.2d 680 (C.A.7 1972); *Joyce v. McCrane,* 320 F.Supp. 1284 (NJ 1970); *Weiner v. Cuyahoga Community College District,* 19 Ohio St.2d 35, 249 N.E.2d 907, cert. denied, 396 U.S. 1004, 90 S.Ct. 554, 24 L.Ed.2d 495 (1970). See also *Rosetti Contracting Co. v. Brennan,* 508 F.2d 1039, 1041 (C.A.7 1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (C.A.1 1973), cert. denied, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974); *Northeast Constr. Co. v. Romney,* 157 U.S.App.D.C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

41 This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, *e. g., South Carolina v. Katzenbach,* 383 U.S. 301, 308–310, 86 S.Ct. 803, 808–809, 15 L.Ed.2d 769 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See *Hampton v. Mow Sun Wong,* 426 U.S. 88, 103, 96 S.Ct. 1895, 1905, 48 L.Ed.2d 495 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

42 Petitioner also cites our decision in *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis. Id.,* at 554, 94 S.Ct., at 2484. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*

43 A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra* n. 25, at 581–586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. *E. g.*, Greenawalt, *supra* n. 25, at 581; Posner, *supra*, n. 25 at 16–17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra* n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

44 Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post*, at 2786–2787, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 431, 91 S.Ct., at 853 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*, at 432, 91 S.Ct., at 854. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–803, 805–806, 93 S.Ct. 1817, 1824, 1825, 1826, 36 L.Ed.2d 668 (1973). Nothing *in this record*—as opposed to some of the general literature cited by Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN—even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n. 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs, supra*, 401 U.S., at 429–430, 91 S.Ct., at 853.

See, *e. g.*, H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). See generally Vaas, Title VII: The Legislative History, 7 B.C.Ind. & Com.L.Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." 401 U.S., at 430–431, 91 S.Ct., at 853. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e–2(j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

45 For example, the University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American-Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, *supra*.

46 The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

47 It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical

experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

48 The president of Princeton University has described some of the benefits derived from a diverse student body:
"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth." Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

49 Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation—contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent." *Id.*, at 10.

50 See Manning, The Pursuit of Fairness in Admissions to Higher Education, in Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education 19, 57–59 (1977).

51 The admissions program at Princeton has been described in similar terms:
"While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished—and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own." Bowen, *supra* n. 48, at 8–9.
For an illuminating discussion of such flexible admissions systems, see Manning, *supra* n. 50, at 57–59.

52 The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN is this denial even addressed.

53 Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.
There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954).

54 There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in Part V, *supra*. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284–287, 97 S.Ct. 568, 575–576, 50 L.Ed.2d 471 (1977). In *Mt. Healthy*, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265–266, 97 S.Ct., at 563–564. No one can say how—or even if—petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

55 This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*.

1 We also agree with Mr. Justice POWELL that a plan like the "Harvard" plan, see *ante*, at 2762–2763, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

2 See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

3 *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46 (1958); *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112 (1954); *Mayor of Baltimore v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955); *Holmes v. Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955); *Gayle v. Browder*, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1956).

4 See *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

5 See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).

6 See, *e. g.*, cases collected in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 663 n. 5, 98 S.Ct. 2018, 2022, 56 L.Ed.2d 611 (1978).

7 Section 601 of Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

8 Mr. Justice WHITE believes we should address the private-right-of-action issue. Accordingly, he has filed a separate opinion stating his view that there is no private right of action under Title VI. See *post*, p. 2794.

9 "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also . . ..

"Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining —which might be used to withhold funds if discrimination were not ended—is at best questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally—as is often proposed—the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites; for this may only penalize those who least deserve it without ending discrimination.

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance, or otherwise—to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein—but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices." 109 Cong.Rec. 11161 (1963).

10 See, *e. g.*, 110 Cong.Rec. 2732 (1964) (Rep. Dawson); *id.*, at 2481–2482 (Rep. Ryan); *id.*, at 2766 (Rep. Matsunaga); *id.*, at 2595 (Rep. Donahue).

11 There is also language in 42 U.S.C. § 2000d–5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. Section 2000d–5 provides that "for the purpose of determining whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned." This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

12 As has already been seen, the proponents of Title VI in the House were motivated by the identical concern. See remarks of Representative Celler (110 Cong. Rec. at 2467 (1964)); Representative Ryan (*id.*, at 1643, 2481–2482); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, Additional Views of Seven Representatives 24–25 (1963).

13 See separate opinion of Mr. Justice WHITE, *post*, at 2795–2796, n. 2.

14 These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their concern—the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs—was clear. See *supra*, at 2770–2772; *infra*, at 2774–2775, n. 17.

15 Testimony of Attorney General Kennedy in Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 398–399 (1963).

16 See, *e. g.*, 110 Cong.Rec. 6544, 13820 (1964) (Sen. Humphrey); *id.*, at 6050 (Sen. Javits); *id.*, at 12677 (Sen. Allott).

17 Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See *id.*, at 6547 (Sen. Humphrey); *id.*, at 6047, 7055 (Sen. Pastore); *id.*, at 12675 (Sen. Allott); *id.*, at 6561 (Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination. In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroes in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context there can be no doubt that the Fourteenth Amendment does command color blindness and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color. Significantly one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See *supra*, at 2773–2774; 110 Cong.Rec. 6562 (1964). See also *id.*, at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor to prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." *Id.*, at 15893.

Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI but was rather left to the judgment of state and local communities. See, *e. g.*, *id.*, at 10920 (Sen. Javits); *id.*, at 5807, 5266 (Sen. Keating); *id.*, at 13821 (Sens. Humphrey and Saltonstall). See also, *id.*, at 6562 (Sen. Kuchel); *id.*, at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U.S.C. § 2000e–2(a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin . . . ."), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute and might in fact violate it. See, *e. g.*, 110 Cong.Rec. 7214 (1964) (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the Fourteenth Amendment (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed *infra*, at 2780–2781, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 767–768, 96 S.Ct. 1251, 1265–1266, 47 L.Ed.2d 444 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See *id.*, at 762–770, 96 S.Ct., at 1263–1267; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). There is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See *infra*, at 2780–2782, and n. 28.

18 HEW has stated that the purpose of these regulations is "to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination." 36 Fed.Reg. 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for United States as *Amicus Curiae* 16 n. 14.

19 Moreover, the President has delegated to the Attorney General reponsibility for coordinating the enforcement of Title VI by federal departments and agencies and has directed him to 'assist the departments and agencies in accomplishing effective implementation.' Exec. Order No. 11764, 3 CFR 849 (1971-1975 Comp.). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect.

20 HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the Office of Management and Budget, 1977 Catalogue of Federal Domestic Assistance 205-206, 401-402. The first program, No. 13.375, 'Minority Biomedical Support.' has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total $9,711,000 for 1977.

The second program, No. 13.880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

21 H.R.Conf.Rep. No. 95–538, p. 22 (1977); 123 Cong.Rec. 26188 (1977). See H.J.Res. 662, 95th Cong., 1st Sess. (1977); Pub.L. 95–205, 91 Stat. 1460.

22 91 Stat. 117, 42 U.S.C. § 6705 (f)(2) (1976 ed.).

23 123 Cong.Rec. 7156 (1977); *id.*, at 5327–5330 (1977).

24 See *id.*, at 7156 (1977) (Sen. Brooke).

25 In addition to the enactment of the 10% quota provision discussed *supra*, Congress has also passed other Acts mandating race-conscious measures to overcome disadvantages experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some circumstances. This in turn undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7(a) of the National Science Foundation Authorization Act, 1977, provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation." 90 Stat. 2056, note following 42 U.S.C. § 1873 (1976 ed.).

Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. Section 7(c)(2) of the Act, 90 Stat. 2056, requires that these Centers:

"(A) have substantial minority student enrollment;

"(B) are geographically located near minority population centers;

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;

"(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and

"(G) will develop joint educational programs with nearby undergraduate institutions of higher education which have a substantial minority student enrollment."

Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And, once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely color-blind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 *et seq.* (1976 ed.), 49 U.S.C. § 1657a *et seq.* (1976 ed.); the Emergency School Aid Act, 20 U.S.C. § 1601 *et seq.* (1976 ed.).

26 Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

27 *Ibid.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

28 *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII (Equal Employment Opportunity Act of 1972, 86 Stat. 103) a number of Courts of Appeals approved race-conscious action to remedy the effects of employment discrimination. See, *e. g., Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (C.A.5 1969); *United States v. Electrical Workers*, 428 F.2d 144, 149–150 (C.A.6), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); *United States v. Sheet Metal Workers*, 416 F.2d 123 (C.A.8 1969). In 1965, the President issued Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), which as amended by Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.), required federal contractors to take affirmative action to remedy the disproportionately low employment of racial minorities in the construction industry. The Attorney General issued an opinion concluding that the race consciousness required by Exec. Order No. 11246 did not conflict with Title VII: "It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria." 42 Op. Atty. Gen. 405, 411 (1969).
The federal courts agreed. See, *e. g., Contractors Assn. of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (C.A.3), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971) (which also held, 442 F.2d, at 173, that race-conscious affirmative action was permissible under Title VI); *Southern Illinois Builders Assn. v. Ogilvie*, 471 F.2d 680 (C.A.7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Exec. Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chi.L.Rev. 723, 747–757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Conference Committee Report on H.R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:
"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of the Equal Employment Opportunity Act of 1972, p. 1844 (Comm.Print. 1972).

29 *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977). See also *id.*, at 167–168, 97 S.Ct., at 1010–1011 (opinion of WHITE, J.).

30 We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.

31 Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. *Castaneda v. Partida*, 430 U.S. 482, 499–500, 97 S.Ct. 1272, 1282–1283, 51 L.Ed.2d 498 (1977); *id.*, at 501, 97 S.Ct., at 1283 (MARSHALL, J., concurring).

32 "[T]he conclusion cannot be resisted, that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which the petitioners belong . . .. The discrimination is, therefore, illegal . . .."

33 Indeed, even in *Plessy v. Ferguson* the Court recognized that a classification by race that presumed one race to be inferior to another would have to be condemned. See 163 U.S., at 544–551, 16 S.Ct., at 1140–1143.

34 Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). In *Hirabayashi*, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." *Hirabayashi*, 320 U.S., at 101, 63 S.Ct., at 1386. A similar mode of analysis was followed in *Korematsu*, see 323 U.S., at 224, 65 S.Ct., at 197, even though the Court stated there that racial classifications were "immediately suspect" and should be subject to "the most rigid scrutiny." *Id.*, at 216, 65 S.Ct., at 194.

35 We disagree with our Brother POWELL's suggestion, *ante*, at 2755, that the presence of "rival groups which can claim that they, too, are entitled to preferential treatment" distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.
But, were we asked to decide whether any given rival group—German-Americans for example—must constitutionally be accorded preferential treatment, we do have a "principled basis," *ante*, at 2751, for deciding this question, one that is well established in our cases: The Davis program expressly sets out four classes which receive preferred status. *Ante*, at 2740. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for

invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264–265, 97 S.Ct. 555, 562–563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 238–241, 96 S.Ct. 2040, 2046, 2048, 48 L.Ed.2d 597 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable," *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See *ibid.*; *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 38–39, 93 S.Ct. 1278, 1299–1300, 36 L.Ed.2d 16 (1973) (applying *Katzenbach* test to state action intended to remove discrimination in educational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

36 Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972).

37 In *Albemarle*, we approved "differential validation" of employment tests. See 422 U.S., at 435, 95 S.Ct., at 2380. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

38 Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See *supra*, at 2772–2773. And, significantly, the Equal Employment Opportunity Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII. See 42 Fed.Reg. 64826 (1977).

39 "[T]he [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionments . . . ."

40 "[T]he State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

41 Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." *Ante*, at 2756. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and *UJO* deprived the Hassidim of bloc voting strength. Each of these injuries was constitutionally cognizable as is respondent's here.

42 We do not understand Mr. Justice POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See *ante*, at 2756. Yet, because petitioner is a corporation administering a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations." *Ante*, at 2758. While we agree that reversal in this case would follow *a fortiori* had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from applying any admissions policy that had a disparate and unjustified racial impact, see, *e. g.*, *McDaniel v. Barresi*, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582 (1971); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 256, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in result). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. See Cal.Const., Art. 9, § 9(a). Control over the University is to be found not in the legislature, but rather in the Regents who had been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See *ibid.*; *Ishimatsu v. Regents*, 266 Cal.App.2d 854, 863–864, 72 Cal.Rptr. 756, 762–763 (1968); *Goldberg v. Regents*, 248 Cal.App.2d 867, 874, 57 Cal.Rptr. 463, 468 (1967); 30 Op.Cal.Atty.Gen. 162, 166 (1957) ("The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University"). This is certainly a permissible choice, see *Sweezy*, *supra*, and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the Equal Protection Clause required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See *infra*, at 2789–2790.

43 "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) (*per curiam*), citing *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228, 43 L.Ed.2d 514 (1975).

44 *Railway Mail Assn.* held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association's due process rights secured by the Fourteenth Amendment because that result "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U.S., at 94, 65 S.Ct., at 1487. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

45 According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Action, 1966–1976, p. 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M.D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexican American, American-Indian, and mainland Puerto Rican graduates were also recorded during those years. *Id.,* at 40.
The statistical information cited in this and the following notes was compiled by Government officials or medical educators, and has been brought to our attention in many of the briefs. Neither the parties nor the *amici* challenge the validity of the statistics alluded to in our discussion.

46 D. Reitzes, Negroes and Medicine, pp. xxvii, 3 (1958).

47 Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard 19.

48 U.S. Dept. of Health, Education, and Welfare, Minorities and Women in the Health Fields 7 (Pub. No. (HRA) 75–22, May 1974).

49 U.S. Dept. of Commerce, Bureau of the Census, 1970 Census, vol. 1, pt. 1, Table 60 (1973).

50 See *ante,* at 2741 n. 6 (opinion of POWELL, J.).

51 See, *e. g.,* R. Wade, Slavery in the Cities: The South 1820–1860, pp. 90–91 (1964).

52 For an example of unequal facilities in California schools, see *Soria v. Oxnard School Dist. Board,* 386 F.Supp. 539, 542 (CD Cal.1974). See also R. Kluger, Simple Justice (1976).

53 See, *e. g., Crawford v. Board of Education,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976); *Soria v. Oxnard School Dist. Board, supra; Spangler v. Pasadena City Board of Education,* 311 F.Supp. 501 (C.D.Cal.1970); C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855–1975, pp. 136–177 (1976).

54 For example, over 40% of American-born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the statistic for females was over 48%. These statistics were computed from data contained in Census, *supra* n. 49, pt. 6, California, Tables 139, 140.

55 See, *e. g.,* O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 729–731 (1971).

56 Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality because of the effects of past and present discrimination. See *supra,* at 2778–2779.

57 Negroes and Chicanos alone constitute approximately 22% of California's population. This percentage was computed from data contained in Census, *supra,* n. 49, pt. 6, California, sec. 1, 6–4, and Table 139.

58 The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see *ibid.*, and to those minority applicants deemed qualified for admission and deemed likely to contribute to the Medical School and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admittees is unconstitutionally high.

59 See Census, *supra,* n. 49, Sources and Structure of Family Income, pp. 1–12.

60 This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools 34 (Table A–15), 42 (Table A–23) (Association of American Medical Colleges 1977.)

61 This figure was computed from data contained in Census, *supra* n. 49, pt. 1, United States Summary, Table 209.

62 See Waldman, *supra* n. 60, at 10–14 (Figures 1–5).

63 The excluded white applicant, despite Mr. Justice POWELL's contention to the contrary, *ante*, at 2763 n. 52, receives no more or less "individualized consideration" under our approach than under his.

1 It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties . . . ." 303 U.S., at 229, 58 S.Ct., at 602. See also *Mount Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of Mr. Justice STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present respondent. *Id.*, at 571 n. 2, 94 S.Ct., at 790. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U.S.C. § 1983 rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause of action.

2 "Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President.

"Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final because it is subject to judicial review and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safeguards to incorporate in such a procedure." 110 Cong.Rec. 6749 (1964) (Sen. Moss).

"[T]he authority to cut off funds is hedged about with a number of procedural restrictions. . . . [There follow details of the preliminary steps.]

"In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action." *Id.*, at 6544 (Sen. Humphrey). "Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed." *Id.*, at 1519 (Rep. Celler) (emphasis added). See also remarks of Sen. Ribicoff (*id.*, at 7066–7067); Sen. Proxmire (*id.*, at 8345); Sen. Kuchel (*id.*, at 6562). These safeguards were incorporated into 42 U.S.C. § 2000d–1.

3 This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), private schools that received state aid were held subject to the Fourteenth Amendment's ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.*, at 466, 93 S.Ct., at 2811. The mandate of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.

Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin v. School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 265 (1964). Tuition grants and tax concessions were provided for parents of students in private schools, which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented: "[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." *Id.*, at 232, 84 S.Ct., at 1234.

Hence, neither at the time of the enactment of Title VI, nor at the present time to the extent this Court has spoken, has mere receipt of state funds created state action. Moreover, *Simkins* has not met with universal approval among the United States Courts of Appeals.

See cases cited in *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000, 1004, 96 S.Ct. 433, 435, 46 L.Ed.2d 376 (1975) (WHITE, J., dissenting from denial of certiorari).

4 "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong.Rec. 2467 (1964) (Rep. Gill).
"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.*, at 6562 (Sen. Kuchel).
"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." *Id.*, at 7065 (Sen. Keating).

5 *Ibid.*

6 As Senator Ribicoff stated: "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs." *Id.*, at 7067.

7 I also join Parts I, III–A, and V–C of Mr. Justice POWELL's opinion.

1 The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. Franklin, From Slavery to Freedom (4th ed. 1974) (hereinafter Franklin); R. Kluger, Simple Justice (1975) (hereinafter Kluger); C. Woodward, The Strange Career of Jim Crow (3d ed. 1974) (hereinafter Woodward).

2 U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 65 (1977) (Table 94).

3 *Id.*, at 70 (Table 102).

4 *Ibid.*

5 U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P–60, No. 107, p. 7 (1977) (Table 1).

6 *Id.*, at 20 (Table 14).

7 U. S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1978, p. 170 (Table 44).

8 *Ibid.*

9 U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P–60, No. 105, p. 198 (1977) (Table 47).

10 U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract, *supra*, at 25 (Table 24).

11 *Id.*, at 407–408 (Table 662) (based on 1970 census).

12 Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3(b)(6)(ii) (1977).

1 Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of Justices BRENNAN, WHITE, MARSHALL, and BLACKMUN, *ante*, at 2766. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

2 The judgment first entered by the trial court read, in its entirety, as follows:
"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:
"1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;
"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;
"3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. § 2000d];
"4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35." App. to Pet. for Cert. 120a.

3 In paragraph 2 the trial court ordered that "plaintiff [Bakke] is entitled to have *his* application for admission to the medical school considered without regard to *his* race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering *plaintiff's* race or the race of any other applicant in passing upon *his* application for admission." See n. 2, *supra* (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph

to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

4 Appendix B to Application for Stay A19–A20.

5 18 Cal.3d 34, 64, 132 Cal.Rptr. 680, 700, 553 P.2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:

"IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted.

"Bakke shall recover his costs on these appeals."

6 "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188.

7 "From *Hayburn's Case*, 2 Dall. 409, to *Alma Motor Co. v. Timken-Detroit Axle Co.*[, 329 U.S. 129, 67 S.Ct. 231, 91 L.Ed. 128,] and the *Hatch Act* case [*United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U.S.Const., Art. III. . . .

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided." *Rescue Army v. Municipal Court*, 331 U.S. 549, 568–569, 67 S.Ct. 1409, 1419, 91 L.Ed. 1666 (footnotes omitted). See also *Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 482–483, 80 L.Ed. 688 (Brandeis, J., concurring).

8 The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, The Least Dangerous Branch 131 (1962).

9 Record 29.

10 H.R.Rep.No.914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963), U.S.Code Cong. & Admin.News 1964, p. 2393.

11 It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, *e. g.*, 110 Cong.Rec. 1521 (1964) (remarks of Rep. Celler); *id.*, at 6544 (remarks of Sen. Humphrey).

12 In *McDonald v. Santa Fe Trail Transp. Co.*, the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes . . . ." 427 U.S., at 280, 96 S.Ct., at 2579. Quoting from our earlier decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158, the Court reaffirmed the principle that the statute "prohibit[s] '[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*.' " 427 U.S., at 279, 96 S.Ct., at 2578 (emphasis in original).

13 See, *e. g.*, 110 Cong.Rec. 1520 (1964) (remarks of Rep. Celler); *id.*, at 5864 (remarks of Sen. Humphrey); *id.*, at 6561 (remarks of Sen. Kuchel); *id.*, at 7055 (remarks of Sen. Pastore). (Representative Celler and Senators Humphrey and Kuchel were the House and Senate floor managers for the entire Civil Rights Act, and Senator Pastore was the majority Senate floor manager for Title VI.)

14 Representative Abernathy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill . . . .

"It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . .

"Presumably the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria . . . .

"The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual . . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction . . . ." *Id.*, at 1619. See also, *e. g.*, *id.*, at 5611–5613 (remarks of Sen. Ervin); *id.*, at 9083 (remarks of Sen. Gore).

15 *E. g.*, *id.*, at 5863, 5874 (remarks of Sen. Eastland).

16 See, *e. g.*, *id.*, at 8346 (remarks of Sen. Proxmire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); *id.*, at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind"); and *id.*, at 6543 (remarks of Sen. Humphrey) ("

'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination' ") (quoting from President Kennedy's Message to Congress, June 19, 1963).

17 See, *e. g.*, 110 Cong.Rec. 5253 (1964) (remarks of Sen. Humphrey); and *id.*, at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the immediate goal of the Act—an end to federal funding of "separate but equal" facilities.

18 "As in *Monroe [v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492], we have no occasion here to 'reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.' 365 U.S. [167], at 191 [81 S.Ct. 473, 5 L.Ed.2d 492]. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries v. Lynskey*, 452 F.2d, 172, at 175." *Moor v. County of Alameda*, 411 U.S. 693, 709, 93 S.Ct. 1785, 1795, 36 L.Ed.2d 596.

19 Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 709, 98 S.Ct. 1370, 1376, 55 L.Ed.2d 657 ("[T]he basic policy of the statute [Title VII] requires that we focus on fairness to individuals rather than fairness to classes"). This same principle of *individual* fairness is embodied in Title VI.

"The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition. . . .

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 1146, 41 L.Ed. 256.

" 'Our Constitution is colorblind.'

"So—I say to Senators—must be our Government. . . .

"Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values . . . .

"Title VI offers a place for the meeting of our minds as to Federal money." 110 Cong.Rec. 7063–7064 (1964) (remarks of Sen. Pastore). Of course, one of the reasons marshaled in support of the conclusion that Title VI was "noncontroversial" was that its prohibition was already reflected in the law. See *ibid.* (remarks of Sen. Pell and Sen. Pastore).

20 For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the Fifth and Fourteenth Amendments which are directed only to governmental action.

In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1, the Government's brief stressed that "the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [T]he statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief." Brief for United States as *Amicus Curiae*, O.T. 1973, No. 72–6520, p. 15. The Court, in turn, rested its decision on Title VI. Mr. Justice POWELL takes pains to distinguish *Lau* from the case at hand because the *Lau* decision "rested solely on the statute." *Ante*, at 2756. See also *Washington v. Davis*, 426 U.S. 229, 238–239, 96 S.Ct. 2040, 2046–2047, 48 L.Ed.2d 597; *Allen v. State Board of Elections*, 393 U.S. 544, 588, 89 S.Ct. 817, 843, 22 L.Ed.2d 1 (Harlan, J., concurring and dissenting).

21 As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional *and* moral understanding of the times. "The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . *In all cases*, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong.Rec. 6544 (1964) (emphasis added).

22 Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5(j) (1977). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.

23 110 Cong.Rec. 6047 (1964) (remarks of Sen Pastore).

24 Record 30–31.

25 See, *e. g.*, *Lau v. Nichols*, *supra*; *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (C.A.5 1967), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350; *Uzzell v. Friday*, 547 F.2d 801 (C.A.4 1977), opinion on rehearing en banc, 558 F.2d 727, cert. pending, No. 77–635; *Serna v. Portales*, 499 F.2d 1147 (C.A.10 1974); cf. *Chambers v. Omaha Public School District*, 536 F.2d 222, 225 n. 2 (C.A.8 1976) (indicating doubt over whether a *money judgment* can be obtained under Title VI). Indeed, the Government's brief

in *Lau v. Nichols, supra,* succinctly expressed this common assumption: "It is settled that petitioners . . . have standing to enforce Section 601 . . . ." Brief for United States as *Amicus Curiae* in *Lau v. Nichols*, O.T.1973, No. 72–6520, p. 13 n. 5.

26 Supplemental Brief for United States as *Amicus Curiae* 24–34. The Government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. *Id.,* at 28–30. Section 601 is specifically addressed to personal rights, while § 602—the fund cutoff provision—establishes "an elaborate mechanism for *governmental* enforcement by federal agencies." Supplemental Brief, *supra*, at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of Mr. Justice WHITE, *ante*, at 2794. But Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:
"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 . . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602." Supplemental Brief, *supra,* at 30 n. 25. The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See *Rosado v. Wyman,* 397 U.S. 397, 420, 90 S.Ct. 1207, 1221, 25 L.Ed.2d 442.

27 See 29 U.S.C. § 794 (1976 ed.) (the Rehabilitation Act of 1973) (in particular, the legislative history discussed in *Lloyd v. Regional Transportation Authority,* 548 F.2d 1277, 1285–1286 (C.A.7 1977)); 20 U.S.C. § 1617 (1976 ed.) (attorney fees under the Emergency School Aid Act); and 31 U.S.C. § 1244 (1976 ed.) (private action under the Financial Assistance Act). Of course, none of these subsequent legislative enactments is necessarily reliable evidence of Congress' intent in 1964 in enacting Title VI, and the legislation was not intended to change the existing status of Title VI.

28 Framing the analysis in terms of the four-part *Cort v. Ash* test, see 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the " 'class for whose *especial* benefit the statute was enacted,' " *Ibid.* (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." *Ibid.* (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of Mr. Justice *POWELL, ante,* at 2745 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent with, if not essential to, the legislative scheme. See, *e. g.,* remarks of Senator Ribicoff:
"We come then to the crux of the dispute—how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable since that reaches the objective of extending the funds on a nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?" 110 Cong.Rec. 7065 (1964). See also *id.,* at 5090, 6543, 6544 (remarks of Sen. Humphrey); *id.,* at 7103, 12719 (remarks of Sen. Javits); id., at 7062, 7063 (remarks of Sen. Pastore).
The congressional debates thus show a clear understanding that the principle embodied in § 601 involves *personal* federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1970 ed. and Supp. V), is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See *Allen v. State Bd. of Elections,* 393 U.S. 544, 556, 89 S.Ct. 817, 826, 22 L.Ed.2d 1. In *Allen,* of course, this Court found a private right of action under the Voting Rights Act.

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Superseded by Statute as Stated in Harrison v. Vanderkooi, Mich.App., May 23, 2017

123 S.Ct. 2325
Supreme Court of the United States

Barbara GRUTTER, Petitioner,
v.
Lee BOLLINGER et al.

No. 02–241.
|
Argued April 1, 2003.
|
Decided June 23, 2003. Rehearing Denied Aug. 25, 2003. See 539 U.S. 982, 124 S.Ct. 35.

Synopsis

Law school applicants who were denied admission challenged race-conscious admissions policy of state university law school, alleging that the admissions policy encouraging student body diversity violated their equal protection rights. The United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., 137 F.Supp.2d 821, held that the law school's consideration of race and ethnicity in its admissions decisions was unlawful and enjoined law school from using race as a factor in its admissions decisions. Appeal was taken. Sitting en banc, the United States Court of Appeals for the Sixth Circuit, 288 F.3d 732, Boyce F. Martin, Jr., Chief Judge, reversed the District Court's judgment and vacated the injunction. Certiorari was granted. The United States Supreme Court, Justice O'Connor, held that: (1) law school had a compelling interest in attaining a diverse student body; and (2) admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and thus did not violate the Equal Protection Clause.

Affirmed.

Justice Ginsburg concurred and filed opinion in which Justice Breyer joined.

Justice Scalia concurred in part, dissented in part, and filed opinion in which Justice Thomas joined.

Justice Thomas concurred in part, dissented in part, and filed opinion in which Justice Scalia joined in part.

Chief Justice Rehnquist dissented and filed opinion in which Justice Scalia, Justice Kennedy, and Justice Thomas joined.

Justice Kennedy dissented and filed opinion.

**2327 *306 *Syllabus* *

The University of Michigan Law School (Law School), one of the Nation's top law schools, follows an official admissions policy that seeks to achieve student body diversity through compliance with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750. Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to Law School life and diversity, and the applicant's undergraduate grade **2328 point average (GPA) and Law School Admission Test (LSAT) score. Additionally, officials must look beyond grades and scores to so-called "soft variables," such as recommenders'

enthusiasm, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for "substantial weight," but it does reaffirm the Law School's commitment to diversity with special reference to the inclusion of African–American, Hispanic, and Native–American students, who otherwise might not be represented in the student body in meaningful numbers. By enrolling a "critical mass" of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession.

When the Law School denied admission to petitioner Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, she filed this suit, alleging that respondents had discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981; that she was rejected because the Law School uses race as a "predominant" factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race. The District Court found the Law School's use of race as an admissions factor unlawful. The Sixth Circuit reversed, holding that Justice Powell's opinion in *Bakke* was binding precedent establishing ***307** diversity as a compelling state interest, and that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was virtually identical to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion.

Held: The Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981. Pp. 2335–2347.

(a) In the landmark *Bakke* case, this Court reviewed a medical school's racial set-aside program that reserved 16 out of 100 seats for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority. Four Justices would have upheld the program on the ground that the government can use race to remedy disadvantages cast on minorities by past racial prejudice. 438 U.S., at 325, 98 S.Ct. 2733. Four other Justices would have struck the program down on statutory grounds. *Id.*, at 408, 98 S.Ct. 2733. Justice Powell, announcing the Court's judgment, provided a fifth vote not only for invalidating the program, but also for reversing the state court's injunction against any use of race whatsoever. In a part of his opinion that was joined by no other Justice, Justice Powell expressed his view that attaining a diverse student body was the only interest asserted by the university that survived scrutiny. *Id.*, at 311, 98 S.Ct. 2733. Grounding his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment," *id.*, at 312, 314, 98 S.Ct. 2733, Justice Powell emphasized that the " 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation." *Id.*, at 313, 98 S.Ct. 2733. However, he also emphasized that "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify using race. *Id.*, at 315, 98 S.Ct. 2733. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader ****2329** array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.* Since *Bakke*, Justice Powell's opinion has been the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views. Courts, however, have struggled to discern whether Justice Powell's diversity rationale is binding precedent. The Court finds it unnecessary to decide this issue because the Court endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions. Pp. 2335–2337.

***308** b) All government racial classifications must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158. But not all such uses are invalidated by strict scrutiny. Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest. *E.g., Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207. Context matters when reviewing such action. See *Gomillion v. Lightfoot*, 364 U.S. 339, 343–344, 81 S.Ct. 125, 5 L.Ed.2d 110. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for

carefully examining the importance and the sincerity of the government's reasons for using race in a particular context. Pp. 2337–2338.

(c) The Court endorses Justice Powell's view that student body diversity is a compelling state interest that can justify using race in university admissions. The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise. See, *e.g., Bakke,* 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.). Attaining a diverse student body is at the heart of the Law School's proper institutional mission, and its "good faith" is "presumed" absent "a showing to the contrary." *Id.,* at 318–319, 98 S.Ct. 2733. Enrolling a "critical mass" of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. *E.g., id.,* at 307, 98 S.Ct. 2733. But the Law School defines its critical mass concept by reference to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes. The Law School's claim is further bolstered by numerous expert studies and reports showing that such diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation's leaders, *Sweatt v. Painter,* 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114, the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. Thus, the Law School has a compelling interest in attaining a diverse student body. Pp. 2338–2341.

***309** d) The Law School's admissions program bears the hallmarks of a narrowly tailored plan. To be narrowly tailored, a race-conscious admissions program cannot "insulat[e] each category of applicants with certain desired qualifications from ****2330** competition with all other applicants." *Bakke,* 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, it may consider race or ethnicity only as a " 'plus' in a particular applicant's file"; *i.e.,* it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight," *id.,* at 317, 98 S.Ct. 2733. It follows that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks. See *id.,* at 315–316, 98 S.Ct. 2733. The Law School's admissions program, like the Harvard plan approved by Justice Powell, satisfies these requirements. Moreover, the program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application. See *id.,* at 317, 98 S.Ct. 2733. The Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. There is no policy, either *de jure* or *de facto,* of automatic acceptance or rejection based on any single "soft" variable. *Gratz v. Bollinger, post,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 2003 WL 21434002, distinguished. Also, the program adequately ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Moreover, the Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. The Court rejects the argument that the Law School should have used other race-neutral means to obtain the educational benefits of student body diversity, *e.g.,* a lottery system or decreasing the emphasis on GPA and LSAT scores. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative or mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See, *e.g., Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260. The Court is satisfied that the Law School adequately considered the available alternatives. The Court is also satisfied that, in the context of individualized consideration of the possible diversity contributions of each applicant, the Law School's race-conscious admissions program does not unduly harm nonminority applicants. Finally, race-conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial ***310** preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. Pp. 2341–2347.

(e) Because the Law School's use of race in admissions decisions is not prohibited by the Equal Protection Clause, petitioner's statutory claims based on Title VI and § 1981 also fail. See *Bakke, supra,* at 287, 98 S.Ct. 2733 (opinion of Powell, J.); *General Building Contractors Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 389–391, 102 S.Ct. 3141, 73 L.Ed.2d 835. P. 2347.

288 F.3d 732, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of THOMAS, J. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined, *post,* p. 2347. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, **2331 *post,* p. 2348. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined as to Parts I–VII, *post,* p. 2350. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post,* p. 2365. KENNEDY, J., filed a dissenting opinion, *post,* p. 2370.

Attorneys and Law Firms

Kirk O. Kolbo, Minneapolis, MN, for petitioner.

Theodore B. Olson, for United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Maureen E. Mahoney, Washington, DC, for respondents.

Michael E. Rosman, Hans Bader Center for Individual Rights, Washington, D.C., Kerry L. Morgan Pentiuk, Couvreur & Kobiljak, P.C., Wyandotte, MI, Kirk O. Kolbo, Counsel of Record, David F. Herr, R. Lawrence Purdy, Michael C. McCarthy, Kai H. Richter, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, MN, for petitioner.

Miranda K.S. Massie, Counsel of Record, Shanta Driver, George B. Washington, Jodi-Marie Masley, Scheff & Washington, P.C., Detroit, Michigan, for Respondents Kimberly James, et al.

Marvin Krislov, Jonathan Alger, University of Michigan, Office Of The Vice President And General Counsel, Ann Arbor, MI, Evan Caminker, University of Michigan Law School, Ann Arbor, MI, Philip J. Kessler, Leonard M. Niehoff, Butzel Long, Ann Arbor, MI, Maureen E. Mahoney, Counsel of Record, J. Scott Ballenger, Nathaniel A. Vitan, Latham & Watkins, LLP, Washington, DC, John H. Pickering, John Payton, Brigida Benitez, Stuart Delery, Craig Goldblatt, Anne Harkavy, Terry A. Maroney, Wilmer, Cutler & Pikering, Washington, DC, for Respondents.

Opinion

*311 Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

*312 I

A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class *313 of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable,"

the Law School looks for individuals with "substantial *314 promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." App. 110. More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Ibid.* In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court's most recent ruling on the use of race in university admissions. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). *315 Upon the unanimous adoption of the committee's report by the Law School faculty, it became the Law School's official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." App. 111. The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, **2332 and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. *Id.*, at 83–84, 114–121. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. *Id.*, at 112. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems." *Id.*, at 111.

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. *Id.*, at 113. Nor does a low score automatically disqualify an applicant. *Ibid.* Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. *Id.*, at 114. So-called " 'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution." *Ibid.*

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.*, at 118. *316 The policy does not restrict the types of diversity contributions eligible for "substantial weight" in the admissions process, but instead recognizes "many possible bases for diversity admissions." *Id.*, at 118, 120. The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African–Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.*, at 120. By enrolling a " 'critical mass' of [underrepresented] minority students," the Law School seeks to "ensur[e] their ability to make unique contributions to the character of the Law School." *Id.*, at 120–121.

The policy does not define diversity "solely in terms of racial and ethnic status." *Id.*, at 121. Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool." *Ibid.* Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession." *Ibid.*

B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application. In December 1997, petitioner filed suit in the United States District Court for the Eastern District of Michigan against the Law School, the Regents of the University of Michigan, Lee Bollinger (Dean of the Law School from 1987 to 1994, and President of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the Law School), and Dennis Shields (Director of Admissions at the Law School from 1991 *317 until 1998). Petitioner alleged that respondents discriminated against her on the basis of race in

violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d; and Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981.

Petitioner further alleged that her application was rejected because the Law School uses race as a "predominant" factor, **2333 giving applicants who belong to certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups." App. 33–34. Petitioner also alleged that respondents "had no compelling interest to justify their use of race in the admissions process." *Id.*, at 34. Petitioner requested compensatory and punitive damages, an order requiring the Law School to offer her admission, and an injunction prohibiting the Law School from continuing to discriminate on the basis of race. *Id.*, at 36. Petitioner clearly has standing to bring this lawsuit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

The District Court granted petitioner's motion for class certification and for bifurcation of the trial into liability and damages phases. The class was defined as " 'all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.' " App. to Pet. for Cert. 191a–192a.

The District Court heard oral argument on the parties' cross-motions for summary judgment on December 22, 2000. Taking the motions under advisement, the District Court indicated that it would decide as a matter of law whether the Law School's asserted interest in obtaining the educational benefits that flow from a diverse student body was compelling. *318 The District Court also indicated that it would conduct a bench trial on the extent to which race was a factor in the Law School's admissions decisions, and whether the Law School's consideration of race in admissions decisions constituted a race-based double standard.

During the 15–day bench trial, the parties introduced extensive evidence concerning the Law School's use of race in the admissions process. Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors. *Id.*, at 206a. Shields testified that at the height of the admissions season, he would frequently consult the so-called "daily reports" that kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender). *Id.*, at 207a. This was done, Shields testified, to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body. *Ibid.* Shields stressed, however, that he did not seek to admit any particular number or percentage of underrepresented minority students. *Ibid.*

Erica Munzel, who succeeded Shields as Director of Admissions, testified that " 'critical mass' " means " 'meaningful numbers' " or " 'meaningful representation,' " which she understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. *Id.*, at 208a–209a. Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass. *Id.*, at 209a. Munzel also asserted that she must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores. *Ibid.*

The current Dean of the Law School, Jeffrey Lehman, also testified. Like the other Law School witnesses, Lehman did *319 not quantify critical mass in terms of numbers or percentages. *Id.*, at 211a. He indicated that critical mass means numbers **2334 such that underrepresented minority students do not feel isolated or like spokespersons for their race. *Ibid.* When asked about the extent to which race is considered in admissions, Lehman testified that it varies from one applicant to another. *Ibid.* In some cases, according to Lehman's testimony, an applicant's race may play no role, while in others it may be a " 'determinative' " factor. *Ibid.*

The District Court heard extensive testimony from Professor Richard Lempert, who chaired the faculty committee that drafted the 1992 policy. Lempert emphasized that the Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom. *Id.*, at 213a. When asked about the

policy's " 'commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against,' " Lempert explained that this language did not purport to remedy past discrimination, but rather to include students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination. *Ibid.* Lempert acknowledged that other groups, such as Asians and Jews, have experienced discrimination, but explained they were not mentioned in the policy because individuals who are members of those groups were already being admitted to the Law School in significant numbers. *Ibid.*

Kent Syverud was the final witness to testify about the Law School's use of race in admissions decisions. Syverud was a professor at the Law School when the 1992 admissions policy was adopted and is now Dean of Vanderbilt Law School. In addition to his testimony at trial, Syverud submitted several expert reports on the educational benefits of diversity. Syverud's testimony indicated that when a critical mass of underrepresented minority students is present, ***320** racial stereotypes lose their force because nonminority students learn there is no " 'minority viewpoint' " but rather a variety of viewpoints among minority students. *Id.*, at 215a.

In an attempt to quantify the extent to which the Law School actually considers race in making admissions decisions, the parties introduced voluminous evidence at trial. Relying on data obtained from the Law School, petitioner's expert, Dr. Kinley Larntz, generated and analyzed "admissions grids" for the years in question (1995–2000). These grids show the number of applicants and the number of admittees for all combinations of GPAs and LSAT scores. Dr. Larntz made " 'cell-by-cell' " comparisons between applicants of different races to determine whether a statistically significant relationship existed between race and admission rates. He concluded that membership in certain minority groups " 'is an extremely strong factor in the decision for acceptance,' " and that applicants from these minority groups " 'are given an extremely large allowance for admission' " as compared to applicants who are members of nonfavored groups. *Id.*, at 218a–220a. Dr. Larntz conceded, however, that race is not the predominant factor in the Law School's admissions calculus. 12 Tr. 11–13 (Feb. 10, 2001).

Dr. Stephen Raudenbush, the Law School's expert, focused on the predicted effect of eliminating race as a factor in the Law School's admission process. In Dr. Raudenbush's view, a race-blind admissions system would have a " 'very dramatic,' " negative effect on underrepresented minority admissions. App. to Pet. for Cert. 223a. He testified that in 2000, 35 percent of underrepresented minority applicants were admitted. *Ibid.* Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. *Ibid.* Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent. *Ibid.*

****2335** ***321** In the end, the District Court concluded that the Law School's use of race as a factor in admissions decisions was unlawful. Applying strict scrutiny, the District Court determined that the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class ... was not recognized as such by *Bakke* and it is not a remedy for past discrimination." *Id.*, at 246a. The District Court went on to hold that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest. The District Court granted petitioner's request for declaratory relief and enjoined the Law School from using race as a factor in its admissions decisions. The Court of Appeals entered a stay of the injunction pending appeal.

Sitting en banc, the Court of Appeals reversed the District Court's judgment and vacated the injunction. The Court of Appeals first held that Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest. According to the Court of Appeals, Justice Powell's opinion with respect to diversity constituted the controlling rationale for the judgment of this Court under the analysis set forth in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). The Court of Appeals also held that the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor" and because the Law School's program was "virtually identical" to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion. 288 F.3d 732, 746, 749 (C.A.6 2002).

Four dissenting judges would have held the Law School's use of race unconstitutional. Three of the dissenters, rejecting the majority's *Marks* analysis, examined the Law School's interest in student body diversity on the merits and concluded it was

not compelling. The fourth dissenter, writing separately, found it unnecessary to decide whether diversity was a compelling interest because, like the other dissenters, *322 he believed that the Law School's use of race was not narrowly tailored to further that interest.

We granted certiorari, 537 U.S. 1043, 123 S.Ct. 617, 154 L.Ed.2d 514 (2002), to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. Compare *Hopwood v. Texas*, 78 F.3d 932 (C.A.5 1996) *(Hopwood I)* (holding that diversity is not a compelling state interest), with *Smith v. University of Wash. Law School*, 233 F.3d 1188 (C.A.9 2000) (holding that it is).

II

A

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." *Id.*, at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. *Id.*, at 408, 98 S.Ct. 2733 (opinion of STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ., concurring in judgment in part and dissenting in part). Justice Powell provided a fifth vote not only for invalidating the set-aside program, but **2336 also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving *323 the competitive consideration of race and ethnic origin." *Id.*, at 320, 98 S.Ct. 2733. Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant." *Ibid.*

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. See, *e.g.*, Brief for Judith Areen et al. as *Amici Curiae* 12–13 (law school admissions programs employ "methods designed from and based on Justice Powell's opinion in *Bakke* "); Brief for Amherst College et al. as *Amici Curiae* 27 ("After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion ... and set sail accordingly"). We therefore discuss Justice Powell's opinion in some detail.

Justice Powell began by stating that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U.S., at 289–290, 98 S.Ct. 2733. In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299, 98 S.Ct. 2733. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in " 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' " as an unlawful interest in racial balancing. *Id.*, at 306–307, 98 S.Ct. 2733. Second, Justice Powell rejected an interest in remedying societal discrimination *324 because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.*, at 310, 98 S.Ct. 2733. Third, Justice Powell rejected an interest in "increasing the

number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal." *Id.*, at 306, 310, 98 S.Ct. 2733.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.*, at 311, 98 S.Ct. 2733. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Id.*, at 312, 314, 98 S.Ct. 2733. Justice Powell emphasized that nothing less than the " 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.*, at 313, 98 S.Ct. 2733 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). In seeking the "right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university seeks "to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313, 98 S.Ct. 2733. Both "tradition and experience lend support to **2337 the view that the contribution of diversity is substantial." *Ibid.*

Justice Powell was, however, careful to emphasize that in his view race "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.*, at 314, 98 S.Ct. 2733. For Justice Powell, "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that *325 can justify the use of race. *Id.*, at 315, 98 S.Ct. 2733. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Ibid.*

In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*. In that case, we explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S., at 193, 97 S.Ct. 990 (internal quotation marks and citation omitted). As the divergent opinions of the lower courts demonstrate, however, "[t]his test is more easily stated than applied to the various opinions supporting the result in *[Bakke]*." *Nichols v. United States*, 511 U.S. 738, 745–746, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). Compare, *e.g.*, *Johnson v. Board of Regents of Univ. of Ga.*, 263 F.3d 1234 (C.A.11 2001) (Justice Powell's diversity rationale was not the holding of the Court); *Hopwood v. Texas*, 236 F.3d 256, 274–275 (C.A.5 2000) *(Hopwood II)* (same); *Hopwood I*, 78 F.3d 932 (C.A.5 1996) (same), with *Smith v. University of Wash. Law School*, 233 F.3d, at 1199 (Justice Powell's opinion, including the diversity rationale, is controlling under *Marks*).

We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, *supra*, at 745–746, 114 S.Ct. 1921. More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

*326 B

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis in original; internal quotation marks and citation omitted). We are a "free people whose institutions are founded upon the doctrine

of equality." *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (internal quotation marks and citation omitted). It follows from that principle that "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Peña,* 515 U.S., at 227, 115 S.Ct. 2097.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Ibid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling **2338 governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to " 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña, supra,* at 237, 115 S.Ct. 2097 (internal quotation marks and citation omitted). Although all governmental *327 uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." 515 U.S., at 229–230, 115 S.Ct. 2097. But that observation "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." *Id.,* at 230, 115 S.Ct. 2097. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.

Context matters when reviewing race-based governmental action under the Equal Protection Clause. See *Gomillion v. Lightfoot,* 364 U.S. 339, 343–344, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (admonishing that, "in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts"). In *Adarand Constructors, Inc. v. Peña,* we made clear that strict scrutiny must take " 'relevant differences' into account." 515 U.S., at 228, 115 S.Ct. 2097. Indeed, as we explained, that is its "fundamental purpose." *Ibid.* Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

III

A

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have *328 throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." Brief for Respondent Bollinger et al. i. In other words, the Law School asks us to recognize, in the context of higher education, a compelling state interest in student body diversity.

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke.* It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. See, *e.g., Richmond v. J.A. Croson Co., supra,* at 493, 109 S.Ct. 706 (plurality opinion) (stating that unless classifications based on race are "strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of **2339 racial hostility"). But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past

discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); *Board of Curators of Univ. of Mo.* ***329** *v. Horowitz*, 435 U.S. 78, 96, n. 6, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978); *Bakke*, 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.).

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. See, *e.g.*, *Wieman v. Updegraff*, 344 U.S. 183, 195, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S., at 603, 87 S.Ct. 675. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke, supra*, at 312, 98 S.Ct. 2733. From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas,' " a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." 438 U.S., at 313, 98 S.Ct. 2733 (quoting *Keyishian v. Board of Regents of Univ. of State of N. Y.*, *supra*, at 603, 87 S.Ct. 675). Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary." 438 U.S., at 318–319, 98 S.Ct. 2733.

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." Brief for Respondent Bollinger et al. 13. The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." ***330** *Bakke*, 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. *Ibid.*; *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) ("Racial balance is not to be achieved for its own sake"); *Richmond v. J.A. Croson Co.*, 488 U.S., at 507, 109 S.Ct. 706. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to ****2340** break down racial stereotypes, and "enables [students] to better understand persons of different races." App. to Pet. for Cert. 246a. These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds." *Id.*, at 246a, 244a.

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. as *Amici Curiae* 3; see, *e.g.*, W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds.2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, D. Witt, J. Jones, & K. Hakuta eds.2003).

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Brief for 3M et al. as *Amici Curiae* ***331** 5; Brief for General Motors Corp. as *Amicus Curiae* 3–4. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5. The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. *Ibid.* At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." *Ibid.* (emphasis in original). To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." *Id.*, at 29 (emphasis in original). We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." *Ibid.*

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). This Court has long recognized that "education ... is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American ***332** society, including people of all races and ethnicities, represents a paramount government objective." Brief for United States as *Amicus Curiae* 13. And, "[n]owhere is the importance of such openness more acute than in the context of higher education." *Ibid.* Effective participation by members of all racial and ethnic groups in the civic life of our Nation is ****2341** essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as *Amicus Curiae* 5–6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.*, at 6.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See *Sweatt v. Painter, supra*, at 634, 70 S.Ct. 848. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society ***333** may participate in the educational institutions that provide the training and education necessary to succeed in America.

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." Brief for Respondent Bollinger et al. 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

B

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Shaw v. Hunt,* 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (internal quotation marks and citation omitted). The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.,* 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion).

Since *Bakke,* we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry ***334** must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice KENNEDY's assertions, we do not "abando[n] strict scrutiny," see *post,* at 2374 (dissenting opinion). Rather, as we have already ****2342** explained, *supra,* at 2338, we adhere to *Adarand's* teaching that the very purpose of strict scrutiny is to take such "relevant differences into account." 515 U.S., at 228, 115 S.Ct. 2097 (internal quotation marks omitted).

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke,* 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a " 'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.,* at 317, 98 S.Ct. 2733. In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke,* truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See *id.,* at 315–316, 98 S.Ct. 2733. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. *Ibid.* Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. *Ibid.*

***335** We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Richmond v. J.A. Croson Co., supra,* at 496, 109 S.Ct. 706 (plurality opinion). Quotas " 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' " *Sheet Metal Workers v. EEOC,* 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part), and "insulate the individual from comparison with all other candidates for the available seats," *Bakke, supra,* at 317, 98 S.Ct. 2733 (opinion of Powell, J.). In contrast, "a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself," *Sheet Metal Workers v. EEOC, supra,* at 495, 106 S.Ct. 3019, and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants," *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 638, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Justice Powell's distinction between the medical school's rigid 16–seat quota and Harvard's flexible use of race as a "plus" factor is instructive. Harvard certainly had minimum *goals* for minority enrollment, even if it had no specific number firmly in mind. See *Bakke, supra,* at 323, 98 S.Ct. 2733 (opinion of Powell, J.) ("10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States").

What is more, Justice Powell flatly rejected the argument that Harvard's program was "the functional equivalent of a quota" merely because it had some " 'plus' " for race, or gave greater "weight" to race than to some other factors, in order to achieve student body diversity. 438 U.S., at 317–318, 98 S.Ct. 2733.

**2343 The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program *336 into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Id.*, at 323, 98 S.Ct. 2733. "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. *Ibid.* Nor, as Justice KENNEDY posits, does the Law School's consultation of the "daily reports," which keep track of the racial and ethnic composition of the class (as well as of residency and gender), "sugges[t] there was no further attempt at individual review save for race itself" during the final stages of the admissions process. See *post,* at 2372 (dissenting opinion). To the contrary, the Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in these reports. Brief for Respondents Bollinger et al. 43, n. 70 (citing App. in Nos. 01–1447 and 01–1516(CA6), p. 7336). Moreover, as Justice KENNEDY concedes, see *post,* at 2372, between 1993 and 1998, the number of African–American, Latino, and Native–American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

THE CHIEF JUSTICE believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. *Post,* at 2366–2369 (dissenting opinion). But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year. See *post,* at 2369 (dissenting opinion).

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" *337 factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke,* 438 U.S., at 318, n. 52, 98 S.Ct. 2733 (opinion of Powell, J.) (identifying the "denial ... of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto,* of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger, post,* 539 U.S. 244, 123 S.Ct. 2411, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. See *post,* 539 U.S., at 271–272, 123 S.Ct. 2411, 2003 WL 21434002 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but "did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity"). Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, **2344 although not necessarily according them the same weight." *Bakke, supra,* at 317, 98 S.Ct. 2733 (opinion of Powell, J.).

We also find that, like the Harvard plan Justice Powell referenced in *Bakke,* the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. With respect *338 to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. See App. 120.

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. *Id.*, at 118–119. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.*, at 83–84. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.

What is more, the Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected. See Brief for Respondent Bollinger et al. 10; App. 121–122. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this ***339** flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body. Justice KENNEDY speculates that "race is likely outcome determinative for many members of minority groups" who do not fall within the upper range of LSAT scores and grades. *Post*, at 2371 (dissenting opinion). But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors. See 438 U.S., at 316, 98 S.Ct. 2733 (" 'When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor' ").

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (alternatives must serve the interest " 'about as well' "); ****2345** *Richmond v. J.A. Croson Co.*, 488 U.S., at 509–510, 109 S.Ct. 706 (plurality opinion) (city had a "whole array of race-neutral" alternatives because changing requirements "would have [had] little detrimental effect on the city's interests"). Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. See *id.*, at 507, 109 S.Ct. 706 (set-aside plan not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means"); *Wygant v. Jackson Bd. of Ed., supra*, at 280, n. 6, 106 S.Ct. 1842 (narrow tailoring ***340** "require[s] consideration" of "lawful alternative and less restrictive means").

We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives. The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." App. to Pet. for Cert. 251a. But these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity. So too with the suggestion that the Law School simply lower admissions standards for all students, a drastic remedy that would require the Law School to become a much different institution and sacrifice a vital component of its educational mission. The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California, to guarantee admission to all students above a certain class-rank threshold in every high school in the State. Brief for United States as *Amicus Curiae* 14–18. The United States does not, however, explain how such plans could work for graduate and professional schools. Moreover,

even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

***341** We acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke*, 438 U.S., at 298, 98 S.Ct. 2733 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 308, 98 S.Ct. 2733. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting).

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke*, *supra*, at 317, 98 S.Ct. 2733 (opinion of Powell, J.). As Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a "plus" factor in the context of ****2346** individualized consideration, a rejected applicant

> "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.... His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." 438 U.S., at 318, 98 S.Ct. 2733.

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." ***342** *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondent Bollinger et al. 32.

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States v. Lopez*, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Richmond v. J.A. Croson Co.*, 488 U.S., at 510, 109 S.Ct. 706 (plurality opinion); see also Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, ***343** 58 Chicago Bar Rec. 282, 293 (May–June 1977) ("It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for

programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all").

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. See Brief for Respondent Bollinger et al. 34; *Bakke, supra,* at 317–318, 98 S.Ct. 2733 (opinion of Powell, J.) (presuming good faith of university officials in the absence of a showing to the contrary). It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. **2347 See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Consequently, petitioner's statutory claims based on Title VI and 42 U.S.C. § 1981 also fail. See *Bakke, supra,* at 287, 98 S.Ct. 2733 (opinion of Powell, J.) ("Title VI ... proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *General Building Contractors Assn., Inc. v. Pennsylvania,* 458 U.S. 375, 389–391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) (the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause). The judgment *344 of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

It is so ordered.

Justice GINSBURG, with whom Justice BREYER joins, concurring.

The Court's observation that race-conscious programs "must have a logical end point," *ante,* at 2346, accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422–423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G.A. Res. 2106, 20 U.N. GAOR, 20th Sess., Res. Supp. (No. 14), p. 47, U.N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid.*; see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Res. Supp. (No. 46), p. 194, U.N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating *de facto* equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved").

The Court further observes that "[i]t has been 25 years since Justice Powell [in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education." *Ante,* at 2346. For at least part of that *345 time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. See *Hopwood v. Texas,* 78 F.3d 932 (C.A.5 1996); cf. *Wessmann v. Gittens,* 160 F.3d 790 (C.A.1 1998); *Tuttle v. Arlington Cty. School Bd.,* 195 F.3d 698 (C.A.4 1999); *Johnson v. Board of Regents of Univ. of Ga.,* 263 F.3d 1234 (C.A.11 2001). Moreover, it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery. See *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); cf. *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).

It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest **2348 values and ideals. See, *e.g.*, *Gratz v. Bollinger, post,* 539 U.S., at 298–301, 123 S.Ct. 2411, 2003 WL 21434002 (GINSBURG, J., dissenting); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 272–274, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (Ginsburg, J., dissenting); Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 Calif. L.Rev. 1251, 1276–1291, 1303 (1998). As to public education, data for the years 2000–2001 show that 71.6% of African–American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body. See E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? p. 4 (Jan.2003), http://www.civilrights project. harvard.edu / research / reseg03/AreWeLosing theDream.pdf (as visited June 16, 2003, and available in Clerk of Court's case file). And schools in predominantly minority communities lag far behind others measured by the educational resources available to them. See *id.*, at 11; Brief for National Urban League et al. as *Amici Curiae* 11–12 (citing General Accounting Office, Per–Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area 17 (2002)).

346 However strong the public's desire for improved education systems may be, see P. Hart & R. Teeter, A National Priority: Americans Speak on Teacher Quality 2, 11 (2002) (public opinion research conducted for Educational Testing Service); No Child Left Behind Act of 2001, Pub.L. 107–110, 115 Stat. 1806, 20 U.S.C. § 7231 (2000 ed., Supp. I), it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

Justice SCALIA, with whom Justice THOMAS joins, concurring in part and dissenting in part.
I join the opinion of THE CHIEF JUSTICE. As he demonstrates, the University of Michigan Law School's mystical *347 "critical mass" justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.

I also join Parts I through VII of Justice THOMAS's opinion.* I find particularly unanswerable his central point: that the **2349 allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

I add the following: The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of " 'cross-racial understanding,' " *ante,* at 2339, and " 'better prepar[ation of] students for an increasingly diverse workforce and society,' " *ante,* at 2340, all of which is necessary not only for work, but also for good "citizenship," *ibid.* This is not, of course, an "educational benefit" on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be "taught" in the usual sense) people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an "educational benefit" at all, it is surely not one that is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting. *And therefore:* If it is appropriate for the University *348 of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if

they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation. Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," *ante,* at 2343, and sufficiently avoids "separate admissions tracks," *ante,* at 2342, to fall under *Grutter* rather than *Gratz.* Some will focus on whether a university has gone beyond the bounds of a " 'good faith effort' " and has so zealously pursued its "critical mass" as to make it an unconstitutional *de facto* quota system, rather than merely " 'a permissible goal.' " *Ante,* at 2342 (quoting *Sheet Metal Workers' v. EEOC,* 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O'CONNOR, J., concurring in part and dissenting in part)). Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter;* and while the opinion accords "a degree of deference to a university's academic decisions," *ante,* at 2339, "deference does not imply ***349** abandonment or abdication of judicial review," *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).) Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter.* (Tempting targets, one would suppose, will be those ****2350** universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass." I do not look forward to any of these cases. The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.

Justice THOMAS, with whom Justice SCALIA joins as to Parts I–VII, concurring in part and dissenting in part.
Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

> "[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice.* The American people have always been anxious to know what they shall do with us.... I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of ***350** their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ... And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! ... [Y]our interference is doing him positive injury." What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865, reprinted in 4 The Frederick Douglass Papers 59, 68 (J. Blassingame & J. McKivigan eds.1991) (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it

knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

The majority upholds the Law School's racial discrimination not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti. Nevertheless, I concur in part in the Court's opinion. First, I agree with the Court insofar as its decision, which approves of only ***351** one racial classification, confirms that further use of race in admissions remains unlawful. Second, I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years. See *ante*, at 2346–2347 (stating that racial discrimination will no longer be narrowly tailored, or ****2351** "necessary to further" a compelling state interest, in 25 years). I respectfully dissent from the remainder of the Court's opinion and the judgment, however, because I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

I

The majority agrees that the Law School's racial discrimination should be subjected to strict scrutiny. *Ante*, at 2337–2338. Before applying that standard to this case, I will briefly revisit the Court's treatment of racial classifications.

The strict scrutiny standard that the Court purports to apply in this case was first enunciated in *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There the Court held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.*, at 216, 65 S.Ct. 193. This standard of "pressing public necessity" has more frequently been termed "compelling governmental interest," [1] see, *e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). A majority of the Court has validated only two circumstances where "pressing public necessity" or a "compelling state interest" can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a "pressing public necessity," though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy ***352** past discrimination for which it is responsible. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

The contours of "pressing public necessity" can be further discerned from those interests the Court has rejected as bases for racial discrimination. For example, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), found unconstitutional a collective-bargaining agreement between a school board and a teachers' union that favored certain minority races. The school board defended the policy on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. See Brief for Respondents, O.T.1984, No. 84–1340, pp. 27–28; 476 U.S., at 315, 106 S.Ct. 1842 (STEVENS, J., dissenting) ("[A]n integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty"). Nevertheless, the Court found that the use of race violated the Equal Protection Clause, deeming both asserted state interests insufficiently compelling. *Id.*, at 275–276, 106 S.Ct. 1842 (plurality opinion); *id.*, at 295, 106 S.Ct. 1842 (White, J., concurring in judgment) ("None of the interests asserted by the [school board] ... justify this racially discriminatory layoff policy"). [2]

An even greater governmental interest involves the sensitive role of courts in child custody determinations. In *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the Court held that even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage. ****2352** *Id.*, at 433, 104 S.Ct. 1879 (finding the interest "substantial" but ***353** holding the custody decision could not be based on the race of the mother's new husband).

Finally, the Court has rejected an interest in remedying general societal discrimination as a justification for race discrimination. See *Wygant*, *supra*, at 276, 106 S.Ct. 1842 (plurality opinion); *Croson*, 488 U.S., at 496–498, 109 S.Ct. 706 (plurality opinion); *id.*, at 520–521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment). "Societal discrimination, without more, is too amorphous

a basis for imposing a racially classified remedy" because a "court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant, supra,* at 276, 106 S.Ct. 1842 (plurality opinion). But see *Gratz v. Bollinger, post,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 2003 WL 21434002 (GINSBURG, J., dissenting).

Where the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." Cf. *Lee v. Washington,* 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) *(per curiam)* (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination); *Croson, supra,* at 521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb ... can justify [racial discrimination]").

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." ***354** *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment).

II

Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination. The Law School maintains that it wishes to obtain "educational benefits that flow from student body diversity," Brief for Respondent Bollinger et al. 14. This statement must be evaluated carefully, because it implies that both "diversity" and "educational benefits" are components of the Law School's compelling state interest. Additionally, the Law School's refusal to entertain certain changes in its admissions process and status indicates that the compelling state interest it seeks to validate is actually broader than might appear at first glance.

Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity," whatever it means,[3] is the ****2353** ***355** mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing," *ante,* at 2339, that the majority expressly rejects?

A distinction between these two ideas (unique educational benefits based on racial aesthetics and race for its own sake) is purely sophistic—so much so that the majority uses them interchangeably. Compare *ibid.* ("[T]he Law School has a compelling interest in attaining a diverse student body"), with *ante,* at 2341 (referring to the "compelling interest in securing the *educational benefits* of a diverse student body" (emphasis added)). The Law School's argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity." But see *ibid.* (citing the need for "openness and integrity of the educational institutions that provide [legal] training" without reference to any consequential educational benefits).

One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce "academic selectivity," which would in turn "require the Law School to become a very different institution, and to sacrifice a core part of its

educational mission." Brief for Respondent Bollinger et al. 33–36. In other words, the Law School seeks to improve marginally the education it offers *356 without sacrificing too much of its exclusivity and elite status. [4]

The proffered interest that the majority vindicates today, then, is not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

III

A

A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a "compelling interest in securing the educational benefits of a diverse student body." *Ante,* at 2341. No serious effort is made to explain how these **2354 benefits fit with the state interests the Court has recognized (or rejected) as compelling, see Part I, *supra,* or to place any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination. In the absence of any explanation, one might expect the Court to fall back on the judicial policy of *stare decisis.* But the Court eschews even this weak defense of its holding, shunning an analysis of the extent to which Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), *357 is binding, *ante,* at 2337, in favor of an unfounded wholesale adoption of it.

Justice Powell's opinion in *Bakke* and the Court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another. This "we know it when we see it" approach to evaluating state interests is not capable of judicial application. Today, the Court insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class. I can only presume that the majority's failure to justify its decision by reference to any principle arises from the absence of any such principle. See Part VI, *infra.*

B

Under the proper standard, there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest.

1

While legal education at a public university may be good policy or otherwise laudable, it is obviously not a pressing public necessity when the correct legal standard is applied. Additionally, circumstantial evidence as to whether a state activity is of pressing public necessity can be obtained by asking whether all States feel compelled to engage in that activity. Evidence that States, in general, engage in a certain activity by no means demonstrates that the activity constitutes a pressing public necessity, given the expansive role of government in today's society. The fact that some fraction of the States reject a particular enterprise, however, creates a presumption that the enterprise itself is not a compelling state interest. In this sense, the absence of a public, American Bar Association (ABA) accredited, law school in *358 Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island, see ABA–LSAC Official Guide to ABA–Approved Law Schools (W. Margolis, B. Gordon, J. Puskarz, & D. Rosenlieb eds.2004) (hereinafter ABA–LSAC Guide), provides further evidence that Michigan's maintenance of the Law School does not constitute a compelling state interest.

2

As the foregoing makes clear, Michigan has no compelling interest in having a law school at all, much less an *elite* one. Still, even assuming that a State may, under appropriate circumstances, demonstrate a cognizable interest in having an elite law school, Michigan has failed to do so here.

This Court has limited the scope of equal protection review to interests and activities that occur within that State's jurisdiction. The Court held in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938), that Missouri could not satisfy the demands of "separate but equal" by paying for legal training of blacks at neighboring state law schools, while maintaining a segregated law school within the State. The equal protection

> "obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It ****2355** is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance *by what another State may do or fail to do*. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system." *Id.*, at 350, 59 S.Ct. 232 (emphasis added).

The Equal Protection Clause, as interpreted by the Court in *Gaines*, does not permit States to justify racial discrimination on the basis of what the rest of the Nation "may do or fail to do." The only interests that can satisfy the Equal ***359** Protection Clause's demands are those found within a State's jurisdiction.

The only cognizable state interests vindicated by operating a public law school are, therefore, the education of that State's citizens and the training of that State's lawyers. James Campbell's address at the opening of the Law Department at the University of Michigan on October 3, 1859, makes this clear:

> "It not only concerns *the State* that every one should have all reasonable facilities for preparing himself for any honest position in life to which he may aspire, but it also concerns *the community* that the Law should be taught and understood .... There is not an office *in the State* in which serious legal inquiries may not frequently arise .... In all these matters, public and private rights are constantly involved and discussed, and ignorance of the Law has frequently led to results deplorable and alarming .... [I]n the history of *this State*, in more than one instance, that ignorance has led to unlawful violence, and the shedding of innocent blood." E. Brown, Legal Education at Michigan 1859–1959, pp. 404–406 (1959) (emphasis added).

The Law School today, however, does precious little training of those attorneys who will serve the citizens of Michigan. In 2002, graduates of the Law School made up less than 6% of applicants to the Michigan bar, Michigan Lawyers Weekly, available at http:// www.michiganlawyersweekly.com/barpassers0202.cfm,barpassers0702.cfm (all Internet materials as visited June 13, 2003, and available in Clerk of Court's case file), even though the Law School's graduates constitute nearly 30% of all law students graduating in Michigan. *Ibid.* Less than 16% of the Law School's graduating class elects to stay in Michigan after law school. ABA–LSAC Guide 427. Thus, while a mere 27% of the Law School's 2002 entering class is from Michigan, see University of ***360** Michigan Law School Website, available at http://www.law.umich.edu/prospectivestudents/Admissions/index.htm, only half of these, it appears, will stay in Michigan.

In sum, the Law School trains few Michigan residents and overwhelmingly serves students, who, as lawyers, leave the State of Michigan. By contrast, Michigan's other public law school, Wayne State University Law School, sends 88% of its graduates on to serve the people of Michigan. ABA–LSAC Guide 775. It does not take a social scientist to conclude that it is precisely the Law School's status as an elite institution that causes it to be a waystation for the rest of the country's lawyers, rather than a training ground for those who will remain in Michigan. The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan.

Again, the fact that few States choose to maintain elite law schools raises a strong inference that there is nothing compelling about elite status. Arguably, only the public law schools of the University of Texas, the University of California, Berkeley (Boalt Hall), and the University of Virginia maintain the same reputation for excellence as the Law School.[5] Two of **2356 these States, Texas and California, are so large that they could reasonably be expected to provide elite legal training at a separate law school to students who will, in fact, stay in the State and provide legal services to its citizens. And these two schools far outshine the Law School in producing in-state lawyers. The University of Texas, for example, sends over three-fourths of its graduates on to work in the State of Texas, vindicating the State's interest (compelling or not) in training Texas' lawyers. *Id.*, at 691.

*361 3

Finally, even if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies.

IV

The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions "standards" that, in turn, create the Law School's "need" to discriminate on the basis of race. The Court validates these admissions standards by concluding that alternatives that would require "a dramatic sacrifice of ... the academic quality of all admitted students," *ante*, at 2345, need not be considered before racial discrimination can be employed.[6] In the majority's view, such methods are not required by the "narrow tailoring" prong of strict scrutiny because that inquiry demands, in this context, that any race-neutral alternative work " 'about as well.' " *Ante*, at 2344 (quoting *Wygant*, 476 U.S., at 280, n. 6, 106 S.Ct. 1842). The majority errs, however, because race-neutral alternatives must only be "workable," *ante*, at 2345, and do "about as well" *in vindicating the compelling state interest.* The Court never explicitly holds that the Law School's desire to retain the status quo in "academic selectivity" is itself a compelling state interest, and, as I have demonstrated, it is not. See Part III–B, *supra*. Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system —it cannot have it both ways.

With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, *362 see Brief for United States as *Amicus Curiae* 13–14, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination. The Law School concedes this, but the Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do. I cannot agree. First, under strict scrutiny, the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo are not entitled to any sort of deference, grounded in the First Amendment or anywhere else. Second, even if its "academic selectivity" must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.

A

The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of "educational autonomy" grounded in the First Amendment. *Ante*, at 2339. In my view, there is no basis for a right of public **2357 universities to do what would otherwise violate the Equal Protection Clause.

The constitutionalization of "academic freedom" began with the concurring opinion of Justice Frankfurter in *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957). Sweezy, a Marxist economist, was investigated by the Attorney

General of New Hampshire on suspicion of being a subversive. The prosecution sought, *inter alia,* the contents of a lecture Sweezy had given at the University of New Hampshire. The Court held that the investigation violated due process. *Id.,* at 254, 77 S.Ct. 1203.

Justice Frankfurter went further, however, reasoning that the First Amendment created a right of academic freedom that prohibited the investigation. *Id.,* at 256–267, 77 S.Ct. 1203 (opinion concurring in result). Much of the rhetoric in Justice Frankfurter's opinion was devoted to the personal right of Sweezy to free speech. See, *e.g., id.,* at 265, 77 S.Ct. 1203 ("For a citizen to be ***363** made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling"). Still, claiming that the United States Reports "need not be burdened with proof," Justice Frankfurter also asserted that a "free society" depends on "free universities" and "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.,* at 262, 77 S.Ct. 1203. According to Justice Frankfurter: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.,* at 263, 77 S.Ct. 1203 (citation omitted).

In my view, "[i]t is the business" of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point. The only source for the Court's conclusion that public universities are entitled to deference even within the confines of strict scrutiny is Justice Powell's opinion in *Bakke.* Justice Powell, for his part, relied only on Justice Frankfurter's opinion in *Sweezy* and the Court's decision in *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), to support his view that the First Amendment somehow protected a public university's use of race in admissions. *Bakke,* 438 U.S., at 312, 98 S.Ct. 2733. *Keyishian* provides no answer to the question whether the Fourteenth Amendment's restrictions are relaxed when applied to public universities. In that case, the Court held that state statutes and regulations designed to prevent the "appointment or retention of 'subversive' persons in state employment," 385 U.S., at 592, 87 S.Ct. 675, violated the First Amendment for vagueness. The statutes covered all public employees and were not invalidated only as applied to university ***364** faculty members, although the Court appeared sympathetic to the notion of academic freedom, calling it a "special concern of the First Amendment." *Id.,* at 603, 87 S.Ct. 675. Again, however, the Court did not relax any independent constitutional restrictions on public universities.

I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution's ban on racial discrimination. The majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.

****2358 B**

1

The Court's deference to the Law School's conclusion that its racial experimentation leads to educational benefits will, if adhered to, have serious collateral consequences. The Court relies heavily on social science evidence to justify its deference. See *ante,* at 2339–2341; but see also Rothman, Lipset, & Nevitte, Racial Diversity Reconsidered, 151 Public Interest 25 (2003) (finding that the racial mix of a student body produced by racial discrimination of the type practiced by the Law School in fact hinders students' perception of academic quality). The Court never acknowledges, however, the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students. See, *e.g.,* Flowers & Pascarella, Cognitive Effects of College Racial Composition on African American Students After 3 Years of College, 40 J. of College Student Development 669, 674 (1999) (concluding that black students experience superior cognitive development at Historically Black Colleges (HBCs) and that, even among blacks, "a substantial diversity moderates the cognitive effects of attending an HBC"); Allen,

The Color of Success: African–American College Student *365 Outcomes at Predominantly White and Historically Black Public Colleges and Universities, 62 Harv. Educ. Rev. 26, 35 (1992) (finding that black students attending HBCs report higher academic achievement than those attending predominantly white colleges).

At oral argument in *Gratz v. Bollinger, post,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, 2003 WL 21434002, counsel for respondents stated that "most every single one of [the HBCs] do have diverse student bodies." Tr. of Oral Arg. in No. 02–516, p. 52. What precisely counsel meant by "diverse" is indeterminate, but it is reported that in 2000 at Morehouse College, one of the most distinguished HBCs in the Nation, only 0.1% of the student body was white, and only 0.2% was Hispanic. College Admissions Data Handbook 2002–2003, p. 613 (43d ed.2002) (hereinafter College Admissions Data Handbook). And at Mississippi Valley State University, a public HBC, only 1.1% of the freshman class in 2001 was white. *Id.,* at 603. If there is a "critical mass" of whites at these institutions, then "critical mass" is indeed a very small proportion.

The majority grants deference to the Law School's "assessment that diversity will, in fact, yield educational benefits," *ante,* at 2339. It follows, therefore, that an HBC's assessment that racial homogeneity will yield educational benefits would similarly be given deference.[7] An HBC's rejection of white applicants in order to maintain racial homogeneity seems permissible, therefore, under the majority's view of the Equal Protection Clause. But see *United States v. Fordice,* 505 U.S. 717, 748, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992) (THOMAS, J., concurring) ("Obviously, a State cannot maintain ... traditions by closing particular institutions, historically white or historically black, to particular racial groups"). Contained within today's majority opinion is the seed of a new constitutional *366 justification for a concept I thought long and rightly rejected—racial segregation.

2

Moreover one would think, in light of the Court's decision in *United States v. Virginia,* 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), that before being given license to use racial discrimination, the Law School would be required to radically reshape its admissions process, even to the point of sacrificing some elements of its character. In *Virginia,* a majority of the Court, without a word about academic **2359 freedom, accepted the all-male Virginia Military Institute's (VMI) representation that some changes in its "adversative" method of education would be required with the admission of women, *id.,* at 540, 116 S.Ct. 2264, but did not defer to VMI's judgment that these changes would be too great. Instead, the Court concluded that they were "manageable." *Id.,* at 551, n. 19, 116 S.Ct. 2264. That case involved sex discrimination, which is subjected to intermediate, not strict, scrutiny. *Id.,* at 533, 116 S.Ct. 2264; *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). So in *Virginia,* where the standard of review dictated that greater flexibility be granted to VMI's educational policies than the Law School deserves here, this Court gave no deference. Apparently where the status quo being defended is that of the elite establishment—here the Law School—rather than a less fashionable Southern military institution, the Court will defer without serious inquiry and without regard to the applicable legal standard.

C

Virginia is also notable for the fact that the Court relied on the "experience" of formerly single-sex institutions, such as the service academies, to conclude that admission of women to VMI would be "manageable." 518 U.S., at 544–545, 116 S.Ct. 2264. Today, however, the majority ignores the "experience" of those institutions that have been forced to abandon explicit racial discrimination in admissions.

*367 The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example. Prior to Proposition 209's adoption of Cal. Const., Art. 1, § 31(a), which bars the State from "grant[ing] preferential treatment ... on the basis of race ... in the operation of ... public education,"[8] Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt's entering class enrolled 14 blacks and 36 Hispanics.[9]

University of California Law and Medical School Enrollments, available at http://www.ucop.edu/acadadv/ datamgmt/ lawmed/ law-enrolls-eth2.html. Total underrepresented minority student enrollment at Boalt Hall now exceeds 1996 levels. Apparently the Law School cannot be counted on to be as resourceful. The Court is willfully blind to the very real experience in California and elsewhere, which raises the inference that institutions with "reputation[s] for excellence," *ante,* at 2344, rivaling the Law School's have satisfied their sense of mission without resorting to prohibited racial discrimination.

V

Putting aside the absence of any legal support for the majority's reflexive deference, there is much to be said for the view that the use of tests and other measures to "predict" academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true ***368** meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to ****2360** a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race. So while legacy preferences can stand under the Constitution, racial discrimination cannot.[10] I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation. The majority should similarly stay its impulse to validate faddish racial discrimination the Constitution clearly forbids.

In any event, there is nothing ancient, honorable, or constitutionally protected about "selective" admissions. The University of Michigan should be well aware that alternative methods have historically been used for the admission of students, for it brought to this country the German certificate system in the late–19th century. See H. Wechsler, The Qualified Student 16–39 (1977) (hereinafter Qualified Student). Under this system, a secondary school was certified by a university so that any graduate who completed the course offered by the school was offered admission to the university. The certification regime supplemented, and later virtually replaced (at least in the Midwest), the prior regime of rigorous ***369** subject-matter entrance examinations. *Id.,* at 57–58. The facially race-neutral "percent plans" now used in Texas, California, and Florida, see *ante,* at 2345, are in many ways the descendents of the certificate system.

Certification was replaced by selective admissions in the beginning of the 20th century, as universities sought to exercise more control over the composition of their student bodies. Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today. Columbia, Harvard, and others infamously determined that they had "too many" Jews, just as today the Law School argues it would have "too many" whites if it could not discriminate in its admissions process. See Qualified Student 155–168 (Columbia); H. Broun & G. Britt, Christians Only: A Study in Prejudice 53–54 (1931) (Harvard).

Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that " '[w]e have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant [through the use of intelligence testing] and it turns out that a good many of the low grade men are New York City Jews.' " Letter from Herbert E. Hawkes, dean of Columbia College, to E.B. Wilson, June 16, 1922 (reprinted in Qualified Student 160–161). In other words, the tests were adopted with full knowledge of their disparate impact. Cf. *DeFunis v. Odegaard,* 416 U.S. 312, 335, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) *(per curiam)* (Douglas, J., dissenting).

Similarly no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools ***370** continue to use the test and then attempt to "correct" for black

underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures **2361 it knows produce racially skewed results is not entitled to deference by this Court. See Part IV, *supra*. The Law School itself admits that the test is imperfect, as it must, given that it regularly admits students who score at or below 150 (the national median) on the test. See App. 156–203 (showing that, between 1995 and 2000, the Law School admitted 37 students—27 of whom were black; 31 of whom were "underrepresented minorities"—with LSAT scores of 150 or lower). And the Law School's *amici* cannot seem to agree on the fundamental question whether the test itself is useful. Compare Brief for Law School Admission Council as *Amicus Curiae* 12 ("LSAT scores ... are an effective predictor of students' performance in law school") with Brief for Harvard Black Law Students Association et al. as *Amici Curiae* 27 ("Whether [the LSAT] measure[s] objective merit ... is certainly questionable").

Having decided to use the LSAT, the Law School must accept the constitutional burdens that come with this decision. The Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination. An infinite variety of admissions methods are available to the Law School. Considering all of the radical thinking that has historically occurred at this country's universities, the Law School's intractable approach toward admissions is striking.

The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25–year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes *371 rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.

VI

The absence of any articulated legal principle supporting the majority's principal holding suggests another rationale. I believe what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, see *Adarand*, 515 U.S., at 239, 115 S.Ct. 2097 (SCALIA, J., concurring in part and concurring in judgment), and that racial discrimination is necessary to remedy general societal ills. This Court's precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.

Putting aside what I take to be the Court's implicit rejection of *Adarand's* holding that beneficial and burdensome racial classifications are equally invalid, I must contest the notion that the Law School's discrimination benefits those admitted as a result of it. The Court spends considerable time discussing the impressive display of *amicus* support for the Law School in this case from all corners of society. *Ante*, at 2340. But nowhere in any of the filings in this Court is any evidence that the purported "beneficiaries" of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L.Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom).

The silence in this case is deafening to those of us who view higher education's purpose as imparting knowledge and skills to students, rather than a communal, rubber-stamp, *372 credentialing process. The **2362 Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. See T. Sowell, Race and Culture 176–177 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic

mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education"). Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, see University of Michigan Law School Student Handbook 2002–2003, pp. 39–40 (noting the presence of a "diversity plan" for admission to the review), and in hiring at law firms and for judicial clerkships—until the "beneficiaries" are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less "elite" law school for which they were better prepared. And the aestheticists will never address the real problems facing "underrepresented minorities,"[11] instead continuing their social experiments on other people's children.

*373 Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke [s] resentment among those who believe that they have been wronged by the government's use of race." *Adarand,* 515 U.S., at 241, 115 S.Ct. 2097 (THOMAS, J., concurring in part and concurring in judgment). "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Ibid.*

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. See Brief for Respondent Bollinger et al. 6. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. Is this what the Court means by "visibly open"? *Ante,* at 2341.

Finally, the Court's disturbing reference to the importance of the country's law **2363 schools as training grounds meant to cultivate "a set of leaders with legitimacy in the eyes of the citizenry," *ibid.*, through the use of racial discrimination deserves discussion. As noted earlier, the Court has soundly *374 rejected the remedying of societal discrimination as a justification for governmental use of race. *Wygant,* 476 U.S., at 276, 106 S.Ct. 1842 (plurality opinion); *Croson,* 488 U.S., at 497, 109 S.Ct. 706 (plurality opinion); *id.,* at 520–521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment). For those who believe that every racial disproportionality in our society is caused by some kind of racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportionalities in the country's leadership caste. And if the lack of proportional racial representation among our leaders is not caused by societal discrimination, then "fixing" it is even less of a pressing public necessity.

The Court's civics lesson presents yet another example of judicial selection of a theory of political representation based on skin color—an endeavor I have previously rejected. See *Holder v. Hall,* 512 U.S. 874, 899, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (THOMAS, J., concurring in judgment). The majority appears to believe that broader utopian goals justify the Law School's use of race, but "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis,* 416 U.S., at 342, 94 S.Ct. 1704 (Douglas, J., dissenting).

VII

As the foregoing makes clear, I believe the Court's opinion to be, in most respects, erroneous. I do, however, find two points on which I agree.

A

First, I note that the issue of unconstitutional racial discrimination among the groups the Law School prefers is not presented in this case, because petitioner has never argued that the Law School engages in such a practice, and the Law School maintains that it does not. See Brief for Respondent Bollinger et al. 32, n. 50, and 6–7, n. 7. I join the Court's opinion insofar as it confirms that this type of racial discrimination remains unlawful. *Ante,* at 2337–2338. Under today's *375 decision, it is still the case that racial discrimination that does not help a university to enroll an unspecified number, or "critical mass," of underrepresented minority students is unconstitutional. Thus, the Law School may not discriminate in admissions between similarly situated blacks and Hispanics, or between whites and Asians. This is so because preferring black to Hispanic applicants, for instance, does nothing to further the interest recognized by the majority today. [12] Indeed, the majority describes such racial balancing as "patently unconstitutional." *Ante,* at 2339. Like the Court, *ante,* at 2343, I express no opinion as to whether the Law School's current admissions program runs afoul of this prohibition.

B

The Court also holds that racial discrimination in admissions should be given another **2364 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest. *Ante,* at 2346–2347. While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now. The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white *376 students is shrinking or will be gone in that timeframe. [13] In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. [14] In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. Law School Admission Council, National Statistical Report (1994) (hereinafter LSAC Statistical Report). In 2000 the comparable numbers were 1.0% and 11.3%. LSAC Statistical Report (2001). No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time. [15]

*377 Indeed, the very existence of racial discrimination of the type practiced by the Law School may impede the narrowing of the LSAT testing gap. An applicant's LSAT score can improve dramatically with preparation, but such preparation is a cost, and there must be sufficient benefits attached to an improved score to justify additional study. Whites scoring between 163 and 167 on the LSAT are routinely rejected by the Law School, and thus whites aspiring to admission at the Law School have every incentive to improve their score to levels above that range. See App. 199 (showing that in 2000, 209 out of 422 white applicants were rejected in this scoring range). Blacks, on the other hand, are nearly guaranteed admission if they score above 155. *Id.,* at 198 (showing that 63 out of 77 black applicants are accepted with LSAT scores above 155). As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score. It is far from certain that the LSAT test-taker's behavior is responsive to the Law School's admissions policies. [16] **2365 Nevertheless, the possibility remains that this racial discrimination will help fulfill the bigot's prophecy about black underperformance—just as it confirms the conspiracy theorist's belief that "institutional racism" is at fault for every racial disparity in our society.

I therefore can understand the imposition of a 25–year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire. At that point these policies will clearly have failed to " 'eliminat[e] *378 the [perceived] need for any racial or ethnic' " discrimination because the academic credentials gap will still be there. *Ante,* at 2346 (quoting Nathanson & Bartnik, The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, 58 Chicago Bar Rec. 282, 293 (May–June 1977)). The Court defines this time limit in terms of narrow tailoring, see *ante,* at 2346–2347, but I believe this arises from its refusal to define rigorously

the broad state interest vindicated today. Cf. Part II, *supra*. With these observations, I join the last sentence of Part III of the opinion of the Court.

* * *

For the immediate future, however, the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting). It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment.

Chief Justice REHNQUIST, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

I agree with the Court that, "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. *Ante*, at 2341; see also *Fullilove v. Klutznick*, 448 U.S. 448, 498, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J., concurring) ("[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental ***379** purpose"). I do not believe, however, that the University of Michigan Law School's (Law School) means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a " 'critical mass' " of underrepresented minority students. Brief for Respondent Bollinger et al. 13. But its actual program bears no relation to this asserted goal. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.

As we have explained many times, " ' "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." ' " *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.)). Our cases establish that, in order to withstand this demanding inquiry, respondents must demonstrate that their methods of using race " 'fit' " a compelling state interest "with greater precision than any alternative means." *Id.*, at 280, n. 6, 106 S.Ct. 1842; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.) ("When [political judgments] touch upon ****2366** an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

Before the Court's decision today, we consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. We rejected calls to use more lenient review in the face of claims that race was being used in "good faith" because " '[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.' " *Adarand*, *supra*, at 226, 115 S.Ct. 2097; *Fullilove*, *supra*, at 537, 100 S.Ct. 2758 (STEVENS, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"). We likewise rejected ***380** calls to apply more lenient review based on the particular setting in which race is being used. Indeed, even in the specific context of higher education, we emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Bakke*, *supra*, at 314, 98 S.Ct. 2733.

Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.

Respondents' asserted justification for the Law School's use of race in the admissions process is "obtaining 'the educational benefits that flow from a diverse student body.' " *Ante*, at 2338 (quoting Brief for Respondent Bollinger et al. i). They contend

that a "critical mass" of underrepresented minorities is necessary to further that interest. *Ante,* at 2339. Respondents and school administrators explain generally that "critical mass" means a sufficient number of underrepresented minority students to achieve several objectives: To ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes. See App. to Pet. for Cert. 211a; Brief for Respondent Bollinger et al. 26. These objectives indicate that "critical mass" relates to the size of the student body. *Id.,* at 5 (claiming that the Law School has enrolled "critical mass," or "enough minority students to provide meaningful integration of its classrooms and residence halls"). Respondents further claim that the Law School is achieving "critical mass." *Id.,* at 4 (noting that the Law School's goals have been "greatly furthered by the presence of ... a 'critical mass' of" minority students in the student body).

In practice, the Law School's program bears little or no relation to its asserted goal of achieving "critical mass." Respondents explain that the Law School seeks to accumulate a "critical mass" of *each* underrepresented minority ***381** group. See, *e.g., id.,* at 49, n. 79 ("The Law School's ... current policy ... provide[s] a special commitment to enrolling a 'critical mass' of 'Hispanics' "). But the record demonstrates that the Law School's admissions practices with respect to these groups differ dramatically and cannot be defended under any consistent use of the term "critical mass."

From 1995 through 2000, the Law School admitted between 1,130 and 1,310 students. Of those, between 13 and 19 were Native American, between 91 and 108 were African–American, and between 47 and 56 were Hispanic. If the Law School is admitting between 91 and 108 African–Americans in order to achieve "critical mass," thereby preventing African–American students from feeling "isolated or like spokespersons for their race," one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. Similarly, even if ****2367** all of the Native American applicants admitted in a given year matriculate, which the record demonstrates is not at all the case,* how can this possibly constitute a "critical mass" of Native Americans in a class of over 350 students? In order for this pattern of admission to be consistent with the Law School's explanation of "critical mass," one would have to believe that the objectives of "critical mass" offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African–Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving "critical mass," without any explanation of why that concept is applied differently among the three underrepresented minority groups.

***382** These different numbers, moreover, come only as a result of substantially different treatment among the three underrepresented minority groups, as is apparent in an example offered by the Law School and highlighted by the Court: The school asserts that it "frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected." *Ante,* at 2344 (citing Brief for Respondent Bollinger et al. 10). Specifically, the Law School states that "[s]ixty-nine minority applicants were rejected between 1995 and 2000 with at least a 3.5 [Grade Point Average (GPA)] and a [score of] 159 or higher on the [Law School Admission Test (LSAT)]" while a number of Caucasian and Asian–American applicants with similar or lower scores were admitted. *Ibid.*

Review of the record reveals only 67 such individuals. Of these 67 individuals, *56* were Hispanic, while only 6 were African–American, and only 5 were Native American. This discrepancy reflects a consistent practice. For example, in 2000, 12 Hispanics who scored between a 159–160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. App. 200–201. Meanwhile, 12 African–Americans in the same range of qualifications applied for admission and all 12 were admitted. *Id.,* at 198. Likewise, that same year, 16 Hispanics who scored between a 151–153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. *Id.,* at 200–201. Twenty-three similarly qualified African–Americans applied for admission and 14 were admitted. *Id.,* at 198.

These statistics have a significant bearing on petitioner's case. Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve "critical mass" or further student body diversity. They certainly have not explained why Hispanics, who they ***383** have said are among "the groups most isolated by racial barriers in our country," should have their admission capped out in this manner. Brief

for Respondent Bollinger et al. 50. True, petitioner is neither Hispanic nor Native American. But the Law School's disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of "critical mass" is simply a sham. Petitioner may use these statistics to expose this sham, which is the basis for the Law School's admission of less qualified underrepresented minorities in preference to her. Surely strict scrutiny cannot permit these sorts of disparities without at least some explanation.

Only when the "critical mass" label is discarded does a likely explanation for these numbers emerge. The Court states **2368 that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not an interest in merely " 'assur[ing] within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' " *Ante*, at 2339 (quoting *Bakke*, 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.)). The Court recognizes that such an interest "would amount to outright racial balancing, which is patently unconstitutional." *Ante*, at 2339. The Court concludes, however, that the Law School's use of race in admissions, consistent with Justice Powell's opinion in *Bakke*, only pays " '[s]ome attention to numbers.' " *Ante*, at 2343 (quoting *Bakke, supra*, at 323, 98 S.Ct. 2733).

But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.

TABLE 1

Year	Number of law school applicants	Number of African-American applicants	% of applicants who were African-American	Number of applicants admitted by the law school	Number of African-American applicants admitted	% of admitted applicants who were African-American
1995	4147	404	9.7%	1130	106	9.4%
1996	3677	342	9.3%	1170	108	9.2%
1997	3429	320	9.3%	1218	101	8.3%
1998	3537	304	8.6%	1310	103	7.9%
1999	3400	247	7.3%	1280	91	7.1%
2000	3432	259	7.5%	1249	91	7.3%

Table 2

				Number of		% of

Year	Number of law school applicants	Number of Hispanic applicants	% of applicants who were Hispanic	applicants admitted by the law school	Number of Hispanic applicants admitted	admitted applicants who were Hispanic
1995	4147	213	*5.1%*	1130	56	*5.0%*
1996	3677	186	*5.1%*	1170	54	*4.6%*
1997	3429	163	*4.8%*	1218	47	*3.9%*
1998	3537	150	*4.2%*	1310	55	*4.2%*
1999	3400	152	*4.5%*	1280	48	*3.8%*
2000	3432	168	*4.9%*	1249	53	*4.2%*

Table 3

Year	Number of law school applicants	Number of Native American applicants	% of applicants who were Native American	Number of applicants admitted by the law school	Number of Native American applicants admitted	% of admitted applicants who were Native American
1995	4147	45	*1.1%*	1130	14	*1.2%*
1996	3677	31	*0.8%*	1170	13	*1.1%*
1997	3429	37	*1.1%*	1218	19	*1.6%*
1998	3537	40	*1.1%*	1310	18	*1.4%*
1999	3400	25	*0.7%*	1280	13	*1.0%*
2000	3432	35	*1.0%*	1249	14	*1.1%*

****2369** ***385** For example, in 1995, when 9.7% of the applicant pool was African–American, 9.4% of the admitted class was African–American. By 2000, only 7.5% of the applicant pool was African–American, and 7.3% of the admitted class

was African–American. This correlation is striking. Respondents themselves emphasize that the number of underrepresented minority students admitted to the Law School would be significantly smaller if the race of each applicant were not considered. See App. to Pet. for Cert. 223a; Brief for Respondent Bollinger et al. 6 (quoting App. to Pet. for Cert. 299a). But, as the examples above illustrate, the measure of the decrease would differ dramatically among the groups. The tight correlation between the percentage of applicants and admittees of a given race, therefore, must result from careful race based planning by the Law School. It suggests a formula for admission based on the aspirational assumption that all applicants are equally qualified academically, and therefore that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool. See Brief for Respondent Bollinger et al. 43, n. 70 (discussing admissions officers' use of "periodic reports" to track "the racial composition of the developing class").

Not only do respondents fail to explain this phenomenon, they attempt to obscure it. See *id.*, at 32, n. 50 ("The Law School's minority enrollment percentages ... diverged from the percentages in the applicant pool by as much as 17.7% from 1995–2000"). But the divergence between the percentages of underrepresented minorities in the applicant pool and in the *enrolled* classes is not the only relevant comparison. In fact, it may not be the most relevant comparison. The Law School cannot precisely control which of its admitted applicants decide to attend the university. But it can and, as the numbers demonstrate, clearly does employ racial preferences in extending offers of admission. Indeed, the ostensibly flexible nature of the Law School's admissions program ***386** that the Court finds appealing, see *ante*, at 2343–2344, appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.

I do not believe that the Constitution gives the Law School such free rein in the use of race. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional." *Ante*, at 2339.

Finally, I believe that the Law School's program fails strict scrutiny because it is devoid of any reasonably precise time limit on the Law School's use of race in admissions. We have emphasized that we will consider "the planned duration of the remedy" in determining whether a race-conscious program is constitutional. *Fullilove*, 448 U.S., at 510, 100 S.Ct. 2758 (Powell, J., concurring); see also *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the ... duration of the relief"). Our previous cases have required some limit on the duration of programs such as this because discrimination on the basis of race is invidious.

The Court suggests a possible 25–year limitation on the Law School's current program. ****2370** See *ante*, at 2346–2347. Respondents, on the other hand, remain more ambiguous, explaining that "[t]he Law School of course recognizes that race-conscious programs must have reasonable durational limits, and the Sixth Circuit properly found such a limit in the Law School's resolve to cease considering race when genuine race-neutral alternatives become available." Brief for Respondent Bollinger et al. 32. These discussions of a time ***387** limit are the vaguest of assurances. In truth, they permit the Law School's use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny—that a program be limited in time—is casually subverted.

The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws. We have said that when it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that; it is not merely a question of "fit" between ends and means. Here the means actually used are forbidden by the Equal Protection Clause of the Constitution.

Justice KENNEDY, dissenting.

The separate opinion by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–291, 315–318, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), is based on the principle that a university admissions program may take account of race as one,

nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.

Justice Powell's approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. *Id.*, at 312–314, 98 S.Ct. 2733; *ante*, at 2339. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among *388 students can further its educational task, when supported by empirical evidence. *Ante*, at 2339–2340.

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. *Bakke, supra*, at 291, 98 S.Ct. 2733 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). This Court has reaffirmed, subsequent to *Bakke*, the absolute necessity of strict scrutiny when the State uses race as an operative category. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); see *id.*, at 519, 109 S.Ct. 706 (KENNEDY, J., concurring in part and concurring in judgment) ("[A]ny racial preference must face the most rigorous scrutiny by the courts"). The Court confuses deference to a university's definition **2371 of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's (Law *389 School) assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional." *Ante*, at 2339; see also *Bakke, supra*, at 307, 98 S.Ct. 2733 (opinion of Powell, J.). It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

About 80% to 85% of the places in the entering class are given to applicants in the upper range of Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

The Law School has not demonstrated how individual consideration is, or can be, preserved at this stage of the application process given the instruction to attain what it calls critical mass. In fact the evidence shows otherwise. There was little deviation among admitted minority students during the years from 1995 to 1998. The percentage of enrolled minorities fluctuated only by 0.3%, from 13.5% to 13.8%. The number of minority students to whom offers were extended varied by just a slightly greater magnitude of 2.2%, from the high of 15.6% in 1995 to the low of 13.4% in 1998.

*390 The District Court relied on this uncontested fact to draw an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota. 137 F.Supp.2d 821, 851 (E.D.Mich.2001). Admittedly, there were greater fluctuations among enrolled minorities in the preceding years, 1987–1994, by as much as 5% or 6%. The percentage of minority offers, however, at no point fell below 12%, historically defined by the Law School as the bottom of its critical mass range. The greater variance during the earlier years, in any event, does not dispel suspicion that the school engaged in racial balancing. The data would be consistent with an inference that the Law School modified its target only twice, in 1991 (from 13% to 19%), and then again in 1995 (back from 20% to 13%). The intervening year, 1993, when the percentage dropped to 14.5%, could be an aberration, caused by the school's miscalculation as to how many applicants with offers would accept or by its redefinition, made in April 1992, of which minority groups were entitled to race-based preference. See Brief for Respondent Bollinger et al. 49, n. 79.

Year	Percentage of enrolled minority students
1987	12.3%
1988	13.6%
1989	14.4%
1990	13.4%
1991	19.1%
1992	19.8%
1993	14.5%
1994	20.1%
1995	13.5%
1996	13.8%
1997	13.6%
1998	13.8%

**2372 The narrow fluctuation band raises an inference that the Law School subverted individual determination, and strict *391 scrutiny requires the Law School to overcome the inference. Whether the objective of critical mass "is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status," and so risks compromising individual assessment. *Bakke*, 438 U.S., at 289, 98 S.Ct. 2733 (opinion of Powell, J.). In this respect the Law School program compares unfavorably with the experience of Little Ivy League colleges. *Amicus* Amherst College, for example, informs us that the offers it extended to students of African–American background during the period from 1993 to 2002 ranged between 81 and 125 out of 950 offers total, resulting in a fluctuation from 24 to 49 matriculated students in a class of about 425. See Brief for Amherst College et al. as *Amici Curiae* 10–11. The Law School insisted upon a much smaller fluctuation, both in the offers extended and in the students who eventually enrolled, despite having a comparable class size.

The Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way. *Adarand Constructors,* 515 U.S., at 224, 115 S.Ct. 2097. At the very least, the constancy of admitted minority students and the close correlation between the racial breakdown of admitted minorities and the composition of the applicant pool, discussed by THE CHIEF JUSTICE, *ante,* at 2366–2369, require the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment. The Law School does neither.

The obvious tension between the pursuit of critical mass and the requirement of individual review increased by the end of the admissions season. Most of the decisions where race may decide the outcome are made during this period. See *supra,* at 2371. The admissions officers consulted the daily reports which indicated the composition of the incoming class along racial lines. As Dennis Shields, Director of Admissions from 1991 to 1996, stated, "the further [he] went into the [admissions] season the more frequently [he] would ***392** want to look at these [reports] and see the change from day-to-day." These reports would "track exactly where [the Law School] st[ood] at any given time in assembling the class," and so would tell the admissions personnel whether they were short of assembling a critical mass of minority students. Shields generated these reports because the Law School's admissions policy told him the racial makeup of the entering class was "something [he] need[ed] to be concerned about," and so he had "to find a way of tracking what's going on." Deposition of Dennis Shields in Civ. Action No. 97–75928, pp. 129–130, 141 (E.D.Mich., Dec. 7, 1998).

The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.

****2373** The Law School made no effort to guard against this danger. It provided no guidelines to its admissions personnel on how to reconcile individual assessment with the directive to admit a critical mass of minority students. The admissions program could have been structured to eliminate at least some of the risk that the promise of individual evaluation was not being kept. The daily consideration of racial breakdown of admitted students is not a feature of affirmative-action programs used by other institutions of higher learning. The Little Ivy League colleges, for instance, do not keep ongoing tallies of racial or ethnic composition of their entering students. See Brief for Amherst College et al. as *Amici Curiae* 10.

To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process. There is no constitutional objection to the goal of ***393** considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking. The Law School failed to comply with this requirement, and by no means has it carried its burden to show otherwise by the test of strict scrutiny.

The Court's refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools' choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution. Dean Allan Stillwagon, who directed the Law School's Office of Admissions from 1979 to 1990, explained the difficulties he encountered in defining racial groups entitled to benefit under the Law School's affirmative action policy. He testified that faculty members were "breathtakingly cynical" in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. Many academics at other law schools who are "affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds." Schuck, Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 34 (2002) (citing Levinson, Diversity, 2 U. Pa. J. Const. L. 573, 577–578 (2000); Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 471 (1997)). This is not to suggest the faculty at Michigan or other law schools do not pursue aspirations they consider laudable

and consistent with our constitutional *394 traditions. It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking. Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.

It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now. *Ante,* at 2345–2347. If it is intended to mitigate the damage the Court does to the concept of strict scrutiny, neither petitioner nor other rejected law school applicants will find solace in knowing the basic protection put in place by Justice Powell will be suspended for a full quarter of a century. Deference is antithetical to strict scrutiny, not consistent with it.

As to the interpretation that the opinion contains its own self-destruct mechanism, **2374 the majority's abandonment of strict scrutiny undermines this objective. Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith. The majority admits as much: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Ante,* at 2346 (quoting Brief for Respondent Bollinger et al. 34).

If universities are given the latitude to administer programs that are tantamount to quotas, they will have few incentives to make the existing minority admissions schemes transparent and protective of individual review. The unhappy consequence will be to perpetuate the hostilities that proper consideration of race is designed to avoid. The perpetuation, of course, would be the worst of all outcomes. Other programs do exist which will be more effective in *395 bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought. They, and not the program under review here, should be the model, even if the Court defaults by not demanding it.

It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

All Citations

539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, 91 Fair Empl.Prac.Cas. (BNA) 1761, 84 Empl. Prac. Dec. P 41,415, 71 USLW 4498, 177 Ed. Law Rep. 801, 03 Cal. Daily Op. Serv. 5378, 2003 Daily Journal D.A.R. 6800, 16 Fla. L. Weekly Fed. S 367

Footnotes

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

* As the Court explains, the admissions policy challenged here survives review under the standards stated in *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), and Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). This case therefore does not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review. Cf. *Gratz, post,* 539 U.S., at 301–302, 123 S.Ct. 2411, 2003 WL 21434002 (GINSBURG, J., dissenting); *Adarand,* 515 U.S., at 274, n. 8, 115 S.Ct. 2097 (GINSBURG, J., dissenting). Nor does this case necessitate reconsideration whether interests other than "student body diversity," *ante,* at 2337, rank as sufficiently important to justify a race-conscious government program. Cf. *Gratz, post,* 539 U.S., at 301–302, 123 S.Ct.2411, 2003 WL 21434002 (GINSBURG, J., dissenting); *Adarand,* 515 U.S., at 273–274, 115 S.Ct. 2097 (GINSBURG, J., dissenting).

* Part VII of Justice THOMAS's opinion describes those portions of the Court's opinion in which I concur. See *post,* at 2363–2365 (opinion concurring in part and dissenting in part).

1 Throughout I will use the two phrases interchangeably.

2 The Court's refusal to address *Wygant's* rejection of a state interest virtually indistinguishable from that presented by the Law School is perplexing. If the Court defers to the Law School's judgment that a racially mixed student body confers educational benefits to all, then why would the *Wygant* Court not defer to the school board's judgment with respect to the benefits a racially mixed faculty confers?

3 "[D]iversity," for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue. Because the Equal Protection Clause renders the color of one's skin constitutionally irrelevant to the Law School's mission, I refer to the Law School's interest as an "aesthetic." That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.

I also use the term "aesthetic" because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged. Cf. *Orr v. Orr,* 440 U.S. 268, 283, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) (noting that suspect classifications are especially impermissible when "the choice made by the State appears to redound ... to the benefit of those without need for special solicitude"). It must be remembered that the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.

4 The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.

5 Cf. U.S. News & World Report, America's Best Graduate Schools 28 (2004 ed.) (placing these schools in the uppermost 15 in the Nation).

6 The Court refers to this component of the Law School's compelling state interest variously as "academic quality," avoiding "sacrifice [of] a vital component of its educational mission," and "academic selectivity." *Ante,* at 2345.

7 For example, North Carolina A & T State University, which is currently 5.4% white, College Admissions Data Handbook 643, could seek to reduce the representation of whites in order to gain additional educational benefits.

8 Cal. Const., Art. 1, § 31(a), states in full:

"The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." See *Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (C.A.9 1997).

9 Given the incredible deference the Law School receives from the Court, I think it appropriate to indulge in the presumption that Boalt Hall operates without violating California law.

10 Were this Court to have the courage to forbid the use of racial discrimination in admissions, legacy preferences (and similar practices) might quickly become less popular—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case.

11 For example, there is no recognition by the Law School in this case that even with their racial discrimination in place, black *men* are "underrepresented" at the Law School. See ABA–LSAC Guide 426 (reporting that the Law School has 46 black women and 28 black men). Why does the Law School not also discriminate in favor of black men over black women, given this underrepresentation? The answer is, again, that all the Law School cares about is its own image among know-it-all elites, not solving real problems like the crisis of black male underperformance.

12 That interest depends on enrolling a "critical mass" of underrepresented minority students, as the majority repeatedly states. *Ante,* at 2332, 2333, 2334, 2339, 2341, 2343, 2345; cf. *ante,* at 2341 (referring to the unique experience of being a "racial minority," as opposed to being black, or Native American); *ante,* at 2343 (rejecting argument that the Law School maintains a disguised quota by referring to the total number of enrolled underrepresented minority students, not specific races). As it relates to the Law School's racial discrimination, the Court clearly approves of only one use of race—the distinction between underrepresented minority applicants and those of all other races. A relative preference awarded to a black applicant over, for example, a similarly situated Native American applicant, does not lead to the enrollment of even one more underrepresented minority student, but only balances the races within the "critical mass."

13 I agree with Justice GINSBURG that the Court's holding that racial discrimination in admissions will be illegal in 25 years is not based upon a "forecast," *ante.,* at 2348 (concurring opinion). I do not agree with Justice GINSBURG's characterization of the Court's holding as an expression of "hope." *Ibid.*

14 I use a score of 165 as the benchmark here because the Law School feels it is the relevant score range for applicant consideration (absent race discrimination). See Brief for Respondent Bollinger et al. 5; App. to Pet. for Cert. 309a (showing that the median LSAT

score for all accepted applicants from 1995–1998 was 168); *id.*, at 310a–311a (showing the median LSAT score for accepted applicants was 167 for the years 1999 and 2000); University of Michigan Law School Website, available at http:// www.law.umich.edu/ prospectivestudents /Admissions / index.htm (showing that the median LSAT score for accepted applicants in 2002 was 166).

15 The majority's non sequitur observation that since 1978 the number of blacks that have scored in these upper ranges on the LSAT has grown, *ante*, at 2346–2347, says nothing about current trends. First, black participation in the LSAT until the early 1990's lagged behind black representation in the general population. For instance, in 1984 only 7.3% of law school applicants were black, whereas in 2000 11.3% of law school applicants were black. See LSAC Statistical Reports (1984 and 2000). Today, however, unless blacks were to begin applying to law school in proportions greater than their representation in the general population, the growth in absolute numbers of high scoring blacks should be expected to plateau, and it has. In 1992, 63 black applicants to law school had LSAT scores above 165. In 2000, that number was 65. See LSAC Statistical Reports (1992 and 2000).

16 I use the LSAT as an example, but the same incentive structure is in place for any admissions criteria, including undergraduate grades, on which minorities are consistently admitted at thresholds significantly lower than whites.

* Indeed, during this 5–year time period, enrollment of Native American students dropped to as low as *three* such students. Any assertion that such a small group constituted a "critical mass" of Native Americans is simply absurd.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Braunstein v. Arizona Dept. of Transp., 9th Cir.(Ariz.), June 27, 2012

123 S.Ct. 2411
Supreme Court of the United States

Jennifer GRATZ and Patrick Hamacher, Petitioners,
v.
Lee BOLLINGER et al.

No. 02–516.
|
Argued April 1, 2003.
|
Decided June 23, 2003.

Synopsis
Rejected Caucasian in-state applicants for admission to University of Michigan's College of Literature, Science and the Arts (LSA) filed class action complaint against, inter alia, board of regents alleging that university's use of racial preferences in undergraduate admissions violated Equal Protection Clause, Title VI, and § 1981 and seeking, inter alia, compensatory and punitive damages for past violations, declaratory and injunctive relief, and order requiring LSA to offer one of them admission as transfer student. Action was certified as class action and bifurcated into damages and liability phases. On cross-motions for summary judgment with respect to liability phase only, the United States District Court for the Eastern District of Michigan, 122 F.Supp.2d 811, Patrick J. Duggan, J., granted petitioners' motion with respect to admissions programs in existence from 1995 through 1998, but denied motion with respect to admissions programs for 1999 and 2000. During pendency of interlocutory appeal to the United States Court of Appeals for the Sixth Circuit, certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) petitioners had standing to seek declaratory and injunctive relief; (2) university's current freshman admissions policy violated Equal Protection Clause because its use of race was not narrowly tailored to achieve respondents' asserted compelling state interest in diversity; and (3) Title VI and § 1981 were also violated by that policy.

Reversed in part and remanded.

Justice O'Connor filed concurring opinion in which Justice Breyer joined in part.

Justice Thomas filed concurring opinion.

Justice Breyer filed opinion concurring in the judgment.

Justice Souter filed dissenting opinion in which Justice Ginsburg joined in part.

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

****2413 *244** *Syllabus* [*]

Petitioners Gratz and Hamacher, both of whom are Michigan residents and Caucasian, applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) in 1995 and 1997, respectively. Although the LSA considered Gratz to be well qualified and Hamacher to be within the qualified range, both were denied early admission and were ultimately denied admission. In order to promote consistency in the ****2414** review of the many applications received,

the University's Office of Undergraduate Admissions (OUA) uses written guidelines for each academic year. The guidelines have changed a number of times during the period relevant to this litigation. The OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. During all relevant periods, the University has considered African–Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits virtually every qualified applicant from these groups. The current guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.

Petitioners filed this class action alleging that the University's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. They sought compensatory and punitive damages for past violations, declaratory relief finding that respondents violated their rights to nondiscriminatory treatment, an injunction prohibiting respondents from continuing to discriminate on the basis of race, and an order requiring the LSA to offer Hamacher admission as a transfer student. The District Court granted petitioners' motion to certify a class consisting of individuals who applied for and were denied admission to the LSA for academic year 1995 and forward and who are members of racial or ethnic groups that respondents treated less favorably on the basis of race. Hamacher, whose claim was found to challenge racial discrimination on a classwide basis, was designated as the class representative. On cross-motions for summary judgment, respondents relied on Justice Powell's principal opinion in *Regents of* **245 *Univ. of Cal. v. Bakke,* 438 U.S. 265, 317, 98 S.Ct. 2733, 57 L.Ed.2d 750, which expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. The court agreed with respondents as to the LSA's current admissions guidelines and granted them summary judgment in that respect. However, the court also found that the LSA's admissions guidelines for 1995 through 1998 operated as the functional equivalent of a quota running afoul of Justice Powell's *Bakke* opinion, and thus granted petitioners summary judgment with respect to respondents' admissions programs for those years. While interlocutory appeals were pending in the Sixth Circuit, that court issued an opinion in *Grutter v. Bollinger, ante,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, upholding the admissions program used by the University's Law School. This Court granted certiorari in both cases, even though the Sixth Circuit had not yet rendered judgment in this one.

Held:

1. Petitioners have standing to seek declaratory and injunctive relief. The Court rejects Justice STEVENS' contention that, because Hamacher did not actually apply for admission as a transfer student, his future injury claim is at best conjectural or hypothetical rather than real and immediate. The "injury in fact" necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586. In the face of such a barrier, to establish standing, a party need only demonstrate that it is able and ready to perform and that a discriminatory **2415 policy prevents it from doing so on an equal basis. *Ibid.* In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. Hamacher was denied admission to the University as a freshman applicant even though an underrepresented minority applicant with his qualifications would have been admitted. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race. Also rejected is Justice STEVENS' contention that such use in undergraduate transfer admissions differs from the University's use of race in undergraduate freshman admissions, so that Hamacher lacks standing to represent absent class members challenging the latter. Each year the OUA produces a document setting forth **246 guidelines for those seeking admission to the LSA, including freshman and transfer applicants. The transfer applicant guidelines specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to diversity are *identical* to those used to evaluate freshman applicants. The *only* difference is that all

underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest justifying its consideration of the race of its undergraduate applicants. See *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 72 L.Ed.2d 740; *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534, distinguished. The District Court's carefully considered decision to certify this class action is correct. Cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351. Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain the action. Pp. 2422–2426.

2. Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause. For the reasons set forth in *Grutter v. Bollinger, ante*, 539 U.S., at 327–333, 123 S.Ct. 2325, 2003 WL 21433492, the Court has today rejected petitioners' argument that diversity cannot constitute a compelling state interest. However, the Court finds that the University's current policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve educational diversity. In *Bakke*, Justice Powell explained his view that it would be permissible for a university to employ an admissions program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file." 438 U.S., at 317, 98 S.Ct. 2733. He emphasized, however, the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.*, at 315, 98 S.Ct. 2733. The current LSA policy does ****2416** not provide the individualized consideration Justice Powell contemplated. The only consideration that accompanies the 20–point automatic distribution to all applicants from underrepresented minorities is a factual review to determine whether an individual is a member ***247** of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *id.*, at 317, 98 S.Ct. 2733, the LSA's 20–point distribution has the effect of making "the factor of race ... decisive" for virtually every minimally qualified underrepresented minority applicant, *ibid.* The fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. The record does not reveal precisely how many applications are flagged, but it is undisputed that such consideration is the exception and not the rule in the LSA's program. Also, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant. The Court rejects respondents' contention that the volume of applications and the presentation of applicant information make it impractical for the LSA to use the admissions system upheld today in *Grutter*. The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See, *e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508, 109 S.Ct. 706, 102 L.Ed.2d 854. Nothing in Justice Powell's *Bakke* opinion signaled that a university may employ whatever means it desires to achieve diversity without regard to the limits imposed by strict scrutiny. Pp. 2426–2430.

3. Because the University's use of race in its current freshman admissions policy violates the Equal Protection Clause, it also violates Title VI and § 1981. See, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 281, 121 S.Ct. 1511, 149 L.Ed.2d 517; *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 389–390, 102 S.Ct. 3141, 73 L.Ed.2d 835. Accordingly, the Court reverses that portion of the District Court's decision granting respondents summary judgment with respect to liability. Pp. 2430–2431.

Reversed in part and remanded.

REHNQUIST, C.J. delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BREYER, J., joined in part, *post*, p. 2431. THOMAS, J., filed a concurring

opinion, *post,* p. 2433. BREYER, J., filed an opinion concurring in the judgment, *post,* p. 2433. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post,* p. 2434. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post,* p. 2438. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, and in which BREYER, J., joined as to Part I, *post,* p. 2442.

Attorneys and Law Firms

***248** Kirk O. Kolbo, Minneapolis, MN, for petitioners.

Theodore B. Olson, Great Falls, VA, for the United States as amicus curiae, by special leave of the Court, supporting the petitioners.

John Payton, Washington, DC, for respondents.

Michael E. Rosman, Hans Bader Center for Individual Rights, Washington, D.C., Kerry L. Morgan, Pentiuk, Couvreur & Kobiljak, P.C., Wyandotte, MI, David F. Herr, Counsel of Record, Kirk O. Kolbo, R. Lawrence Purdy, Michael C. McCarthy, Kai H. Richter, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, MN, for petitioners.

****2417** Christopher A. Hansen, E. Vincent Warren, American Civil Liberties Union Foundation, New York City, Elaine R. Jones, Director-Counsel, Theodore M. Shaw, Norman J. Chachkin, James L. Cott, Melissa S. Woods, NAACP Legal Defense and Educational Fund, Inc., New York City, Brent E. Simmons, ACLU Fund of Michigan, Lansing, MI, Michael J. Steinberg, ACLU Fund of Michigan, Detroit, MI, Antonia Hernandez, President and General Counsel, Thomas Saenz, Patricia Mendoza, Victor Viramontes, Mexican American Legal Defense and Education Fund, Los Angeles, CA, Godfrey J. Dillard, Milton R. Henry, Reginald M. Turner, Citizens For Affirmative Action's Preservation, Detroit, MI, Counsel for Patterson Respondents.

Marvin Krislov, Jonathan Alger, University of Michigan, Office of the Vice President and General Counsel, Ann Arbor, MI, Jeffrey Lehman, Evan Caminker, University of Michigan Law School, Ann Arbor, MI, Philip J. Kessler, Leonard M. Niehoff, Butzel Long, Ann Arbor, MI, John H. Pickering, John Payton, Counsel of Record, Brigida Benitez, Stuart F. Delery, Craig Goldblatt, Anne Harkavy, Terry A. Maroney, Wilmer, Cutler & Pickering, Washington, DC, Maureen E. Mahoney, J. Scott Ballenger, Nathaniel A. Vitan, Latham & Watkins, Washington, DC, Counsel for Respondents.

Opinion

***249** Chief Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to decide whether "the University of Michigan's use of racial preferences in undergraduate ***250** admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981." Brief ***251** for Petitioners i. Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court's decision upholding the guidelines.

I

A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year that a final decision regarding her admission had been delayed until April. This delay was based upon the University's determination that, although Gratz was " 'well qualified,'

" she was " 'less competitive than the students who ha[d] been admitted on first review.' " App. to Pet. for Cert. 109a. Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his " 'academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.' " *Ibid.* Hamacher's application was subsequently denied in April 1997, and he enrolled at Michigan State University. [1]

***252** In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan ****2418** against the University, the LSA, [2] James Duderstadt, and Lee Bollinger. [3] Petitioners' complaint was a class-action suit alleging "violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment ..., and for racial discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 2000d *et seq.*" App. 33. Petitioners sought, *inter alia,* compensatory and punitive damages for past violations, declaratory relief finding that respondents violated petitioners' "rights to nondiscriminatory treatment," an injunction prohibiting respondents from "continuing to discriminate on the basis of race in violation of the Fourteenth Amendment," and an order requiring the LSA to offer Hamacher admission as a transfer student. [4] *Id.*, at 40.

The District Court granted petitioners' motion for class certification after determining that a class action was appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2). The certified class consisted of "those individuals who applied for and were not granted admission to the College of ***253** Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treat[ed] less favorably on the basis of race in considering their application for admission." App. 70–71. And Hamacher, whose claim the District Court found to challenge a " 'practice of racial discrimination pervasively applied on a classwide basis,' " was designated as the class representative. *Id.*, at 67, 70. The court also granted petitioners' motion to bifurcate the proceedings into a liability and damages phase. *Id.*, at 71. The liability phase was to determine "whether [respondents'] use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution." *Id.*, at 70. [5]

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University's Office of Undergraduate Admissions (OUA) oversees the LSA admissions process. [6] In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum ****2419** strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University ***254** has considered African–Americans, Hispanics, and Native Americans to be "underrepresented minorities," and it is undisputed that the University admits "virtually every qualified ... applicant" from these groups. App. to Pet. for Cert. 111a.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the "SCUGA" factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's "GPA 2" score, the reviewing admissions counselors referenced a set of "Guidelines" tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells

that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status.[7] For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission.

***255** In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the "U" category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA dispensed with the Guidelines tables and the SCUGA point system in favor of a "selection index," on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a "miscellaneous" category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the ****2420** " 'development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions.' " App. to Pet. for Cert. 116a.

***256** In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief that such applicants were more likely to enroll if promptly notified of their admission. Also from 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the academic year through the use of "protected seats." Specific groups—including athletes, foreign students, ROTC candidates, and underrepresented minorities—were "protected categories" eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list.

During 1999 and 2000, the OUA used the selection index, under which every applicant from an underrepresented racial or ethnic minority group was awarded 20 points. Starting in 1999, however, the University established an Admissions Review Committee (ARC), to provide an additional level of consideration for some applications. Under the new system, counselors may, in their discretion, "flag" an application for the ARC to review after determining that the applicant (1) is academically prepared to succeed at the University,[8] (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition ***257** of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography. After reviewing "flagged" applications, the ARC determines whether to admit, defer, or deny each applicant.

C

The parties filed cross-motions for summary judgment with respect to liability. Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. Respondents relied on Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), to respond to petitioners' arguments. As discussed in greater detail in the Court's opinion in *Grutter v. Bollinger, ante*, 539 U.S., at 323–325, 123 S.Ct. 2325, 2003 WL 21433492, Justice Powell, in *Bakke*, expressed the view that the consideration of race as a factor in admissions might in some cases serve a compelling government interest. See 438 U.S., at 317, 98 S.Ct. 2733. Respondents contended that the LSA has just such an interest in the educational benefits that result from having a racially and ethnically diverse student body and that its program is narrowly tailored to serve that interest. Respondent-intervenors asserted that the LSA had a compelling interest in remedying the University's past and current discrimination against minorities.[9]

**2421 *258 The District Court began its analysis by reviewing this Court's decision in *Bakke*. See 122 F.Supp.2d 811, 817 (E.D.Mich.2000). Although the court acknowledged that no decision from this Court since *Bakke* has explicitly accepted the diversity rationale discussed by Justice Powell, see 122 F.Supp.2d, at 820–821, it also concluded that this Court had not, in the years since *Bakke*, ruled out such a justification for the use of race, 122 F.Supp.2d, at 820–821. The District Court concluded that respondents and their *amici curiae* had presented "solid evidence" that a racially and ethnically diverse student body produces significant educational benefits such that achieving such a student body constitutes a compelling governmental interest. See *id.*, at 822–824.

The court next considered whether the LSA's admissions guidelines were narrowly tailored to achieve that interest. See *id.*, at 824. Again relying on Justice Powell's opinion in *Bakke*, the District Court determined that the admissions program the LSA began using in 1999 is a narrowly tailored means of achieving the University's interest in the educational benefits that flow from a racially and ethnically diverse student body. See 122 F.Supp.2d, at 827. The court emphasized that the LSA's current program does not utilize rigid quotas or seek to admit a predetermined number of minority students. See *ibid.* The award of 20 points for membership in an underrepresented minority group, in the District Court's view, was not the functional equivalent of a quota because minority candidates were not insulated from review by virtue of those points. See *id.*, at 828. Likewise, the court rejected the assertion that the LSA's program operates like the two-track system Justice Powell found objectionable in *Bakke* on the grounds that LSA applicants are not competing for different groups of seats. See 122 F.Supp.2d, at 828–829. The court also dismissed petitioners' assertion that the LSA's current system is nothing more than a means by which to achieve racial balancing. See *id.*, at 831. The court explained that the LSA does not seek to *259 achieve a certain proportion of minority students, let alone a proportion that represents the community. See *ibid.*

The District Court found the admissions guidelines the LSA used from 1995 through 1998 to be more problematic. In the court's view, the University's prior practice of "protecting" or "reserving" seats for underrepresented minority applicants effectively kept nonprotected applicants from competing for those slots. See *id.*, at 832. This system, the court concluded, operated as the functional equivalent of a quota and ran afoul of Justice Powell's opinion in *Bakke*.[10] See 122 F.Supp.2d, at 832.

Based on these findings, the court granted petitioners' motion for summary judgment with respect to the LSA's admissions programs in existence from 1995 through 1998, and respondents' motion with respect to the LSA's admissions programs for 1999 and 2000. See *id.*, at 833. Accordingly, **2422 the District Court denied petitioners' request for injunctive relief. See *id.*, at 814.

The District Court issued an order consistent with its rulings and certified two questions for interlocutory appeal to the Sixth Circuit pursuant to 28 U.S.C. § 1292(b). Both parties appealed aspects of the District Court's rulings, and the Court of Appeals heard the case en banc on the same day as *Grutter v. Bollinger*. The Sixth Circuit later issued an opinion in *Grutter*, upholding the admissions program used by the University of Michigan Law School, and the petitioner in that case sought a writ of certiorari

from this Court. Petitioners asked this Court to grant certiorari in this case as *260 well, despite the fact that the Court of Appeals had not yet rendered a judgment, so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances. We did so. See 537 U.S. 1044, 123 S.Ct. 617, 154 L.Ed.2d 514 (2002).

II

As they have throughout the course of this litigation, petitioners contend that the University's consideration of race in its undergraduate admissions decisions violates § 1 of the Equal Protection Clause of the Fourteenth Amendment, [11] Title VI, [12] and 42 U.S.C. § 1981. [13] We consider first whether petitioners have standing to seek declaratory and injunctive relief, and, finding that they do, we next consider the merits of their claims.

A

Although no party has raised the issue, Justice STEVENS argues that petitioners lack Article III standing to seek injunctive relief with respect to the University's use of race in undergraduate admissions. He first contends that because Hamacher did not "actually appl[y] for admission as a transfer student[,][h]is claim of future injury is at best 'conjectural or hypothetical' rather than 'real and immediate.' " *Post,* at 2436 (dissenting opinion). But whether Hamacher "actually applied" for admission as a transfer student is not *261 determinative of his ability to seek injunctive relief in this case. If Hamacher had submitted a transfer application and been rejected, he would still need to allege an intent to apply again in order to seek prospective relief. If Justice STEVENS means that because Hamacher did not apply to transfer, he must never *really* have intended to do so, that conclusion directly conflicts with the finding of fact entered by the District Court that Hamacher "intends to transfer to the University of Michigan when defendants cease the use of race as an admissions preference." App. 67. [14]

It is well established that intent may be relevant to standing in an equal protection challenge. In *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982), for example, we considered a challenge to a provision of the Texas Constitution requiring the immediate resignation of certain state officeholders upon their announcement of candidacy for another office. We concluded that the **2423 plaintiff officeholders had Article III standing because they had alleged that they *would have announced their candidacy* for other offices were it not for the "automatic resignation" provision they were challenging. *Id.,* at 962, 102 S.Ct. 2836; accord, *Turner v. Fouche,* 396 U.S. 346, 361–362, n. 23, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (plaintiff who did not own property had standing to challenge property ownership requirement for membership on school board even though there was no evidence that plaintiff had applied and been rejected); *Quinn v. Millsap,* 491 U.S. 95, 103, n. 8, 109 S.Ct. 2324, 105 L.Ed.2d 74 (1989) (plaintiffs who did not own property had standing to challenge property ownership requirement for membership on government board even though they lacked standing to challenge the requirement "as applied"). Likewise, in *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), we considered whether an association challenging an ordinance that gave preferential treatment to certain *262 minority-owned businesses in the award of city contracts needed to show that one of its members would have received a contract absent the ordinance in order to establish standing. In finding that no such showing was necessary, we explained that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit .... And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract." *Id.,* at 666, 113 S.Ct. 2297. We concluded that in the face of such a barrier, "[t]o establish standing ..., a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Ibid.*

In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis. When Hamacher applied to

the University as a freshman applicant, he was denied admission even though an underrepresented minority applicant with his qualifications would have been admitted. See App. to Pet. for Cert. 115a. After being denied admission, Hamacher demonstrated that he was "able and ready" to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions.

Justice STEVENS raises a second argument as to standing. He contends that the University's use of race in undergraduate transfer admissions differs from its use of race in undergraduate freshman admissions, and that therefore Hamacher lacks standing to represent absent class members challenging the latter. *Post,* at 2436 (dissenting opinion). ***263** As an initial matter, there is a question whether the relevance of this variation, if any, is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a). The parties have not briefed the question of standing versus adequacy, however, and we need not resolve the question today: Regardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case. [15]

****2424** From the time petitioners filed their original complaint through their brief on the merits in this Court, they have consistently challenged the University's use of race in undergraduate admissions and its asserted justification of promoting "diversity." See, *e.g.,* App. 38; Brief for Petitioners 13. Consistent with this challenge, petitioners requested injunctive relief prohibiting respondents "from continuing to discriminate on the basis of race." App. 40. They sought to certify a class consisting of all individuals who were not members of an underrepresented minority group who either had applied for admission to the LSA and been rejected or who intended to apply for admission to the LSA, for all academic years from 1995 forward. *Id.,* at 35–36. The District Court determined that the proposed class satisfied the requirements of the Federal Rules of Civil Procedure, including the requirements of numerosity, commonality, and typicality. See Fed. Rule Civ. Proc. 23(a); App. 70. The court further concluded that Hamacher was an adequate representative ***264** for the class in the pursuit of compensatory and injunctive relief for purposes of Rule 23(a)(4), see *id.,* at 61–69, and found "the record utterly devoid of the presence of ... antagonism between the interests of ... Hamacher, and the members of the class which [he] seek[s] to represent," *id.,* at 61. Finally, the District Court concluded that petitioners' claim was appropriate for class treatment because the University's " 'practice of racial discrimination pervasively applied on a classwide basis.' " *Id.,* at 67. The court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2), and designated Hamacher as the class representative. App. 70.

Justice STEVENS cites *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), in arguing that the District Court erred. *Post,* at 2437. In *Blum,* we considered a class-action suit brought by Medicaid beneficiaries. The named representatives in *Blum* challenged decisions by the State's Medicaid Utilization Review Committee (URC) to transfer them to lower levels of care without, in their view, sufficient procedural safeguards. After a class was certified, the plaintiffs obtained an order expanding class certification to include challenges to URC decisions to transfer patients to *higher* levels of care as well. The defendants argued that the named representatives could not represent absent class members challenging transfers to higher levels of care because they had not been threatened with such transfers. We agreed. We noted that "[n]othing in the record ... suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers." 457 U.S., at 1001, 102 S.Ct. 2777. And we found that transfers to lower levels of care involved a number of fundamentally different concerns than did transfers to higher ones. *Id.,* at 1001–1002, 102 S.Ct. 2777 (noting, for example, that transfers to lower levels of care implicated beneficiaries' property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not).

***265** In the present case, the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions. Respondents challenged Hamacher's standing at the certification stage, but *never* did so on the grounds that the University's use of race in undergraduate transfer admissions involves a different set ****2425** of concerns than does its use of race in freshman admissions. Respondents' failure to allege any such difference is simply consistent with the fact that no such difference exists. Each year the OUA produces a document entitled "COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS," which sets forth guidelines for all individuals seeking admission to the LSA, including freshman applicants, transfer applicants,

international student applicants, and the like. See, *e.g.*, 2 App. in No. 01–1333 etc. (CA6), pp. 507–542. The guidelines used to evaluate transfer applicants specifically cross-reference factors and qualifications considered in assessing freshman applicants. In fact, the criteria used to determine whether a transfer applicant will contribute to the University's stated goal of diversity are *identical* to that used to evaluate freshman applicants. For example, in 1997, when the class was certified and the District Court found that Hamacher had standing to represent the class, the transfer guidelines contained a separate section entitled "CONTRIBUTION TO A DIVERSE STUDENT BODY." 2 *id.*, at 531. This section explained that any transfer applicant who could "*contribut[e] to a diverse student body*" should "generally be admitted" even with substantially lower qualifications than those required of other transfer applicants. *Ibid.* (emphasis added). To determine whether a transfer applicant was capable of "contribut[ing] to a diverse student body," admissions counselors were instructed to determine whether that transfer applicant met the "criteria as defined in Section IV of the 'U' category of [the] SCUGA" factors used to assess ***266** freshman applicants. *Ibid.* Section IV of the "U" category, entitled "Contribution to a Diverse Class," explained that "[t]he University is committed to a rich educational experience for its students. A diverse, as opposed to a homogenous, student population enhances the educational experience for all students. To insure a diverse class, significant weight will be given in the admissions process to indicators of students contribution to a diverse class." 1 *id.*, at 432. These indicators, used in evaluating freshman and transfer applicants alike, list being a member of an underrepresented minority group as establishing an applicant's contribution to diversity. See 3 *id.*, at 1133–1134, 1153–1154. Indeed, the *only* difference between the University's use of race in considering freshman and transfer applicants is that all underrepresented minority freshman applicants receive 20 points and "virtually" all who are minimally qualified are admitted, while "generally" all minimally qualified minority transfer applicants are admitted outright. While this difference might be relevant to a narrow tailoring analysis, it clearly has no effect on petitioners' standing to challenge the University's use of race in undergraduate admissions and its assertion that diversity is a compelling state interest that justifies its consideration of the race of its undergraduate applicants. [16]

****2426** ***267** Particularly instructive here is our statement in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), that "[i]f [defendant-employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test *clearly* would satisfy the ... requirements of Rule 23(a)." *Id.*, at 159, n. 15, 102 S.Ct. 2364 (emphasis added). Here, the District Court found that the sole rationale the University had provided for any of its race-based preferences in undergraduate admissions was the interest in "the educational benefits that result from having a diverse student body." App. to Pet. for Cert. 8a. And petitioners argue that an interest in "diversity" is not a compelling state interest that is *ever* capable of justifying the use of race in undergraduate admissions. See, *e.g.*, Brief for Petitioners 11–13. In sum, the same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines. [17] We therefore agree with the District Court's ***268** carefully considered decision to certify this class-action challenge to the University's consideration of race in undergraduate admissions. See App. 67 (" 'It is a singular policy ... applied on a classwide basis' "); cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)). Indeed, class-action treatment was particularly important in this case because "the claims of the individual students run the risk of becoming moot" and the "[t]he class action vehicle ... provides a mechanism for ensuring that a justiciable claim is before the Court." App. 69. Thus, we think it clear that Hamacher's personal stake, in view of both his past injury and the potential injury he faced at the time of certification, demonstrates that he may maintain this class-action challenge to the University's use of race in undergraduate admissions.

B

Petitioners argue, first and foremost, that the University's use of race in undergraduate admissions violates the Fourteenth Amendment. Specifically, they contend that this Court has only sanctioned the use of racial classifications to remedy identified discrimination, a justification on which respondents have never relied. Brief for Petitioners 15–16. Petitioners further argue that "diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means." *Id.*, at 17–18, 40–41. But for the reasons set forth today

in **2427 *Grutter v. Bollinger, ante,* 539 U.S., at 327–333, 123 S.Ct. 2325, 2003 WL 21433492, the Court has rejected these arguments of petitioners.

*269 Petitioners alternatively argue that even if the University's interest in diversity can constitute a compelling state interest, the District Court erroneously concluded that the University's use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest. Petitioners argue that the guidelines the University began using in 1999 do not "remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*." Brief for Petitioners 18. Respondents reply that the University's current admissions program *is* narrowly tailored and avoids the problems of the Medical School of the University of California at Davis program (U.C. Davis) rejected by Justice Powell.[18] They claim that their program "hews closely" to both the admissions program described by Justice Powell as well as the Harvard College admissions program that he endorsed. Brief for Respondent Bollinger et al 32. Specifically, respondents contend that the LSA's policy provides the individualized consideration that "Justice Powell considered a hallmark of a constitutionally appropriate admissions program." *Id.,* at 35. For the reasons set out below, we do not agree.

*270 It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This " 'standard of review ... is not dependent on the race of those burdened or benefited by a particular classification.' " *Ibid.* (quoting *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand,* 515 U.S., at 224, 115 S.Ct. 2097.

To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs "narrowly tailored measures that further compelling governmental interests." *Id.,* at 227, 115 S.Ct. 2097. Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), our review of whether such requirements have been met must entail " 'a most searching examination.' " *Adarand, supra,* at 223, 115 S.Ct. 2097 (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.)). We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity **2428 that respondents claim justifies their program.

In *Bakke,* Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 438 U.S., at 307, 98 S.Ct. 2733. He then explained, however, that in his view it would be permissible for a university to employ an admissions program in which "race or ethnic background may be *271 deemed a 'plus' in a particular applicant's file." *Id.,* at 317, 98 S.Ct. 2733. He explained that such a program might allow for "[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian–American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Ibid.* Such a system, in Justice Powell's view, would be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.*

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. See *id.,* at 315, 98 S.Ct. 2733. See also *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 618, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (concluding that the Federal Communications Commission's policy, which "embodie[d] the related notions ... that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [the applicant is] 'likely to provide [a] distinct perspective,' " "impermissibly value[d] individuals" based on a presumption that "persons think in a manner associated

with their race"). Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by the University. The only consideration that accompanies this distribution of ***272** points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, see *Bakke*, 438 U.S., at 317, 98 S.Ct. 2733, the LSA's automatic distribution of 20 points has the effect of making "the factor of race ... decisive" for virtually every minimally qualified underrepresented minority applicant. *Ibid.* [19]

Also instructive in our consideration of the LSA's system is the example provided in the description of the Harvard College Admissions Program, which Justice Powell both discussed in, and attached to, his opinion in *Bakke*. The example was included to "illustrate the kind of significance attached to race" under the Harvard College program. *Id.*, at 324, 98 S.Ct. 2733. It provided as follows:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic ****2429** achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience *not dependent* ***273** *upon race but sometimes associated with it.*" *Ibid.* (emphasis added).

This example further demonstrates the problematic nature of the LSA's admissions system. Even if student C's "extraordinary artistic talent" rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA's system. See App. 234–235. At the same time, every single underrepresented minority applicant, including students A and B, would automatically receive 20 points for submitting an application. Clearly, the LSA's system does not offer applicants the individualized selection process described in Harvard's example. Instead of considering how the differing backgrounds, experiences, and characteristics of students A, B, and C might benefit the University, admissions counselors reviewing LSA applications would simply award both A and B 20 points because their applications indicate that they are African–American, and student C would receive up to 5 points for his "extraordinary talent." [20]

Respondents emphasize the fact that the LSA has created the possibility of an applicant's file being flagged for individualized consideration by the ARC. We think that the flagging program only emphasizes the flaws of the University's system as a whole when compared to that described by Justice Powell. Again, students A, B, and C illustrate the point. First, student A would never be flagged. This is because, as the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted. Student A, an applicant "with promise of superior academic performance," would certainly fit this description. Thus, the result of the automatic distribution of 20 points is that the University ***274** would never consider student A's individual background, experiences, and characteristics to assess his individual "potential contribution to diversity," *Bakke, supra*, at 317, 98 S.Ct. 2733. Instead, every applicant like student A would simply be admitted.

It is possible that students B and C would be flagged and considered as individuals. This assumes that student B was not already admitted because of the automatic 20–point distribution, and that student C could muster at least 70 additional points. But the fact that the "review committee can look at the applications individually and ignore the points," once an application is flagged, Tr. of Oral Arg. 42, is of little comfort under our strict scrutiny analysis. The record does not reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in

the operation of the LSA's admissions program. See App. to Pet. for Cert. 117a ("The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG").[21] **2430 Additionally, this individualized review is only provided *after* admissions counselors automatically distribute the University's version of a "plus" that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.

*275 Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system" upheld by the Court today in *Grutter*. Brief for Respondent Bollinger et al. 6, n. 8. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. See *J.A. Croson Co.*, 488 U.S., at 508, 109 S.Ct. 706 (citing *Frontiero v. Richardson*, 411 U.S. 677, 690, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality opinion of Brennan, J.) (rejecting " 'administrative convenience' " as a determinant of constitutionality in the face of a suspect classification)). Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.[22] We further find that the admissions policy also violates Title VI and *276 42 U.S.C. § 1981.[23] Accordingly, we reverse **2431 that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.*

I

Unlike the law school admissions policy the Court upholds today in *Grutter v. Bollinger, ante*, 539 U.S. 306, 123 S.Ct. 2325, 2003 WL 21433492, the procedures employed by the University of Michigan's (University) Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (principal opinion of Powell, J.). The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. See *Grutter v. Bollinger, ante*, 539 U.S., at 337–339, 123 S.Ct. 2325, 2003 WL 21433492. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20–point bonus without consideration of the particular background, experiences, or *277 qualities of each individual applicant. Cf. *ante*, at 2428, 2429. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter, ante*, 539 U.S., at 334, 123 S.Ct. 2325, 2003 WL 21433492, requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups. Cf. *ante*, at 2428–2429 (citing *Bakke, supra*, at 324, 98 S.Ct. 2733).

On cross-motions for summary judgment, the District Court held that the admissions policy the University instituted in 1999 and continues to use today passed constitutional muster. See 122 F.Supp.2d 811, 827 (E.D.Mich.2000). In their proposed summary of undisputed facts, the parties jointly stipulated to the admission policy's mechanics. App. to Pet. for Cert. 116a–118a. When the University receives an application for admission to its incoming class, an admissions counselor turns to a Selection Index Worksheet to calculate the applicant's selection index score out of 150 maximum possible points—a procedure the University began using in 1998. App. 256. Applicants with a score of over 100 are automatically admitted; applicants with scores of 95

to 99 are categorized as "admit or postpone"; applicants with 90–94 points are postponed or admitted; applicants with 75–89 points are delayed or postponed; and applicants with 74 points or fewer are delayed or rejected. The Office of Undergraduate Admissions extends offers of admission on a rolling basis and acts upon the applications it has received through periodic "[m]ass [a]ction [s]." *Ibid.*

In calculating an applicant's selection index score, counselors assign numerical values to a broad range of academic factors, as well as to other variables the University considers important to assembling a diverse student body, including race. Up to 110 points can be assigned for academic performance, ***278** and up to 40 points can be assigned for the other, nonacademic factors. Michigan residents, for example, receive 10 points, and children of alumni receive 4. Counselors may assign an outstanding essay up to 3 points and may award up to 5 points for an applicant's personal achievement, leadership, or public service. Most importantly for this case, an applicant automatically receives a 20 point bonus if he or she possesses any one of the following "miscellaneous" factors: membership ****2432** in an underrepresented minority group; attendance at a predominantly minority or disadvantaged high school; or recruitment for athletics.

In 1999, the University added another layer of review to its admissions process. After an admissions counselor has tabulated an applicant's selection index score, he or she may "flag" an application for further consideration by an Admissions Review Committee, which is composed of members of the Office of Undergraduate Admissions and the Office of the Provost. App. to Pet. for Cert. 117a. The review committee meets periodically to discuss the files of "flagged" applicants not already admitted based on the selection index parameters. App. 275. After discussing each flagged application, the committee decides whether to admit, defer, or deny the applicant. *Ibid.*

Counselors may flag an applicant for review by the committee if he or she is academically prepared, has a selection index score of at least 75 (for non-Michigan residents) or 80 (for Michigan residents), and possesses one of several qualities valued by the University. These qualities include "high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography." App. to Pet. for Cert. 117a. Counselors also have the discretion to flag an application if, notwithstanding a high selection index score, something in the applicant's file suggests that the applicant may not be suitable for admission. App. 274. Finally, in "rare circumstances," an admissions counselor ***279** may flag an applicant with a selection index score below the designated levels if the counselor has reason to believe from reading the entire file that the score does not reflect the applicant's true promise. *Ibid.*

II

Although the Office of Undergraduate Admissions does assign 20 points to some "soft" variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels. Even the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race. Of course, as Justice Powell made clear in *Bakke*, a university need not "necessarily accor[d]" all diversity factors "the same weight," 438 U.S., at 317, 98 S.Ct. 2733, and the "weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class," *id.*, at 317–318, 98 S.Ct. 2733. But the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class. See *Grutter v. Bollinger, ante,* 539 U.S., at 337, 123 S.Ct. 2325, 2003 WL 21433492 ("[T]he Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

The only potential source of individualized consideration appears to be the Admissions Review Committee. The evidence in the record, however, reveals very little about how ***280** the review committee actually functions. And what evidence there is

indicates that the committee is a kind of afterthought, rather than an integral component of a system of individualized review. As the Court points out, it is undisputed that the " '[committee] reviews only a portion of all of the applications. **2433 The bulk of admissions decisions are executed based on selection index score parameters set by the [Enrollment Working Group].' " *Ante,* at 2429 (quoting App. to Pet. for Cert. 117a). Review by the committee thus represents a necessarily limited exception to the Office of Undergraduate Admissions' general reliance on the selection index. Indeed, the record does not reveal how many applications admissions counselors send to the review committee each year, and the University has not pointed to evidence demonstrating that a meaningful percentage of applicants receives this level of discretionary review. In addition, eligibility for consideration by the committee is itself based on automatic cutoff levels determined with reference to selection index scores. And there is no evidence of how the decisions are actually made—what type of individualized consideration is or is not used. Given these circumstances, the addition of the Admissions Review Committee to the admissions process cannot offset the apparent absence of individualized consideration from the Office of Undergraduate Admissions' general practices.

For these reasons, the record before us does not support the conclusion that the University's admissions program for its College of Literature, Science, and the Arts—to the extent that it considers race—provides the necessary individualized consideration. The University, of course, remains free to modify its system so that it does so. Cf. *Grutter v. Bollinger, ante,* 539 U.S. 306, 123 S.Ct. 2325, 2003 WL 21433492. But the current system, as I understand it, is a nonindividualized, mechanical one. As a result, I join the Court's opinion reversing the decision of the District Court.

*281 Justice THOMAS, concurring.
I join the Court's opinion because I believe it correctly applies our precedents, including today's decision in *Grutter v. Bollinger, ante,* 539 U.S. 306, 123 S.Ct. 2325, 2003 WL 21433492. For similar reasons to those given in my separate opinion in that case, see *ante,* 539 U.S., at 349, 123 S.Ct. 2325, 2003 WL 21433492 (opinion concurring in part and dissenting in part), however, I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.

I make only one further observation. The University of Michigan's College of Literature, Science, and the Arts (LSA) admissions policy that the Court today invalidates does not suffer from the additional constitutional defect of allowing racial "discriminat[ion] among [the] groups" included within its definition of underrepresented minorities, *Grutter, ante,* 539 U.S., at 336, 123 S.Ct. 2325, 2003 WL 21433492 (opinion of the Court); *ante,* 539 U.S., at 374, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part), because it awards all underrepresented minorities the same racial preference. The LSA policy falls, however, because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants. Under today's decisions, a university may not racially discriminate between the groups constituting the critical mass. See *ante,* 539 U.S., at 374–375, 123 S.Ct. 2325; *Grutter, ante,* 539 U.S., at 329–330, 123 S.Ct. 2325, 2003 WL 21433492 (opinion of the Court) (stating that such "racial balancing ... is patently unconstitutional"). An admissions policy, however, must allow for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification. See *ante,* at 2428–2429 (opinion of the Court); *ante,* at 2431 (O'CONNOR, J., concurring).

Justice BREYER, concurring in the judgment.
I concur in the judgment of the Court though I do not join its opinion. I join Justice O'CONNOR'S opinion except insofar as it joins that of the Court. I join Part I of Justice GINSBURG'S dissenting opinion, but I do not dissent from the *282 Court's reversal of the District Court's **2434 decision. I agree with Justice GINSBURG that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion, *post,* at 2444, for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally, see U.S. Const., Amdt. 14.

Justice STEVENS, with whom Justice SOUTER joins, dissenting.
Petitioners seek forward-looking relief enjoining the University of Michigan from continuing to use its current race-conscious freshman admissions policy. Yet unlike the plaintiff in *Grutter v. Bollinger, ante,* 539 U.S. 306, 123 S.Ct. 2325, 2003 WL

21433492,[1] the petitioners in this case had already enrolled at other schools before they filed their class-action complaint in this case. Neither petitioner was in the process of reapplying to Michigan through the freshman admissions process at the time this suit was filed, and neither has done so since. There is a total absence of evidence that either petitioner would receive any benefit from the prospective relief sought by their lawyer. While some unidentified members of the class may very well have standing to seek prospective relief, it is clear that neither petitioner does. Our precedents therefore require dismissal of the action.

I

Petitioner Jennifer Gratz applied in 1994 for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as an undergraduate for the 1995–1996 freshman class. After the University delayed action on her application and then placed her name on an extended waiting list, Gratz decided to attend the University of Michigan at Dearborn instead; she graduated in 1999. ***283** Petitioner Patrick Hamacher applied for admission to LSA as an undergraduate for the 1997–1998 freshman class. After the University postponed decision on his application and then placed his name on an extended waiting list, he attended Michigan State University, graduating in 2001. In the complaint that petitioners filed on October 14, 1997, Hamacher alleged that "[h]e intends to apply to transfer [to the University of Michigan] if the discriminatory admissions system described herein is eliminated." App. 34.

At the class certification stage, petitioners sought to have Hamacher represent a class pursuant to Federal Rule of Civil Procedure 23(b)(2).[2] See App. 71, n. 3. In response, Michigan contended that "Hamacher lacks standing to represent a class seeking declaratory and injunctive relief." *Id.*, at 63. Michigan submitted that Hamacher suffered " 'no threat of imminent future injury' " given that he had already enrolled at another undergraduate institution.[3] *Id.*, at 64. The District Court rejected Michigan's contention, concluding that Hamacher had standing to seek injunctive relief because the complaint alleged that he intended to apply to Michigan as a transfer student. See *id.*, at 67 ("To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same 'harm' in that race will continue to be a factor in admissions"). ****2435** The District Court, accordingly, certified Hamacher as the sole class representative and limited the claims of the class to injunctive and declaratory relief. See *id.*, at 70–71.

In subsequent proceedings, the District Court held that the 1995–1998 admissions system, which was in effect when both petitioners' applications were denied, was unlawful but ***284** that Michigan's new 1999–2000 admissions system was lawful. When petitioners sought certiorari from this Court, Michigan did not cross-petition for review of the District Court's judgment concerning the admissions policies that Michigan had in place when Gratz and Hamacher applied for admission in 1994 and 1996 respectively. See Brief for Respondent Bollinger et al. 5, n. 7. Accordingly, we have before us only that portion of the District Court's judgment that upheld Michigan's new freshman admissions policy.

II

Both Hamacher and Gratz, of course, have standing to seek damages as compensation for the alleged wrongful denial of their respective applications under Michigan's old freshman admissions system. However, like the plaintiff in *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), who had standing to recover damages caused by "chokeholds" administered by the police in the past but had no standing to seek injunctive relief preventing future chokeholds, petitioners' past injuries do not give them standing to obtain injunctive relief to protect third parties from similar harms. See *id.*, at 102, 103 S.Ct. 1660 (" '[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects' " (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974))). To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210–211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

This they cannot do given that when this suit was filed, neither faced an impending threat of future injury based on Michigan's new freshman admissions policy. [4]

*285 Even though there is not a scintilla of evidence that the freshman admissions program now being administered by respondents will ever have any impact on either Hamacher or Gratz, petitioners nonetheless argue that Hamacher has a personal stake in this suit because at the time the complaint was filed, Hamacher intended to apply to transfer to Michigan once certain admission policy changes occurred. [5] See App. 34; see also Tr. of Oral **2436 Arg. 4–5. Petitioners' attempt to base Hamacher's standing in this suit on a hypothetical transfer application fails for several reasons. First, there is no evidence that Hamacher ever actually applied for admission as a transfer student at Michigan. His claim of future injury is at best "conjectural or hypothetical" rather than "real and immediate." *O'Shea v. Littleton*, 414 U.S., at 494, 94 S.Ct. 669 *286 internal quotation marks omitted); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Second, as petitioners' counsel conceded at oral argument, the transfer policy is not before this Court and was not addressed by the District Court. See Tr. of Oral Arg. 4–5 (admitting that "[t]he transfer admissions policy itself is not before you—the Court"). Unlike the University's freshman policy, which is detailed at great length in the Joint Appendix filed with this Court, the specifics of the transfer policy are conspicuously missing from the Joint Appendix filed with this Court. Furthermore, the transfer policy is not discussed anywhere in the parties' briefs. Nor is it ever even referenced in the District Court's Dec. 13, 2000, opinion that upheld Michigan's new freshman admissions policy and struck down Michigan's old policy. Nonetheless, evidence filed with the District Court by Michigan demonstrates that the criteria used to evaluate transfer applications at Michigan differ significantly from the criteria used to evaluate freshman undergraduate applications. Of special significance, Michigan's 2000 freshman admissions policy, for example, provides for 20 points to be added to the selection index scores of minority applicants. See *ante*, at 2428. In contrast, Michigan does not use points in its transfer policy; some applicants, including minority and socioeconomically disadvantaged applicants, "will generally be admitted" if they possess certain qualifications, including a 2.5 undergraduate grade point average (GPA), sophomore standing, and a 3.0 high school GPA. 10 Record 16 (Exh. C). Because of these differences, Hamacher cannot base his right to complain about the *freshman* admissions policy on his hypothetical injury under a wholly separate *transfer* policy. For "[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *287 *Lewis v. Casey*, 518 U.S. 343, 358–359, n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (emphasis in original); see also *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) ("[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar"). [6]

Third, the differences between the freshman and the transfer admissions policies make it extremely unlikely, at best, that an injunction requiring respondents to modify the freshman admissions program would have any impact on Michigan's transfer policy. See **2437 *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) ("[T]he discrete factual context within which the concrete injury occurred or is threatened insures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied"). This is especially true in light of petitioners' unequivocal disavowal of any request for equitable relief that would totally preclude the use of race in the processing of all admissions applications. See Tr. of Oral Arg. 14–15.

The majority asserts that petitioners "have challenged *any* use of race by the University in undergraduate admissions"—freshman and transfer alike. *Ante*, at 2425, n. 16 (emphasis in original). Yet when questioned at oral argument about whether petitioners' challenge would impact both private and public universities, petitioners' counsel stated: "Your Honor, I want to be clear about what it is that we're arguing for here today. *We are not suggesting an absolute* *288 *rule forbidding any use of race under any circumstances.* What we are arguing is that the interest asserted here by the University, this amorphous, ill-defined, unlimited interest in diversity is not a compelling interest." Tr. of Oral Arg. 14 (emphasis added). In addition, when asked whether petitioners took the position that the only permissible use of race is as a remedy for past discrimination, petitioners' lawyer stated: "I would not go that far.... [T]here may be other reasons. I think they would have to be extraordinary and rare ... ."

Id., at 15. Consistent with these statements, petitioners' briefs filed with this Court attack the University's asserted interest in "diversity" but acknowledge that race could be considered for remedial reasons. See, *e.g.*, Brief for Petitioners 16–17.

Because Michigan's transfer policy was not challenged by petitioners and is not before this Court, see *supra*, at 2436, we do not know whether Michigan would defend its transfer policy on diversity grounds, or whether it might try to justify its transfer policy on other grounds, such as a remedial interest. Petitioners' counsel was therefore incorrect in asserting at oral argument that if the University's asserted interest in "diversity" were to be "struck down as a rationale, then the law would be [the] same with respect to the transfer policy as with respect to the original [freshman admissions] policy." Tr. of Oral Arg. 7–8. And the majority is likewise mistaken in assuming that "the University's use of race in undergraduate transfer admissions does not implicate a significantly different set of concerns than does its use of race in undergraduate freshman admissions." *Ante*, at 2424. Because the transfer policy has never been the subject of this suit, we simply do not know (1) whether Michigan would defend its transfer policy on "diversity" grounds or some other grounds, or (2) how the absence of a point system in the transfer policy might impact a narrow tailoring analysis of that policy.

***289** At bottom, petitioners' interest in obtaining an injunction for the benefit of younger third parties is comparable to that of the unemancipated minor who had no standing to litigate on behalf of older women in *H.L. v. Matheson*, 450 U.S. 398, 406–407, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981), or that of the Medicaid patients transferred to less intensive care who had no standing to litigate on behalf of patients objecting to transfers to more intensive care facilities in *Blum v. Yaretsky*, 457 U.S., at 1001, 102 S.Ct. 2777. To have standing, it is elementary that the petitioners' own interests must be implicated. Because neither petitioner has a personal stake in this suit for prospective relief, neither has standing.

III

It is true that the petitioners' complaint was filed as a class action and that Hamacher ****2438** has been certified as the representative of a class, some of whose members may well have standing to challenge the LSA freshman admissions program that is presently in effect. But the fact that "a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' " *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40, n. 20, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); see also 1 A. Conte & H. Newberg, Class Actions § 2:5 (4th ed. 2002) ("[O]ne cannot acquire individual standing by virtue of bringing a class action"). [7] Thus, in *Blum*, we squarely held that the interests of members of the class could not satisfy the requirement that the class representatives have a personal interest in obtaining the particular equitable relief being sought. The class in ***290** *Blum* included patients who wanted a hearing before being transferred to facilities where they would receive more intensive care. The class representatives, however, were in the category of patients threatened with a transfer to less intensive care facilities. In explaining why the named class representatives could not base their standing to sue on the injury suffered by other members of the class, we stated:

> "Respondents suggest that members of the class they represent have been transferred to higher levels of care as a result of [utilization review committee] decisions. Respondents, however, 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.' *Warth v. Seldin*, 422 U.S. 490, 502[, 95 S.Ct. 2197, 45 L.Ed.2d 343] (1975). Unless these individuals 'can thus demonstrate the requisite case or controversy between themselves personally and [petitioners], "none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494[, 94 S.Ct. 669, 38 L.Ed.2d 674] (1974).' *Ibid.*" 457 U.S., at 1001, n. 13, 102 S.Ct. 2777.

Much like the class representatives in *Blum*, Hamacher—the sole class representative in this case—cannot meet Article III's threshold personal-stake requirement. While unidentified members of the class he represents may well have standing to

challenge Michigan's current freshman admissions policy, Hamacher cannot base his standing to sue on injuries suffered by other members of the class.

IV

As this case comes to us, our precedents leave us no alternative but to dismiss the writ for lack of jurisdiction. Neither petitioner has a personal stake in the outcome of the case, and neither has standing to seek prospective relief on behalf of unidentified class members who may or may not ***291** have standing to litigate on behalf of themselves. Accordingly, I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG joins as to Part II, dissenting.
I agree with Justice STEVENS that Patrick Hamacher has no standing to seek declaratory or injunctive relief against a freshman admissions policy that will never cause him any harm. I write separately to note that even the Court's new gloss on the law of standing should not permit it to reach the issue it decides today. And because a majority of the Court has chosen to address the merits, I also add a word to say that even if the merits were reachable, ****2439** I would dissent from the Court's judgment.

I

The Court's finding of Article III standing rests on two propositions: first, that both the University of Michigan's undergraduate college's transfer policy and its freshman admissions policy seek to achieve student body diversity through the "use of race," *ante,* at 2422–2427, and second, that Hamacher has standing to challenge the transfer policy on the grounds that diversity can never be a "compelling state interest" justifying the use of race in any admissions decision, freshman or transfer, *ante,* at 2427. The Court concludes that, because Hamacher's argument, if successful, would seal the fate of both policies, his standing to challenge the transfer policy also allows him to attack the freshman admissions policy. *Ante,* at 2425, n. 16 ("[P]etitioners challenged any use of race by the University to promote diversity, including through the transfer policy"); *ibid.* (" '[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor' " (quoting Tr. of Oral Arg. 7–8)). I agree with Justice STEVENS's critique ***292** that the Court thus ignores the basic principle of Article III standing that a plaintiff cannot challenge a government program that does not apply to him. See *ante,* at 2436, and n. 6 (dissenting opinion). [1]

But even on the Court's indulgent standing theory, the decision should not go beyond a recognition that diversity can serve as a compelling state interest justifying race-conscious decisions in education. *Ante,* at 2426–2427 (citing *Grutter v. Bollinger, ante,* 539 U.S., at 327–333, 123 S.Ct. 2325, 2003 WL 21433492). Since, as the Court says, "petitioners did not raise a narrow tailoring challenge to the transfer policy," *ante,* at 2425, n. 16, our decision in *Grutter* is fatal to Hamacher's sole attack upon the transfer policy, which is the only policy before this Court that he claims aggrieved him. Hamacher's challenge to that policy having failed, his standing is presumably spent. The further question whether the freshman admissions plan is narrowly tailored to achieving student body diversity remains legally irrelevant to Hamacher and should await a plaintiff who is actually hurt by it. [2]

***293** II

The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell's opinion in *Regents* ****2440** *of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), rules out a racial quota or set-aside, in which race is

the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

The record does not describe a system with a quota like the one struck down in *Bakke*, which "insulate[d]" all nonminority candidates from competition from certain seats. *Bakke, supra,* at 317, 98 S.Ct. 2733 (opinion of Powell, J.); see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion) (stating that *Bakke* invalidated "a plan that completely eliminated nonminorities from consideration for a specified percentage of opportunities"). The *Bakke* plan "focused *solely* on ethnic diversity" and effectively told nonminority applicants that "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats." *Bakke, supra,* at 315, 319, 98 S.Ct. 2733 (opinion of Powell, J.) (emphasis in original).

The plan here, in contrast, lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic ***294** disadvantage, athletic ability, and quality of a personal essay. *Ante,* at 2419–2420. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20–point bonus. Cf. *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 638, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (upholding a program in which gender "was but one of numerous factors [taken] into account in arriving at [a] decision" because "[n]o persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants" (emphasis deleted)).

Subject to one qualification to be taken up below, this scheme of considering, through the selection index system, all of the characteristics that the college thinks relevant to student diversity for every one of the student places to be filled fits Justice Powell's description of a constitutionally acceptable program: one that considers "all pertinent elements of diversity in light of the particular qualifications of each applicant" and places each element "on the same footing for consideration, although not necessarily according them the same weight." *Bakke, supra,* at 317, 98 S.Ct. 2733. In the Court's own words, "each characteristic of a particular applicant [is] considered in assessing the applicant's entire application." *Ante,* at 2428. An unsuccessful nonminority applicant cannot complain that he was rejected "simply because he was not the right color"; an applicant who is rejected because "his combined qualifications ... did not outweigh those of the other applicant" has been given an opportunity to compete with all other applicants. *Bakke, supra,* at 318, 98 S.Ct. 2733 (opinion of Powell, J.).

The one qualification to this description of the admissions process is that membership in an underrepresented minority is given a weight of 20 points on the 150–point scale. On the face of things, however, this assignment of specific points does not set race apart from all other weighted considerations. Nonminority students may receive 20 points for athletic ability, socioeconomic disadvantage, attendance at a socioeconomically ***295** disadvantaged or predominantly minority high school, or at the Provost's discretion; they may also receive 10 points for being residents of ****2441** Michigan, 6 for residence in an underrepresented Michigan county, 5 for leadership and service, and so on.

The Court nonetheless finds fault with a scheme that "automatically" distributes 20 points to minority applicants because "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Ante,* at 2428. The objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken.

The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," *Grutter, ante,* 539 U.S., at 337,

123 S.Ct. 2325, 2003 WL 21433492; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.

Nor is it possible to say that the 20 points convert race into a decisive factor comparable to reserving minority places as in *Bakke*. Of course we can conceive of a point system in which the "plus" factor given to minority applicants would be so extreme as to guarantee every minority applicant a higher rank than every nonminority applicant in the university's admissions system, see 438 U.S., at 319, n. 53, 98 S.Ct. 2733 (opinion of Powell, J.). But petitioners do not have a convincing argument ***296** that the freshman admissions system operates this way. The present record obviously shows that nonminority applicants may achieve higher selection point totals than minority applicants owing to characteristics other than race, and the fact that the university admits "virtually every qualified under-represented minority applicant," App. to Pet. for Cert. 111a, may reflect nothing more than the likelihood that very few qualified minority applicants apply, Brief for Respondent Bollinger et al. 39, as well as the possibility that self-selection results in a strong minority applicant pool. It suffices for me, as it did for the District Court, that there are no *Bakke*-like set-asides and that consideration of an applicant's whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

Any argument that the "tailoring" amounts to a set-aside, then, boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of 10 points might not. But suspicion does not carry petitioners' ultimate burden of persuasion in this constitutional challenge, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 287–288, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.), and it surely does not warrant condemning the college's admissions scheme on this record. Because the District Court (correctly, in my view) did not believe that the specific point assignment was constitutionally troubling, it made only limited and general findings on other characteristics of the university's admissions practice, such as the conduct of individualized review by the Admissions Review Committee. 122 F.Supp.2d 811, 829–830 (E.D.Mich.2000). As the Court indicates, we know very little about the actual role of the review committee. *Ante*, at 2429 ("The record does not reveal precisely how many applications are flagged for this individualized ****2442** consideration [by the committee]"); see also *ante*, at 2432 (O'CONNOR, J., concurring) ("The evidence in the record ... reveals very little about how the review committee actually functions"). The point system cannot operate as a *de facto* set-aside if the ***297** greater admissions process, including review by the committee, results in individualized review sufficient to meet the Court's standards. Since the record is quiet, if not silent, on the case-by-case work of the committee, the Court would be on more defensible ground by vacating and remanding for evidence about the committee's specific determinations. [3]

Without knowing more about how the Admissions Review Committee actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel. In contrast to the college's forthrightness in saying just what plus factor it gives for membership in an underrepresented minority, it is worth considering the character of one alternative thrown up as preferable, because supposedly not based on race. Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. Brief for United States as *Amicus Curiae* 18; Brief for United States as *Amicus Curiae* in *Grutter v. Bollinger*, O.T.2002, No. 02–241, pp. 13–17.

While there is nothing unconstitutional about such a practice, it nonetheless suffers from a serious disadvantage. [4] It ***298** is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.

III

If this plan were challenged by a plaintiff with proper standing under Article III, I would affirm the judgment of the District Court granting summary judgment to the college. As it is, I would vacate the judgment for lack of jurisdiction, and I respectfully dissent.

Justice GINSBURG, with whom Justice SOUTER joins, dissenting. *

I

Educational institutions, the Court acknowledges, are not barred from any and all consideration of race when making admissions decisions. *Ante,* at 2426–2427; see *Grutter v. Bollinger, ante,* 539 U.S., at 326–333, 123 S.Ct. 2325, 2003 WL 21433492. But the Court once again maintains that the same standard of review controls judicial inspection of all official race classifications. *Ante,* at 2427 (quoting **2443 *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). This insistence on "consistency," *Adarand,* 515 U.S., at 224, 115 S.Ct. 2097, would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law, see *id.,* at 274–276, and n. 8, 115 S.Ct. 2097 (GINSBURG, J., dissenting). But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.

*299 In the wake "of a system of racial caste only recently ended," *id.,* at 273, 115 S.Ct. 2097 (GINSBURG, J., dissenting), large disparities endure. Unemployment, [1] poverty, [2] and access to health care [3] vary disproportionately by race. Neighborhoods and schools remain racially divided. [4] African–American and Hispanic children are all too often educated in poverty-stricken *300 and underperforming institutions. [5] Adult African–Americans and Hispanics generally earn less than whites with equivalent levels of education. [6] Equally credentialed job applicants receive different receptions depending on their race. [7] Irrational prejudice is still encountered in **2444 real estate markets [8] and consumer transactions. [9] "Bias both *301 conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." *Id.,* at 274, 115 S.Ct. 2097 (GINSBURG, J., dissenting); see generally Krieger, Civil Rights Perestroika: Intergroup Relations After Affirmative Action, 86 Calif. L.Rev. 1251, 1276–1291 (1998).

The Constitution instructs all who act for the government that they may not "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. See *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 316, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting). Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated. See Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 433–434 (1988) ("[T]o say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppressio[n] is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in [*Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)] was the same as the issue in [*Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)] is to pretend that history never happened and that the present doesn't exist.").

Our jurisprudence ranks race a "suspect" category, "not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.2d 920, 931–932 (C.A.2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," *id.,* at 932, no automatic proscription is in order. *302 For, as insightfully explained: "The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But

the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836, 876 (C.A.5 1966) (Wisdom, J.); see Wechsler, The Nationalization of Civil Liberties and Civil Rights, Supp. to 12 Tex. Q. 10, **2445 23 (1968) (*Brown* may be seen as disallowing racial classifications that "impl[y] an invidious assessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. See *Grutter, ante*, 539 U.S., at 344, 123 S.Ct. 2325, 2003 WL 21433492 (GINSBURG, J., concurring) (citing the United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women).

The mere assertion of a laudable governmental purpose, of course, should not immunize a race-conscious measure from careful judicial inspection. See *Jefferson County*, 372 F.2d, at 876 ("The criterion is the relevancy of color to a legitimate governmental purpose."). Close review is needed "to ferret out classifications in reality malign, but masquerading as benign," *Adarand*, 515 U.S., at 275, 115 S.Ct. 2097 (GINSBURG, J., dissenting), and to "ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups," *id.*, at 276, 115 S.Ct. 2097.

II

Examining in this light the admissions policy employed by the University of Michigan's College of Literature, Science, and the Arts (College), and for the reasons well stated by *303 Justice SOUTER, I see no constitutional infirmity. See *ante*, at 2439–2442 (dissenting opinion). Like other top-ranking institutions, the College has many more applicants for admission than it can accommodate in an entering class. App. to Pet. for Cert. 108a. Every applicant admitted under the current plan, petitioners do not here dispute, is qualified to attend the College. *Id.*, at 111a. The racial and ethnic groups to which the College accords special consideration (African–Americans, Hispanics, and Native–Americans) historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day, see *supra*, at 2442–2444. There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. See Brief for Respondent Bollinger et al. 10; Tr. of Oral Arg. 41–42 (in the range between 75 and 100 points, the review committee may look at applications individually and ignore the points). Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race. Cf. Liu, The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions, 100 Mich. L.Rev. 1045, 1049 (2002) ("In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants."). [10]

**2446 *304 The stain of generations of racial oppression is still visible in our society, see Krieger, 86 Calif. L.Rev., at 1253, and the determination to hasten its removal remains vital. One can reasonably anticipate, therefore, that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers' recommendations may emphasize who a student is as much as what he or she has accomplished. See, *e.g.*, Steinberg, Using Synonyms for Race, College Strives for Diversity, *305 N.Y. Times, Dec. 8, 2002, section 1, p. 1, col. 3 (describing admissions process at Rice University); cf. Brief for United States as *Amicus Curiae* 14–15 (suggesting institutions could consider, *inter alia*, "a history of overcoming disadvantage," "reputation and location of high school," and "individual outlook as reflected by essays"). If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises. [11]

* * *

For the reasons stated, I would affirm the judgment of the District Court.

All Citations

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Footnotes

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

1 Although Hamacher indicated that he "intend[ed] to apply to transfer if the [LSA's] discriminatory admissions system [is] eliminated," he has since graduated from Michigan State University. App. 34.

2 The University of Michigan Board of Regents was subsequently named as the proper defendant in place of the University and the LSA. See *id.*, at 17.

3 Duderstadt was the president of the University during the time that Gratz's application was under consideration. He has been sued in his individual capacity. Bollinger was the president of the University when Hamacher applied for admission. He was originally sued in both his individual and official capacities, but he is no longer the president of the University. *Id.*, at 35.

4 A group of African–American and Latino students who applied for, or intended to apply for, admission to the University, as well as the Citizens for Affirmative Action's Preservation, a nonprofit organization in Michigan, sought to intervene pursuant to Federal Rule of Civil Procedure 24. See App. 13–14. The District Court originally denied this request, see *id.*, at 14–15, but the Sixth Circuit reversed that decision. See *Gratz v. Bollinger*, 188 F.3d 394 (1999).

5 The District Court decided also to consider petitioners' request for injunctive and declaratory relief during the liability phase of the proceedings. App. 71.

6 Our description is taken, in large part, from the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process" filed by the parties in the District Court. App. to Pet. for Cert. 108a–117a.

7 In 1995, counselors used four such tables for different groups of applicants: (1) in-state, nonminority applicants; (2) out-of-state, nonminority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. But each cell on these two tables contained separate courses of action for minority applicants and nonminority applicants whose GPA 2 scores and ACT/SAT scores placed them in that cell.

8 LSA applicants who are Michigan residents must accumulate 80 points from the selection index criteria to be flagged, while out-of-state applicants need to accumulate 75 points to be eligible for such consideration. See App. 257.

9 The District Court considered and rejected respondent-intervenors' arguments in a supplemental opinion and order. See 135 F.Supp.2d 790 (E.D.Mich.2001). The court explained that respondent-intervenors "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs." *Id.*, at 795. We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court's disposition of the issue.

10 The District Court determined that respondents Bollinger and Duderstadt, who were sued in their individual capacities under Rev. Stat. § 1979, 42 U.S.C. § 1983, were entitled to summary judgment based on the doctrine of qualified immunity. See 122 F.Supp.2d, at 833–834. Petitioners have not asked this Court to review this aspect of the District Court's decision. The District Court denied the Board of Regents' motion for summary judgment with respect to petitioners' Title VI claim on Eleventh Amendment immunity grounds. See *id.*, at 834–836. Respondents have not asked this Court to review this aspect of the District Court's decision.

11 The Equal Protection Clause of the Fourteenth Amendment explains that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

12 Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

13 Section 1981(a) provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

14 This finding is further corroborated by Hamacher's request that the District Court "[r]equir[e] the LSA College to offer [him] admission as a transfer student." App. 40.

15 Although we do not resolve here whether such an inquiry in this case is appropriately addressed under the rubric of standing or adequacy, we note that there is tension in our prior cases in this regard. See, *e.g.*, Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U.C.D.L.Rev. 1239, 1240–1241 (1989); *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 149, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (Mexican–American plaintiff alleging that he was passed over for a promotion because of race was not an adequate representative to "maintain a class action on behalf of Mexican–American applicants" who were not hired by the same employer); *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (class representatives who had been transferred to lower levels of medical care lacked standing to challenge transfers to higher levels of care).

16 Because the University's guidelines concededly use race in evaluating both freshman and transfer applications, and because petitioners have challenged *any* use of race by the University in undergraduate admissions, the transfer admissions policy is very much before this Court. Although petitioners did not raise a narrow tailoring challenge to the transfer policy, as counsel for petitioners repeatedly explained, the transfer policy is before this Court in that petitioners challenged any use of race by the University to promote diversity, including through the transfer policy. See Tr. of Oral Arg. 4 ("[T]he [transfer] policy is essentially the same with respect to the consideration of race"); *id.,* at 5 ("The transfer policy considers race"); *id.,* at 6 (same); *id.,* at 7 ("[T]he transfer policy and the [freshman] admissions policy are fundamentally the same in the respect that they both consider race in the admissions process in a way that is discriminatory"); *id.,* at 7–8 ("[T]he University considers race for a purpose to achieve a diversity that we believe is not compelling, and if that is struck down as a rationale, then the [result] would be [the] same with respect to the transfer policy as with respect to the [freshman] admissions policy, Your Honor").

17 Indeed, as the litigation history of this case demonstrates, "the class-action device save[d] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano v. Yamasaki,* 442 U.S. 682, 701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). This case was therefore quite unlike *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), in which we found that the named representative, who had been passed over for a promotion, was not an adequate representative for absent class members who were never hired in the first instance. As we explained, the plaintiff's "evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact.... It is clear that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.' " *Id.,* at 159, 102 S.Ct. 2364 (quoting *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 553, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)).

18 U.C. Davis set aside 16 of the 100 seats available in its first year medical school program for "economically and/or educationally disadvantaged" applicants who were also members of designated "minority groups" as defined by the university. "To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants." *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 274, 289, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (principal opinion). Justice Powell found that the program employed an impermissible two-track system that "disregard [ed] ... individual rights as guaranteed by the Fourteenth Amendment." *Id.,* at 320, 98 S.Ct. 2733. He reached this conclusion even though the university argued that "the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups" was "the only effective means of serving the interest of diversity." *Id.,* at 315, 98 S.Ct. 2733. Justice Powell concluded that such arguments misunderstood the very nature of the diversity he found to be compelling. See *ibid.*

19 Justice SOUTER recognizes that the LSA's use of race is decisive in practice, but he attempts to avoid that fact through unsupported speculation about the self-selection of minorities in the applicant pool. See *post,* at 2441–2442 (dissenting opinion).

20 Justice SOUTER is therefore wrong when he contends that "applicants to the undergraduate college are [not] denied individualized consideration." *Post,* at 2441. As Justice O'CONNOR explains in her concurrence, the LSA's program "ensures that the diversity contributions of applicants cannot be individually assessed." *Post,* at 2432.

21 Justice SOUTER is mistaken in his assertion that the Court "take[s] it upon itself to apply a newly-formulated legal standard to an undeveloped record." *Post,* at 2442, n. 3. He ignores the fact that respondents have told us all that is necessary to decide this case. As explained above, respondents concede that only a portion of the applications are reviewed by the ARC and that the "bulk

of admissions decisions" are based on the point system. It should be readily apparent that the availability of this review, which comes *after* the automatic distribution of points, is far more limited than the individualized review given to the "large middle group of applicants" discussed by Justice Powell and described by the Harvard plan in *Bakke*. 438 U.S., at 316, 98 S.Ct. 2733 (internal quotation marks omitted).

22 Justice GINSBURG in her dissent observes that "[o]ne can reasonably anticipate ... that colleges and universities will seek to maintain their minority enrollment ... whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue." *Post*, at 2446. She goes on to say that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Ibid.* These observations are remarkable for two reasons. First, they suggest that universities—to whose academic judgment we are told in *Grutter v. Bollinger, ante*, 539 U.S., at 328, 123 S.Ct. 2325, 2003 WL 21433492, we should defer—will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.

23 We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. See *Alexander v. Sandoval*, 532 U.S. 275, 281, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *United States v. Fordice*, 505 U.S. 717, 732, n. 7, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992); *Alexander v. Choate*, 469 U.S. 287, 293, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). Likewise, with respect to § 1981, we have explained that the provision was "meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295–296, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Furthermore, we have explained that a contract for educational services is a "contract" for purposes of § 1981. See *Runyon v. McCrary*, 427 U.S. 160, 172, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981. See *General Building Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389–390, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

* Justice BREYER joins this opinion, except for the last sentence.

1 In challenging the use of race in admissions at Michigan's law school, Barbara Grutter alleged in her complaint that she "has not attended any other law school" and that she "still desires to attend the Law School and become a lawyer." App. in No. 02–241, p. 30.

2 Petitioners did not seek to have Gratz represent the class pursuant to Federal Rule of Civil Procedure 23(b)(2). See App. 71, n. 3.

3 In arguing that Hamacher lacked standing, Michigan also asserted that Hamacher "would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan." *Id.*, at 64, n. 2. The District Court rejected this argument, concluding that "Hamacher's present grades are not a factor to be considered at this time." *Id.*, at 67.

4 In responding to questions about petitioners' standing at oral argument, petitioners' counsel alluded to the fact that Michigan might continually change the details of its admissions policy. See Tr. of Oral Arg. 9. The change in Michigan's freshman admissions policy, however, is not the reason why petitioners cannot establish standing to seek prospective relief. Rather, the reason they lack standing to seek forward-looking relief is that when this suit was filed, neither faced a " 'real and immediate threat' " of future injury under Michigan's freshman admissions policy given that they had both already enrolled at other institutions. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210–211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). Their decision to obtain a college education elsewhere distinguishes this case from Allan Bakke's single-minded pursuit of a medical education from the University of California at Davis. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); cf. *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) *(per curiam)*.

5 Hamacher clearly can no longer claim an intent to transfer into Michigan's undergraduate program given that he graduated from college in 2001. However, this fact alone is not necessarily fatal to the instant class action because we have recognized that, if a named class representative has standing at the time a suit is initiated, class actions may proceed in some instances following mootness of the named class representative's claim. See, *e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (holding that the requisite Article III "case or controversy" may exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot"); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). The problem in this case is that neither Gratz nor Hamacher had standing to assert a forward-looking, injunctive claim in federal court at the time this suit was initiated.

6 Under the majority's view of standing, there would be no end to Hamacher's ability to challenge any use of race by the University in a variety of programs. For if Hamacher's right to complain about the *transfer* policy gives him standing to challenge the *freshman* policy, presumably his ability to complain about the *transfer* policy likewise would enable him to challenge Michigan's *law school* admissions policy, as well as any other race-based admissions policy used by Michigan.

7 Of course, the injury to Hamacher would give him standing to claim damages for past harm on behalf of class members, but he was certified as the class representative for the limited purpose of seeking injunctive and declaratory relief.

1 The Court's holding arguably exposes a weakness in the rule of *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), that Article III standing may not be satisfied by the unnamed members of a duly certified class. But no party has invited us to reconsider *Blum*, and I follow Justice STEVENS in approaching the case on the assumption that *Blum* is settled law.

2 For that matter, as the Court suggests, narrow tailoring challenges against the two policies could well have different outcomes. *Ante*, at 2425. The record on the decisionmaking process for transfer applicants is understandably thin, given that petitioners never raised a narrow tailoring challenge against it. Most importantly, however, the transfer policy does not use a points-based "selection index" to evaluate transfer applicants, but rather considers race as one of many factors in making the general determination whether the applicant would make a " 'contribution to a diverse student body.' " *Ante*, at 2425 (quoting 2 App. in No. 01–1333 etc. (CA6), p. 531 (capitalization omitted)). This limited glimpse into the transfer policy at least permits the inference that the university engages in a "holistic review" of transfer applications consistent with the program upheld today in *Grutter v. Bollinger, ante*, 539 U.S., at 337, 123 S.Ct. 2325, 2003 WL 21433492.

3 The Court surmises that the committee does not contribute meaningfully to the university's individualized review of applications. *Ante*, at 2429–2430. The Court should not take it upon itself to apply a newly-formulated legal standard to an undeveloped record. Given the District Court's statement that the committee may examine "any number of applicants, including applicants other than under-represented minority applicants," 122 F.Supp.2d 811, 830 (E.D.Mich.2000), it is quite possible that further factual development would reveal the committee to be a "source of individualized consideration" sufficient to satisfy the Court's rule, *ante*, at 2432 (O'CONNOR, J., concurring). Determination of that issue in the first instance is a job for the District Court, not for this Court on a record that is admittedly lacking.

4 Of course it might be pointless in the State of Michigan, where minorities are a much smaller fraction of the population than in California, Florida, or Texas. Brief for Respondents Bollinger et al. 48–49.

* Justice BREYER joins Part I of this opinion.

1 See, *e.g.*, U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p. 368 (2002) (Table 562) (hereinafter Statistical Abstract) (unemployment rate among whites was 3.7% in 1999, 3.5% in 2000, and 4.2% in 2001; during those years, the unemployment rate among African–Americans was 8.0%, 7.6%, and 8.7%, respectively; among Hispanics, 6.4%, 5.7%, and 6.6%).

2 See, *e.g.*, U.S. Dept of Commerce, Bureau of Census, Poverty in the United States: 2000, p. 291 (2001) (Table A) (In 2000, 7.5% of non-Hispanic whites, 22.1% of African–Americans, 10.8% of Asian–Americans, and 21.2% of Hispanics were living in poverty.); S. Staveteig & A. Wigton, Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families 1 (Urban Institute Report B–5, Feb.2000) ("Blacks, Hispanics, and Native Americans ... each have poverty rates almost twice as high as Asians and almost three times as high as whites.").

3 See, *e.g.*, U.S. Dept. of Commerce, Bureau of Census, Health Insurance Coverage: 2000, p. 391 (2001) (Table A) (In 2000, 9.7% of non-Hispanic whites were without health insurance, as compared to 18.5% of African–Americans, 18.0% of Asian–Americans, and 32.0% of Hispanics.); Waidmann & Rajan, Race and Ethnic Disparities in Health Care Access and Utilization: An Examination of State Variation, 57 Med. Care Res. and Rev. 55, 56 (2000) ("On average, Latinos and African Americans have both worse health and worse access to effective health care than do non-Hispanic whites ... .").

4 See, *e.g.*, U.S. Dept. of Commerce, Bureau of Census, Racial and Ethnic Residential Segregation in the United States: 1980–2000 (2002) (documenting residential segregation); E. Frankenberg, C. Lee, & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 4 (Jan.2003), http:// www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (all Internet materials as visited June 2, 2003, and available in Clerk of Court's case file) ("[W]hites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the studend body is white."); *id.*, at 28 ("[A]lmost three-fourths of black and Latino students attend schools that are predominantly minority.... More than one in six black children attend a school that is 99–100% minority.... One in nine Latino students attend virtually all minority schools.").

5 See, *e.g.*, Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 273–274 (1999) ("Urban public schools are attended primarily by African–American and Hispanic students"; students who attend such schools are disproportionately poor, score poorly on standardized tests, and are far more likely to drop out than students who attend nonurban schools.).

6 See, *e.g.*, Statistical Abstract 140 (Table 211).

7 See, *e.g.*, Holzer, Career Advancement Prospects and Strategies for Low–Wage Minority Workers, in Low–Wage Workers in the New Economy 228 (R. Kazis & M. Miller eds. 2001) ("[I]n studies that have sent matched pairs of minority and white applicants with apparently equal credentials to apply for jobs, whites routinely get more interviews and job offers than either black or Hispanic applicants."); M. Bertrand & S. Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination (Nov. 18, 2002), http:// gsb.uchicago.edu/pdf/bertrand.pdf; Mincy, The Urban Institute

Audit Studies: Their Research and Policy Context, in Clear and Convincing Evidence: Measurement of Discrimination in America 165–186 (M. Fix & R. Struyk eds.1993).

8 See, *e.g.*, M. Turner et al., Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000, pp. i, iii (Nov.2002), http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (paired testing in which "two individuals—one minority and the other white—pose as otherwise identical homeseekers, and visit real estate or rental agents to inquire about the availability of advertised housing units" revealed that "discrimination still persists in both rental and sales markets of large metropolitan areas nationwide"); M. Turner & F. Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence 2 (1999) (existing research evidence shows that minority homebuyers in the United States "face discrimination from mortgage lending institutions.").

9 See, *e.g.*, Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause, 94 Mich. L.Rev. 109, 109–110 (1995) (study in which 38 testers negotiated the purchase of more than 400 automobiles confirmed earlier finding "that dealers systematically offer lower prices to white males than to other tester types").

10 The United States points to the "percentage plans" used in California, Florida, and Texas as one example of a "race-neutral alternativ [e]" that would permit the College to enroll meaningful numbers of minority students. Brief for United States as *Amicus Curiae* 14; see U.S. Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education 1 (Nov.2002), http:// www.usccr.gov/pubs/ percent2/percent2.pdf (percentage plans guarantee admission to state universities for a fixed percentage of the top students from high schools in the State). Calling such 10% or 20% plans "race-neutral" seems to me disingenuous, for they "unquestionably were adopted with the specific purpose of increasing representation of African–Americans and Hispanics in the public higher education system." Brief for Respondent Bollinger et al. 44; see C. Horn & S. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences 14–19 (2003), http:// www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf. Percentage plans depend for their effectiveness on continued racial segregation at the secondary school level: They can ensure significant minority enrollment in universities only if the majority-minority high school population is large enough to guarantee that, in many schools, most of the students in the top 10% or 20% are minorities. Moreover, because such plans link college admission to a single criterion—high school class rank—they create perverse incentives. They encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages. See Selingo, What States Aren't Saying About the "X-Percent Solution," Chronicle of Higher Education, June 2, 2000, p. A31. And even if percentage plans could boost the sheer numbers of minority enrollees at the undergraduate level, they do not touch enrollment in graduate and professional schools.

11 Contrary to the Court's contention, I do not suggest "changing the Constitution so that it conforms to the conduct of the universities." *Ante*, at 2430, n. 22. In my view, the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race. See *supra*, at 2444–2445. Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.

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Declined to Extend by Rosas v. University of Texas at San Antonio, 5th Cir.(Tex.), November 20, 2019

133 S.Ct. 2411
Supreme Court of the United States

Abigail Noel FISHER, Petitioner
v.
UNIVERSITY OF TEXAS AT AUSTIN et al.

No. 11–345.
|
Argued Oct. 10, 2012.
|
Decided June 24, 2013.

Synopsis
Background: Caucasian applicant who was denied admission to state university brought suit alleging that university's consideration of race in its admissions process violated her right to equal protection. The United States District Court for the Western District of Texas, Sam Sparks, J., 645 F.Supp.2d 587, granted university summary judgment. Applicant appealed. The United States Court of Appeals for the Fifth Circuit, Patrick E. Higginbotham, Circuit Judge, 631 F.3d 213, affirmed. Certiorari was granted.

The Supreme Court, Justice Kennedy, held that Court of Appeals did not apply correct standard of strict scrutiny.

Vacated and remanded.

Justices Scalia and Thomas filed concurring opinions.

Justice Ginsburg filed dissenting opinion.

Justice Kagan took no part in consideration or decision of the case.

****2412** *Syllabus* *

***297** The University of Texas at Austin considers race as one of various factors in ****2413** its undergraduate admissions process. The University, which is committed to increasing racial minority enrollment, adopted its current program after this Court decided *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, upholding the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate, and decided *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, holding unconstitutional an admissions program that automatically awarded points to applicants from certain racial minorities.

Petitioner, who is Caucasian, was rejected for admission to the University's 2008 entering class. She sued the University and school officials, alleging that the University's consideration of race in admissions violated the Equal Protection Clause. The District Court granted summary judgment to the University. Affirming, the Fifth Circuit held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding

whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.

Held : Because the Fifth Circuit did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, its decision affirming the District Court's grant of summary judgment to the University was incorrect. Pp. 2417 – 2422.

(a) *Bakke*, *Gratz*, and *Grutter*, which directly address the question considered here, are taken as given for purposes of deciding this case. In *Bakke*'s principal opinion, Justice Powell recognized that state university "decisions based on race or ethnic origin ... are reviewable under the Fourteenth Amendment," 438 U.S., at 287, 98 S.Ct. 2733, using a strict scrutiny standard, *id.*, at 299, 98 S.Ct. 2733. He identified as a compelling interest that could justify the consideration of race the interest in the educational benefits that flow from a diverse student body, but noted that this interest is complex, encompassing a broad array "of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.*, at 315, 98 S.Ct. 2733

***298** In *Gratz* and *Grutter*, the Court endorsed these precepts, observing that an admissions process with such an interest is subject to judicial review and must withstand strict scrutiny, *Gratz*, *supra*, at 275, 123 S.Ct. 2411, *i.e.*, a university must clearly demonstrate that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary ... to the accomplishment" of its purpose,' " *Bakke*, *supra*, at 305, 98 S.Ct. 2733 Additional guidance may be found in the Court's broader equal protection jurisprudence. See, *e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854. Strict scrutiny is a searching examination, and the government bears the burden to prove " 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.' " *Ibid.* Pp. 2417 – 2419.

(b) Under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications. A court may give some deference to a university's "judgment that such diversity is essential to its educational mission," 539 U.S., at 328, 123 S.Ct. 2325, provided that diversity is not defined as ****2414** mere racial balancing and there is a reasoned, principled explanation for the academic decision. On this point, the courts below were correct in finding that *Grutter* calls for deference to the University's experience and expertise about its educational mission. However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference. *Id.*, at 333, 123 S.Ct. 2325. It is at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337, 123 S.Ct. 2325. Narrow tailoring also requires a reviewing court to verify that it is "necessary" for the university to use race to achieve the educational benefits of diversity. *Bakke*, *supra*, at 305, 98 S.Ct. 2733 The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.

Rather than perform this searching examination, the Fifth Circuit held petitioner could challenge only whether the University's decision to use race as an admissions factor "was made in good faith." It presumed that the school had acted in good faith and gave petitioner the burden of rebutting that presumption. It thus undertook the narrow-tailoring requirement with a "degree of deference" to the school. These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " 539 U.S., at 326, 123 S.Ct. 2325. Strict scrutiny does not permit a court to accept a school's assertion that ***299** its admissions process uses race in a permissible way without closely examining how the process works in practice, yet that is what the District Court and Fifth Circuit did here. The Court vacates the Fifth Circuit's judgment. But fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. In determining whether summary judgment in the University's favor was appropriate, the Fifth Circuit must assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Pp. 2419 – 2422.

631 F.3d 213, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., and THOMAS, J., filed concurring opinions. GINSBURG, J., filed a dissenting opinion. KAGAN, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Bert W. Rein, Washington, DC, Petitioner.

Gregory G. Garre, Washington, DC, for Respondents.

Donald B. Verilli, Jr., for the United States as amicus curiae, by special leave of the Court, supporting the Respondents.

Bert W. Rein, Counsel Of Record, William S. Consovoy, Thomas R. McCarthy, Claire J. Evans, Wiley Rein LLP, Washington, DC, for Petitioner.

Patricia C. Ohlendorf, Vice President for Legal Affairs, The University of Texas at Austin Flawn Academic Center, Austin, TX, Douglas Laycock, University of Virginia ****2415** School of Law, Charlottesville, VA, Gregory G. Garre, Counsel of Record, Maureen E. Mahoney, J. Scott Ballenger, Lori Alvino McGill, Katya S. Georgieva, Latham & Watkins LLP, Washington, DC, James C. Ho, Gibson, Dunn & Crutcher LLP, Dallas, TX, for Respondents.

Opinion

Justice KENNEDY delivered the opinion of the Court.

***300** The University of Texas at Austin considers race as one of various factors in its undergraduate admissions ***301** process. Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a "critical mass." Petitioner, who is Caucasian, ***302** sued the University after her application was rejected. She contends that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.

***303** The parties asked the Court to review whether the judgment below was consistent with "this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)." Pet. for Cert. i. The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the University was incorrect. That decision is vacated, and the case is remanded for further proceedings.

***304** I

A

Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive. In 2008, when petitioner sought admission to the University's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled. Petitioner was denied admission.

In recent years the University has used three different programs to evaluate candidates for admission. The first is the program it used for some years before 1997, when the University considered two factors: a numerical score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and the applicant's race. In 1996, this system was held unconstitutional by the United States Court of Appeals for the Fifth Circuit. It ruled the University's consideration of race violated the Equal Protection Clause because it did not further any compelling government interest. *Hopwood v. Texas*, 78 F.3d 932, 955 (1996).

The second program was adopted to comply with the *Hopwood* decision. The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with the Academic Index. This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's **2416 background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline in minority enrollment after *Hopwood*, the University also expanded its outreach programs.

*305 The Texas State Legislature also responded to the *Hopwood* decision. It enacted a measure known as the Top Ten Percent Law, codified at Tex. Educ.Code Ann. § 51.803 (West 2009). Also referred to as H.B. 588, the Top Ten Percent Law grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African–American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African–American and 14.5% Hispanic.

Following this Court's decisions in *Grutter v. Bollinger, supra*, and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003), the University adopted a third admissions program, the 2004 program in which the University reverted to explicit consideration of race. This is the program here at issue. In *Grutter*, the Court upheld the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.

The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions (Proposal). Supp. App. 1a. The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It *306 showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called "anecdotal" reports from students regarding their "interaction in the classroom." The Proposal concluded that the University lacked a "critical mass" of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.

To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as Liberal

Arts or Engineering—admits students separately. So a student is considered **2417 initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.

Petitioner applied for admission to the University's 2008 entering class and was rejected. She sued the University and various University officials in the United States District Court for the Western District of Texas. She alleged that the University's consideration of race in admissions violated the Equal Protection Clause. The parties cross-moved for summary judgment. The District Court granted summary judgment to the University. The United States Court of Appeals for the Fifth Circuit affirmed. It held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's *307 benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan. 631 F.3d 213, 217–218 (2011).

Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc. See 644 F.3d 301, 303 (C.A.5 2011) (*per curiam*). Petitioner sought a writ of certiorari. The writ was granted. 565 U.S. ——, 132 S.Ct. 1536, 182 L.Ed.2d 160 (2012).

B

Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body: *Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750; *Gratz, supra*; and *Grutter,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304. We take those cases as given for purposes of deciding this case.

We begin with the principal opinion authored by Justice Powell in *Bakke, supra*. In *Bakke,* the Court considered a system used by the medical school of the University of California at Davis. From an entering class of 100 students the school had set aside 16 seats for minority applicants. In holding this program impermissible under the Equal Protection Clause Justice Powell's opinion stated certain basic premises. First, "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." *Id.,* at 287, 98 S.Ct. 2733 (separate opinion). The principle of equal protection admits no "artificial line of a 'two-class theory' " that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.,* at 295, 98 S.Ct. 2733. It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a *308 judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.,* at 299, 98 S.Ct. 2733.

Next, Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a compelling interest, because a university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification. *Id.,* at 307–309, 98 S.Ct. 2733.

**2418 The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is "a special concern of the First Amendment." *Id.,* at 312, 98 S.Ct. 2733. Part of " 'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,' " and this in turn leads to the question of " 'who may be admitted to study.' " *Sweezy v. New Hampshire,* 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring in judgment).

Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students.

The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S., at 315, 98 S.Ct. 2733 (separate opinion).

In *Gratz*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, and *Grutter, supra*, the Court endorsed the precepts stated by Justice Powell. In *Grutter*, ***309** the Court reaffirmed his conclusion that obtaining the educational benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325, 123 S.Ct. 2325.

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. "Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." *Gratz, supra*, at 275, 123 S.Ct. 2411. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system," *Grutter*, 539 U.S., at 334, 123 S.Ct. 2325, but instead must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.*, at 337, 123 S.Ct. 2325. Strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose." *Bakke*, 438 U.S., at 305, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted).

While these are the cases that most specifically address the central issue in this case, additional guidance may be found in the Court's broader equal protection jurisprudence which applies in this context. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (internal quotation marks omitted), and therefore "are contrary to our traditions and hence constitutionally suspect," *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954). " '[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,' " *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting ***310** *Fullilove v. Klutznick*, 448 U.S. 448, 533–534, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) ****2419** (Stevens, J., dissenting)), "the Equal Protection Clause demands that racial classifications ... be subjected to the 'most rigid scrutiny.' " *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

To implement these canons, judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fullilove, supra*, at 523, 100 S.Ct. 2758 (Stewart, J., dissenting); *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Strict scrutiny is a searching examination, and it is the government that bears the burden to prove " 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,' " *Croson, supra*, at 505, 109 S.Ct. 706 (quoting *Fullilove, supra*, 448 U.S., at 533–535, 100 S.Ct. 2758 (Stevens, J., dissenting)).

II

Grutter made clear that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." 539 U.S., at 326, 123 S.Ct. 2325. And *Grutter* endorsed Justice Powell's conclusion in *Bakke* that "the attainment of a diverse student body ... is a constitutionally permissible goal for an institution of higher education." 438 U.S., at 311–312, 98 S.Ct. 2733 (separate opinion). Thus, under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications.

According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." 539 U.S., at 328, 123 S.Ct. 2325. *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," *id.*, at 330, 123 S.Ct. 2325, that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and

Court of Appeals were correct in finding *311 that *Grutter* calls for deference to the University's conclusion, " 'based on its experience and expertise,' " 631 F.3d, at 230 (quoting 645 F.Supp.2d 587, 603 (W.D.Tex.2009)), that a diverse student body would serve its educational goals. There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. See *post,* at 2422 (SCALIA, J., concurring); *post,* at 2423 – 2424 (THOMAS, J., concurring); *post,* at 2432 – 2433 (GINSBURG, J., dissenting). But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.

A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke, supra,* at 307, 98 S.Ct. 2733 (opinion of Powell, J.). "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter, supra,* at 330, 123 S.Ct. 2325. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' " *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 732, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets **2420 strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." 539 U.S., at 333, 123 S.Ct. 2325 (internal quotation marks omitted). True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter,* it remains at all times the University's obligation to demonstrate, and the Judiciary's *312 obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337, 123 S.Ct. 2325.

Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. *Bakke, supra,* at 305, 98 S.Ct. 2733 This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." See *Grutter,* 539 U.S., at 339–340, 123 S.Ct. 2325 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If " 'a nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense,' " *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (quoting Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L.Rev. 559, 578–579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." 631 F.3d, at 236. And in considering such a challenge, the court would "presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption. *Id.*, at 231–232. The Court of Appeals held that to "second-guess the merits" of this aspect of the University's decision was a task it was "ill-equipped to perform" and that it would attempt only to "ensure that [the University's] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration." *Id.*, at 231. The Court of Appeals thus concluded that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]." *Id.*, at 232. Because "the efforts of the University have been studied, serious, and of high purpose," the Court of Appeals held that the use of race in the admissions **2421 program fell within "a constitutionally protected zone of discretion." *Id.*, at 231.

These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " 539 U.S., at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed "serious, good faith consideration of workable race-neutral alternatives." 539 U.S., at 339, 123 S.Ct. 2325. As noted above, see *supra*, at 2415, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.

Grutter did not hold that good faith would forgive an impermissible consideration of race. It must be remembered that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*, 488 U.S., at 500, 109 S.Ct. 706. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

***314** The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts. "[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable.... While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n. 9, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. See *Adarand, supra*, at 237, 115 S.Ct. 2097. Unlike *Grutter*, which was decided after trial, this case arises from cross-motions for summary judgment. In this case, as in similar cases, in determining whether summary judgment in favor of the University would be appropriate, the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record—and not "simple ... assurances of good intention," *Croson, supra*, at 500, 109 S.Ct. 706—is sufficient is a question for the Court of Appeals in the first instance.

* * *

Strict scrutiny must not be " 'strict in theory, but fatal in fact,' " *Adarand, supra*, at 237, 115 S.Ct. 2097; see also *Grutter, supra*, at 326, 123 S.Ct. 2325. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest ***315** that this Court has approved in this context: the benefits of a student body diversity that "encompasses a ... broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S., at 315, 98 S.Ct. 2733 ****2422** (opinion of Powell, J.). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice SCALIA, concurring.

I adhere to the view I expressed in *Grutter v. Bollinger* : "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." 539 U.S. 306, 349, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (opinion concurring in part and dissenting in part). The petitioner in this case did not ask us to overrule *Grutter*'s holding that a "compelling interest" in the educational benefits of diversity can justify racial preferences in university admissions. Tr. of Oral Arg. 8–9. I therefore join the Court's opinion in full.

Justice THOMAS, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. *Ante,* at 2415. I write separately to explain that I would overrule *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

I

A

The Fourteenth Amendment provides that no State shall "deny to any person ... the equal protection of the laws." ***316** The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri v. Jenkins,* 515 U.S. 70, 120–121, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.,* at 121, 115 S.Ct. 2038.

Under strict scrutiny, all racial classifications are categorically prohibited unless they are " 'necessary to further a compelling governmental interest' " and "narrowly tailored to that end." *Johnson v. California,* 543 U.S. 499, 514, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) (quoting *Grutter, supra,* at 327, 123 S.Ct. 2325). This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins, supra,* at 121, 115 S.Ct. 2038 (THOMAS, J., concurring). And rightly so. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 240, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (THOMAS, J., concurring in part and concurring in judgment). "The Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter, supra,* at 353, 123 S.Ct. 2325 (THOMAS, J., concurring in part and dissenting in part).

B

1

The Court first articulated the strict-scrutiny standard in *Korematsu v. United* ****2423** *States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.,* at 216, 65 S.Ct. 193. [1] Aside from *Grutter,* the Court has ***317** recognized only two instances in which a "[p]ressing public necessity" may justify racial discrimination by the government. First, in *Korematsu,* the Court recognized that protecting national security may satisfy this exacting standard. In that case, the Court upheld an evacuation order directed at "all persons of Japanese ancestry" on the grounds that the Nation was at war with Japan and that the order had "a definite and close relationship to the prevention of espionage and sabotage." 323 U.S., at 217–218, 65 S.Ct. 193. Second, the Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide "a 'strong basis in evidence for its conclusion that remedial action [is] necessary.' " *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 500, 504, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion)).

In contrast to these compelling interests that may, in a narrow set of circumstances, justify racial discrimination, the Court has frequently found other asserted interests insufficient. For example, in *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d

421 (1984), the Court flatly rejected a claim that the best interests of a child justified the government's racial discrimination. In that case, a state court awarded custody to a child's father because the mother was in a mixed-race marriage. The state court believed the child might be stigmatized by living in a mixed-race household and sought to avoid this perceived problem in its custody determination. We acknowledged the possibility of stigma but nevertheless concluded that "the reality of private biases and the possible injury they might inflict" do not justify racial discrimination. *Id.*, at 433, 104 S.Ct. 1879. As we explained, "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Ibid.*

***318** Two years later, in *Wygant, supra,* the Court held that even asserted interests in remedying societal discrimination and in providing role models for minority students could not justify governmentally imposed racial discrimination. In that case, a collective-bargaining agreement between a school board and a teacher's union favored teachers who were " 'Black, American Indian, Oriental, or of Spanish descendancy.' " *Id.*, at 270–271, and n. 2, 106 S.Ct. 1842 (plurality opinion). We rejected the interest in remedying societal discrimination because it had no logical stopping point. *Id.*, at 276, 106 S.Ct. 1842. We similarly rebuffed as inadequate the interest in providing role models to minority students and added that the notion that "black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)." *Ibid.*

2

Grutter was a radical departure from our strict-scrutiny precedents. In *Grutter,* the University of Michigan Law School (Law School) claimed that it had a compelling reason to discriminate based on race. ****2424** The reason it advanced did not concern protecting national security or remedying its own past discrimination. Instead, the Law School argued that it needed to discriminate in admissions decisions in order to obtain the "educational benefits that flow from a diverse student body." 539 U.S., at 317, 123 S.Ct. 2325. Contrary to the very meaning of strict scrutiny, the Court *deferred* to the Law School's determination that this interest was sufficiently compelling to justify racial discrimination. *Id.*, at 325, 123 S.Ct. 2325.

I dissented from that part of the Court's decision. I explained that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity' " sufficient to satisfy strict scrutiny. *Id.*, at 353, 123 S.Ct. 2325. Cf. *Lee v. Washington,* 390 U.S. 333, 334, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (Black, J., concurring) (protecting prisoners ***319** from violence might justify narrowly tailored discrimination); *J.A. Croson, supra,* at 521, 109 S.Ct. 706 (SCALIA, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb ... can justify [racial discrimination]"). I adhere to that view today. As should be obvious, there is nothing "pressing" or "necessary" about obtaining whatever educational benefits may flow from racial diversity.

II

A

The University claims that the District Court found that it has a compelling interest in attaining "a diverse student body and the educational benefits flowing from such diversity." Brief for Respondents 18. The use of the conjunction, "and," implies that the University believes its discrimination furthers two distinct interests. The first is an interest in attaining diversity for its own sake. The second is an interest in attaining educational benefits that allegedly flow from diversity.

Attaining diversity for its own sake is a nonstarter. As even *Grutter* recognized, the pursuit of diversity as an end is nothing more than impermissible "racial balancing." 539 U.S., at 329–330, 123 S.Ct. 2325 ("The Law School's interest is not simply

'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978); citation omitted)); see also *id.*, at 307, 98 S.Ct. 2733 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids"). Rather, diversity can only be the *means* by which the University obtains educational benefits; it cannot be an end pursued for its own sake. Therefore, the *educational benefits* allegedly produced by diversity must rise to ***320** the level of a compelling state interest in order for the program to survive strict scrutiny.

Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the alleged educational benefits of diversity ****2425** cannot justify racial discrimination today.

1

Our desegregation cases establish that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. In *Davis v. School Bd. of Prince Edward Cty.*, decided with *Brown, supra*, the school board argued that if the Court found segregation unconstitutional, white students would migrate to private schools, funding for public schools would decrease, and public schools would either decline in quality or cease to exist altogether. Brief for Appellees in *Davis v. School Bd. of Prince Edward Cty.*, O.T. 1952, No. 191, p. 30 (hereinafter Brief for Appellees in *Davis*) ("Virginians ... would no longer permit sizeable appropriations for schools on either the State or local level; private segregated schools would be greatly increased in number and the masses of our people, both white and Negro, would suffer terribly.... [M]any white parents would withdraw their children from the public schools and, as a result, the program of providing better schools would be abandoned" (internal quotation marks omitted)). The true victims of desegregation, the school board asserted, would be black students, who would be unable to afford private school. See *id.*, at 31 ("[W]ith the demise of segregation, education in Virginia would receive ***321** a serious setback. Those who would suffer most would be the Negroes who, by and large, would be economically less able to afford the private school"); Tr. of Oral Arg. in *Davis v. School Bd. of Prince Edward Cty.*, O.T. 1954, No. 3, p. 208 ("What is worst of all, in our opinion, you impair the public school system of Virginia and the victims will be the children of both races, we think the Negro race worse than the white race, because the Negro race needs it more by virtue of these disadvantages under which they have labored. We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County"). [2]

Unmoved by this sky-is-falling argument, we held that segregation violates the principle of equality enshrined in the Fourteenth Amendment. See *Brown, supra*, at 495, 74 S.Ct. 686 ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"); see also *Allen v. School Bd. of Prince* ***322** *Edward Cty.*, 249 F.2d 462, 465 (C.A.4 1957) (*per curiam*) ("The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to ****2426** which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights"). Within a matter of years, the warning became reality: After being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964. See R. Sarratt, The Ordeal of Desegregation 237 (1966). Despite this fact, the Court never backed down from its rigid enforcement of the Equal Protection Clause's antidiscrimination principle.

In this case, of course, Texas has not alleged that the University will close if it is prohibited from discriminating based on race. But even if it had, the foregoing cases make clear that even that consequence would not justify its use of racial discrimination. It follows, *a fortiori*, that the putative educational benefits of student body diversity cannot justify racial discrimination: If a State does not have a compelling interest in the *existence* of a university, it certainly cannot have a compelling interest in the supposed

benefits that might accrue to that university from racial discrimination. See *Grutter*, 539 U.S., at 361, 123 S.Ct. 2325 (opinion of THOMAS, J.) ("[A] marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies"). If the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.

2

It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced ***323** by the University today. The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society. See, *e.g.*, Brief for Respondents 6 (arguing that student body diversity "prepares students to become the next generation of leaders in an increasingly diverse society"). The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. See, *e.g.*, Brief for Respondents in *Sweatt* 96 ("[A] very large group of Northern Negroes [comes] South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more 'secure' at a college of his own people"); Brief for Appellees in *Davis* 25–26 ("The Negro child gets an opportunity to participate in segregated schools that I have never seen accorded to him in non-segregated schools. He is important, he holds offices, he is accepted by his fellows, he is on athletic teams, he has a full place there" (internal quotation marks omitted)). This argument was unavailing. It is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders. Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr., and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders.

****2427** The University also asserts that student body diversity improves interracial relations. See, *e.g.*, Brief for Respondents 6 (arguing that student body diversity promotes "cross-racial understanding" and breaks down racial and ethnic ***324** stereotypes). In this argument, too, the University repeats arguments once marshaled in support of segregation. See, *e.g.*, Brief for Appellees in *Davis* 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the general welfare will be definitely harmed ... there would be more friction developed" (internal quotation marks omitted)); Brief for Respondents in *Sweatt* 93 ("Texas has had no serious breaches of the peace in recent years in connection with its schools. The separation of the races has kept the conflicts at a minimum"); *id.*, at 97–98 ("The legislative acts are based not only on the belief that it is the best way to provide education for both races, and the knowledge that separate schools are necessary to keep public support for the public schools, but upon the necessity to maintain the public peace, harmony, and welfare"); Brief for Appellees in *Briggs* 32 ("The southern Negro, by and large, does not want an end to segregation in itself any more than does the southern white man. The Negro in the South knows that discriminations, and worse, can and would multiply in such event" (internal quotation marks omitted)). We flatly rejected this line of arguments in *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950), where we held that segregation would be unconstitutional even if white students never tolerated blacks. *Id.*, at 641, 70 S.Ct. 851 ("It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar"). It is, ***325** thus, entirely irrelevant whether the University's racial discrimination increases or decreases tolerance.

Finally, while the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary necessity because of the enduring race consciousness of our society. See Brief for Respondents 53–54 ("Certainly all aspire for a colorblind

society in which race does not matter.... But in Texas, as in America, 'our highest aspirations are yet unfulfilled' "). Yet again, the University echoes the hollow justifications advanced by the segregationists. See, *e.g.*, Brief for State of Kansas on Reargument in *Brown v. Board of Education*, O.T. 1953, No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Brief for Respondents in *Sweatt* 94 ("The racial consciousness and feeling which exists today in the minds of many people may be regrettable and unjustified. Yet they are a reality which must be dealt with by the State if it is to preserve harmony and peace and at the same time furnish equal education to both groups"); *id.*, at 96 (" '[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions' "); Brief for Appellees in *Briggs* 26–27 ("[I]t would be unwise in administrative practice ... to mix the two races in the same schools at the present **2428 time and under present conditions"); Brief for Appellees on Reargument in *Briggs v. Elliott*, O.T. 1953, No. 2, p. 79 ("It is not 'racism' to be cognizant of the fact that mankind has struggled with race problems and racial tensions for upwards of sixty centuries"). But these arguments too were unavailing. The Fourteenth Amendment views racial bigotry as an evil to be stamped out, not as an excuse for perpetual racial tinkering by the State. See *DeFunis v. Odegaard*, 416 U.S. 312, 342, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting) ("The Equal Protection Clause commands *326 the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized"). The University's arguments to this effect are similarly insufficient to justify discrimination. [3]

3

The University's arguments today are no more persuasive than they were 60 years ago. Nevertheless, despite rejecting identical arguments in *Brown*, the Court in *Grutter* deferred to the University's determination that the diversity obtained by racial discrimination would yield educational benefits. There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits. See *Grutter*, 539 U.S., at 365–366, 123 S.Ct. 2325 (opinion of THOMAS, J.) ("Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation"). Educational benefits are a far cry from the truly compelling state interests that we previously required to justify use of racial classifications.

B

My view of the Constitution is the one advanced by the plaintiffs in *Brown* : "[N]o State has any authority under the *327 equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown v. Board of Education*, O.T. 1952, No. 8, p. 7; see also Juris. Statement in *Davis v. School Bd. of Prince Edward Cty.*, O.T. 1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Brief for Appellants in *Brown v. Board of Education*, O.T. 1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"); Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown v. Board of Education*, O.T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"). The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants **2429 must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

This principle is neither new nor difficult to understand. In 1868, decades before *Plessy*, the Iowa Supreme Court held that schools may not discriminate against applicants based on their skin color. In *Clark v. Board of Directors*, 24 Iowa 266 (1868), a school denied admission to a student because she was black, and "public sentiment [was] opposed to the intermingling of white and colored children in the same schools." *Id.*, at 269. The Iowa Supreme Court rejected that flimsy justification, holding that "all the youths are equal before the law, and there is no discretion vested in the board ... or elsewhere, to interfere with or disturb that equality." *Id.*, at 277. "For the courts to sustain a board of school directors ... in limiting the rights and privileges

of persons by reason of their [race], would be to sanction a plain violation of the spirit of ***328** our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races." *Id.*, at 276. This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.

I would overrule *Grutter* and hold that the University's admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination.

III

While I find the theory advanced by the University to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the University's program is instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities. See *post*, at 2433 – 2434 (GINSBURG, J., dissenting) ("[G]overnment actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality' "). But "[h]istory should teach greater humility." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 609, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting). The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.

A

Slaveholders argued that slavery was a "positive good" that civilized blacks and elevated them in every dimension of life. See, *e.g.*, Calhoun, Speech in the U.S. Senate, 1837, in P. Finkelman, Defending Slavery 54, 58–59 (2003) ("Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually.... [T]he relation now existing in the slaveholding States between the two [races], is, instead of an evil, a good— ***329** a positive good"); Harper, Memoir on Slavery, in The Ideology of Slavery 78, 115–116 (D. Faust ed. 1981) ("Slavery, as it is said in an eloquent article published in a Southern periodical work ... 'has done more to elevate a degraded race in the scale of humanity; to tame the savage; to civilize the barbarous; to soften the ferocious; to enlighten the ignorant, and to spread the blessings of [C]hristianity among the heathen, than all the missionaries that philanthropy and religion have ever sent forth' "); Hammond, The Mudsill Speech, 1858, in Defending Slavery, *supra*, at 80, 87 ("They are elevated from the ****2430** condition in which God first created them, by being made our slaves").

A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. They argued, for example, that separate schools protected black children from racist white students and teachers. See, *e.g.*, Brief for Appellees in *Briggs* 33–34 (" 'I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their child to "fight" this thing out,—but, dear God, at what a cost! ... We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated' " (quoting DuBois, Does the Negro Need Separate Schools? 4 J. of Negro Educ. 328, 330–331 (1935))); Tr. of Oral Arg. in *Bolling v. Sharpe*, O.T. 1952, No. 413, p. 56 ("There was behind these [a]cts a kindly feeling [and] an intention to help these people who had been in bondage. And there was and there still is an intention by the Congress to see that these children shall be educated in a healthful atmosphere, in a wholesome atmosphere, in a place where they are wanted, in a place where ***330** they will not be looked upon with hostility, in a place where there will be a receptive atmosphere for learning for both races without the hostility that undoubtedly Congress thought might creep into these situations"). And they even appealed to the fact that many blacks agreed that separate schools were in the "best interests" of both races. See, *e.g.*, Brief for Appellees in *Davis* 24–25 (" 'It has been my experience, in working with the people of Virginia,

including both white and Negro, that the customs and the habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best' ").

Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign. " '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." See *Metro Broadcasting*, 497 U.S., at 610, 110 S.Ct. 2997 (O'Connor, J., dissenting). It is for this reason that the Court has repeatedly held that strict scrutiny applies to *all* racial classifications, regardless of whether the government has benevolent motives. See, *e.g.*, *Johnson*, 543 U.S., at 505, 125 S.Ct. 1141 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand*, 515 U.S., at 227, 115 S.Ct. 2097 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *J.A. Croson*, 488 U.S., at 500, 109 S.Ct. 706 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"). The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

*331 B

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that **2431 racial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful.

Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as *Amici Curiae* 3–4, and n. 4. Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.[4] *Ibid.*

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L.Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom). "It is a fact that in virtually all selective schools ... where racial preferences in *332 admission is practiced, the majority of [black] students end up in the lower quarter of their class." S. Cole & E. Barber, Increasing Faculty Diversity: The Occupational Choices of High–Achieving Minority Students 124 (2003). There is no reason to believe this is not the case at the University. The University and its dozens of *amici* are deafeningly silent on this point.

Furthermore, the University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, Affirmative Action Around the World 145–146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

The Court of Appeals believed that the University needed to enroll more blacks and Hispanics because they remained "clustered in certain programs." 631 F.3d 213, 240 (C.A.5 2011) ("[N]early a quarter of the undergraduate students in [the University's] College of Social Work are Hispanic, and more than 10% are [black]. In the College of Education, 22.4% of students are Hispanic and 10.1% are [black]"). But racial discrimination may be the cause of, not the solution to, this clustering. There is some evidence that students admitted ****2432** as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who ***333** attend less selective schools. See, *e.g.*, Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699–701 (1996).[5] These students may well drift towards less competitive majors because the mismatch caused by racial discrimination in admissions makes it difficult for them to compete in more rigorous majors.

Moreover, the University's discrimination "stamp[s] [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U.S., at 241, 115 S.Ct. 2097 (opinion of THOMAS, J.). It taints the accomplishments of all those who are admitted as a result of racial discrimination. Cf. J. McWhorter, Losing the Race: Self–Sabotage in Black America 248 (2000) ("I was never able to be as proud of getting into Stanford as my classmates could be.... [H]ow much of an achievement can I truly say it was to have been a good enough *black* person to be admitted, while my colleagues had been considered good enough *people* to be admitted"). And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. ***334** "When blacks [and Hispanics] take positions in the highest places of government, industry, or academia, it is an open question ... whether their skin color played a part in their advancement." See *Grutter*, 539 U.S., at 373, 123 S.Ct. 2325 (opinion of THOMAS, J.). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those ... who would succeed without discrimination." *Ibid.* Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping.

* * *

For the foregoing reasons, I would overrule *Grutter*. However, because the Court correctly concludes that the Court of Appeals did not apply strict scrutiny, I join its opinion.

Justice GINSBURG, dissenting.

The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–317, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). The University has steered clear of a quota system ****2433** like the one struck down in *Bakke*, which excluded all nonminority candidates from competition for a fixed number of seats. See *id.*, at 272–275, 315, 319–320, 98 S.Ct. 2733 (opinion of Powell, J.). See also *Gratz v. Bollinger*, 539 U.S. 244, 293, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (Souter, J., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."). And, like so many educational institutions across the Nation,[1] the University has taken care to follow the ***335** model approved by the Court in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). See 645 F.Supp.2d 587, 609 (W.D.Tex.2009) ("[T]he parties agree [that the University's] policy was based on the [admissions] policy [upheld in *Grutter*].").

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. See *Gratz*, 539 U.S., at 303–304, n. 10, 123 S.Ct. 2411 (dissenting opinion). As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." *Id.*, at 297–298, 123 S.Ct. 2411 (dissenting opinion).

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4–5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities."). It is race consciousness, not blindness to race, that drives such plans.[2] As for holistic review, if universities cannot explicitly *336 include race as a factor, many may " resort to camouflage" to "maintain their minority enrollment." *Gratz,* 539 U.S., at 304, 123 S.Ct. 2411 (GINSBURG, J., dissenting).

I have several times explained why government actors, including state universities, need not be blind to the lingering effects of "an overtly discriminatory past," the legacy of "centuries of law-sanctioned inequality." *Id.,* at 298, 123 S.Ct. 2411 (dissenting opinion). See also *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 272–274, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (dissenting opinion). Among constitutionally permissible options, I remain convinced, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." **2434 *Gratz,* 539 U.S., at 305, n. 11, 123 S.Ct. 2411 (dissenting opinion).

Accordingly, I would not return this case for a second look. As the thorough opinions below show, 631 F.3d 213 (C.A.5 2011); 645 F.Supp.2d 587, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus, *id.,* at 608; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity, see 631 F.3d, at 225–226; and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives, see *id.,* at 226.[3] Justice Powell's opinion in *Bakke* and the Court's decision *337 in *Grutter* require no further determinations. See *Grutter,* 539 U.S., at 333–343, 123 S.Ct. 2325; *Bakke,* 438 U.S., at 315–320, 98 S.Ct. 2733.

The Court rightly declines to cast off the equal protection framework settled in *Grutter.* See *ante,* at 2417. Yet it stops short of reaching the conclusion that framework warrants. Instead, the Court vacates the Court of Appeals' judgment and remands for the Court of Appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Ante,* at 2421. As I see it, the Court of Appeals has already completed that inquiry, and its judgment, trained on this Court's *Bakke* and *Grutter* pathmarkers, merits our approbation.[4]

For the reasons stated, I would affirm the judgment of the Court of Appeals.

All Citations

570 U.S. 297, 133 S.Ct. 2411, 186 L.Ed.2d 474, 118 Fair Empl.Prac.Cas. (BNA) 1459, 97 Empl. Prac. Dec. P 44,850, 81 USLW 4503, 293 Ed. Law Rep. 588, 13 Cal. Daily Op. Serv. 6442, 24 Fla. L. Weekly Fed. S 399

Footnotes

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

1 The standard of "pressing public necessity" is more frequently called a "compelling governmental interest." I use the terms interchangeably.

2 Similar arguments were advanced unsuccessfully in other cases as well. See, *e.g.,* Brief for Respondents in *Sweatt v. Painter,* O.T. 1949, No. 44, pp. 94–95 (hereinafter Brief for Respondents in *Sweatt*) ("[I]f the power to separate the students were terminated, ... it would be as a bonanza to the private white schools of the State, and it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children ... who are the largest contributors to the cause of public education, and whose financial support is necessary for the continued progress of

public education.... Should the State be required to mix the public schools, there is no question but that a very large group of students would transfer, or be moved by their parents, to private schools with a resultant deterioration of the public schools" (internal quotation marks omitted)); Brief for Appellees in *Briggs v. Elliott*, O.T. 1952, No. 101, p. 27 (hereinafter Brief for Appellees in *Briggs*) ("[I]t would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to have public education on that basis at all.... [I]t would eliminate the public schools in most, if not all, of the communities in the State").

3 While the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists, one obvious difference is that the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key. Today, the segregationists' arguments would never be given serious consideration. But see M. Plocienniczak, Pennsylvania School Experiments with 'Segregation,' CNN (Jan. 27, 2011), http://www.cnn.com/2011/US/01/27/pennsylvania. segregation/index.html?_s=PM:US (as visited June 21, 2013, and available in Clerk of Court's case file). We should be equally hostile to the University's repackaged version of the same arguments in support of its favored form of racial discrimination.

4 The lowest possible score on the SAT is 600, and the highest possible score is 2400.

5 The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering is well documented. See, *e.g.*, National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate-Origin Institutions of Black S & E Doctorate Recipients 6 (2008) (Table 2) (showing that, from 1997–2006, Howard University had more black students who went on to earn science and engineering doctorates than any other undergraduate institution, and that 7 other historically black colleges ranked in the top 10); American Association of Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19) (showing that, in 2011, Xavier University had more black students who went on to earn medical degrees than any other undergraduate institution and that Howard University was second).

1 See Brief for Amherst College et al. as *Amici Curiae* 33–35; Brief for Association of American Law Schools as *Amicus Curiae* 6; Brief for Association of American Medical Colleges et al. as *Amici Curiae* 30–32; Brief for Brown University et al. as *Amici Curiae* 2–3, 13; Brief for Robert Post et al. as *Amici Curiae* 24–27; Brief for Fordham University et al. as *Amici Curiae* 5–6; Brief for University of Delaware et al. as *Amici Curiae* 16–21.

2 The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." T. Arnold, The Symbols of Government 101 (1935) (internal quotation marks omitted). Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

3 As the Court said in *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), "[n]arrow tailoring ... require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." But, *Grutter* also explained, it does not "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.* I do not read the Court to say otherwise. See *ante*, at 2420 (acknowledging that, in determining whether a race-conscious admissions policy satisfies *Grutter*'s narrow-tailoring requirement, "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes").

4 Because the University's admissions policy, in my view, is constitutional under *Grutter*, there is no need for the Court in this case "to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review." 539 U.S., at 346, n., 123 S.Ct. 2325 (GINSBURG, J., concurring). See also *Gratz v. Bollinger*, 539 U.S. 244, 301, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (GINSBURG, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.").

* * *

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Declined to Extend by Rosas v. University of Texas at San Antonio, 5th Cir.(Tex.), November 20, 2019

136 S.Ct. 2198
Supreme Court of the United States

Abigail Noel FISHER, Petitioner
v.
UNIVERSITY OF TEXAS AT AUSTIN et al.

No. 14–981.
|
Argued Dec. 9, 2015.
|
Decided June 23, 2016.

Synopsis
Background: Caucasian applicant who was denied admission to state university brought action alleging that university's race-conscious admissions program violated her Fourteenth Amendment right to equal protection. The United States District Court for the Western District of Texas, Sam Sparks, J., 645 F.Supp.2d 587, granted summary judgment to university. Applicant appealed and the United States Court of Appeals for the Fifth Circuit, Patrick E. Higginbotham, Circuit Judge, 631 F.3d 213, affirmed. Certiorari was granted. The Supreme Court, —— U.S. ——, 133 S.Ct. 2411, 186 L.Ed.2d 474 vacated and remanded. On remand, the Court of Appeals, Higginbotham, Circuit Judge, 758 F.3d 633, affirmed, and certiorari was again granted.

The Supreme Court, Justice Kennedy, held that university's admissions program did not violate equal protection.

Affirmed.

Justice Thomas filed a dissenting opinion.

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

Justice Kagan took no part in the consideration or decision of the case.

***2202** *Syllabus* [*]

The University of Texas at Austin (University) uses an undergraduate admissions system containing two components. First, as required by the State's Top Ten Percent Law, it offers admission to any students who graduate from a Texas high school in the top 10% of their class. It then fills the remainder of its incoming freshman class, some 25%, by combining an applicant's "Academic Index"—the student's SAT score and high school academic performance—with the applicant's "Personal Achievement Index," a holistic review containing numerous factors, including race. The University adopted its current admissions process in 2004, after a year-long-study of its admissions process—undertaken in the wake of *Grutter v. Bollinger,* 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, and *Gratz v. Bollinger,* 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257—led it to conclude that its prior race-neutral system did not reach its goal of providing the educational benefits of diversity to its undergraduate students.

Petitioner Abigail Fisher, who was not in the top 10% of her high school class, was denied admission to the University's 2008 freshman class. She filed suit, alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. The District Court entered summary judgment in the University's favor, and the Fifth Circuit affirmed. This Court vacated the judgment, *Fisher v. University of Tex. at Austin*, 570 U.S. ——, 133 S.Ct. 2411, 186 L.Ed.2d 474 (*Fisher I*), and remanded the case to the Court of Appeals, so the University's program could be evaluated under the proper strict scrutiny standard. On remand, the Fifth Circuit again affirmed the entry of summary judgment for the University.

Held: The race-conscious admissions program in use at the time of petitioner's application is lawful under the Equal Protection Clause. Pp. 2207 – 2215.

(a) *Fisher I* sets out three controlling principles relevant to assessing the constitutionality of a public university's affirmative action program. First, a university ***2203** may not consider race "unless the admissions process can withstand strict scrutiny," *i.e.*, it must show that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary" to accomplish that purpose. 570 U.S., at ——, 133 S.Ct., at 2418. Second, "the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." *Id.*, at ——, 133 S.Ct., at 2419. Third, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school bears the burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice. *Id.*, at ——, 133 S.Ct., at 2420. Pp. 2207 – 2209.

(b) The University's approach to admissions gives rise to an unusual consequence here. The component with the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but the Top Ten Percent Plan. Because petitioner did not challenge the percentage part of the plan, the record is devoid of evidence of its impact on diversity. Remand for further factfinding would serve little purpose, however, because at the time of petitioner's application, the current plan had been in effect only three years and, in any event, the University lacked authority to alter the percentage plan, which was mandated by the Texas Legislature. These circumstances refute any criticism that the University did not make good faith efforts to comply with the law. The University, however, does have a continuing obligation to satisfy the strict scrutiny burden: by periodically reassessing the admission program's constitutionality, and efficacy, in light of the school's experience and the data it has gathered since adopting its admissions plan, and by tailoring its approach to ensure that race plays no greater role than is necessary to meet its compelling interests. Pp. 2208 – 2210.

(c) Drawing all reasonable inferences in her favor, petitioner has not shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected. Pp. 2210 – 2215.

(1) Petitioner claims that the University has not articulated its compelling interest with sufficient clarity because it has failed to state more precisely what level of minority enrollment would constitute a "critical mass." However, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students, but an interest in obtaining "the educational benefits that flow from student body diversity." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2419. Since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them. The record here reveals that the University articulated concrete and precise goals—*e.g.*, ending stereotypes, promoting "cross-racial understanding," preparing students for "an increasingly diverse workforce and society," and cultivating leaders with "legitimacy in the eyes of the citizenry"—that mirror the compelling interest this Court has approved in prior cases. It also gave a "reasoned, principled explanation" for its ***2204** decision, *id.*, at ——, 133 S.Ct., at 2419 in a 39–page proposal written after a year-long study revealed that its race-neutral policies and programs did not meet its goals. Pp. 2210 – 2211.

(2) Petitioner also claims that the University need not consider race because it had already "achieved critical mass" by 2003 under the Top Ten Percent Plan and race-neutral holistic review. The record, however, reveals that the University studied and deliberated for months, concluding that race-neutral programs had not achieved the University's diversity goals, a conclusion supported by significant statistical and anecdotal evidence. Pp. 2211 – 2212.

(3) Petitioner argues further that it was unnecessary to consider race because such consideration had only a minor impact on the number of minority students the school admitted. But the record shows that the consideration of race has had a meaningful, if still limited, effect on freshman class diversity. That race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality. P. 2212.

(4) Finally, petitioner argues that there were numerous other race-neutral means to achieve the University's goals. However, as the record reveals, none of those alternatives was a workable means of attaining the University's educational goals, as of the time of her application. Pp. 2212 – 2215.

758 F.3d 633, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined. KAGAN, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Bert Rein, Washington, DC, for Petitioner.

Gregory G. Garre, Washington, DC, for Respondents.

Donald B. Verrilli, Jr., Solicitor General, for the United States, as amicus curiae, by special leave of the Court, supporting the Respondents.

Paul M. Smith, Elizabeth C. Bullock, Jenner & Block LLP, Washington, DC, Beverly E. Ledbetter, Providence, RI, Kim Taylor, Chicago, IL, Jane E. Booth, New York, NY, James J. Mingle, Ithaca, NY, Robert B. Donin, Hanover, NH, Pamela J. Bernard, Durham, NC, Paul Pineau, Baltimore, MD, Mark C. DiVincenzo, Cambridge, MA, Wendy S. White, Philadelphia, PA, Ramona E. Romero, Princeton, NJ, Debra L. Zumwalt, Stanford, CA, Audrey J. Anderson, Nashville, TN, Alexander E. Dreier, New Haven, CT, for Respondents.

Patricia C. Ohlendorf, Austin, TX, Douglas Laycock, Charlottesville, VA, James C. Ho, Andrew P. LeGrand, Gibson, Dunn & Crutcher LLP, Dallas, TX, Gregory G. Garre, Maureen E. Mahoney, J. Scott Ballenger Nicole Ries Fox, Latham & Watkins LLP, Washington, DC, Lori Alvino McGill, Quinn Emanuel Urquhart & Sullivan LLP, Washington, DC, Katya S. Cronin, Tucker Ellis LLP, Cleveland, OH, for Respondents.

William S. Consovoy, Thomas R. McCarthy, J. Michael Connolly, Consovoy McCarthy Park PLLC, Arlington, VA, Paul M. Terrill, The Terrill Firm, P.C., Austin, TX, Bert W. Rein, Claire J. Evans, Wiley Rein LLP, Washington, DC, for Petitioner.

Opinion

Justice KENNEDY delivered the opinion of the Court.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

I

The University of Texas at Austin (or University) relies upon a complex system of admissions that has undergone significant evolution over the past two decades. Until 1996, the University made its admissions decisions primarily based on a measure called "Academic Index" (or AI), which it calculated by combining an applicant's SAT score and academic performance in high school. In assessing applicants, preference was given to racial minorities.

In 1996, the Court of Appeals for the Fifth Circuit invalidated this admissions system, holding that any consideration of race in college admissions violates the Equal Protection Clause. See *Hopwood v. Texas*, 78 F.3d 932, 934–935, 948.

One year later the University adopted a new admissions policy. Instead of considering race, the University began making admissions decisions based on an applicant's AI and his or her "Personal Achievement Index" (PAI). The PAI was a numerical score based on a holistic review of an application. Included in the number were the applicant's essays, leadership and work experience, extracurricular activities, community service, and other "special characteristics" that might give the admissions committee insight into a student's background. Consistent with *Hopwood*, race was not a consideration in calculating an applicant's AI or PAI.

The Texas Legislature responded to *Hopwood* as well. It enacted H.B. 588, commonly known as the Top Ten Percent Law. Tex. Educ.Code Ann. § 51.803 (West Cum. Supp. 2015). As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.

The University implemented the Top Ten Percent Law in 1998. After first admitting any student who qualified for admission under that law, the University filled the remainder of its incoming freshman class using a combination of an applicant's AI and PAI scores—again, without considering race.

The University used this admissions system until 2003, when this Court decided the companion cases of *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, and *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257. In *Gratz*, this Court struck down the University of Michigan's undergraduate system of admissions, which at the time allocated predetermined points to racial minority candidates. See 539 U.S., at 255, 275–276, 123 S.Ct. 2411. In *Grutter*, however, the Court upheld the University of Michigan Law School's system of holistic review—a system that did not mechanically assign points but rather treated race as a relevant feature within the broader context of a candidate's application. See 539 U.S., at 337, 343–344, 123 S.Ct. 2325. In upholding this nuanced use of race, *Grutter* implicitly overruled *Hopwood*'s categorical prohibition.

In the wake of *Grutter*, the University embarked upon a year-long study seeking to ascertain whether its admissions policy was allowing it to provide "the educational benefits of a diverse student body ... to ***2206** all of the University's undergraduate students." App. 481a–482a (affidavit of N. Bruce Walker ¶ 11 (Walker Aff.)); see also *id.*, at 445a–447a. The University concluded that its admissions policy was not providing these benefits. Supp. App. 24a–25a.

To change its system, the University submitted a proposal to the Board of Regents that requested permission to begin taking race into consideration as one of "the many ways in which [an] academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging educational environment of the University." *Id.*, at 23a. After the board approved the proposal, the University adopted a new admissions policy to implement it. The University has continued to use that admissions policy to this day.

Although the University's new admissions policy was a direct result of *Grutter*, it is not identical to the policy this Court approved in that case. Instead, consistent with the State's legislative directive, the University continues to fill a significant majority of its class through the Top Ten Percent Plan (or Plan). Today, up to 75 percent of the places in the freshman class are filled through

the Plan. As a practical matter, this 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a "Top Ten Percent Plan," a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.

The University did adopt an approach similar to the one in *Grutter* for the remaining 25 percent or so of the incoming class. This portion of the class continues to be admitted based on a combination of their AI and PAI scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1–to–6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."

"Special circumstances" include the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race. See App. 218a–220a, 430a.

Both the essay readers and the full-file readers who assign applicants their PAI undergo extensive training to ensure that they are scoring applicants consistently. Deposition of Brian Breman 9–14, Record in No. 1: 08–CV–00263, (WD Tex.), Doc. 96–3. The Admissions Office also undertakes regular "reliability analyses" to "measure the frequency of readers scoring within one point of each other." App. 474a (affidavit of Gary M. Lavergne ¶ 8); see also *id.*, at 253a (deposition of Kedra Ishop (Ishop Dep.)). Both the intensive training and the reliability analyses aim to ensure that similarly situated applicants are being treated identically regardless of which admissions officer reads the file.

***2207** Once the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point. In setting the cutoff, those admissions officers only know how many applicants received a given PAI/AI score combination. They do not know what factors went into calculating those applicants' scores. The admissions officers who make the final decision as to whether a particular applicant will be admitted make that decision without knowing the applicant's race. Race enters the admissions process, then, at one stage and one stage only—the calculation of the PAS.

Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a "factor of a factor of a factor" in the holistic-review calculus. 645 F.Supp.2d 587, 608 (W.D.Tex.2009). Furthermore, consideration of race is contextual and does not operate as a mechanical plus factor for underrepresented minorities. *Id.*, at 606 ("Plaintiffs cite no evidence to show racial groups other than African–Americans and Hispanics are *excluded* from benefitting from UT's consideration of race in admissions. As the Defendants point out, the consideration of race, within the full context of the entire application, may be beneficial to any UT Austin applicant—including whites and Asian–Americans"); see also Brief for Asian American Legal Defense and Education Fund et al. as *Amici Curiae* 12 (the contention that the University discriminates against Asian–Americans is "entirely unsupported by evidence in the record or empirical data"). There is also no dispute, however, that race, when considered in conjunction with other aspects of an applicant's background, can alter an applicant's PAS score. Thus, race, in this indirect fashion, considered with all of the other factors that make up an applicant's AI and PAI scores, can make a difference to whether an application is accepted or rejected.

Petitioner Abigail Fisher applied for admission to the University's 2008 freshman class. She was not in the top 10 percent of her high school class, so she was evaluated for admission through holistic, full-file review. Petitioner's application was rejected.

Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause. See U.S. Const., Amdt. 14, § 1 (no State shall "deny to any person within its jurisdiction the equal protection of the laws"). The District Court entered summary judgment in the University's favor, and the Court of Appeals affirmed.

This Court granted certiorari and vacated the judgment of the Court of Appeals, *Fisher v. University of Tex. at Austin*, 570 U.S. ——, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*), because it had applied an overly deferential "good-faith" standard in assessing the constitutionality of the University's program. The Court remanded the case for the Court of Appeals to assess the parties' claims under the correct legal standard.

Without further remanding to the District Court, the Court of Appeals again affirmed the entry of summary judgment in the University's favor. 758 F.3d 633 (C.A.5 2014). This Court granted certiorari for a second time, 576 U.S. ——, 135 S.Ct. 2888, 192 L.Ed.2d 923 (2015), and now affirms.

II

Fisher I set forth three controlling principles relevant to assessing the ***2208** constitutionality of a public university's affirmative-action program. First, "because racial characteristics so seldom provide a relevant basis for disparate treatment," *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2418. Strict scrutiny requires the university to demonstrate with clarity that its " 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.' " *Ibid.*

Second, *Fisher I* confirmed that "the decision to pursue 'the educational benefits that flow from student body diversity' ... is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." *Id.*, at ——, 133 S.Ct., at 2419. A university cannot impose a fixed quota or otherwise "define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' " *Ibid.* Once, however, a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals." *Ibid.* (internal quotation marks and citation omitted).

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. *Id.*, at ——, 133 S.Ct., at 2419–2420. A university, *Fisher I* explained, bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity "about as well and at tolerable administrative expense." *Id.*, at ——, 133 S.Ct., at 2420 (internal quotation marks omitted). Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" or "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups," *Grutter*, 539 U.S., at 339, 123 S.Ct. 2325 it does impose "on the university the ultimate burden of demonstrating" that "race-neutral alternatives" that are both "available" and "workable" "do not suffice." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2420.

Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions program at issue in this case. The Court held only that the District Court and the Court of Appeals had "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." *Id.*, at ——, 133 S.Ct., at 2421 The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made "a showing that its plan is narrowly tailored to achieve" the educational benefits that flow from diversity. *Id.*, at ——, 133 S.Ct., at 2421. On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by *Fisher I*. See 758 F.3d, at 659–660. Judge Garza dissented.

III

The University's program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University's admissions policy that had the largest impact on petitioner's ***2209** chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*.

Despite the Top Ten Percent Plan's outsized effect on petitioner's chances of admission, she has not challenged it. For that reason, throughout this litigation, the Top Ten Percent Plan has been taken, somewhat artificially, as a given premise.

Petitioner's acceptance of the Top Ten Percent Plan complicates this Court's review. In particular, it has led to a record that is almost devoid of information about the students who secured admission to the University through the Plan. The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.

In an ordinary case, this evidentiary gap perhaps could be filled by a remand to the district court for further factfinding. When petitioner's application was rejected, however, the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years. While studies undertaken over the eight years since then may be of significant value in determining the constitutionality of the University's current admissions policy, that evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008. If the Court were to remand, therefore, further factfinding would be limited to a narrow 3–year sample, review of which might yield little insight.

Furthermore, as discussed above, the University lacks any authority to alter the role of the Top Ten Percent Plan in its admissions process. The Plan was mandated by the Texas Legislature in the wake of *Hopwood*, so the University, like petitioner in this litigation, has likely taken the Plan as a given since its implementation in 1998. If the University had no reason to think that it could deviate from the Top Ten Percent Plan, it similarly had no reason to keep extensive data on the Plan or the students admitted under it—particularly in the years before *Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review.

Under the circumstances of this case, then, a remand would do nothing more than prolong a suit that has already persisted for eight years and cost the parties on both sides significant resources. Petitioner long since has graduated from another college, and the University's policy—and the data on which it first was based—may have evolved or changed in material ways.

The fact that this case has been litigated on a somewhat artificial basis, furthermore, may limit its value for prospective guidance. The Texas Legislature, in enacting the Top Ten Percent Plan, cannot much be criticized, for it was responding to *Hopwood*, which at the time was binding law in the State of Texas. That legislative response, in turn, circumscribed the University's discretion in crafting its admissions policy. These circumstances refute any criticism that the University did not make good-faith efforts to comply with the law.

That does not diminish, however, the University's continuing obligation to ***2210** satisfy the burden of strict scrutiny in light of changing circumstances. The University engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. See Supp. App. 32a; App. 448a. Going forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.

As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values. Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest. The University's examination of the data it has acquired in the years since petitioner's application, for these reasons, must proceed with full respect for the constraints imposed by the Equal Protection Clause. The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come. Here, however, the Court is necessarily limited to the narrow question before it: whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.

IV

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal.

As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2419 (internal quotation marks omitted); see also *Grutter*, 539 U.S., at 328, 123 S.Ct. 2325. As this Court has said, enrolling a diverse student body "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races." *Id.*, at 330, 123 S.Ct. 2325 (internal quotation marks and alteration omitted). Equally important, "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society." *Ibid.* (internal quotation marks omitted).

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

*2211 On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 "Proposal to Consider Race and Ethnicity in Admissions," the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the " 'promot[ion of] cross-racial understanding,' " the preparation of a student body " 'for an increasingly diverse workforce and society,' " and the " 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.' " Supp. App. 1a; see also *id.*, at 69a; App. 314a–315a (deposition of N. Bruce Walker (Walker Dep.)), 478a–479a (Walker Aff. ¶ 4) (setting forth the same goals). Later in the proposal, the University explains that it strives to provide an "academic environment" that offers a "robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." Supp. App. 23a. All of these objectives, as a general matter, mirror the "compelling interest" this Court has approved in its prior cases.

The University has provided in addition a "reasoned, principled explanation" for its decision to pursue these goals. *Fisher I*, *supra*, at ——, 133 S.Ct., at 2419. The University's 39–page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society." Supp. App. 25a; see also App. 481a–482a (Walker Aff. ¶¶ 8–12) (describing the "thoughtful review" the University undertook when it faced the "important decision ... whether or not to use race in its admissions process"). Further support for the University's conclusion can be found in the depositions and affidavits from various admissions officers, all of whom articulate the same, consistent "reasoned, principled explanation." See, *e.g.*, *id.*, at 253a (Ishop Dep.), 314a–318a, 359a (Walker Dep.), 415a–416a (Defendant's Statement of Facts), 478a–479a, 481a–482a (Walker Aff. ¶¶ 4, 10–13). Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record.

Second, petitioner argues that the University has no need to consider race because it had already "achieved critical mass" by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Brief for Petitioner 46. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score. Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," App. 446a, and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a. At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential ***2212** to this case at best and none of which the University has had a full opportunity to respond to. See, *e.g.*, *post*, at 2240 (opinion of ALITO, J.) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").

The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African–American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African–American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian–American students tell a similar story. See Supp. App. 43a. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives.

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. See, *e.g.*, App. 317a–318a.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African–American students enrolled in them, and 27 percent had only one African–American student. Supp. App. 140a. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African–American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996. *Id.*, at 74a, 140a. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a " 'minimal impact' in advancing the [University's] compelling interest." Brief for Petitioner 46; see also Tr. of Oral Arg. 23:10–12; 24:13–25:2, 25:24–26:3. Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African–American. Supp. App. 157a. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African–American. *Ibid.* Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. Brief for Petitioner 47. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests ***2213** that the University could intensify its outreach efforts to African–American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Supp. App. 29a–32a; App. 450a–452a (citing affidavit of Michael Orr ¶¶ 4–20). Perhaps more significantly, in the wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application.

Petitioner also suggests altering the weight given to academic and socioeconomic factors in the University's admissions calculus. This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors. And it further ignores this Court's precedent making clear that the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. *Grutter*, 539 U.S., at 339, 123 S.Ct. 2325.

Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are "adopted with racially segregated neighborhoods and schools front and center stage." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2433 (GINSBURG, J., dissenting). "It is race consciousness, not blindness to race, that drives such plans." *Ibid.* Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral.

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

These are but examples of the general problem. Class rank is a single metric, and like any single metric, it will capture certain types of people and miss others. This does not imply that students admitted through holistic review are necessarily more capable or more desirable than those admitted through the Top Ten Percent Plan. It merely reflects the fact that privileging one characteristic above all others does not lead to a diverse student body. Indeed, to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined ***2214** it. See *Grutter, supra*, at 340, 123 S.Ct. 2325 (explaining that percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university"); 758 F.3d, at 653 (pointing out that the Top Ten Percent Law leaves out students "who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of [the University's] educational experience" and "leaves a gap in an admissions process seeking to create the multi-dimensional diversity that [*Regents of Univ. of Cal. v.*

Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978),] envisions"). At its center, the Top Ten Percent Plan is a blunt instrument that may well compromise the University's own definition of the diversity it seeks.

In addition to these fundamental problems, an admissions policy that relies exclusively on class rank creates perverse incentives for applicants. Percentage plans "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."*Gratz*, 539 U.S., at 304, n. 10, 123 S.Ct. 2411 (GINSBURG, J., dissenting).

For all these reasons, although it may be true that the Top Ten Percent Plan in some instances may provide a path out of poverty for those who excel at schools lacking in resources, the Plan cannot serve as the admissions solution that petitioner suggests. Wherever the balance between percentage plans and holistic review should rest, an effective admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.

In short, none of petitioner's suggested alternatives—nor other proposals considered or discussed in the course of this litigation —have been shown to be "available" and "workable" means through which the University could have met its educational goals, as it understood and defined them in 2008. *Fisher I, supra*, at ——, 133 S.Ct., at 2420. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored.

* * *

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as "laboratories for experimentation." *United States v. Lopez*, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify ***2215** the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice THOMAS, dissenting.

I join Justice ALITO's dissent. As Justice ALITO explains, the Court's decision today is irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents.

I write separately to reaffirm that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." *Fisher v. University of Tex. at Austin*, 570 U.S. ——, ——, 133 S.Ct. 2411, 2422, 186 L.Ed.2d 474 (2013) (THOMAS, J., concurring). "The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Id.*, at ——, 133 S.Ct., at 2422 (internal quotation marks omitted). That constitutional imperative does not change in the face of a "faddish theor[y]" that racial discrimination may produce "educational benefits." *Id.*, at ——, ——, 133 S.Ct., at 2421, 2428. The Court was wrong to hold otherwise in *Grutter v. Bollinger*, 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). I would overrule *Grutter* and reverse the Fifth Circuit's judgment.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.
Something strange has happened since our prior decision in this case. See *Fisher v. University of Tex. at Austin*, 570 U.S. ——, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (*Fisher I*). In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT's judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. ***2216** When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. See Supp. App. 1a, 24a–25a, 39a; App. 316a. It pointed to a study showing that African–American, Hispanic, and Asian–American students were underrepresented in many classes. See Supp. App. 26a. But UT has never shown that its race-conscious plan actually ameliorates this situation. The University presents no evidence that its admissions officers, in administering the "holistic" component of its plan, make any effort to determine whether an African–American, Hispanic, or Asian–American student is likely to enroll in classes in which minority students are underrepresented. And although UT's records should permit it to determine without much difficulty whether holistic admittees are any more likely than students admitted through the Top Ten Percent Law, Tex. Educ.Code Ann. § 51.803 (West Cum. Supp. 2015), to enroll in the classes lacking racial or ethnic diversity, UT either has not crunched those numbers or has not revealed what they show. Nor has UT explained why the underrepresentation of Asian–American students in many classes justifies its plan, which discriminates *against* those students.

At times, UT has claimed that its plan is needed to achieve a "critical mass" of African–American and Hispanic students, but it has never explained what this term means. According to UT, a critical mass is neither some absolute number of African–American or Hispanic students nor the percentage of African–Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. See App. 314a–315a. This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in *Fisher I*.

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits *the wrong kind* of African–American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African–American or Hispanic. As UT put it in its brief in *Fisher I*, the race-based component of

its admissions plan is needed to admit "[t]he African–American or Hispanic child of successful professionals in Dallas." Brief for Respondents, O.T. 2012, No. 11–345, p. 34.

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. See Brief for Respondents 2 ("Petitioner's argument that UT's interest is favoring 'affluent' minorities is a fabrication"); see also *id.*, at 15. But it did, and the argument turns affirmative action on its head. Affirmative-action programs were created to help *disadvantaged* students.

Although UT now disowns the argument that the Top Ten Percent Plan results in the admission of the wrong kind of African–American and Hispanic students, the Fifth Circuit majority bought a version of that claim. As the panel majority put it, the Top Ten African–American and Hispanic admittees cannot match the holistic African–American and Hispanic admittees when it comes to "records of personal achievement," a "variety of perspectives" and "life experiences," and "unique skills." 758 F.3d 633, 653 (2014). All in all, according to the panel majority, the Top Ten Percent students cannot "enrich the diversity of the student body" in the same way as the holistic admittees. *Id.*, at 654. As Judge Garza put it in dissent, the panel majority concluded that the Top Ten Percent ***2217** admittees are "somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." *Id.*, at 669–670 (Garza, J., dissenting).

The Fifth Circuit reached this conclusion with little direct evidence regarding the characteristics of the Top Ten Percent and holistic admittees. Instead, the assumption behind the Fifth Circuit's reasoning is that most of the African–American and Hispanic students admitted under the race-neutral component of UT's plan were able to rank in the top decile of their high school classes only because they did not have to compete against white and Asian–American students. This insulting stereotype is not supported by the record. African–American and Hispanic students admitted under the Top Ten Percent Plan receive higher college grades than the African–American and Hispanic students admitted under the race-conscious program. See Supp. App. 164a–165a.

It should not have been necessary for us to grant review a second time in this case, and I have no greater desire than the majority to see the case drag on. But that need not happen. When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be *its burden* to show that the plan was narrowly tailored to serve compelling interests. UT has failed to make that showing. By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong.

I

Over the past 20 years, UT has frequently modified its admissions policies, and it has generally employed race and ethnicity in the most aggressive manner permitted under controlling precedent.

Before 1997, race was considered directly as part of the general admissions process, and it was frequently a controlling factor. Admissions were based on two criteria: (1) the applicant's Academic Index (AI), which was computed from standardized test scores and high school class rank, and (2) the applicant's race. In 1996, the last year this race-conscious system was in place, 4.1% of enrolled freshmen were African–American, 14.7% were Asian–American, and 14.5% were Hispanic. Supp. App. 43a.

The Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (1996), prohibited UT from using race in admissions. In response to *Hopwood*, beginning with the 1997 admissions cycle, UT instituted a "holistic review" process in which it considered an applicant's AI as well as a Personal Achievement Index (PAI) that was intended, among other things, to increase minority

enrollment. The race-neutral PAI was a composite of scores from two essays and a personal achievement score, which in turn was based on a holistic review of an applicant's leadership qualities, extracurricular activities, honors and awards, work experience, community service, and special circumstances. Special consideration was given to applicants from poor families, applicants from homes in which a language other than English was customarily spoken, and applicants from single-parent households. Because this race-neutral plan gave a preference to disadvantaged students, it had the effect of "disproportionately" benefiting minority candidates. 645 F.Supp.2d 587, 592 (W.D.Tex.2009).

***2218** The Texas Legislature also responded to *Hopwood*. In 1997, it enacted the Top Ten Percent Plan, which mandated that UT admit all Texas seniors who rank in the top 10% of their high school classes. This facially race-neutral law served to equalize competition between students who live in relatively affluent areas with superior schools and students in poorer areas served by schools offering fewer opportunities for academic excellence. And by benefiting the students in the latter group, this plan, like the race-neutral holistic plan already adopted by UT, tended to benefit African–American and Hispanic students, who are often trapped in inferior public schools. 758 F.3d, at 650–653.

Starting in 1998, when the Top Ten Percent Plan took effect, UT's holistic, race-neutral AI/PAI system continued to be used to fill the seats in the entering class that were not taken by Top Ten Percent students. The AI/PAI system was also used to determine program placement for all incoming students, including the Top Ten Percent students.

"The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2416. In 2000, UT announced that its "enrollment levels for African American and Hispanic freshmen have returned to those of 1996, the year before the *Hopwood* decision prohibited the consideration of race in admissions policies." App. 393a; see also Supp. App. 23a–24a (pre-*Hopwood* diversity levels were "restored" in 1999); App. 392a–393a ("The 'Top 10 Percent Law' is Working for Texas" and "has enabled us to diversify enrollment at UT Austin with talented students who succeed"). And in 2003, UT proclaimed that it had "effectively compensated for the loss of affirmative action." *Id.*, at 396a; see also *id.*, at 398a ("Diversity efforts at The University of Texas at Austin have brought a higher number of freshman minority students—African Americans, Hispanics and Asian–Americans—to the campus than were enrolled in 1996, the year a court ruling ended the use of affirmative action in the university's enrollment process"). By 2004—the last year under the holistic, race-neutral AI/PAI system—UT's entering class was 4.5% African–American, 17.9% Asian–American, and 16.9% Hispanic. Supp. App. 156a. The 2004 entering class thus had a higher percentage of African–Americans, Asian–Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.

Notwithstanding these lauded results, UT leapt at the opportunity to reinsert race into the process. On June 23, 2003, this Court decided *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), which upheld the University of Michigan Law School's race-conscious admissions system. In *Grutter*, the Court warned that a university contemplating the consideration of race as part of its admissions process must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.*, at 339, 123 S.Ct. 2325. Nevertheless, *on the very day Grutter was handed down*, UT's president announced that "[t]he University of Texas at Austin *will* modify its admissions procedures" in light of *Grutter*, including by "implementing procedures at the undergraduate level that combine the benefits of the Top 10 Percent Law with affirmative action programs." App. 406a–407a (emphasis added).[1] UT purports to ***2219** have later engaged in "almost a year of deliberations," *id.*, at 482a, but there is no evidence that the reintroduction of race into the admissions process was anything other than a foregone conclusion following the president's announcement.

"The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions" (Proposal). *Fisher I*, *supra*, at ——, 133 S.Ct., at 2416. The Proposal stated that UT needed race-conscious admissions because it had not yet achieved a "critical mass of racial diversity." Supp. App. 25a. In support of this claim, UT cited two pieces of evidence. First, it noted that there were "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population." *Id.*, at 24a. Second, the Proposal "relied in substantial part," *Fisher I*, *supra*, at ——, 133 S.Ct., at 2416, on a study of a subset of

undergraduate classes containing at least five students, see Supp. App. 26a. The study showed that among select classes with five or more students, 52% had no African–Americans, 16% had no Asian–Americans, and 12% had no Hispanics. *Ibid.* Moreover, the study showed, only 21% of these classes had two or more African–Americans, 67% had two or more Asian–Americans, and 70% had two or more Hispanics. See *ibid.* Based on this study, the Proposal concluded that UT "has not reached a critical mass at the classroom level." *Id.*, at 24a. The Proposal did not analyze the backgrounds, life experiences, leadership qualities, awards, extracurricular activities, community service, personal attributes, or other characteristics of the minority students who were already being admitted to UT under the holistic, race-neutral process.

"To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2416. "The University asks students to classify themselves from among five predefined racial categories on the application." *Ibid.* "Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor." *Ibid.* UT decided to use racial preferences to benefit African–American and Hispanic students because it considers those groups "underrepresented minorities." Supp. App. 25a; see also App. 445a–446a (defining "underrepresented minorities" as "Hispanic[s] and African Americans"). Even though UT's classroom study showed that more classes lacked Asian–American students than lacked Hispanic students, Supp. App. 26a, UT deemed Asian–Americans "*overrepresented*" based on state demographics, ***2220** 645 F.Supp.2d, at 606; see also *ibid.* ("It is undisputed that UT considers African–Americans and Hispanics to be underrepresented but does not consider Asian–Americans to be underrepresented").

Although UT claims that race is but a "factor of a factor of a factor of a factor," *id.*, at 608, UT acknowledges that "race is the only one of [its] holistic factors that appears on the cover of every application," Tr. of Oral Arg. 54 (Oct. 10, 2012). "Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation." 645 F.Supp.2d, at 597; see also *id.*, at 598 ("[A] candidate's race is known throughout the application process"). Consideration of race therefore pervades every aspect of UT's admissions process. See App. 219a ("We are certainly aware of the applicant's race. It's on the front page of the application that's being read [and] is used in context with everything else that's part of the applicant's file"). This is by design, as UT considers its use of racial classifications to be a benign form of "social engineering." Powers, Why Schools Still Need Affirmative Action, National L. J., Aug. 4, 2014, p. 22 (editorial by Bill Powers, President of UT from 2006–2015) ("Opponents accuse defenders of race-conscious admissions of being in favor of 'social engineering,' to which I believe we should reply, 'Guilty as charged' ").

Notwithstanding the omnipresence of racial classifications, UT claims that it keeps no record of how those classifications affect its process. "The university doesn't keep any statistics on how many students are affected by the consideration of race in admissions decisions," and it "does not know how many minority students are affected in a positive manner by the consideration of race." App. 337a. According to UT, it has no way of making these determinations. See *id.*, at 320a–322a. UT says that it does not tell its admissions officers how much weight to give to race. See Deposition of Gary Lavergne 43–45, Record in No. 1:08–CV–00263 (WD Tex.), Doc. 94–9 (Lavergne Deposition). And because the influence of race is always "contextual," UT claims, it cannot provide even a single example of an instance in which race impacted a student's odds of admission. See App. 220a ("Q. Could you give me an example where race would have some impact on an applicant's personal achievement score? A. To be honest, not really.... [I]t's impossible to say—to give you an example of a particular student because it's all contextual"). Accordingly, UT asserts that it has no idea which students were admitted as a result of its race-conscious system and which students would have been admitted under a race-neutral process. UT thus makes no effort to assess how the individual characteristics of students admitted as the result of racial preferences differ (or do not differ) from those of students who would have been admitted without them.

II

UT's race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is

narrowly tailored to achieve that or any other particular interest. By accepting UT's rationales as sufficient to meet its burden, the majority licenses UT's perverse assumptions about different groups of minority students—the precise assumptions strict scrutiny is supposed to stamp out.

A

"The moral imperative of racial neutrality is the driving force of the Equal Protection *2221 Clause." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (KENNEDY, J., concurring in part and concurring in judgment). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (internal quotation marks omitted). "Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912, 115 S.Ct. 2475 (internal quotation marks omitted). Given our constitutional commitment to "the doctrine of equality," " '[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people.' " *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)).

"[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications ... be subjected to the most rigid scrutiny." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2419 (internal quotation marks and citations omitted). "[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.' " *Ibid.*; see also *Grutter*, 539 U.S., at 388, 123 S.Ct. 2325 (KENNEDY, J., dissenting) (" 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination' "). Under strict scrutiny, the use of race must be "necessary to further a compelling governmental interest," and the means employed must be " 'specifically and narrowly' " tailored to accomplish the compelling interest. *Id.*, at 327, 333, 123 S.Ct. 2325 (O'Connor, J., for the Court).

The "higher education dynamic does not change" this standard. *Fisher I, supra*, at ——, 133 S.Ct., at 2421. "Racial discrimination [is] invidious in all contexts," *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), and " '[t]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable,' " *Fisher I, supra*, at ——, 133 S.Ct., at 2421.

Nor does the standard of review " 'depen[d] on the race of those burdened or benefited by a particular classification.' " *Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)); see also *Miller, supra*, at 904, 115 S.Ct. 2475 ("This rule obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification' " (quoting *Croson, supra*, at 494, 109 S.Ct. 706 (plurality opinion of O'Connor, J.))). "Thus, 'any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.' " *Gratz, supra*, at 270, 123 S.Ct. 2411 (quoting *Adarand, supra*, at 224, 115 S.Ct. 2097).

In short, in "all contexts," *Edmonson, supra*, at 619, 111 S.Ct. 2077 racial classifications are permitted only "as a last resort," when all else has failed, *Croson, supra*, at 519, 109 S.Ct. 706 (opinion of *2222 KENNEDY, J.). "Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2419. To meet this burden, the government must "demonstrate *with clarity* that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of its purpose.' " *Id.*, at ——, 133 S.Ct., at 2418 (emphasis added).

B

Here, UT has failed to define its interest in using racial preferences with clarity. As a result, the narrow tailoring inquiry is impossible, and UT cannot satisfy strict scrutiny.

When UT adopted its challenged policy, it characterized its compelling interest as obtaining a " 'critical mass' " of underrepresented minorities. *Id.*, at ——, 133 S.Ct., at 2415. The 2004 Proposal claimed that "[t]he use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity." Supp. App. 25a; see *Fisher v. University of Tex. at Austin*, 631 F.3d 213, 226 (C.A.5 2011) ("[T]he *2004 Proposal* explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity"). But to this day, UT has not explained in anything other than the vaguest terms what it means by "critical mass." In fact, UT argues that it need not identify *any* interest more specific than "securing the educational benefits of diversity." Brief for Respondents 15.

UT has insisted that critical mass is not an absolute number. See Tr. of Oral Arg. 39 (Oct. 10, 2012) (declaring that UT is not working toward any particular number of African–American or Hispanic students); App. 315a (confirming that UT has not defined critical mass as a number and has not projected when it will attain critical mass). Instead, UT prefers a deliberately malleable "we'll know it when we see it" notion of critical mass. It defines "critical mass" as "an adequate representation of minority students so that the ... educational benefits that can be derived from diversity can actually happen," and it declares that it "will ... know [that] it has reached critical mass" when it "see[s] the educational benefits happening." *Id.*, at 314a–315a. In other words: Trust us.

This intentionally imprecise interest is designed to insulate UT's program from meaningful judicial review. As Judge Garza explained:

> "[T]o meet its narrow tailoring burden, the University must explain its goal to us in some meaningful way. We cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends. We cannot tell whether the admissions program closely 'fits' the University's goal when it fails to objectively articulate its goal. Nor can we determine whether considering race is necessary for the University to achieve 'critical mass,' or whether there are effective race-neutral alternatives, when it has not described what 'critical mass' requires."758 F.3d, at 667 (dissenting opinion).

Indeed, without knowing in reasonably specific terms what critical mass is or how it can be measured, a reviewing court cannot conduct the requisite "careful judicial inquiry" into whether the use of race was " 'necessary.' " *Fisher I, supra*, at ——, 133 S.Ct., 2420.

To be sure, I agree with the majority that our precedents do not require UT to pinpoint "an interest in enrolling a certain number of minority students." *Ante*, at 2210. But in order for us to assess whether ***2223** UT's program is narrowly tailored, the University must identify *some sort of concrete interest*. "Classifying and assigning" students according to race "requires more than ... an amorphous end to justify it." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 735, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Because UT has failed to explain "with clarity," *Fisher I, supra*, at ——, 133 S.Ct., at 2418, why it needs a race-conscious policy and how it will know when its goals have been met, the narrow tailoring analysis cannot be meaningfully conducted. UT therefore cannot satisfy strict scrutiny.

The majority acknowledges that "asserting an interest in the educational benefits of diversity writ large is insufficient," and that "[a] university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Ante*, at 2211. According to the majority, however, UT has articulated the following "concrete and precise goals": "the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry." *Ibid.* (internal quotation marks omitted).

These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, see *ante,* at 2210 – 2211 (citing *only* self-serving statements from UT officials), then the narrow tailoring inquiry is meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review.

By accepting these amorphous goals as sufficient for UT to carry its burden, the majority violates decades of precedent rejecting blind deference to government officials defending " 'inherently suspect' " classifications. *Miller,* 515 U.S., at 904, 115 S.Ct. 2475 (citing *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 291, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.)); see also, *e.g.,Miller, supra,* at 922, 115 S.Ct. 2475 ("Our presumptive skepticism of all racial classifications ... prohibits us ... from accepting on its face the Justice Department's conclusion" (citation omitted)); *Croson,* 488 U.S., at 500, 109 S.Ct. 706 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight"); *id.,* at 501, 109 S.Ct. 706 ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). Most troublingly, the majority's uncritical deference to UT's self-serving claims blatantly contradicts our decision in the prior iteration of this very case, in which we faulted the Fifth Circuit for improperly "deferring to the University's good faith in its use of racial classifications." *Fisher I,* 570 U.S., at ——, 133 S.Ct., at 2421. As we emphasized just three years ago, our precedent "ma[kes] clear that it is for the courts, not for university administrators, to ensure that" an admissions process is narrowly tailored. *Id.,* at ——, 133 S.Ct., at 2420.

A court cannot ensure that an admissions process is narrowly tailored if it cannot pin down the goals that the process is designed to achieve. UT's vague policy ***2224** goals are "so broad and imprecise that they cannot withstand strict scrutiny." *Parents Involved, supra,* at 785, 127 S.Ct. 2738 (KENNEDY, J., concurring in part and concurring in judgment).

C

Although UT's primary argument is that it need not point to any interest more specific than "the educational benefits of diversity," Brief for Respondents 15, it has—at various points in this litigation—identified four more specific goals: demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation. Neither UT nor the majority has demonstrated that any of these four goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.

1

First, both UT and the majority cite demographic data as evidence that African–American and Hispanic students are "underrepresented" at UT and that racial preferences are necessary to compensate for this underrepresentation. See, *e.g.,* Supp. App. 24a; *ante,* at 2211 – 2212. But neither UT nor the majority is clear about the relationship between Texas demographics and UT's interest in obtaining a critical mass.

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African–Americans and Hispanics in Texas, where African–Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African–American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)? See United States Census Bureau, QuickFacts, online at https://www.census.gov/quickfacts/table/PST045215/35,48 (all Internet materials as last visited June 21, 2016).

UT's answer to this question has veered back and forth. At oral argument in *Fisher I*, UT's lawyer indicated that critical mass "could" vary "from group to group" and from "state to state." See Tr. of Oral Arg. 40 (Oct. 10, 2012). And UT initially justified its race-conscious plan at least in part on the ground that "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission." Supp. App. 24a; see also *id.*, at 16a ("[A] critical mass in Texas is necessarily larger than a critical mass in Michigan," because "[a] majority of the college-age population in Texas is African American or Hispanic"); *Fisher*, 631 F.3d, at 225–226, 236 (concluding that UT's reliance on Texas demographics reflects "measured attention to the community it serves"); Brief for Respondents in No. 11–345, at 41 (noting that critical mass may hinge, in part, on "the communities that universities serve"). UT's extensive reliance on state demographics is also revealed by its substantial focus on increasing the representation of Hispanics, but not Asian–Americans, see, *e.g.*, 645 F.Supp.2d, at 606; Supp. App. 25a; App. 445a–446a, because Hispanics, but not Asian–Americans, are underrepresented at UT when compared to the demographics of the State. [2]

***2225** On the other hand, UT's counsel asserted that the critical mass for the University is "not at all" dependent on the demographics of Texas, and that UT's "concept [of] critical mass isn't tied to demographic[s]." Tr. of Oral Arg. 40, 49 (Oct. 10, 2012). And UT's *Fisher I* brief expressly agreed that "a university cannot look to racial demographics—and then work backward in its admissions process to meet a target tied to such demographics." Brief for Respondents in No. 11–345, at 31; see also Brief for Respondents 26–27 (disclaiming any interest in demographic parity).

To the extent that UT is pursuing parity with Texas demographics, that is nothing more than "outright racial balancing," which this Court has time and again held "patently unconstitutional." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2419; see *Grutter*, 539 U.S., at 330, 123 S.Ct. 2325 ("[O]utright racial balancing ... is patently unconstitutional"); *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) ("Racial balance is not to be achieved for its own sake"); *Croson*, 488 U.S., at 507, 109 S.Ct. 706 (rejecting goal of "outright racial balancing"); *Bakke*, 438 U.S., at 307, 98 S.Ct. 2733 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid"). An interest "linked to nothing other than proportional representation of various races ... would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 614, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting). And as we held in *Fisher I*, " '[r]acial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." ' " 570 U.S., at ——, 133 S.Ct., at 2419 (quoting *Parents Involved*, 551 U.S., at 732, 127 S.Ct. 2738).

The record here demonstrates the pitfalls inherent in racial balancing. Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of minority students on its campus and in its classrooms. UT's 2004 Proposal illustrates this approach by repeatedly citing numerical assessments of the racial makeup of the student body and various classes as the justification for adopting a race-conscious plan. See, *e.g.*, Supp. App. 24a–26a, 30a. Instead of focusing on the benefits of diversity, UT seems to have resorted to a simple racial census.

The majority, for its part, claims that "[a]lthough demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives." *Ante*, at 2212. But even if UT merely "view[s] the demographic disparity as cause for concern," Brief for United States as *Amicus Curiae* 29, and is seeking only to reduce—rather than eliminate—the disparity, that undefined goal cannot be properly subjected to strict scrutiny. In that case, there is simply no way for a court to know what specific demographic interest UT is pursuing, why a race-neutral alternative could not achieve that interest, and when that demographic goal would be satisfied. If a demographic discrepancy can serve as "a gauge" that justifies the use of racial discrimination, ***2226** *ante*, at 2211 – 2212, then racial discrimination can be justified on that basis until demographic parity is reached. There is no logical stopping point short of patently unconstitutional racial balancing. Demographic disparities thus cannot be used to satisfy strict scrutiny here. See *Croson*, *supra*, at 498, 109 S.Ct. 706 (rejecting a municipality's assertion that its racial set-aside program was justified in light of past discrimination because that assertion had " 'no logical stopping point' " and could continue until the percentage of government contracts awarded to minorities "mirrored the percentage of minorities in the population as a whole"); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267,

275, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion) (rejecting the government's asserted interest because it had "no logical stopping point").

2

The other major explanation UT offered in the Proposal was its desire to promote classroom diversity. The Proposal stressed that UT "has not reached a critical mass at the *classroom level*." Supp. App. 24a (emphasis added); see also *id.*, at 1a, 25a, 39a; App. 316a. In support of this proposition, UT relied on a study of select classes containing five or more students. As noted above, the study indicated that 52% of these classes had no African–Americans, 16% had no Asian–Americans, and 12% had no Hispanics. Supp. App. 26a. The study further suggested that only 21% of these classes had two or more African–Americans, 67% had two or more Asian–Americans, and 70% had two or more Hispanics. See *ibid.* Based on this study, UT concluded that it had a "compelling educational interest" in employing racial preferences to ensure that it did not "have large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity." *Id.*, at 25a.

UT now equivocates, disclaiming any discrete interest in classroom diversity. See Brief for Respondents 26–27. Instead, UT has taken the position that the lack of classroom diversity was merely a "red flag that UT had not yet fully realized" "the constitutionally permissible educational benefits of diversity." Brief for Respondents in No. 11–345, at 43. But UT has failed to identify the level of classroom diversity it deems sufficient, again making it impossible to apply strict scrutiny.[3] A reviewing court cannot determine whether UT's race-conscious program was necessary to remove the so-called "red flag" without understanding the precise nature of that goal or knowing when the "red flag" will be considered to have disappeared.

Putting aside UT's effective abandonment of its interest in classroom diversity, the evidence cited in support of that interest is woefully insufficient to show that UT's race-conscious plan was necessary to achieve the educational benefits of a diverse student body. As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences. For instance, because UT knows which students were admitted through the Top Ten Percent Plan and which were not, as well as which students enrolled in which classes, it would seem relatively easy to determine whether Top Ten Percent students were more or less likely than holistic admittees to enroll in the types of classes where diversity was lacking. But UT never bothered to figure this out. See *ante*, at 2209 *2227 (acknowledging that UT submitted no evidence regarding "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"). Nor is there any indication that UT instructed admissions officers to search for African–American and Hispanic applicants who would fill particular gaps at the classroom level. Given UT's failure to present such evidence, it has not demonstrated that its race-conscious policy would promote classroom diversity any better than race-neutral options, such as expanding the Top Ten Percent Plan or using race-neutral holistic admissions.

Moreover, if UT is truly seeking to expose its students to a diversity of ideas and perspectives, its policy is poorly tailored to serve that end. UT's own study—which the majority touts as the best "nuanced quantitative data" supporting UT's position, *ante*, at 2212—demonstrated that classroom diversity was more lacking for students classified as Asian–American than for those classified as Hispanic. Supp. App. 26a. But the UT plan discriminates *against* Asian–American students.[4] UT is apparently unconcerned that Asian–Americans "may be made to feel isolated or may be seen as ... 'spokesperson[s]' of their race or ethnicity." *Id.*, at 69a; see *id.*, at 25a. And unless the University is engaged in unconstitutional racial balancing based on Texas demographics (where Hispanics outnumber Asian–Americans), see Part II–C–1, *supra*, it seemingly views the classroom contributions of Asian–American students as less valuable than those of Hispanic students. In UT's view, apparently, "Asian Americans are not worth as much as Hispanics in promoting 'cross-racial understanding,' breaking down 'racial stereotypes,' and enabling students to 'better understand persons of different races.' " Brief for Asian American Legal Foundation et al. as *Amici Curiae* 11 (representing 117 Asian–American organizations). The majority opinion effectively endorses this view, crediting UT's reliance on the classroom study as proof that the University assessed its need for racial discrimination (including racial discrimination that undeniably harms Asian–Americans) "with care." *Ante*, at 2212.

While both the majority and the Fifth Circuit rely on UT's classroom study, see *ante,* at 2223; 758 F.3d, at 658–659, they completely ignore its finding that Hispanics are better represented than Asian–Americans in UT classrooms. In fact, they act almost as if Asian–American students do not exist. See *ante,* at 2211 – 2212 (mentioning Asian–Americans only a single time outside of parentheticals, and not in the context of the classroom study); 758 F.3d, at 658 (mentioning Asian–Americans only a single time).[5] Only the District ***2228** Court acknowledged the impact of UT's policy on Asian–American students. But it brushed aside this impact, concluding—astoundingly—that UT can pick and choose which racial and ethnic groups it would like to favor. According to the District Court, "nothing in *Grutter* requires a university to give equal preference to every minority group," and UT is allowed "to exercise its discretion in determining which minority groups should benefit from the consideration of race." 645 F.Supp.2d, at 606.

This reasoning, which the majority implicitly accepts by blessing UT's reliance on the classroom study, places the Court on the "tortuous" path of "decid[ing] which races to favor." *Metro Broadcasting,* 497 U.S., at 632, 110 S.Ct. 2997 (KENNEDY, J., dissenting). And the Court's willingness to allow this "discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education." Brief for Asian American Legal Foundation et al. as *Amici Curiae* 6; see also, *e.g., id.,* at 16–17 (discussing the placement of Chinese–Americans in " 'separate but equal' " public schools); *Gong Lum v. Rice,* 275 U.S. 78, 81–82, 48 S.Ct. 91, 72 L.Ed. 172 (1927) (holding that a 9–year–old Chinese–American girl could be denied entry to a "white" school because she was "a member of the Mongolian or yellow race"). In sum, "[w]hile the Court repeatedly refers to the preferences as favoring 'minorities,' ... it must be emphasized that the discriminatory policies upheld today operate to exclude" Asian–American students, who "have not made [UT's] list" of favored groups. *Metro Broadcasting, supra,* at 632, 110 S.Ct. 2997 (KENNEDY, J., dissenting).

Perhaps the majority finds discrimination against Asian–American students benign, since Asian–Americans are "*overrepresented*" at UT. 645 F.Supp.2d, at 606. But "[h]istory should teach greater humility." *Metro Broadcasting,* 497 U.S., at 609, 110 S.Ct. 2997 (O'Connor, J., dissenting). " '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Id.,* at 610, 110 S.Ct. 2997. Where, as here, the government has provided little explanation for why it needs to discriminate based on race, " 'there is simply no way of determining what classifications are "benign" ... and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' " *Parents Involved,* 551 U.S., at 783, 127 S.Ct. 2738 (opinion of KENNEDY, ***2229** J.) (quoting *Croson,* 488 U.S., at 493, 109 S.Ct. 706 (plurality opinion of O'Connor, J.)). By accepting the classroom study as proof that UT satisfied strict scrutiny, the majority "move[s] us from 'separate but equal' to 'unequal but benign.' " *Metro Broadcasting, supra,* at 638, 110 S.Ct. 2997 (KENNEDY, J., dissenting).

In addition to demonstrating that UT discriminates against Asian–American students, the classroom study also exhibits UT's use of a few crude, overly simplistic racial and ethnic categories. Under the UT plan, both the favored and the disfavored groups are broad and consist of students from enormously diverse backgrounds. See Supp. App. 30a; see also *Fisher I,* 570 U.S., at ——, 133 S.Ct., at 2416 ("five predefined racial categories"). Because "[c]rude measures of this sort threaten to reduce [students] to racial chits," *Parents Involved,* 551 U.S., at 798, 127 S.Ct. 2738 (opinion of KENNEDY, J.), UT's reliance on such measures further undermines any claim based on classroom diversity statistics, see *id.,* at 723, 127 S.Ct. 2738 (majority opinion) (criticizing school policies that viewed race in rough "white/nonwhite" or "black/'other' " terms); *id.,* at 786, 127 S.Ct. 2738 (opinion of KENNEDY, J.) (faulting government for relying on "crude racial categories"); *Metro Broadcasting, supra,* at 633, n. 1, 110 S.Ct. 2997 (KENNEDY, J., dissenting) (concluding that " 'the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals,' " and noting that if the government " 'is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935' ").

For example, students labeled "Asian American," Supp. App. 26a, seemingly include "individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population," Brief for Asian American Legal Foundation et al. as *Amici Curiae,* O.T. 2012, No. 11–345, p. 28.[6] It would be ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together

and concluded that it is appropriate to discriminate against Asian–American students because they are "overrepresented" in the UT student body? UT has no good answer. And UT makes no effort to ensure that it has a critical mass of, say, "Filipino Americans" or "Cambodian Americans." Tr. of Oral Arg. 52 (Oct. 10, 2012). As long as there are a sufficient number of "Asian Americans," UT is apparently satisfied.

UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be "African–American," "Hispanic," "Asian American," "Native American," or "White." Supp. App. 30a. And UT evidently labels each student as falling into only a single racial or ethnic group, see, *e.g., id.*, at 10a–13a, 30a, 43a–44a, 71a, 156a–157a, 169a–170a, without explaining how individuals with ancestors from different groups are to be characterized. As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups. According to census figures, individuals describing themselves ***2230** as members of multiple races grew by 32% from 2000 to 2010.[7] A recent survey reported that 26% of Hispanics and 28% of Asian–Americans marry a spouse of a different race or ethnicity.[8] UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming. UT assumes that if an applicant describes himself or herself as a member of a particular race or ethnicity, that applicant will have a perspective that differs from that of applicants who describe themselves as members of different groups. But is this necessarily so? If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student's classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say. It instead relies on applicants to "classify themselves." *Fisher I*, 570 U.S., at ——, 133 S.Ct., at 2416. This is an invitation for applicants to game the system.

Finally, it seems clear that the lack of classroom diversity is attributable in good part to factors other than the representation of the favored groups in the UT student population. UT offers an enormous number of classes in a wide range of subjects, and it gives undergraduates a very large measure of freedom to choose their classes. UT also offers courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment under its challenged plan, and this of course diminishes the number of other courses in which these students can enroll. See, *e.g.*,Supp. App. 72a–73a (indicating that the representation of African–Americans and Hispanics in UT classrooms varies substantially from major to major). Having designed an undergraduate program that virtually ensures a lack of classroom diversity, UT is poorly positioned to argue that this very result provides a justification for racial and ethnic discrimination, which the Constitution rarely allows.

3

UT's purported interest in intraracial diversity, or "diversity within diversity," Brief for Respondents 34, also falls short. At bottom, this argument relies on the unsupported assumption that there is something deficient or at least radically different about the African–American and Hispanic students admitted through the Top Ten Percent Plan.

Throughout this litigation, UT has repeatedly shifted its position on the need for intraracial diversity. Initially, in the 2004 Proposal, UT did not rely on this alleged need at all. Rather, the Proposal "examined two metrics—classroom diversity and demographic disparities—that it concluded were relevant to its ability to provide [the] benefits of diversity." Brief for United States as *Amicus Curiae* 27–28. Those metrics looked only to the numbers of African–Americans and Hispanics, not to diversity within each group.

On appeal to the Fifth Circuit and in *Fisher I*, however, UT began to emphasize ***2231** its intraracial diversity argument. UT complained that the Top Ten Percent Law hinders its efforts to assemble a broadly diverse class because the minorities admitted under that law are drawn largely from certain areas of Texas where there are majority-minority schools. These students, UT argued, tend to come from poor, disadvantaged families, and the University would prefer a system that gives it substantial leeway to seek broad diversity *within* groups of underrepresented minorities. In particular, UT asserted a need for more African–American and Hispanic students from privileged backgrounds. See, *e.g.*, Brief for Respondents in No. 11–345, at 34 (explaining that UT needs race-conscious admissions in order to admit "[t]he African–American or Hispanic child of successful

professionals in Dallas"); *ibid.* (claiming that privileged minorities "have great potential for serving as a 'bridge' in promoting cross-racial understanding, as well as in breaking down racial stereotypes"); *ibid.* (intimating that the underprivileged minority students admitted under the Top Ten Percent Plan "*reinforc[e]* " "stereotypical assumptions"); Tr. of Oral Arg. 43–45 (Oct. 10, 2012) ("[A]lthough the percentage plan certainly helps with minority admissions, by and large, the—the minorities who are admitted tend to come from segregated, racially-identifiable schools," and "we want minorities from different backgrounds"). Thus, the Top Ten Percent Law is faulted for admitting *the wrong kind of African–American and Hispanic students*.

The Fifth Circuit embraced this argument on remand, endorsing UT's claimed need to enroll minorities from "high-performing," "majority-white" high schools. 758 F.3d, at 653. According to the Fifth Circuit, these more privileged minorities "bring a perspective not captured by" students admitted under the Top Ten Percent Law, who often come "from highly segregated, underfunded, and underperforming schools." *Ibid.* For instance, the court determined, privileged minorities "can enrich the diversity of the student body in distinct ways" because such students have "higher levels of preparation and better prospects for admission to UT Austin's more demanding colleges" than underprivileged minorities. *Id.*, at 654; see also *Fisher*, 631 F.3d, at 240, n. 149 (concluding that the Top Ten Percent Plan "widens the 'credentials gap' between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences").

Remarkably, UT now contends that petitioner has "fabricat[ed]" the argument that it is seeking affluent minorities. Brief for Respondents 2. That claim is impossible to square with UT's prior statements to this Court in the briefing and oral argument in *Fisher I*.[9] Moreover, although UT reframes ***2232** its argument, it continues to assert that it needs affirmative action to admit privileged minorities. For instance, UT's brief highlights its interest in admitting "[t]he black student with high grades from Andover." Brief for Respondents 33. Similarly, at oral argument, UT claimed that its "interests in the educational benefits of diversity would not be met if all of [the] minority students were ... coming from depressed socioeconomic backgrounds." Tr. of Oral Arg. 53 (Dec. 9, 2015); see also *id.*, at 43, 45.

Ultimately, UT's intraracial diversity rationale relies on the baseless assumption that there is something wrong with African–American and Hispanic students admitted through the Top Ten Percent Plan, because they are "from the lower-performing, racially identifiable schools." *Id.*, at 43; see *id.*, at 42–43 (explaining that "the basis" for UT's conclusion that it was "not getting a variety of perspectives among African–Americans or Hispanics" was the fact that the Top Ten Percent Plan admits underprivileged minorities from highly segregated schools). In effect, UT asks the Court "to *assume* "—without any evidence —"that minorities admitted under the Top Ten Percent Law ... are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." 758 F.3d, at 669–670 (Garza, J., dissenting). And UT's assumptions appear to be based on the pernicious stereotype that the African–Americans and Hispanics admitted through the Top Ten Percent Plan only got in because they did not have to compete against very many whites and Asian–Americans. See Tr. of Oral Arg. 42–43 (Dec. 9, 2015). These are "the very stereotypical assumptions [that] the Equal Protection Clause forbids." *Miller*, 515 U.S., at 914, 115 S.Ct. 2475. UT cannot satisfy its burden by attempting to "substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun v. United States*, 568 U.S. ——, ——, 133 S.Ct. 1136, 1137, 185 L.Ed.2d 385 (2013) (SOTOMAYOR, J., respecting denial of certiorari).

In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head. When affirmative action programs were first adopted, it was for the purpose of helping the disadvantaged. See, *e.g.*, *Bakke*, 438 U.S., at 272–275, 98 S.Ct. 2733 (opinion of Powell, J.) (explaining that the school's affirmative action program was designed "to increase the representation" of " 'economically and/or educationally disadvantaged' applicants"). Now we are told that a program that tends to admit poor and disadvantaged minority students is inadequate because it does not work to the advantage of those who are more fortunate. This is affirmative action gone wild.

It is also far from clear that UT's assumptions about the socioeconomic status of minorities admitted through the Top Ten Percent Plan are even remotely accurate. Take, for example, parental education. In 2008, when petitioner applied to UT, approximately 79% of Texans aged 25 years or older had a high school diploma, 17% had a bachelor's degree, and 8% had a graduate or professional degree. Dept. of Educ., Nat. Center for Educ. Statistics, T. Snyder & S. Dillow, Digest of Education Statistics

2010, p. 29 (2011). In contrast, 96% of African–Americans admitted through the Top Ten Percent Plan had a *2233 parent with a high school diploma, 59% had a parent with a bachelor's degree, and 26% had a parent with a graduate or professional degree. See UT, Office of Admissions, Student Profile, Admitted Freshman Class of 2008, p. 8 (rev. Aug. 1, 2012) (2008 Student Profile), online at https://uteas.app.box.com/s/twqozsbm2vb9fhm14o0v0czvqs1ygzqr/1/7732448553/23476747441/1. Similarly, 83% of Hispanics admitted through the Top Ten Percent Plan had a parent with a high school diploma, 42% had a parent with a bachelor's degree, and 21% had a parent with a graduate or professional degree. *Ibid.* As these statistics make plain, the minorities that UT characterizes as "coming from depressed socioeconomic backgrounds," Tr. of Oral Arg. 53 (Dec. 9, 2015), generally come from households with education levels exceeding the norm in Texas.

Or consider income levels. In 2008, the median annual household income in Texas was $49,453. United States Census Bureau, A. Noss, Household Income for States: 2008 and 2009, p. 4 (2010), online at https://www.census.gov/prod/2010pubs/acsbr09-2.pdf. The household income levels for Top Ten Percent African–American and Hispanic admittees were on par: Roughly half of such admittees came from households below the Texas median, and half came from households above the median. See 2008 Student Profile 6. And a large portion of these admittees are from households with income levels far exceeding the Texas median. Specifically, 25% of African–Americans and 27% of Hispanics admitted through the Top Ten Percent Plan in 2008 were raised in households with incomes exceeding $80,000. *Ibid.* In light of this evidence, UT's actual argument is not that it needs affirmative action to ensure that its minority admittees are representative of the State of Texas. Rather, UT is asserting that it needs affirmative action to ensure that its minority students disproportionally come from families that are wealthier and better educated than the average Texas family.

In addition to using socioeconomic status to falsely denigrate the minority students admitted through the Top Ten Percent Plan, UT also argues that such students are academically inferior. See, *e.g.*, Brief for Respondents in No. 11–345, at 33 ("[T]he top 10% law systematically hinders UT's efforts to assemble a class that is ... academically excellent"). "On average," UT claims, "African–American and Hispanic holistic admits have higher SAT scores than their Top 10% counterparts." Brief for Respondents 43, n. 8. As a result, UT argues that it needs race-conscious admissions to enroll academically superior minority students with higher SAT scores. Regrettably, the majority seems to embrace this argument as well. See *ante*, at 2213 ("[T]he Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence").

This argument fails for a number of reasons. First, it is simply not true that Top Ten Percent minority admittees are academically inferior to holistic admittees. In fact, as UT's president explained in 2000, "top 10 percent high school students make much higher grades in college than non-top 10 percent students," and "[s]trong academic performance in high school is an even better predictor of success in college than standardized test scores." App. 393a–394a; see also Lavergne Deposition 41–42 (agreeing that "it's generally true that students admitted pursuant to HB 588 [the Top Ten Percent Law] have a higher level of academic performance at the University than students admitted outside of HB 588"). Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African–American in-state freshmen who were admitted *2234 under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. Supp. App. 164a. The same is true for Hispanic students. *Id.*, at 165a. These conclusions correspond to the results of nationwide studies showing that high school grades are a better predictor of success in college than SAT scores. [10]

It is also more than a little ironic that UT uses the SAT, which has often been accused of reflecting racial and cultural bias, [11] as a reason for dissatisfaction with poor and disadvantaged African–American and Hispanic students who excel both in high school and in college. Even if the SAT does not reflect such bias (and I am ill equipped to express a view on that subject), SAT scores clearly correlate with wealth. [12]

UT certainly has a compelling interest in admitting students who will achieve academic success, but it does not follow that it has a compelling interest in maximizing admittees' SAT scores. Approximately 850 4–year–degree institutions do not require

the SAT or ACT as part of the admissions process. See J. Soares, SAT Wars: The Case for Test–Optional College Admissions 2 (2012). This includes many excellent schools. [13]

*2235 To the extent that intraracial diversity refers to something other than admitting privileged minorities and minorities with higher SAT scores, UT has failed to define that interest with any clarity. UT "has not provided any concrete targets for admitting more minority students possessing [the] unique qualitative-diversity characteristics" it desires. 758 F.3d, at 669 (Garza, J., dissenting). Nor has UT specified which characteristics, viewpoints, and life experiences are supposedly lacking in the African–Americans and Hispanics admitted through the Top Ten Percent Plan. In fact, because UT administrators make no collective, qualitative assessment of the minorities admitted automatically, they have no way of knowing which attributes are missing. See *ante*, at 2209 (admitting that there is no way of knowing "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review"); 758 F.3d, at 669 (Garza, J., dissenting) ("The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite 'change agents' are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes"). Furthermore, UT has not identified "when, if ever, its goal (which remains undefined) for qualitative diversity will be reached." *Id.*, at 671. UT's intraracial diversity rationale is thus too imprecise to permit strict scrutiny analysis.

Finally, UT's shifting positions on intraracial diversity, and the fact that intraracial diversity was not emphasized in the Proposal, suggest that it was not "the actual purpose underlying the discriminatory classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). Instead, it appears to be a *post hoc* rationalization.

4

UT also alleges—and the majority embraces—an interest in avoiding "feelings of loneliness and isolation" among minority students. *Ante*, at 2212; see Brief for Respondents 7–8, 38–39. In support of this argument, they cite only demographic data and anecdotal statements by UT officials that some students (we are not told how many) feel "isolated." This vague interest cannot possibly satisfy strict scrutiny.

*2236 If UT is seeking demographic parity to avoid isolation, that is impermissible racial balancing. See Part II–C–1, *supra*. And linking racial loneliness and isolation to state demographics is illogical. Imagine, for example, that an African–American student attends a university that is 20% African–American. If racial isolation depends on a comparison to state demographics, then that student is more likely to feel isolated if the school is located in Mississippi (which is 37.0% African–American) than if it is located in Montana (which is 0.4% African–American). See United States Census Bureau, QuickFacts, online at https://www.census.gov/quickfacts/table/PST045215/28,30. In reality, however, the student may feel—if anything—*less* isolated in Mississippi, where African–Americans are more prevalent in the population at large.

If, on the other hand, state demographics are not driving UT's interest in avoiding racial isolation, then its treatment of Asian–American students is hard to understand. As the District Court noted, "the gross number of Hispanic students attending UT exceeds the gross number of Asian–American students." 645 F.Supp.2d, at 606. In 2008, for example, UT enrolled 1,338 Hispanic freshmen and 1,249 Asian–American freshmen. Supp. App. 156a. UT never explains why the Hispanic students—but not the Asian–American students—are isolated and lonely enough to receive an admissions boost, notwithstanding the fact that there are more Hispanics than Asian–Americans in the student population. The anecdotal statements from UT officials certainly do not indicate that Hispanics are somehow lonelier than Asian–Americans.

Ultimately, UT has failed to articulate its interest in preventing racial isolation with any clarity, and it has provided no clear indication of how it will know when such isolation no longer exists. Like UT's purported interests in demographic parity, classroom diversity, and intraracial diversity, its interest in avoiding racial isolation cannot justify the use of racial preferences.

D

Even assuming UT is correct that, under *Grutter,* it need only cite a generic interest in the educational benefits of diversity, its plan still fails strict scrutiny because it is not narrowly tailored. Narrow tailoring requires "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." *Fisher I,* 570 U.S., at ——, 133 S.Ct., at 2420. "If a ' "nonracial approach ... could promote the substantial interest about as well and at tolerable administrative expense," ' then the university may not consider race." *Id.,* at ——, 133 S.Ct., at 2420 (citations omitted). Here, there is no evidence that race-blind, holistic review would not achieve UT's goals at least "about as well" as UT's race-based policy. In addition, UT could have adopted other approaches to further its goals, such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors.

The majority argues that none of these alternatives is "a workable means for the University to attain the benefits of diversity it sought." *Ante,* at 2212. Tellingly, however, the majority devotes only a single, conclusory sentence to the most obvious race-neutral alternative: race-blind, holistic review that considers the applicant's unique characteristics and personal circumstances. See *ibid.* [14] Under a system ***2237** that combines the Top Ten Percent Plan with race-blind, holistic review, UT could still admit "the star athlete or musician whose grades suffered because of daily practices and training," the "talented young biologist who struggled to maintain above-average grades in humanities classes," and the "student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school." *Ante,* at 2213. All of these unique circumstances can be considered without injecting race into the process. Because UT has failed to provide any evidence whatsoever that race-conscious holistic review will achieve its diversity objectives more effectively than race-blind holistic review, it cannot satisfy the heavy burden imposed by the strict scrutiny standard.

The fact that UT's racial preferences are unnecessary to achieve its stated goals is further demonstrated by their minimal effect on UT's diversity. In 2004, when race was not a factor, 3.6% of non-Top Ten Percent Texas enrollees were African–American and 11.6% were Hispanic. See Supp. App. 157a. It would stand to reason that at least the same percentages of African–American and Hispanic students would have been admitted through holistic review in 2008 even if race were not a factor. If that assumption is correct, then race was determinative for only 15 African–American students and 18 Hispanic students in 2008 (representing 0.2% and 0.3%, respectively, of the total enrolled first-time freshmen from Texas high schools). See *ibid.* [15]

The majority contends that "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality." *Ante,* at 2212. This argument directly contradicts this Court's precedent. Because racial classifications are " 'a highly suspect tool,' " *Grutter,* 539 U.S., at 326, 123 S.Ct. 2325 they should be employed only "as a last resort," *Croson,* 488 U.S., at 519, 109 S.Ct. 706 (opinion of KENNEDY, J.); see also *Grutter, supra,* at 342, 123 S.Ct. 2325 ("[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands"). Where, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative ***2238** likely could have reached the same result. See *Parents Involved,* 551 U.S., at 733–734, 127 S.Ct. 2738 (holding that the "minimal effect" of school districts' racial classifications "casts doubt on the necessity of using [such] classifications" and "suggests that other means [of achieving their objectives] would be effective"). As Justice KENNEDY once aptly put it, "the small number of [students] affected suggests that the schoo[l] could have achieved [its] stated ends through different means." *Id.,* at 790, 127 S.Ct. 2738 (opinion concurring in part and concurring in judgment). And in this case, a race-neutral alternative could accomplish UT's objectives without gratuitously branding the covers of tens of thousands of applications with a bare racial stamp and "tell[ing] each student he or she is to be defined by race." *Id.,* at 789, 127 S.Ct. 2738.

III

The majority purports to agree with much of the above analysis. The Court acknowledges that " 'because racial characteristics so seldom provide a relevant basis for disparate treatment,' " " '[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny.' " *Ante,* at 2208. The Court admits that the burden of proof is on UT, *ante,* at 2208, and that "a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan," *ante,* at 2211. And the Court recognizes that the record here is "almost devoid of information about the students who secured admission to the University through the Plan," and that "[t]he Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review." *Ante,*at 2209. This should be the end of the case: Without identifying what was missing from the African–American and Hispanic students it was already admitting through its race-neutral process, and without showing how the use of race-based admissions could rectify the deficiency, UT cannot demonstrate that its procedure is narrowly tailored.

Yet, somehow, the majority concludes that *petitioner* must lose as a result of UT's failure to provide evidence justifying its decision to employ racial discrimination. Tellingly, the Court frames its analysis as if petitioner bears the burden of proof here. See *ante,* at 2220 – 2225. But it is not the petitioner's burden to show that the consideration of race is unconstitutional. To the extent the record is inadequate, the responsibility lies with UT. For "[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State,"*Parents Involved, supra,* at 786, 127 S.Ct. 2738 (opinion of KENNEDY, J.), particularly where, as here, the summary judgment posture obligates the Court to view the facts in the light most favorable to petitioner, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Given that the University bears the burden of proof, it is not surprising that UT never made the argument that it should win based on the *lack* of evidence. UT instead asserts that "if the Court believes there are any deficiencies in [the] record that cast doubt on the constitutionality of UT's policy, the answer is to order a trial, not to grant summary judgment." Brief for Respondents 51; see also *id.,* at 52–53 ("[I]f this Court has any doubts about how the Top 10% Law works, or how UT's holistic plan offsets the tradeoffs of the Top 10% Law, the answer is to remand for a trial"). Nevertheless, the majority cites three reasons for breaking from the normal ***2239** strict scrutiny standard. None of these is convincing.

A

First, the Court states that, while "th[e] evidentiary gap perhaps could be filled by a remand to the district court for further factfinding" in "an ordinary case," that will not work here because "[w]hen petitioner's application was rejected, ... the University's combined percentage-plan/holistic-review approach to admission had been in effect for just three years," so "further factfinding" "might yield little insight." *Ante,* at 2209. This reasoning is dangerously incorrect. The Equal Protection Clause does not provide a 3–year grace period for racial discrimination. Under strict scrutiny, UT was required to identify evidence that race-based admissions were necessary to achieve a compelling interest *before* it put them in place—not three or more years after. See *ante,* at 2211 ("Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity *before* it turned to a race-conscious plan" (emphasis added)); *Fisher I,* 570 U.S., at ——, 133 S.Ct., at 2420 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, *before* turning to racial classifications, that available, workable race-neutral alternatives do not suffice" (emphasis added)). UT's failure to obtain actual evidence that racial preferences were necessary before resolving to use them only confirms that its decision to inject race into admissions was a reflexive response to *Grutter,*[16] and that UT did not seriously consider whether race-neutral means would serve its goals as well as a race-based process.

B

Second, in an effort to excuse UT's lack of evidence, the Court argues that because "the University lacks any authority to alter the role of the Top Ten Percent Plan," "it similarly had no reason to keep extensive data on the Plan or the students admitted

under it—particularly in the years before *Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review." *Ante,* at 2209. But UT has long been aware that it bears the burden of justifying its racial discrimination under strict scrutiny. See, *e.g.,* Brief for Respondents in No. 11–345, at 22 ("It is undisputed that UT's consideration of race in its holistic admissions process triggers strict scrutiny," and "that inquiry is undeniably rigorous"). [17] In light of this burden, UT had *every* reason to keep data on the students admitted through the Top Ten Percent Plan. Without such data, how could UT have possibly identified any characteristics that were lacking in Top Ten Percent admittees and that could be obtained via race-conscious ***2240** admissions? How could UT determine that employing a race-based process would serve its goals better than, for instance, expanding the Top Ten Percent Plan? UT could not possibly make such determinations without studying the students admitted under the Top Ten Percent Plan. Its failure to do so demonstrates that UT unthinkingly employed a race-based process without examining whether the use of race was actually necessary. This is not—as the Court claims—a "good-faith effor[t] to comply with the law." *Ante,* at 2209.

The majority's willingness to cite UT's "good faith" as the basis for excusing its failure to adduce evidence is particularly inappropriate in light of UT's well-documented absence of good faith. Since UT described its admissions policy to this Court in *Fisher I,* it has been revealed that this description was incomplete. As explained in an independent investigation into UT admissions, UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014. See Kroll, Inc., University of Texas at Austin—Investigation of Admissions Practices and Allegations of Undue Influence 4 (Feb. 6, 2015) (Kroll Report). Under this longstanding, secret process, university officials regularly overrode normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT officials and faculty—to get family members and other friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students. *Id.,* at 12–14; see also Blanchard & Hoppe, Influential Texans Helped Underqualified Students Get Into UT, Dallas Morning News, July 20, 2015, online at http://www.dallasnews.com/news/education/headlines/20150720-influential-texans-helped-underqualified-students-get-into-ut.ece ("Dozens of highly influential Texans—including lawmakers, millionaire donors and university regents—helped underqualified students get into the University of Texas, often by writing to UT officials, records show").

UT officials involved in this covert process intentionally kept few records and destroyed those that did exist. See, *e.g.,* Kroll Report 43 ("Efforts were made to minimize paper trails and written lists during this end-of-cycle process. At one meeting, the administrative assistants tried not keeping any notes, but this proved difficult, so they took notes and later shredded them. One administrative assistant usually brought to these meetings a stack of index cards that were subsequently destroyed"); see also *id.,* at 13 (finding that "written records or notes" of the secret admissions meetings "are not maintained and are typically shredded"). And in the course of this litigation, UT has been less than forthright concerning its treatment of well-connected applicants. Compare, *e.g.,* Tr. of Oral Arg. 51 (Dec. 9, 2015) ("University of Texas does not do legacy, Your Honor"), and App. 281a ("[O]ur legacy policy is such that we don't consider legacy"), with Kroll Report 29 (discussing evidence that "alumni/legacy influence" "results each year in certain applicants receiving a competitive boost or special consideration in the admissions process," and noting that this is "an aspect of the admissions process that does not appear in the public representations of UT–Austin's admissions process"). Despite UT's apparent readiness to mislead the public and the Court, the majority is "willing to be satisfied by [UT's] profession of its own good faith." *Grutter,* 539 U.S., at 394, 123 S.Ct. 2325 (KENNEDY, J., dissenting). [18]

***2241** Notwithstanding the majority's claims to the contrary, UT should have access to plenty of information about "how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review." *Ante,* at 2209. UT undoubtedly knows which students were admitted through the Top Ten Percent Plan and which were admitted through holistic review. See, *e.g.,* Supp. App. 157a. And it undoubtedly has a record of all of the classes in which these students enrolled. See, *e.g.,* UT, Office of the Registrar, Transcript—Official, online at https://registrar.utexas.edu/students/transcripts-official (instructing graduates on how to obtain a transcript listing a "comprehensive record" of classes taken). UT could use this information to demonstrate whether the Top Ten Percent minority admittees were more or less likely than the holistic minority admittees to choose to enroll in the courses lacking diversity.

In addition, UT assigns PAI scores to all students—including those admitted through the Top Ten Percent Plan—for purposes of admission to individual majors. Accordingly, all students must submit a full application containing essays, letters of recommendation, a resume, a list of courses taken in high school, and a description of any extracurricular activities, leadership experience, or special circumstances. See App. 212a–214a; 235a–236a; 758 F.3d, at 669, n. 14 (Garza, J., dissenting). Unless UT has destroyed these files,[19] it could use them to compare the unique personal characteristics of Top Ten ***2242** minority admittees with those of holistic minority admittees, and to determine whether the Top Ten admittees are, in fact, less desirable than the holistic admittees. This may require UT to expend some resources, but that is an appropriate burden in light of the strict scrutiny standard and the fact that all of the relevant information is in UT's possession. The cost of factfinding is a strange basis for awarding a victory to UT, which has a huge budget, and a loss to petitioner, who does not.

Finally, while I agree with the majority and the Fifth Circuit that *Fisher I* significantly changed the governing law by clarifying the stringency of the strict scrutiny standard,[20] that does not excuse UT from meeting that heavy burden. In *Adarand,* for instance, another case in which the Court clarified the rigor of the strict scrutiny standard, the Court acknowledged that its decision "alter[ed] the playing field in some important respects." 515 U.S., at 237, 115 S.Ct. 2097. As a result, it "remand[ed] the case to the lower courts for further consideration *in light of the principles [it had] announced.*" *Ibid.* (emphasis added). In other words, the Court made clear that—notwithstanding the shift in the law—the government had to meet the clarified burden it was announcing. The Court did not embrace the notion that its decision to alter the stringency of the strict scrutiny standard somehow allowed the government to automatically prevail.

C

Third, the majority notes that this litigation has persisted for many years, that petitioner has already graduated from another college, that UT's policy may have changed over time, and that this case may offer little prospective guidance. At most, these considerations counsel in favor of dismissing this case as improvidently granted. But see, *e.g., Gratz,* 539 U.S., at 251, and n. 1, 260–262, 123 S.Ct. 2411 (rejecting the dissent's argument that, because the case had already persisted long enough for the petitioners to graduate from other schools, the case should be dismissed); *id.*, at 282, 123 S.Ct. 2411 (Stevens, J., dissenting). None of these considerations has any bearing whatsoever on the merits of this suit. The majority cannot side with UT simply because it is tired of this case.

IV

It is important to understand what is and what is not at stake in this case. *What is not at stake* is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had "effectively compensated for the loss of affirmative action," App. 396a, and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve "the educational benefits of diversity," without explaining—much less proving—why the discrimination is needed or how ***2243** the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.

Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

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Footnotes

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

1 See also Nissimov, UT To Resume Factoring in Applicants' Race: UT To Reintroduce Race–Based Criteria, Houston Chronicle, June 24, 2003, p. 4A ("President Larry Faulkner said Monday his institution will quickly develop race-based admissions criteria by the fall that would be used for the summer and fall of 2004, after being given the green light to do so by Monday's U.S. Supreme Court ruling"); Silverstein, Hong, & Trounson, State Finds Itself Hemmed In, L.A. Times, June 24, 2003, p. A1 (explaining UT's "intention, after dropping race as a consideration, to move swiftly to restore its use in admissions" in time for "the next admissions cycle"); Hart, Texas Ponders Changes to 10% Law, Boston Globe, June 25, 2003, p. A3 ("Soon after Monday's ruling, University of Texas President Larry Faulkner said that the school will overhaul procedures" in order to allow consideration of "[t]he race of an applicant" for "students enrolling in fall 2004"); Ambiguity Remains; High Court Leaves Quota Questions Looming, El Paso Times, June 25, 2003, p. 6B ("The University of Texas at Austin's president, Larry Faulkner, has already announced that new admissions policies would be drafted to include race as a factor").

2 In 2010, 3.8% of Texas's population was Asian, but 18.6% of UT's enrolled, first-time freshmen in 2008 were Asian–American. See Supp. App. 156a; United States Census Bureau, QuickFacts (QuickFacts Texas), online at https://www.census.gov/quickfacts/table/PST045215/48. By contrast, 37.6% of Texas's 2010 population identified as Hispanic or Latino, but a lower percentage—19.9%—of UT's enrolled, first-time freshmen in 2008 were Hispanic. See Supp. App. 156a; QuickFacts Texas.

3 If UT's goal is to have at least two African–Americans, two Hispanics, and two Asian–Americans present in each of the relevant classrooms, that goal is literally unreachable in classes of five and practically unreachable in many other small classes.

4 The majority's assertion that UT's race-based policy does not discriminate against Asian–American students, see *ante*, at 2206 – 2207, defies the laws of mathematics. UT's program is clearly designed to increase the number of African–American and Hispanic students by giving them an admissions boost vis-à-vis other applicants. See, *e.g.*, Supp. App. 25a; App. 445a–446a; cf. 645 F.Supp.2d 587, 606 (W.D.Tex.2009); see also *ante*, at 2223 (citing increases in the presence of African–Americans and Hispanics at UT as evidence that its race-based program was successful). Given a "limited number of spaces," App. 250a, providing a boost to African–Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission.

5 In particular, the Fifth Circuit's willful blindness to Asian–American students is absolutely shameless. For instance, one of the Fifth Circuit's primary contentions—which UT repeatedly highlighted in its brief and at argument—is that, given the SAT score gaps between whites on the one hand and African–Americans and Hispanics on the other, "holistic admissions would approach an all-white enterprise" in the absence of racial preferences. 758 F.3d, at 647. In making this argument, the court below failed to mention Asian–Americans. The reason for this omission is obvious: As indicated in *the very sources* that the Fifth Circuit relied on for this point, on *the very pages* it cited, Asian–American enrollees admitted to UT through holistic review have consistently *higher* average SAT scores than white enrollees admitted through holistic review. See UT, Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall of 2006, pp. 11–14 (rev. Dec. 6, 2007), cited at 758 F.3d, at 647, n. 71; UT, Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall of 2008, pp. 12–15 (Oct. 28, 2008), cited at 758 F.3d, at 647, n. 72. The Fifth Circuit's intentional omission of Asian–Americans from its analysis is also evident in the appendices to its opinion, which either omit any reference to Asian–Americans or misleadingly label them as "other." See *id.*, at 661. The reality of how UT treats Asian–American applicants apparently does not fit into the neat story the Fifth Circuit wanted to tell.

6 And it is anybody's guess whether this group also includes applicants "of full or partial Arab, Armenian, Azerbaijani, Georgian, Kurdish, Persian, or Turkish descent, or whether such applicants are to be considered 'White.' " Brief for Judicial Watch, Inc., et al. as *Amici Curiae* 16.

7 United States Census Bureau, 2010 Census Shows Multiple–Race Population Grew Faster Than Single–Race Population (Sept. 27, 2012), online at https://www.census.gov/newsroom/releases/archives/race/cb12-182.html.

8 W. Wang, Pew Research Center, Interracial Marriage: Who Is "Marrying Out"? (June 12, 2015), online at http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/; W. Wang, Pew Research Center, The Rise of Intermarriage (Feb. 16, 2012), online at http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/.

9 *Amici* supporting UT certainly understood it to be arguing that it needs affirmative action to admit privileged minorities. See Brief for Six Educational Nonprofit Organizations 38 (citing Brief for Respondents in No. 11–345, p. 34). And UT's *amici* continue to press the full-throated version of the argument. See Brief for Six Educational Nonprofit Organizations 12–13 ("Intraracial diversity ... explodes perceived associations between racial groups and particular demographic characteristics, such as the 'common stereotype of Black and Latina/o students[ ] that all students from these groups come from poor, inner-city backgrounds.' Schools like UT combat such stereotypes by seeking to admit African–American and Latino students from elevated socioeconomic and/or non-urban backgrounds" (citation omitted)); *id.*, at 15 (arguing that UT needs racial preferences to admit minority students from "elevated" "socioeconomic backgrounds," because "such students are on a more equal social footing with the average nonminority student"); *id.*, at 37–38 ("African–American and Latino students who may come from higher socioeconomic status ... may serve as 'debiasing agent[s],' promoting disequilibrium to disrupt stereotypical associations. These students are also likely to be better able to promote communication and integration on campus" (citation omitted)).

10 See, *e.g.*, Strauss, Study: High School Grades Best Predictor of College Success—Not SAT/ACT Scores, Washington Post, Feb. 21, 2014, online at https://www.washingtonpost.com/news/answer-sheet/wp/2014/02/21/a-telling-study-about-act-sat-scores/.

11 See, *e.g.*, Freedle, Correcting the SAT's Ethnic and Social–Class Bias: A Method for Reestimating SAT Scores, 73 Harv. Ed. Rev. 1 (2003) ("The SAT has been shown to be both culturally and statistically biased against African Americans, Hispanic Americans, and Asian Americans"); Santelices & Wilson, Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning, 80 Harv. Ed. Rev. 106, 127 (2010) (questioning the validity of African–American SAT scores and, consequently, admissions decisions based on those scores); Brief for Amherst University et al. as *Amici Curiae* 15–16 ("[E]xperience has taught *amici* that SAT and ACT scores for African–American students do not accurately predict achievement later in college and beyond"); Brief for Experimental Psychologists as *Amici Curiae* 7 ("A substantial body of research by social scientists has revealed that standardized test scores and grades often underestimate the true academic capacity of members of certain minority groups"); Brief for Six Educational Nonprofit Organizations as *Amici Curiae* 21 ("Underrepresentation of African–American and Latino students by conventional academic metrics was also a reflection of the racial bias in standardized testing").

12 Zumbrun, SAT Scores and Income Inequality: How Wealthier Kids Rank Higher, Wall Street Journal, Oct. 7, 2014, online at http://blogs.wsj.com/economics/2014/10/07/sat-scores-and-income-inequality-how-wealthier-kids-rank-higher/.

13 See *e.g.*, Brief for California Institute of Technology et al. as *Amici Curiae* 15 ("[I]n amicus George Washington University's experience, standardized test scores are considered so limited in what they can reveal about an applicant that the University recently has done away with the requirement altogether"); see also American University, Applying Test Optional, online at http://www.american.edu/admissions/testoptional.cfm; The University of Arizona, Office of Admissions, Frequently Asked Questions, online at https://admissions.arizona.edu/freshmen/frequently-asked-questions; Bowdoin College, Test Optional Policy, online at http://www.bowdoin.edu/admissions/apply/testing-policy.shtml; Brandeis University, Test–Optional Policy, online at http://www.brandeis.edu/admissions/apply/testing.html; Bryn Mawr College, Standardized Testing Policy, online at http://www.brynmawr.edu/admissions/standardized-testing-policy; College of the Holy Cross, What We Look For, online at http://www.holycross.edu/admissions-aid/what-we-look-for; George Washington University, Test–Optional Policy, online at https://undergraduate.admissions.gwu.edu/test-optional-policy; New York University, Standardized Tests, online at http://www.nyu.edu/admissions/undergraduate-admissions/how-to-apply/all-freshmen-applicants/instructions/standardized-tests.html; Smith College, For First–Year Students, online at http://www.smith.edu/admission/firstyear_apply.php; Temple University, Temple Option FAQ, online at http://admissions.temple.edu/node/441; Wake Forest University, Test Optional, online at http://admissions.wfu.edu/apply/test-optional/.

In 2008, Wake Forest dropped standardized testing requirements based at least in part on "the perception that these tests are unfair to blacks and other minorities and do not offer an effective tool to determine if these minority students will succeed in college." Wake Forest Presents the Most Serious Threat So Far to the Future of the SAT, The Journal of Blacks in Higher Education, No. 60 (Summer 2008), p. 9; see also *ibid.* ("University admissions officials say that one reason for dropping the SAT is to encourage more black and minority applicants"). "The year after the new policy was announced, Wake Forest's minority applications went up by 70%, and the first test-optional class" exhibited "a big leap forward" in minority enrollment. J. Soares, SAT Wars: The Case for Test–Optional College Admissions 3 (2012). From 2008 to 2015, "[e]thnic diversity in the undergraduate population increased by 54 percent." Wake Forest University, Test Optional, online at http://admissions.wfu.edu/apply/test-optional/. And Wake Forest reports that dropping standardized testing requirements has "not compromise[d] the academic quality of [the] institution," and that it has made the university "more diverse and intellectually stimulating." *Ibid.*

14 The Court asserts that race-blind, holistic review is not a workable alternative because UT tried, and failed, to meet its goals via that method from 1996 to 2003. See *ante*, at 2213 ("Perhaps more significantly, in the wake of *Hopwood*, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review"). But the Court never explains its basis for concluding that UT's previous system failed. We are not told how the Court is measuring success or how it knows that a race-conscious

program will satisfy UT's goals more effectively than race-neutral, holistic review. And although the majority elsewhere emphasizes "the University's continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances," *ante,* at 2203, its rejection of race-blind, holistic review relies exclusively on "evidence" predating petitioner's suit by five years.

15 In 2008, 1,208 first-time freshmen from Texas high schools enrolled at UT after being admitted outside the Top Ten Percent Plan. Supp. App. 157a. Based on the 2004 statistics, it is reasonable to assume that, if the University had undertaken a *race-neutral* holistic review in 2008, 3.6% (43) of these students would have been African–American and 11.6% (140) would have been Hispanic. See *ibid.* Under the University's *race-conscious* holistic review, 58 African–American freshmen from Texas and 158 Hispanic freshmen from Texas were enrolled in 2008, thus reflecting an increase of only 15 African–American students and 18 Hispanic students. And if those marginal increases (of 15 and 18 students) are divided by the number of total enrolled first-time freshmen from Texas high schools (6,322), see *ibid.*, the calculation yields the 0.2% and 0.3% percentages mentioned in the text above.

16 Recall that UT's president vowed to reinstate race-conscious admissions within hours of *Grutter* 's release. See Part I, *supra.*

17 See also, *e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"); *Grutter v. Bollinger,* 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny' "); *Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) ("It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized' "); *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny").

18 The majority's claim that UT has not "had a full opportunity to respond to" the Kroll Report, *ante,* at 2212, is simply wrong. The report was discussed in no less than six of the briefs filed in this case. See Brief in Opposition 19–20, n. 2; Reply to Brief in Opposition 6; Brief for Respondents 51, n. 9; Brief for Cato Institute as *Amicus Curiae* 8–12 (certiorari stage); Brief for Cato Institute as *Amicus Curiae* 12, and n. 4 (merits stage); Brief for Judicial Education Project as *Amicus Curiae* 5–17. Not only did UT have an "opportunity to respond" to the Kroll Report—it *did in fact respond* at both the certiorari stage and the merits stage. See Brief in Opposition 19–20, n. 2 (explicitly discussing the "recently released Kroll Report"); Brief for Respondents 51, n. 9 (similar). And the Court's purported concern about reliance on "extrarecord materials," *ante,* at 2211, rings especially hollow in light of its willingness to affirm the decision below, which relied heavily on the Fifth Circuit's own extrarecord Internet research, see, *e.g.,* 758 F.3d, at 650–653.
The majority is also wrong in claiming that the Kroll Report is "tangential to this case at best." *Ante,* at 2212. Given the majority's blind deference to the good faith of UT officials, evidence that those officials "failed to speak with the candor and forthrightness expected of people in their respective positions of trust and leadership," Kroll, Inc., University of Texas at Austin—Investigation of Admissions Practices and Allegations of Undue Influence 29 (Feb. 6, 2015), when discussing UT's admissions process is highly relevant.

19 UT's current records retention policy requires it to retain student records, including application materials, for at least five years after a student graduates. See University of Texas at Austin, Records Retention Schedule, Agency Item No. AALL358, p. 58 (Nov. 14, 2014), online at https://www.tsl.texas.gov/sites/default/files/public/tslac/slrm/state/schedules/721.pdf. If this policy was in place when UT resumed race-conscious admissions in 2004, then it still had these materials when petitioner filed this suit in 2008, and likely still had them at the time of *Fisher I* in 2013. At the very least, the application materials for the 2008 freshman class appear to be subject to a litigation hold. See App. 290a–292a. To the extent that UT failed to preserve these records, the consequences of that decision should fall on the University, not on petitioner. Cf. *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. ——, ——, 136 S.Ct. 1036, 1047, 194 L.Ed.2d 124 (2016) (allowing "a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records").

20 See *ante,* at 2209 ("*Fisher I* clarified the stringency of the strict-scrutiny burden for a school that employs race-conscious review"); 758 F.3d, at 642 ("Bringing forward Justice Kennedy's dissent in *Grutter,* the Supreme Court faulted the district court's and this Court's review of UT Austin's means to achieve the permissible goal of diversity"); *id.,* at 665, n. 5 (Garza, J., dissenting) ("I agree with the majority that *Fisher* represents a decisive shift in the law").

End of Document

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NO. 17058

SUMMONS

DATED AT OYSTER BAY, N.Y. [illegible] 20[illegible]

000022

TO:

NAME [illegible]

ADDRESS [illegible] 4th St

[illegible] NY [illegible]

Christopher [illegible]

(INSERT NAME OF OFFICIAL AUTHORIZED TO ISSUE THE SUMMONS)

HAVING THIS DAY CHARGED YOU WITH TCB Violation

[illegible]

(BRIEFLY STATE THE NATURE OF THE OFFENSE OR CHARGE)

YOU ARE HEREBY SUMMONED

TO APPEAR BEFORE ONE OF THE JUDGES OF THE DISTRICT COURT OF THE COUNTY OF NASSAU, 4TH DISTRICT,

LOCATED AT 99 Main St. Rm 155

Hempstead

NEW YORK, ON THE 9th DAY OF February

20 09 AT 1 A.M. TO ANSWER THE CHARGE AND UPON YOUR FAILURE TO APPEAR AT THE TIME AND PLACE MENTIONED HEREIN YOU WILL BE LIABLE TO PUNISHMENT PROVIDED BY LAW.

[illegible] Enforcement Inspector

OFFICIAL TITLE OF PERSON ISSUING AND SERVING THE SUMMONS

P & D

TOWN DEPARTMENT

[illegible] 21 [illegible] 9:42

Thomas0001

COURT INFORMATION

RETURNABLE
FEBRUARY 9, 2009

DISTRICT COURT OF NASSAU COUNTY
FOURTH DISTRICT: CRIMINAL PART

THE PEOPLE OF THE STATE OF NEW YORK

against

DARREN E. THOMAS
121 4TH STREET
HICKSVILLE, NEW YORK 11801

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

CHRISTOPHER GIOIA, TOWN CODE ENFORCEMENT INSPECTOR, of the Town of Oyster Bay, Department of Planning and Development, being duly sworn, deposes and says that on the 5TH day of December, 2008, at premises located at: 121 4th Street, Hicksville, New York 11801, in the Town of Oyster Bay, County of Nassau and State of New York, District designation R1-7 on the Building Zone Map of the Town of Oyster Bay, Nassau County, New York, also known as Section 46 Block 270 Lot 1 on the Land and Tax Map of the County of Nassau, the defendant did willfully, wrongfully and unlawfully violate the provisions of the Code of the Town of Oyster Bay, New York, as follows:

COUNT I

Violation of the Code of the Town of Oyster Bay, New York,
CHAPTER 246 ZONING CODE OF THE TOWN OF OYSTER BAY
SECTION 246-5. DISTRICT REGULATIONS
SUB-SECTION 246- 5.2 Schedule of Use Regulations.

The accompanying Schedule of Use Regulations lists the permitted uses of land, *buildings* and *structures* and indicates in which districts, and subject to what manner of approval, each is permitted. Any use not specifically listed shall be deemed to be prohibited, unless the Town Board determines by the grant of a special permit that such use is of the same general character as other permitted uses in the district and that such use will not be detrimental to the district. All uses are subject to the requirements and conditions set forth in the noted sections (§). Any *accessory building* or use determined by the Department of Planning and Development to be customarily accessory or incidental to a permitted *principal use* shall be a permitted *accessory use* in the district in which it is located. **(See Attached Schedule 246-5.2)**

To wit: Your deponent observed two separate electric meters on the west side of the subject dwelling. Your deponent further observed two doorbells attached to the front of the building, located next to the front entrance. Your deponent personally, researched the Section, Block, and Lot building files and records kept during the normal course of business by the Division of Buildings at the Town of Oyster Bay, Department of Planning and Development. Certificate of Occupancy #A11417, dated June 9, 1986, for a two car detached garage built on the subject premises shows the premises zoned as a one family use. Personal research by your deponent of the Nassau County Property Tax records indicates subject dwelling had been built in 1926. On May 25, 1943, the Town of Oyster Bay passed an ordinance requiring the issuance of Certificates of Occupancy. Since said building was legally in existence prior to May 25, 1943, it is defined as legally non-conforming and no certificate of occupancy is required. The observance by your deponent of two electric meters and two doorbells is rebuttable presumption of occupancy by more than one family. A two family use of the subject dwelling in a "R1-7" zone requires ZBA approval for a Special Permit Use. A special permit has not been issued for a two family use. The aforementioned is a violation of the Code of the Town of Oyster Bay, New York.

'ENSE:
:tion 246-5
:demeanor

Thomas0002

FFENSE:
ection 93-28
sdemeanor

COUNT II

Violation of the Code of the Town of Oyster Bay, New York,
CHAPTER 93 BUILDING CONSTRUCTION
ARTICLE III, Certificates of Occupancy
§ 93-28. When required. [Amended 5-6-80]

No building hereafter erected, enlarged, extended or altered shall be occupied or used, in hole or in part, until a certificate of occupancy, certifying that the building conforms to the approved plans and the requirements of this chapter and stating the purposes for which the building may be used in its several parts, and any special stipulations, shall have been issued by the Commissioner of the Department of Planning and Development or his designee and signed by him or his authorized assistant. If the occupancy or use of a building is not discontinued during the work of alteration, the occupancy or use of the building shall not continue for more than 30 days after completion of the alteration unless a certificate of occupancy shall have been issued.

To wit: Your deponent observed two separate electric meters on the west side of the subject dwelling. Your deponent further observed two doorbells attached to the front of the building, located next to the front entrance. Your deponent researched the Section, Block, and Lot building files and records in the Division of Buildings at the Town of Oyster Bay, Department of Planning and Development. Certificate of Occupancy # A11417 issued June 9, 1986, for a two car detached garage built on the subject premises shows the premises zoned for one family use. Personal research by your deponent of the Nassau County Property Tax records indicates the subject dwelling had been built in 1926 with only one kitchen. On May 25, 1943, the Town of Oyster Bay passed an ordinance requiring the issuance of Certificates of Occupancy. Since said building was legally in existence prior to May 25, 1943, it is defined as legally non-conforming and no certificate of occupancy is required. A two family use of the subject dwelling in an "R1-7" zone requires ZBA approval for a Special Permit Use. The observance by your deponent of two electric meters and two doorbells is rebuttable presumption of occupancy by more than one family. Upon further review by your deponent of the files and records of the Town of Oyster Bay, no certificate of occupancy has been issued for a two family use. The aforementioned is a violation of the Code of the Town of Oyster Bay, New York.

That the Code of the Town of Oyster Bay, New York, as amended was duly and legally adopted, enacted, published and posted by the Town Board of the Town of Oyster Bay, and filed in the Office of the Town Clerk prior to December 4, 2008 and said ordinances are still applicable;

That at all times hereinabove mentioned defendant, Darren E. Thomas, is the owner of the above mentioned premises.

The above statements are true based upon my personal observation and upon information and belief based upon public documents which are attached hereto and as to those statements; I believe them to be true.

FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

Christopher Gioia
Town Code Enforcement Inspector

Subscribed to and sworn to before me this
22 day of December, 2008

Notary Public

ERIN SMITH-KELLY
Notary Public, State of New York
No. 01SM4777920
Qualified in Nassau County
Commission Expires March 30, 2010

LIST OF NEARBY MULTI-FAMILY HOMES

1. 119 Fourth Street [3 meters]

   - no documents produced

2. 117 Fourth Street [2 meters]

   - listed as zoned for one family; as of May, 2003 listed as nonconforming; no prosecution

3. 41-45 Fourth Street [3 meters]

   - CO for 6 family; in compliance as of October 7, 2011

   - complaint was made and investigation concluded in compliance

4. 35 Fourth Street [3 meters]

   - zoned for one family use; currently used as a 2 family

   - former owner was prosecuted for illegal basement apt. and illegal multi-family (3 family)

   - defendant-former owner died; case dismissed (initially pled guilty to lesser charge)

   - after last inspection by Town it was noted as being used as a 2 family dwelling and the case was CLOSED.

5. 31 Fourth Street [2 meters]

- no documents

6. 235 Jerusalem Avenue [3 meters]

- no documents

7. 139 Fifth Street [2 meters]

- no documents

8. 44 Grand Avenue [2 meters]

- has CO for 2 family dwelling

- no prosecution

MAILED TO ATTY ON _____
CONFORMED ON 12/8/11

At a Special Term of the Supreme Court of the State of New York, County of Nassau, held in and for said County at Mineola, New York, on the 8th day of December, 2011.

PRESENT:

MOTION SEQUENCE # 1

HON. Anthony F. Marano
Justice of the Supreme Court

~~ORIGINAL RETURN~~ DATE 12-15-11

RELIEF OART78

----------X

In the Matter of the Application of

DARREN E. THOMAS,

Petitioner,

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by a selective prosecution violation of equal protection,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

----------X

ORDER TO SHOW CAUSE IN LIEU OF NOTICE OF PETITION

Index # 017161/11

Feinman

KUTNER, JR.
ATTORNEY-AT-LAW
AVENUE
N.Y. 11501
1400

UPON READING AND FILING the petition of DARREN E. THOMAS, duly verified on the 30th day of September, 2011, and the affidavit of DARREN

E. THOMAS, sworn to on the 30th day of September, 2011, and the affidavit of RAYMOND GUCKENBERGER, sworn to the 2nd day of August, 2010, and the affidavit of JAMES P. COLWELL sworn to the 6th day of November, 2010, and the affidavit of EDWARD J. ZEBART sworn to the 16th day of August, 2010, and the affidavit of BARBARA BEISEL sworn to the 2nd day of November, 2010, and the affirmation of HARRY H. KUTNER, JR. dated the 30th day of September, 2011, and the decision-order of the District Court of the County of Nassau dated August , 2011 in the underlying prosecution entitled People v. Thomas (Dkt # 2009 NA 000022), and upon the petitioner's Memorandum of Law, and upon all the papers and proceedings heretofore had herein and in the underlying District Court criminal action,

LET the respondents, TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU, all show cause at an IAS Part 13 of this Court, to be held before the IAS Justice assigned, at the courthouse hereof located at Supreme Court Drive, Mineola, New York, on the 13th day of ~~January~~ December, 2012, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, why an order of this Court should not be entered:

J.C.

KUTNER, JR.
...AT-LAW
...AVENUE
...N.Y. 11501
...1400

1. pursuant to CPLR Article 78, permanently prohibiting the respondents from prosecuting the petitioner, on the ground that it is barred as an unconstitutionally selective prosecution; and

2. for any such other and further relief which is just, equitable, and proper.

SUFFICIENT REASON APPEARING THEREFOR from the papers in support of this order to show cause, it is

ORDERED, that the respondents, and their attorneys, agents, employees, and anyone acting on their behalf or at their behest, are all hereby stayed, pending the hearing ~~and determination~~ of this petition, from taking any action to try the petitioner; and it is further

J.S.C

ORDERED, that personal service of a copy of this order to show cause, With Index Number and Filing Date Endorsed Thereon petition, and supporting affirmation only, be made on or before the 9th day of December, 2011 as follows:

JSC

1. upon the respondents, TOWN OF OYSTER BAY and HON. JOHN VENDITTO, by service upon the Town Attorney at

Thomas0008

the office address of Town Hall East, 54 Audrey Avenue, Oyster Bay, New York; and

2. upon the respondents, THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU, by delivery either to the Administrative Judge of said Court, the Hon. Christopher Quinn, or to James Sullivan, the Clerk of the District Court.

ENTER,

HON. _____
Justice of the Supreme Court

J. KUTNER, JR.
ATTORNEY-AT-LAW
LAWRENCE
N.Y. 11501
741-1000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

In the Matter of the Application of

DARREN E. THOMAS,

Petitioner,

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by a selective prosecution in violation of equal protection,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

----------X

VERIFIED PETITION

Index #

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of DARREN E. THOMAS, through his attorney, HARRY H. KUTNER, JR., ESQ., respectfully shows:

FIRST: That your petitioner is a resident of Nassau County, New York.

SECOND: That your petitioner seeks a writ of prohibition

H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
516 741-1400

barring his further prosecution by your respondents on the ground that it is a racially-based selective prosecution in violation of equal protection.

THIRD: That your petitioner has been and still is a defendant in a pending Nassau County District Court criminal case under Docket # 2009 NA 000022F.

FOURTH: That your first-named respondent, TOWN OF OYSTER BAY (hereinafter "Town"), is the municipality within which your petitioner resides and which is responsible for the selective prosecution of your petitioner.

FIFTH: That your second-named respondent, HON. JOHN VENDITTO (hereinafter "Venditto"), is the chief executive official of your respondent, TOWN.

SIXTH: That your last-named respondents are the judges of the District Court of Nassau County who have been and will continue to preside over your petitioner's criminal case.

SEVENTH: That your petitioner is of African American descent.

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

Thomas0011

EIGHTH: That your petitioner's wife is of Puerto Rican descent.

NINTH: That since 2007, your petitioner and his wife have been and still are the owners of a house and property known as 121 Fourth Street, Hicksville, County of Nassau, State of New York (hereinafter referred to as the "premises").

TENTH: That the premises has been a two family home since it was built in or about 1922 and is therefore a legal, non-conforming use.

ELEVENTH: That when your petitioner purchased the premises, it was listed on the Nassau County and Town tax rolls as a two family home.

TWELFTH: That when your petitioner purchased the premises, it had two apartments, two doorbells, and two electric meters, and had had such since approximately 1943.

THIRTEENTH: That your petitioner and his wife purchased the premises based on its status as a two family home.

H. KUTNER, JR.
RNEY-AT-LAW
ILLIS AVENUE
OLA, N.Y. 11501
09 741-1400

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FOURTEENTH: That after your petitioner and his wife purchased the premises, your respondents, TOWN and VENDITTO's building inspector made several visits to your petitioner, claiming the premises was not a legal two family home.

FIFTEENTH: That your petitioner had his attorney try to contact your respondents, TOWN and VENDITTO's building inspector to determine the reason for his claim.

SIXTEENTH: That your respondents, TOWN and VENDITTO's building inspector never had the courtesy to respond to the contacts.

SEVENTEENTH: That your respondents, TOWN and VENDITTO, have stated under oath that the premises is "legally non-conforming and no certificate of occupancy is required."

EIGHTEENTH: That despite the foregoing and thereafter on or about January 2, 2009, your respondents, TOWN and VENDITTO, commenced a criminal action against your petitioner.

NINETEENTH: That said action charged your petitioner with two alleged misdemeanors for "failure to have a special permit for a two

KUTNER, JR.
EY-AT-LAW
S AVENUE
N.Y. 11501
1-1400

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family dwelling" and "failure to have a certificate of occupancy for a two family dwelling."

TWENTIETH: That as a matter of law, and from the respondents, TOWN and VENDITTO's own statements, as a legal, non-conforming, pre-existing two family home, the premises does not require a special permit nor certificate of occupancy.

TWENTY-FIRST: That your respondents, TOWN and VENDITTO, are selectively prosecuting your respondent based solely on his race.

TWENTY-SECOND: That said prosecution is designed and intended to drive your petitioner and his family from their home.

TWENTY-THIRD: That no prior owners, all of whom were-are white, were ever prosecuted for an alleged illegal two family home.

TWENTY-FOURTH: That such selective prosecution is further evidenced by the affidavits of neighbors and former owners of your petitioner's home which attest to the existence of other similarly situated homes in the neighborhood whose owners have not been prosecuted.

H. KUTNER, JR.
RNEY-AT-LAW
ELLIS AVENUE
A, N.Y. 11501
)741-1400

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TWENTY-FIFTH: That a motion seeking dismissal based on the unconstitutionality of this selective prosecution was denied without holding the required hearing by the District Court of Nassau County.

TWENTY-SIXTH: That by law, an unconstitutional selective prosecution is subject to Article 78 relief in the nature of a writ of prohibition.

TWENTY-SEVENTH: That your petitioner seeks an order pursuant to CPLR Article 78 in the nature of prohibition forbidding the respondents from further prosecuting him on the ground that the District Court case is an unconstitutional selective prosecution.

TWENTY-EIGHTH: That your petitioner has no adequate remedy for being selectively prosecuted in violation of his federal and state constitutional and state statutory rights except by the writ of prohibition sought from this Court.

TWENTY-NINTH: That no prior application has been made to this Court for the relief herein requested.

H. KUTNER, JR.
ORNEY-AT-LAW
ELLIS AVENUE
OL, N.Y. 11501
10 741-1400

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WHEREFORE, your petitioner respectfully prays that a judgment be entered:

a. prohibiting the respondents from further prosecuting your petitioner in the pending case under Docket # 2009 NA 000022F; and

b. for any such other and further relief which is just, equitable, and proper.

Dated: Mineola, New York
September 30, 2011

DARREN E. THOMAS

H. KUTNER, JR.
TORNEY-AT-LAW
FILLIS AVENUE
OLA, N.Y. 11501
(516) 741-1400

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

DARREN E. THOMAS, being duly sworn, deposes and says:

That I am the petitioner in the within proceeding, and that I have read the foregoing PETITION and know the contents thereof, and that the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows: papers in the pending criminal action, materials and other papers, reports and records contained in my files.

DARREN E. THOMAS

Sworn to before me on the
30th day of September, 2011

NOTARY PUBLIC

EILEEN AHERN
Notary Public, State of New York
No. 30-4748613
Qualified in Nassau County
Commission Expires March 30, 20 15

E. KUTNER, JR.
ATTORNEY-AT-LAW
LAWRENCE
L.I., N.Y. 11501
741-1400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

In the Matter of the Application of

DARREN E. THOMAS,

Petitioner,

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by a selective prosecution in violation of equal protection,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

----------X

AFFIDAVIT IN SUPPORT
OF
ORDER TO SHOW CAUSE

Index #

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

DARREN E. THOMAS, being duly sworn, deposes and says:

1. I am the petitioner and make this affidavit based upon personal knowledge and a walk-around my neighborhood.

H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

2. My wife and I purchased the subject property, our first home, in 2007 based on the seller's representation and the County and Town records showing the house to be a legal two-family dwelling.

3. We reside there with our two sons, T.J. (22) and Kobe (9).

4. The records establish what the accusatory instrument itself (Exhibit "1") clearly states: that the house pre-existed the CO ordinance as a pre-existing non-conforming use, and always was and still is a two-family dwelling. It is therefore legal.

SELECTIVE PROSECUTION

A. Introduction

5. I have a current neighbor, Raymond Guckenberger, who has lived in his house since 1948, and Mr. Kutner has spoken to prior owners of our house back to the 1970(s), and all the evidence establishes that none were ever prosecuted for an illegal two family dwelling even though it has always been maintained as such.

6. LILCO-LIPA-National Grid's records conclusively

H. KUTNER, JR.
ORNEY-AT-LAW
ILLIS AVENUE
DLA, N.Y. 11501
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show that there were two electric meters before 1968. Since electric meters then as now are good for approximately 25 years, that information establishes that the house was a two family home with two separate meters since approximately 1943.

7. So the issue is the Town's motive for suddenly prosecuting me.

8. We are a middle-class, modest, quiet, and hardworking family. My wife has an executive job at an auto dealership, and I am a supervisor in the U.S. Postal Service. Our older boy is now a senior at Hofstra University, while our younger one is in fourth grade.

9. My wife is of Puerto Rican descent, while I am African-American. I am a quiet, unaggressive individual, and am not combative about my race, nor wear it aggressively on my sleeve with a perpetual angry attitude.

10. I never ever would have believed in the 21st Century that the Law would still be used to prosecute a black man in this country, and especially here in Hicksville. And as I said while I do not wear my race on my

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

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shoulder as a chip, unfortunately there simply is no other explanation other than a racially-motivated prosecution. I am not only sorry that it is true but have a mixture of pity and anger for the Building Inspector who put us and the Court in this position.

But he is trying to take our family home away from us.

11. The inspector's actions are clearly and indisputably racially-motivated. No other conclusion is possible.

12. The Town's explanations have been so plainly insulting to anyone's intelligence as to further prove the racist real motive.

B. <u>The neighborhood</u>

13. The Town has repeatedly insisted that this prosecution was initiated by a complaint, which when investigated by the inspector, caused him to observe two electric meters and two doorbells (see Exhibit "1", lines 33-34).

14. At Mr. Kutner's request after the Town told us that nonsense, I walked the neighborhood to see how many other homes have multiple electric meters in open view. 15% of the homes have two or three

Y H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

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meters, and multiple mailboxes and doorbells. But not strangely, none have ever been prosecuted.

15. So, why us? None of the other homes are owned by African Americans.

C. History

16. Based upon what Mr. Kutner and I have now learned, no prior owners were harassed by criminal violations as has been done to us. The house is now, and always has been, the residences of two families, with two electric meters. So the Town's behavior in first harassing me, and then refusing to return Mr. Kutner's telephone calls and respond to his letters, and then to file criminal charges against me, is obviously racially-based.

17. The most obvious question is, "Why now?" Why, sixty-eight years after the passage of the CO ordinance (1943), and during which it was always taxed as a two-family home, would the Town suddenly be pursuing me?

18. The Town never turned down the extra taxes it assessed and collected on our house as a two family dwelling.

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
SPOLA, N.Y. 11501
(516) 741-1300

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19. Mr. Kutner was the first to voice the opinion that the Town's actions were racially-motivated. As he asked me, *why else* would the Town be making life miserable for me and my family, when the prior owners, all white, were never bothered? *Why else* would the Town be pursuing me, since the house has always been a two-family with two meters? *Why else* would the Town be so doing when the house has been taxed at the increased rate for a two-family, by the Town? *Why else* did the Building Inspector act guiltily when Mr. Kutner repeatedly tried to contact him, by refusing to respond? *Why else* – because I am African-American and my wife is Puerto Rican! It is obvious that there is no other explanation.

CONCLUSION

20. If my house is not a legal two family dwelling, the Town should not have taxed it as such all these years, and done *nothing* about it until after we became the owners.

21. I humbly and respectfully ask this Court to do what should be done: grant the petition and let my family live in peace.

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
ERDLA, N.Y. 11501
(516) 741-1400

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WHEREFORE, it is respectfully requested that the petition be allowed, and for any such other and further relief which is just, equitable, and proper.

Sworn to before me this
30th day of September 2011

Notary Public

EILEEN AHERN
Notary Public, State of New York
No. 30-4748613
Qualified in Nassau County
Commission Expires March 30, 2015

DARREN E. THOMAS

GY H. KUTNER, JR.
TTORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

DISTRICT COURT OF THE COUNTY OF NASSAU
FOURTH DISTRICT: CRIMINAL PART
----------X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

- against -

DARREN E. THOMAS,

Defendant.

----------X

AFFIDAVIT

Dkt # 2009 NA 000022 F

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

RAYMOND GUCKENBERGER, being duly sworn, deposes and says:

1. I make this affidavit based on personal knowledge.

2. Since 1947, I have lived at 119 Fourth Street, Hicksville, New York, next door to Mr. Thomas' house at 121 Fourth Street. I have therefore lived there for sixty-three years.

3. My parents moved the family to our house in 1947 when I was a freshman at Hicksville High School.

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WILLIS AVENUE
DSLA, N.Y. 11501
(516) 741-1400

4. In 1947 when we moved into our home, there were two separate apartments in Mr. Thomas' house which was then owned by the Kochs, who told us that the house had always been a two family home.

5. In the sixty-three years since 1947, the Thomas' house has always been a two family home.

RAYMOND GUCKENBERGER

Sworn to before me this
2nd day of August, 2010

Notary Public
[Notary stamp/seal]

MATTHEW DONOVAN
NOTARY PUBLIC, State of New York
No. 4700724
Qualified in Nassau County
Commission Expires April 30, 2011

H. KUTNER, JR.
RNEY-AT-LAW
ILLIS AVENUE
LA, N.Y. 11501
0 741-1400

DISTRICT COURT OF THE COUNTY OF NASSAU
FOURTH DISTRICT: HEMPSTEAD, CRIMINAL PART (Room 118)
----------X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

AFFIDAVIT

- against -

Dkt # 2009 NA 000022 F

DARREN E. THOMAS,

Defendant.

----------X

STATE OF NEW YORK)

) ss.:

COUNTY OF NASSAU)

JAMES P. COLWELL, being duly sworn, deposes and says:

1. I reside at 235 Jerusalem Avenue, Hicksville, New York.

2. Our house is next door to the Thomases who moved into their home in 2007. They are quiet, friendly, polite, nice people, and good neighbors.

3. My wife and I purchased our home in 1975.

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FILLIS AVENUE
OLA, N.Y. 11501
(10) 741-1400

4. Since we moved in, we know that the Thomases' home at 121 Fourth Street, Hicksville, has always been a two-family.

James P. Colwell
JAMES P. COLWELL

Sworn to before me this
6th day of November, 2010

Lonnie D. McCowan
Notary Public

LONNIE O MCCOWAN
Notary Public - State of New York
NO. 01MC6110005
Qualified in Suffolk County
My Commission Expires 5/24/12

H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
OLA, N.Y. 11501
516 741-1400

DISTRICT COURT OF THE COUNTY OF NASSAU
FOURTH DISTRICT: HEMPSTEAD, CRIMINAL PART (Room 155)
----------X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

AFFIDAVIT

- against -

Dkt # 2009 NA 000022 F

DARREN E. THOMAS,

Defendant.

----------X

STATE OF MARYLAND)
) ss.:
COUNTY OF MONTGOMERY)

EDWARD J. ZEBART, being duly sworn, deposes and says:

1. I make this affidavit based on personal knowledge.

2. I am a previous owner of 121 Fourth Street, Hicksville, New York.

3. I purchased the property on July 3, 1984 from Antoinette Keis Bosted.

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WILLIS AVENUE
BOLA, N.Y. 11501
516) 741-1400

4. Before purchasing it, I was told it was a "legal, non-conforming two family" house, and had always been a two family.

5. Before purchasing it, I inspected the property and found it was as described, a two family home: it had two apartments (ground and second floors) including two kitchens, two electric meters and two mailboxes. It clearly was a two family house.

6. The two car garage had burned down before I purchased the property, and was a pile of rubble. After the closing, I had a new garage built ("CO" issued June 9, 1986).

7. While I owned the house, my wife and I lived on the ground floor.

8. After my wife and I moved into the house, and in approximately October-November, 1984, a new second floor tenant moved in.

9. On June 26, 1986, I sold the house as a "legal non-conforming two family" to the Cahillanes (Patrick, Sr. and his wife, Josephine, and their son, Patrick, Jr.).

M H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
SBOLA, N.Y. 11501
(516) 741-1400

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10. At the time I sold it, the second floor tenant was still living upstairs, and it was still a two family home.

11. During the entire time we owned it, there was no gap in its use as a two family home.

Edward J. Zebart
EDWARD J. ZEBART

Sworn to before me this
16th day of August, 2010

Farai Munyari
Notary Public
[Notary stamp/seal]

FARAI MUNYARI
Notary Public
State of Maryland
Montgomery County
My commission exp. May 19, 2012

H. KUTNER, JR.
ORNEY-AT-LAW
ILLIS AVENUE
DLA, N.Y. 11501
(516) 741-1400

DISTRICT COURT OF THE COUNTY OF NASSAU
FOURTH DISTRICT: HEMPSTEAD, CRIMINAL PART (Room 118)
----------X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

AFFIDAVIT

- against -

Dkt # 2009 NA 000022 F

DARREN E. THOMAS,

Defendant.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

BARBARA BEISEL, being duly sworn, deposes and says:

1. I make this affidavit based on personal knowledge.

2. I lived at 121 Fourth Street, Hicksville, New York, in the second floor apartment, with my mother, Ann, who has since died.

3. I lived there for approximately twelve years (1984-1996).

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WILLIS AVENUE
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(516) 741-1400

4. My mother lived in the apartment from 1984 until 1997.

5. The second floor apartment had an old kitchen, quite small, with an oven-stove, sink, and refrigerator-freezer.

BARBARA BEISEL

Sworn to before me this
2nd day of November, 2010

Notary Public

RENTON PERSAUD
NOTARY PUBLIC-STATE OF NEW YORK
No. 01PE6132586
Qualified In Queens County
My Commission Expires August 29, 2013

Y H. KETNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
INEOLA, N.Y. 11501
516) 741-1400

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X

In the Matter of the Application of

DARREN E. THOMAS,

Petitioner,

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by a selective prosecution in violation of equal protection,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

----------X

AFFIRMATION IN SUPPORT OF PETITION

Index #

HARRY H. KUTNER, JR., an attorney at law duly admitted to practice in the courts of the State of New York, affirms the truth of the following under the penalties of perjury:

1. As the attorney for the petitioner, DARREN E. THOMAS, since he purchased his subject home, this affirmation is based upon

H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

personal knowledge, papers and pleadings in my files, factual research, conversations with prior owners, tenants, and neighbors of Mr. Thomas, conversations with employees of LIPA-National Grid, and legal research.

2. This petition seeks a writ of prohibition to bar the further prosecution of Mr. Thomas as unconstitutionally selectively racially-based. It is acknowledged to be a serious charge, is not made lightly, and was only reluctantly pressed after all the proof was gathered, presented to the Town, but they obstinately refused to drop the prosecution. In this day and age, even after all the undeniable proof was obtained, it still makes us shake our heads in wonder.

CRIMINAL PROCEDURAL HISTORY

3. By an accusatory instrument dated December 22, 2008 but not filed until 2009 (Exhibit "1"), the complainant Town building inspector charged Mr. Thomas with two misdemeanor counts:

a. T.O.B § 246-5.2, two family use of his home in a one family zone; and

b. T.O.B § 93-28, two family use of his house without a Certificate of Occupancy.

ARY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

4. Only Mr. Thomas was prosecuted although he and his wife jointly own the house. Mr. Thomas is African-American, and his wife is not.

FAMILY BACKGROUND

5. Mr. Thomas is a managerial-level employee of the U.S. Postal Service at JFK Airport and is long-time married to his wife, Marlene. Mr. and Mrs. Thomas have two sons who are personable, polite and a credit to their parents. The older son is a graduate of St. Dominic's High School and is now an undergraduate at Hofstra where he is the power hitter on the baseball team. The younger son is in fourth grade.

6. No one in the family has ever had any criminal involvement, and they are insulted by the Town's behavior.

FOUNDATIONAL PROOF

7. Attached as additional supporting papers are affidavits from four people:

a. Raymond Guckenberger: the next door neighbor to Mr. Thomas' home since 1947, swears it has always been a two family home;

Y H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
ELA, N.Y. 11501
(516) 741-1400

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b. James P. Colwell: lives on the other side of Mr. Thomas' home since 1975, and also confirms that it has always been a two family home;

c. Edward J. Zebart: white and a prior owner of Mr. Thomas' home from 1984-1986, bought and sold it as a two family, and rented to Mrs. Beisel and her daughter (next affidavit); also, was never prosecuted for an illegal two family home; relates how in 1986 after he re-built the burned-down garage, the Town inspected, saw the two family use, and not only did nothing but issued a "CC" for the garage on June 9, 1986;

this is critically significant since it establishes the Town's presence, inspection, and acknowledgment of the legitimacy of the two family use twenty-five years ago; sold to the Cahillane family in 1986;

d. Barbara Beisel: white, and moved in with her mother in 1984 as second floor tenants initially of the Zebarts, and

V H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

lived there for twelve years until 1996 (later as tenants of the Zebarts' purchasers, the Cahillanes, who later sold to Mr. & Mrs. Thomas in 2007).

8. I spoke to the Cahillanes, a white family, who likewise confirmed that the house was always a two family and they were never prosecuted.

9. I also spoke to National Grid who now has the electric records regarding the Thomases' home. Even though LILCO's and their records do not go back indefinitely and are only required to be kept for seven years, they happened to have and sent me records proving that the two meters exist since prior to 1969 *since the second floor meter was replaced in that year* (Exhibits "4" and "5"). Since electric meters have a life expectancy of 25 years, the two meters existed since approximately 1944.

10. Again, despite the same circumstances for over sixty years including the two meters, doorbells, and mailboxes, none of the prior owners, all white, were ever prosecuted.

W. H. KUTNER, JR.
ATTORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

11. The accusatory instrument, sworn by the building inspector, declares under oath that:

a. the house was built in 1926;

b. the Town "CO" ordinance was passed on May 25, 1943;

c. the house is defined as legally non-conforming; and

d. no certificate of occupancy is required.

(Exhibit "1", page 1, lines 29-33)

The accusatory instrument's first count charges no named individual with not having a two family permit for the home which the inspector acknowledges is a pre-existing, non-conforming use, while the second count charges only Mr. Thomas with not having a certificate of occupancy although the inspector swears that none is required!

12. We have been unable to uncover <u>any</u> prior prosecutions for an illegal two family house against <u>any</u> of the prior owners of this house, <u>all</u> of whom were white. Not a single one. And, the respondents have not produced any, not even one.

13. Nor have we been able to uncover any prosecutions in the surrounding neighborhood for the many existing two and three family

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

homes. And, the respondents have not produced any, not even after being dared to do so, again not even a single one.

14. Of decisive significance is the Town's own inspection of the house in the Spring, 1986 while the Zebarts and Beisels were living there, and approval of the newly-built garage through issuance of the "CC", inferentially acknowledging and approving the long-standing two family use. No "CC" would have been issued if the two family use had been considered illegal, and it is incontrovertible from all the affidavits and the LILCO-LIPA-National Grid records that there were two families, two meters, two doorbells, and two mailboxes at that time.

15. The house has been taxed as a two family since sometime prior to 1982 (Assessors' prior records missing and supposedly lost in County's warehouse fire).

16. The Thomases' home has been a two family since it was built in 1926, and none-too-curiously for this proceeding the Town never filed criminal charges against any of the prior all-white owners. But now since the African-American Mr. Thomas bought it, the inspector has pursued the non-violative home with a never-before-displayed zeal. Multiple attempts

Y. H. KUTNER, JR.
ATTORNEY-AT-LAW
WILLIS AVENUE
SEOLA, N.Y. 11501
(516) 741-1400

by me to contact that inspector by letter and telephone were all ignored. After all, it would be difficult for the inspector to justify threatening and finally filing violations against a home carried on the tax rolls as a two family, and which he himself in his accusatory instrument swears was "legally" built before the Town zoning ordinance was enacted, is "legally non-conforming," and for which "no certificate of occupancy is required" (Exhibit "1", page 1, lines 30-33).

17. The inspector is conclusively hooked on an irrebutable, fatal contradiction: to be sufficient, an information must be sworn to by an individual with personal knowledge. But if he claims (so far he has not which is one of several defects in the accusatory instrument) that he has personal knowledge that the house was not a two family before Mr. Thomas bought it, then he cannot justify the prosecution only of the current black owner while he did not do so against the prior white owners. On the other hand, should he persist in his allegation in the complaint of no personal knowledge prior to Mr. Thomas' ownership, then his accusatory instrument is fatally defective on its face because he cannot "personal knowledge" deny Mr. Thomas' assertion, corroborated by Messrs. Guckenberger, Colwell, and

RY H. KUTNER, JR.
TTORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

Zebart, and Ms. Beisel, that it was always a two family and is exempt from prosecution as pre-existing and non-conforming.

SELECTIVE PROSECUTION

18. The U.S. Supreme Court has provided the two step test for determining an unconstitutional racially-selective prosecution: a) there were individuals of other races engaged in the same behavior who were not prosecuted, and 2) the prosecution of the defendant is for the constitutionally prohibited purpose of racial discrimination (please see petitioner's Memorandum of Law).

19. The affidavit of Mr. Guckenberger personally establishes that Mr. Thomas' house has been a two family home since 1947. And yet no prior homeowner was ever prosecuted for a two family home because it was and still is permitted as a pre-existing, non-conforming use.

20. All prior owners of the property were white.

21. I have personally spoken to four of the owners back to

V H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
516) 741-1400

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1970. All maintained the house, continuously, as a two family. All knew that the house was a pre-existing, non-conforming, two family house. And none were ever prosecuted for that use. And, all were-are white.

22. Of all the owners of the house since 1926, Mr. Thomas is the only black man, and the only one who has been prosecuted. Even of the two present owners of the house, Mr. and Mrs. Thomas, only the African-American, Mr. Thomas, has been prosecuted.

23. No information can be found nor has been submitted by the Town respondents, that any previous and present owners of other two and three family homes in the same neighborhood, all of whom are reputedly white, have ever been prosecuted.

24. The prosecuting inspector is white (Mr. Thomas saw him).

25. The U.S. Supreme Court's burden has overwhelmingly been met (please refer to petitioner's Memorandum of Law).

26. The caselaw decrees that this issue is to be decided pre-trial by the court through a hearing, not as an affirmative defense during trial (as incorrectly insisted by the Town in opposition to a motion in

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
SBOLA, N.Y. 11501
(516) 741-1400

District Court). However, the court declined to hold the requisite hearing providing the procedural predicate for this Article 78.

27. Where no past owners of this same home, all of whom were white, which has been a two family house since 1926, nor any other white owners of two family homes in the neighborhood, have been prosecuted, and Mr. Thomas, an African-American is being charged, this petition should be granted barring the respondents from continuing the constitutionally-violative, racially-motivated, selective prosecution.

PROHIBITION BASED ON WAIVER-ESTOPPEL

28. The Town's non-enforcement against any previous owners constitutes a waiver of the right to press this issue, and should be held to estop the prosecution.

29. Waiver and estoppel against a municipality are not to be concluded from mere non-enforcement but require affirmative knowledge and a conscious decision not to pursue. Here the Town actually inspected the property in 1986 when it approved the new garage, and two families, with two meters, two doorbells, and two mailboxes, were present.

W. H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

30. The Town's acquiescence then, together with its seven decades ignoring of the two family house, should cause its being barred.

TOWN RESPONDENTS' POSITION

31. The Town respondents procedurally failed to create any issue of fact to rebut the *prima facie* case of selective enforcement by the building inspector. Indeed, he did not even submit an affidavit denying the accusation. Thus there was no personal knowledge affidavit from the individual who initiated this prosecution, the building inspector, denying that the prosecution was initiated for a racially discriminatory reason.

32. Astoundingly, charged with a particularly odious accusation of a racially-based selective prosecution, the Town respondents did not:

a. submit an affidavit of denial from the building inspector;

b. attach any records verifying respondents' attorney's claim of a "code enforcement case . . . opened and resolved in 2006, against a prior owner of the defendant's premises;"

V H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

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c. attach any records verifying respondents' attorney's claim of thirty code enforcement cases within two blocks over the last twenty years;

d. attach any of the Building Department records for the inspections of the subject house in 1986 when the garage building permit and later CO were issued; nor

e. attach any of the Town's tax records establishing why it was taxing the house as a two family.

Each deficiency will now be serially addressed.

A. No affidavit of facts from building inspector

33. An attorney's affirmation is procedurally insufficient to create a factual issue (e.g., summary judgment, motions to vacate defaults, etc., etc.). The Town respondents only presented counsel's arguments-assertions, unsupported by anyone with personal knowledge.

34. Faced with the opprobrious accusation, supported by the history of pre-prosecution harassment and ignoring of my several telephone and written inquiries to prevent any prosecution, that the subject building inspector submitted no affidavit is notably conspicuous-by-its-absence. Had

W H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
516) 741-1400

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this Court, or I, or any other person innocent of such an accusation, been charged with it, we would have chomped at the bit to deny it. And incidentally, it was procedurally required.

B. No 2006 Building Department records

35. To dispel the conclusion that this is a selective prosecution, in District Court the respondents' attorney alleged that a "2006 code enforcement case" had been filed for this same house. The insinuated inference was clear: that they were not just pursuing the case because Mr. Thomas was black since they had done so in the past. However when dared to produce the file, she failed to do so. It is therefore unknown whether there was no case at all and it was a complete fabrication, or whether the file would have confirmed that the house is legal, or whether it was not for a two family charge. It is certain however that her inference sought to be drawn (of a Town position that the two family use always was illegal and not just prosecuted because of race) was nonsense.

36. From their refusal to disclose the supposed "2006 code enforcement case," one can be certain that even if it existed, that it did not involve an illegal two family charge and the claim was at best misinformed.

RY H. KUTNER, JR.
TTORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

37. One can also be certain that attachment of the "2006 code case," if it existed, would not only have proven that the charges did not involve an illegal two family issue, but that the Town knew it was a two family and did not prosecute – because it was known to be a pre-existing, non-conforming use. That is, until an African-American man and his family bought it.

C. No Building Department records - "30 cases"

38. In District Court, the Town attorney also reputed that "thirty code enforcement cases (were prosecuted) . . . within two blocks," but when challenged by Mr. Thomas, never produced a single one.

39. The non-production of the supposed "30 cases" assures that there never were any "thirty code enforcement cases."

40. It can also be fairly concluded that even if there were any such cases, they were certainly not for illegal two family dwellings.

41. Faced with sworn statements that one-third (six not counting the Thomases' pre-existing, non-conforming home, of eighteen houses within two blocks) were two and three family homes sporting

W H. KUTNER, JR.
TTORNEY-AT-LAW
I WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

multiple electric meters, doorbells, and mailboxes, the Town respondents' claim of thirty past prosecutions, uncorroborated by records, inescapably leads to the twin conclusions that the claim was false, and that they are that desperate to make a false claim because they know that this one is too-obviously a racially-motivated selective enforcement.

D. Subject house: 1986 garage construction

42. One previous owner, Mr. Zebart, re-built a fire-destroyed garage and received a CC, incontrovertibly establishing that a building inspector was on-site many times.

43. Challenged to produce those particular Town records, it is not difficult to know why they withheld them: in 1986 a building inspector had to have visited the subject premises at least four times: when the slab was poured, and when the framing was done, and when the electric was finished, and when the job was completed.

44. From Mr. Zebart's affidavit (owner of house at time), and LIPA-National Grid's records, the Court knows for certain that there were two meters on the house since long prior to 1969 (Exhibits "4" and "5"), so

RY H. KUTNER, JR.
TTORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1100

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they were there in plain view in 1986 when the garage was built.

45. From the affidavits of the neighbors and prior owners, it is also inarguable that there have always been two families, two doorbells, and two mailboxes on the house since 1947, and so they also were present each time the building inspector was there in 1986.

46. It is also certain that the then-1986 owner was white.

47. It is also impossible not to believe that the building inspector's 1986 records contain notes that it was a two family home, and he did not prosecute it because it was known to be a pre-existing non-conforming legitimate use. That conclusion is inescapable based on the respondents' withholding the records.

E. Town's collection of taxes

48. Proving that this is a selective enforcement and not a legitimate prosecution of an illegal two family home, the Town also cannot deny their knowing collection of taxes for a two family house for years.

GUY H. KUTNER, JR.
ATTORNEY-AT-LAW
10 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

49. Besides establishing its legitimate pre-existing, non-

Thomas0050

conforming two family status, the collection of taxes also provides a basis for the petitioner's estoppel-waiver argument.

52. How exactly does a municipality have the nerve to assess and collect taxes on a house as a two family, for decades, but then prosecute the first African-American owner for an illegal two family? Unconstitutionally racially-selectively, and without shame.

SELECTIVE PROSECUTION: RESPONDENTS' BURDEN NOT MET

53. The Town respondents did not sustain their burden: as established in the caselaw, Mr. Thomas' *prima facie* demonstration of a racially-based selective prosecution, shifted the burden to the respondents to show that the prosecution arose from a non-violative basis. In response, they failed to meet it.

54. Procedurally, no affidavit was submitted from the building inspector who filed the prosecution. The attorney's affirmation was plainly without any weight.

RY H. KUTNER, JR.
TTORNEY-AT-LAW
8 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

55. No explanation was submitted to counter the irrefutable sworn information establishing a racially-based, selective prosecution:

a. house continuously maintained since at least 1947 as a two family;

b. corroboration from LIPA-National Grid records of two meters since before 1969;

c. no prior owners having ever been prosecuted for an illegal two family home;

d. Town building inspectors having visited the house on multiple occasions without prosecution;

e. house taxed as a two family home.

56. At least as to the last fact, from the moment the Town began taxing the home as a two family, it was on constructive notice that it was a two family use.

57. So if it was an openly notorious two family home for years, and never prosecuted, then the sudden zeal after Mr. Thomas purchased the house, only permits the conclusion of a racially-based selective prosecution.

IV H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
SBOLA, N.Y. 11501
(516) 741-1400

58. Therefore, the burden shifted to the respondents to

establish a legitimate, non-discriminatory reason for prosecuting Mr. Thomas. They absolutely did not meet their burden.

59. The only "excuse" submitted for why the Town is suddenly now prosecuting Mr. Thomas, was and will be obsessively repeated herein: that the respondents only respond to written complaints (petitioner's Memorandum of Law, pages 12-13, "Respondents' mantra: 'civilian complaint' ").

First, even if the excuse were viable, which it is not, but even if so, the People never substantiated by anyone's affidavit that in fact a complaint had ever been received for the Thomases' home, and produced a copy. In light of the *prima facie* established racially-based selective prosecution, the People failed to meet their burden.

Secondly, the excuse insults the Court's, public's, defendant's, and anyone-else-reading-its intelligence that in the face of an accusation of a racially-based selective prosecution, they would try to so excuse it. If that is really their "M.O.," then the Town's Building Department fails to realize that their policy allows it to be used as a dupe for racists, the vengeful, and any others who would provoke use of the Town's police power against some other homeowner. The policy cannot be true, because if so it is short-sighted.

GUY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

Thirdly, as established in the petitioner's Memorandum of Law, the Court of Appeals has declared that far from validly excusing a selective prosecution by the municipality's awaiting civilian complaints, such a practice actually worsens the municipality's position (pages 12-13, Section D, "Respondents' mantra: 'civilian complaint' ").

60. The respondents are however forced to adopt this incredible excuse. Without it, they are trapped that it is certainly a racially-motivated selective prosecution. So no matter how foolish the excuse appears, it relies on an "I'd rather be found foolish, than malicious and unconstitutional" tactical choice.

IMPERMISSIBLE SELECTIVE PROSECUTION: NOT A TRIAL ISSUE

61. The respondents tried to defer this issue for trial but it is an issue of law involving the legitimacy of the prosecution itself, i.e., the "authority of the sovereign to prosecute," and thus must be resolved pre-trial (please refer to petitioner's Memorandum of Law, pages 9-11, Section B). Since District Court failed to grant petitioner his entitled hearing, and respondents created no factual issue, the prosecution should be barred.

RY H. KUTNER, JR.
TTORNEY-AT-LAW
WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

Thomas0054

62. Respondents utterly failed to respond to the methodically laid out, unrefuted facts and law conclusively proving a selective prosecution. Instead of addressing any one of the facts, or the law, respondents chose to ignore the unbeatable. But by doing so, no issue of fact was created and a writ of prohibition should be ordered.

CONCLUSION

63. Of the eighteen closest homes to Mr. Thomas, six others (one-third) display the Town's presumptive indicia of an illegal two family use (multiple electric meters, doorbells, and mailboxes) and yet none are nor have been prosecuted. Only the legal, non-conforming Thomas house, owned by an African-American man, has been singled out for prosecution.

64. When the building inspector first confronted Mr. Thomas, Mr. Thomas told him he would have to sell the house if he could not keep the tenant because the rent helped pay his mortgage. Relatively soon after, the prosecution was filed although not a single one of the other nearby six multi-family homes was also prosecuted.

Y H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
OSLYN, N.Y. 11581
516 741-1400

Thomas0055

65. The Town respondents have indignantly protested that they were truly offended by this "baseless and insulting accusation" of a racially-motivated prosecution. But it was only done by counsel, and no building inspector denied it, with the missing records to prove the accusation was untrue. Neither was done, because the accusation is dead-on right.

66. Evidence that the house has been a two family since at least 1947 (Mr. Guckenberger's affidavit), corroborated by utility and Assessor records, has been met with absolute silence – no building inspector and no records. Respondents' burden in proving a legitimate basis to counteract the overwhelming evidence of a racially-based selective prosecution was not met.

67. In light of the evidence that no prior owner was prosecuted for this two family house, ever, even once during the last sixty-four years, in a neighborhood where on just two blocks one-third of the homes are two and three family, until after it first became owned by an African-American man, not denied by the Town respondents, conclusively establishes an impermissible, racially-based, selective prosecution.

BY H. KUTNER, JR.
ATTORNEY-AT-LAW
8 WILLIS AVENUE
NEW H.A. N.Y. 11501
(516) 741-1400

Thomas0056

68. It is humbly submitted that the writ should be granted and the prosecution should be barred.

WHEREFORE, it is respectfully requested that the relief sought in the petition be granted, together with any such other and further relief which is just, equitable, and proper.

Dated: Mineola, New York
September 30, 2011

HARRY H. KUTNER, JR.

HARRY H. KUTNER, JR.
ATTORNEY-AT-LAW
[illegible] WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1300

EXHIBIT LIST

1 12-22-08 accusatory instrument

2. Nassau County Assessor's card

3. Nassau County Assessor's print-out

4. National Grid records

5. LIPA records

6. 1986 building permit

7. 1986 Certificate of Occupancy

8. 08- -11 decision-order of District Court

W. H. KUTNER, JR.
ATTORNEY-AT-LAW
WILLIS AVENUE
SEOLA, N.Y. 11501
(516) 741-1400

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

In the Matter of the Application of

DARREN E. THOMAS,

Petitioner,

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by a selective prosecution in violation of equal protection,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

----------X

SUPPLEMENTAL AFFIRMATION AS TO DELAY

Index #

HARRY H. KUTNER, JR., an attorney at law duly admitted to practice in the courts of the State of New York, affirms the truth of the following under the penalties of perjury:

1. This affirmation is submitted solely to explain the delay since the execution of the petition and supporting papers.

HARRY H. KUTNER, JR.
ATTORNEY-AT-LAW
16 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

2. The undated District Court decision at issue in this Article 78 was issued in late August. Thus the 120 days expires at the end of this month.

3. In the interim, I repeatedly tried to schedule a conference with Town officials to try to resolve the issues. The Town officials were initially unresponsive and later not available as weeks and now months passed.

4. To avoid any possibility of a Statute of Limitations defense, these papers are now being filed.

5. In the meantime before the return date, if the conference ever manages to take place, of course we will try to resolve the issues.

WHEREFORE, it is respectfully requested that the order to show cause, with the TRO-stay, be signed, and that any such other and further relief be granted as is just, necessary and proper.

Dated: Mineola, New York
December 6, 2011

HARRY H. KUTNER, JR.

Y H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
EOLA, N.Y. 11501
(516) 741-1400

Thomas0060

EXHIBIT 1

COURT INFORMATION

RETURNABLE
FEBRUARY 9, 2009

DISTRICT COURT OF NASSAU COUNTY
FOURTH DISTRICT: CRIMINAL PART

THE PEOPLE OF THE STATE OF NEW YORK

against

DARREN E. THOMAS
121 4TH STREET
HICKSVILLE, NEW YORK 11801

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

CHRISTOPHER GIOIA, TOWN CODE ENFORCEMENT INSPECTOR, of the Town of Oyster Bay, Department of Planning and Development, being duly sworn, deposes and says that on the 5TH day of December, 2008, at premises located at: 121 4th Street, Hicksville, New York 11801, in the Town of Oyster Bay, County of Nassau and State of New York, District designation R1-7 on the Building Zone Map of the Town of Oyster Bay, Nassau County, New York, also known as Section 46 Block 270 Lot 1 on the Land and Tax Map of the County of Nassau, the defendant did willfully, wrongfully and unlawfully violate the provisions of the Code of the Town of Oyster Bay, New York, as follows:

COUNT I

Violation of the Code of the Town of Oyster Bay, New York,
CHAPTER 246 ZONING CODE OF THE TOWN OF OYSTER BAY
SECTION 246-5. DISTRICT REGULATIONS
SUB-SECTION 246- 5.2 Schedule of Use Regulations.

The accompanying Schedule of Use Regulations lists the permitted uses of land, *buildings* and *structures* and indicates in which districts, and subject to what manner of approval, each is permitted. Any use not specifically listed shall be deemed to be prohibited, unless the Town Board determines by the grant of a special permit that such use is of the same general character as other permitted uses in the district and that such use will not be detrimental to the district. All uses are subject to the requirements and conditions set forth in the noted sections (§). Any *accessory building* or use determined by the Department of Planning and Development to be customarily accessory or incidental to a permitted *principal use* shall be a permitted *accessory use* in the district in which it is located. **(See Attached Schedule 246-5.2)**

To wit: Your deponent observed two separate electric meters on the west side of the subject dwelling. Your deponent further observed two doorbells attached to the front of the building, located next to the front entrance. Your deponent personally, researched the Section, Block, and Lot building files and records kept during the normal course of business by the Division of Buildings at the Town of Oyster Bay, Department of Planning and Development. Certificate of Occupancy #A11417, dated June 9, 1986, for a two car detached garage built on the subject premises shows the premises zoned as a one family use. Personal research by your deponent of the Nassau County Property Tax records indicates subject dwelling had been built in 1926. On May 25, 1943, the Town of Oyster Bay passed an ordinance requiring the issuance of Certificates of Occupancy. Since said building was legally in existence prior to May 25, 1943, it is defined as legally non-conforming and no certificate of occupancy is required. The observance by your deponent of two electric meters and two doorbells is rebuttable presumption of occupancy by more than one family. A two family use of the subject dwelling in a "R1-7" zone requires ZBA approval for a Special Permit Use. A special permit has not been issued for a two family use. The aforementioned is a violation of the Code of the Town of Oyster Bay, New York.

NSE:
ion 246-5
emeanor

FENSE:
ction 93-28
sdemeanor

COUNT II

Violation of the Code of the Town of Oyster Bay, New York,
CHAPTER 93 BUILDING CONSTRUCTION
ARTICLE III, Certificates of Occupancy
§ 93-28. When required. [Amended 5-6-80]

No building hereafter erected, enlarged, extended or altered shall be occupied or used, in hole or in part, until a certificate of occupancy, certifying that the building conforms to the approved plans and the requirements of this chapter and stating the purposes for which the building may be used in its several parts, and any special stipulations, shall have been issued by the Commissioner of the Department of Planning and Development or his designee and signed by him or his authorized assistant. If the occupancy or use of a building is not discontinued during the work of alteration, the occupancy or use of the building shall not continue for more than 30 days after completion of the alteration unless a certificate of occupancy shall have been issued.

To wit: Your deponent observed two separate electric meters on the west side of the subject dwelling. Your deponent further observed two doorbells attached to the front of the building, located next to the front entrance. Your deponent researched the Section, Block, and Lot building files and records in the Division of Buildings at the Town of Oyster Bay, Department of Planning and Development. Certificate of Occupancy # A11417 issued June 9, 1986, for a two car detached garage built on the subject premises shows the premises zoned for one family use. Personal research by your deponent of the Nassau County Property Tax records indicates the subject dwelling had been built in 1926 with only one kitchen. On May 25, 1943, the Town of Oyster Bay passed an ordinance requiring the issuance of Certificates of Occupancy. Since said building was legally in existence prior to May 25, 1943, it is defined as legally non-conforming and no certificate of occupancy is required. A two family use of the subject dwelling in an "R1-7" zone requires ZBA approval for a Special Permit Use. The observance by your deponent of two electric meters and two doorbells is rebuttable presumption of occupancy by more than one family. Upon further review by your deponent of the files and records of the Town of Oyster Bay, no certificate of occupancy has been issued for a two family use. The aforementioned is a violation of the Code of the Town of Oyster Bay, New York.

That the Code of the Town of Oyster Bay, New York, as amended was duly and legally adopted, enacted, published and posted by the Town Board of the Town of Oyster Bay, and filed in the Office of the Town Clerk prior to December 4, 2008 and said ordinances are still applicable;

That at all times hereinabove mentioned defendant, Darren E. Thomas, is the owner of the above mentioned premises.

The above statements are true based upon my personal observation and upon information and belief based upon public documents which are attached hereto and as to those statements; I believe them to be true.

FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

Christopher Gioia
Town Code Enforcement Inspector

Subscribed to and sworn to before me this
22 day of December, 2008

Notary Public

Thomas0063

EXHIBIT 2

nationalgrid

Direct Dial: 516-545-5161

4346

September 13, 2010

RECEIVED

SEP 16 2010

HARRY H. KUTNER, JR.
ATTORNEY AT LAW

First District Civil Court
99 Main Street, Room 155
Hempstead, New York 11550

Att: Subpoena Records Room

Re: The People of the State of New York
v.
Darren E. Thomas
Docket No.: 000022/09

Dear Sir/Madam:

In further response to a Subpoena Duces Tecum issued upon Long Island Power Authority in the above-referenced matter, enclosed please find additional account records which indicate the installation dates for the two electric meters installed at 121 Fourth Street, Hicksville, New York. A copy of said Subpoena Duces Tecum is enclosed for your reference.

Pursuant to CPLR 3120(3), effective September 1, 2003, please give all parties to the subject action notice that the enclosed documents are available for inspection and copying.

I hereby certify that the enclosed documents are made and maintained in the normal course of business at National Grid.

Very truly yours,

Loraine Christy Klimas

Loraine Christy Klimas
Legal Assistant

/lck
cc: Harry H. Kutner, Jr., Esq.

175 East Old Country Road, Hicksville, NY 11801
T: (516) 545-5161 ■ F: (516) 545-5029 ■ www.nationalgrid.com

Affidavit of Certification

STATE OF NEW YORK)
)ss.:
COUNTY OF NASSAU)

Loraine Christy Klimas, being duly sworn, deposes and says that:

1. I am a Legal Assistant in National Grid's Legal Department and have the authority to make this certification.

2. To the best of my knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the Subpoena that are in National Grid's possession, custody or control. National Grid is Long Island Power Authority's agent for purposes of billing and customer account records.

3. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and it was the regular course of business to make such records.

Loraine Christy Klimas

Loraine Christy Klimas

Sworn to before me this
13 day of September 2010.

Notary Public

KEVIN B. SCHEID
Notary Public, State of New York
Registration #01SC6211820
Qualified In Suffolk County
Commission Expires Sept. 21, 2013

1 [illegible]
CKSVILLE NY 11801 PHONE:C:770:4532-516 KEY: ARA:RES UNI
IL X-JERUSALEM RD
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Thomas0067

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DISTRICT COURT OF THE COUNTY OF NASSAU
FOURTH DISTRICT: CRIMINAL PART

----------X

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

JUDICIAL SUBPOENA
DUCES TECUM

-against-

DKT # 000022/09

DARREN E. THOMAS,

Defendant.

----------X

THE PEOPLE OF THE STATE OF NEW YORK

TO: LONG ISLAND POWER AUTHORITY
333 Earle Ovington Boulevard, Suite 403
Uniondale, New York 11553

GREETINGS:

WE COMMAND YOU, That all business and excuses being laid aside, you and each of you appear and attend before the HON. NORMAN JANOWITZ or the Judge presiding of the District Court of the County of Nassau, at the courthouse located at 99 Main Street, Room 155, Hempstead, New York, on the ~~23rd~~ 7th day of ~~August~~ September, 2010, at 9:30 o'clock in the forenoon of that day and at any recessed or adjourned date, to give testimony in this action on the part of the defendant, DARREN E. THOMAS, and that you bring with you and produce at the time and place aforesaid, the following records:

HARRY H. KUPFNER, JR.
ATTORNEY-AT-LAW
190 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

2010 SEP -1 A 11:25
L I P A
2010 AUG 32 A 10:17
L I P A

Re: Premises known as 121 Fourth Street, Hicksville, New York
(two accounts – two meters)

1. 1st floor electric meter:

all records since first installed in 1926;

2. 2nd floor electric meter:

all records since first installed in 1926.

PLEASE TAKE FURTHER NOTICE, that failure to comply with this subpoena is punishable as a contempt of court and imprisonment as provided by law, and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed FIFTY ($50.00) DOLLARS, and all damages sustained by reason of your failure to comply.

WITNESS, HON. NORMAN JANOWITZ, one of the Judges of said Court, at Hempstead, New York, on the 9th day of August, 2010.

/s/ Harry H. Kutner Jr.

HARRY H. KUTNER, JR., ESQ.
Attorney for defendant
136 Willis Avenue
Mineola, New York 11501
(B)(516) 741-1400

COMPLIANCE WITH THIS SUBPOENA IS HEREBY "SO ORDERED" THIS 26TH DAY OF AUGUST, 2010.

/s/ Tricia M. Ferrell

HON. HON. TRICIA M. FERRELL
Judge of the District Court

HARRY H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

NOTE: PLEASE CONTACT MR. KUTNER'S OFFICE UPON RECEIPT HEREOF AT (516) 741-1400 TO SCHEDULE THE EXACT DAY AND TIME OF YOUR APPEARANCE.

Thomas0071

Hicksville

SECTION	BLOCK	LOT	ADDRESS	CARD No.
46	270	1,2,3	121 - Fourth ST	

PROPERTY DESCRIPTION

702 5,600 5,600 1565 1

DB 17

84256-1033

2-3-9-23-33-93-57-39-D-A-1S

EDWARD J. ZEBART ETAL

SEC 46 BLOCK 270 9566-369

LOT 1-3

BZ 91284

CLASS 210.11

REMARKS

20x100 @ 200aa.

49

9

ASSESSMENT SUMMARY

19	LAND	600
	BLDGS.	
	TOTAL	2700
19	LAND	
	BLDGS.	
	TOTAL	
19	LAND	780
	BLDGS.	5446
	TOTAL	6226
19	LAND	780
	BLDGS.	
	TOTAL	6250
19	LAND	702
	BLDGS.	
	TOTAL	5600
19	LAND	
	BLDGS.	
	TOTAL	
19	LAND	
	BLDGS.	
	TOTAL	
19	LAND	
	BLDGS.	
	TOTAL	
19	LAND	
	BLDGS.	
	TOTAL	
19	LAND	
	BLDGS.	
	TOTAL	

5,600 5,600 1565 1 EDWARD J. ZEBART ETAL SEC 46 BLOCK 270 LOT 1-3 DB 17 84256-1033 2-3-9-23-33-93-57-39-D-A-1S

5,600 702 DB 17 84067-1220 2-3-9-23-33-93-57-39-D-A-1S DENNIS & ANTOINETTE K. SEC 46 BLOCK 270 LOT 1-3 CLASS 210.11

LOT 1-3

11213

30 26

SC LAND RECORD A-1

NO UTILITIES		LOW
NO SEWER	V	HIGH
NO WATER		ROUGH
NO GAS		ROCKY
ELECTRICITY		SWAMPY
		HILLSIDE
STREET		WOODED
STREET		BRUSH LAND
IMPROVED ST.		TILLABLE
SIDEWALK		

LAND VALUE COMPUTATIONS

FRONTAGE FIGURED	AVERAGE DEPTH	UNIT PRICE	UNIT PERCENT	FRONT FT. PRICE	COR. INFL.	TOTAL	% DEPR.	VALUE
60	100	13				780		

COUNTY RECORD NASSAU COUNTY NEW YORK

Thomas0072

OCCUPANCY	CONSTRUCTION	SIZE	GRADE	AGE	REMODL'G	COND.	PHYS. DEP.	FUNCT. DEP.	REPL. VALUE	PHYSICAL VALUE	SOUND VALUE
Dwell	B&A & BFR		B+5	-17		F	20%		6448	5158	
GAR 2C	1S FR	18X20	D			F	20		360	288	
		11-28				TOTAL				5446	

FOUNDATION
- CONCRETE WALLS ✓
- CEMENT BLK. WALLS
- BRICK WALLS
- STONE WALLS
- PIERS

BASEMENT AREA
- ¼ ½ ¾

EXTERIOR WALLS
- CLAPBOARDS
- COLONIAL SIDING ✓
- SINGLE SIDING
- WOOD SHINGLES
- COMPO. SHINGLES
- STUCCO ON FRAME
- STUCCO OR TILE ON C.B.
- FACE BRICK VENEER
- FACE BR. OR TILE ON C.B.
- COM. BRICK VENEER
- COM. BR. ON TILE OR C.B.
- SOLID COM. BRICK
- STONE VENEER
- SOLID STONE

- ROOF INSULATION
- BLANKET INSULATION

ROOF TYPE
- HIP
- GABLE
- MANSARD
- FLAT ✓
- GAMBREL

ROOFING
- ASPHALT SHINGLE ✓
- WOOD SHINGLE
- ASBESTOS SHINGLE
- SLATE—STD. WT.
- SLATE—HEAVY
- TILE
- METAL
- COMPOSITION

FLOORS

	0	1ST	2ND	3RD
CEMENT	✓			
TILE				
HARDWOOD		✓	✓	
SLATE FL.				

ATTIC & BSMT. FIN.
- ATTIC FL. & STAIRS ✓
- FIN. ATTIC AREA
- FIN. BSMT. AREA
- RECREATION RM. BSMT.
- GARAGE IN BSMT.

ROOMS

BSMT.		1ST 3 FLR	
2ND 3		3RD	

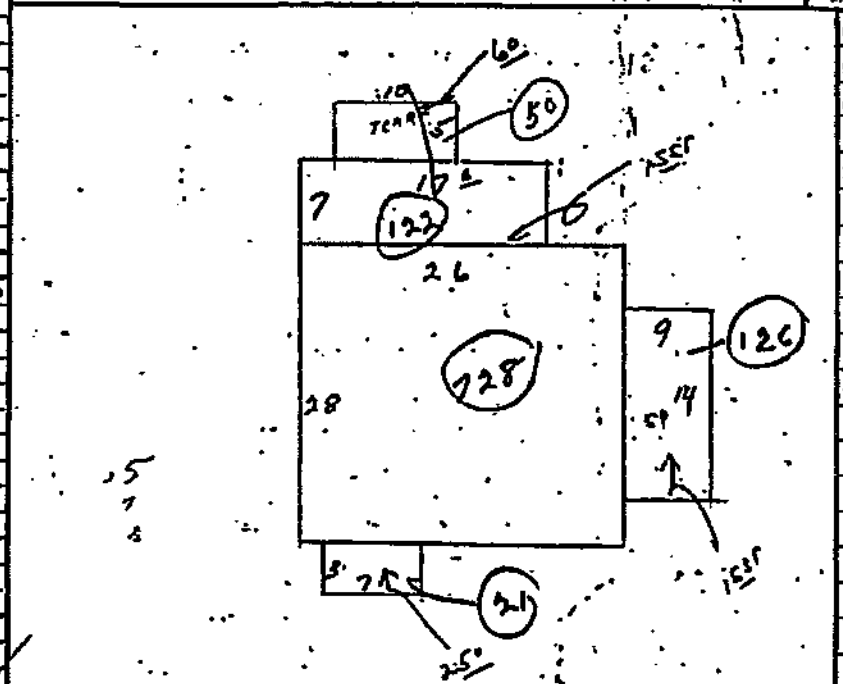
INTERIOR FINISH

	1ST	2ND	3RD
PINE	✓	✓	
ENAMELED			
CHESTNUT			
HARDWOOD			
WALL BOARD			
MATCH BOARD			
UNFIN. INT.			

HEATING
- STEAM
- HOT WATER ✓
- VAPOR
- AIR COND.
- HOT AIR
- PIPELESS
- NO HEATING SYST.
- OIL BURNER
- COAL STOKER
- GAS BOILER

FIREPLACES
- FIREPLACE STACKS 1 ✓
- FIREPLACES 1 ✓
- ARTIFICIAL FIREPLACE
- INCINERATOR

LIGHTING
- NO ELECTRIC LTG.
- GAS LIGHTING
- PRIVATE LTG. SYST.



MEASURED	50
LISTED	41
AREA COMP.	FL
PRICED	113

PLUMBING
- BATH ROOMS ✓
- STALL SHOWER BATH ROOM
- STALL SHOWER EXTRA
- TOILET ROOMS
- WATER CLOSET EXTRA 1 ✓
- LAVATORY EXTRA
- SINK EXTRA
- SEPTIC TANK OR CESSPOOL ✓
- DRILLED WELL
- PRIVATE WATER SYST.

TILING
- BATH FLOOR & WAINSCOT
- BATH FLOOR & WALLS
- BATH FLOOR ONLY 1 ✓
- TOILET RM. FL. & WAINS.
- TOILET RM. FL. & WALLS
- TOILET RM. FL. ONLY
- KITCHEN WAINSCOT

LOCATION

GOOD	FAIR ✓	POOR

BUILDING COMPUTATION

378	S.F.		4727
50	S.F.	60.2	30
122	S.F.	13	407
126	S.F.	13	431
21	S.F.	2.50	52
	S.F.		
	S.F.		
	S.F.		
BSMT. AREA			
WALLS			
ROOF			
FLOORS			-50
FLOORS			
ATTIC			110
INT. FIN.			
HEATING			1411
FIREPLACES			160
PLUMBING			80
TILING			50
			6141
		+5	307
TOTAL			6448
COST FACTOR			
REPLACEMENT VALUE			

OUTBUILDINGS

WALL FOUNDATION	✓	CONC. FLOOR	✓
PIER FOUNDATION		EARTH FLOOR	
SINGLE WALL SDG.			
DOUBLE WALL SDG.	✓	SHINGLE ROOF	✓
SHINGLE WALLS		ROLL ROOFING	
STUCCO ON			
CEMENT BLOCK		ELECTRIC LIGHTS	✓
BRICK		FINISHED INT.	
UNIT PRICE #1		UNIT PRICE #2	

11921 3

46 270 1 E2132316 N195032

Thomas0073

EXHIBIT 3

Roll Year	2011-2012	**Liber & Page (Deed#)**	12244919
		Land Category	Residential
Property Size Code	4	**Land Title**	Two Family Year-Round Residence
Property Class Code	220.01	**Land Description**	
Item Number	11274	A Two Family Dwelling Constructed To Accommodate Year-Round Occupancy.Includes Duplex, Single Owner.	
NYS School Code	282417		
NYS SWIS Code	282489	**Lot Grouping**	1-3

View Property Record Cards 1938-1985

Tax Year	2012	**Total Living Area**	1836
Card/Bldg	1	**Full Bathrooms**	2
School District	HICKSVILLE UFSD - 17	**Half Bathrooms**	0
Acres	0.1377	**Fireplaces**	1
Lot Square Footage	6000	**Number of Bedrooms**	
Land Code	PRIMARY SITE	**Additional Fixtures**	2
Location		**Attic**	UNFI
Living Units	2	**Basement Area**	FULL
Style	COLONIAL	**Finished Basement Living Area**	
Story Height	2	**Recreation Room**	
CDU	AVERAGE	**Basement Garage**	
Grade	C	**Attached Garage**	No
Exterior Walls	ALUM/VINYL	**Detached Garage**	Yes
Year Built	1926	**Decks/Porches**	
Year Remodeled			
Fuel	OIL		
Heat/AC	CNTRL HEAT		
Pool	No		

Addition and Out-Building Structures

Line	Area	Code	Description
1	182	10	1s FR FRAME
1	360	RG1	DET GARAGE
2	72	10	1s FR FRAME
3	126	10	1s FR FRAME

Nassau County Department of Assessment Click Here to Print Screen in Landscape

EXHIBIT 4

PARCEL:46-270- -0001.0 CARD: 1 OF 1 TAX YEAR 2010 TIEBACK ALT ID 1-3 MAP # ROUTE

ADDRESS 121 FOURTH ST

NBHD 060 RESTRICTION / / / /

LUSE 2200 CONDO.LVL TYPE SCH DIST 30171

LIV UNIT 2 ---- OWNER INFORMATION -------- SALES INFORMATION ---

CLASS 1 THOMAS DARREN E & MARLENE

ZONING 121 FOURTH ST

BOOK 12244 HICKSVILLE NY 11801

PAGE 0919

DATE	TYP	PRICE	SR	VAL
03/09/07	2	549,000	4	J

---------- PROPERTY FACTORS ---------- -- ENTRANCE INFORMATION

TOPO 1 LEVEL / /

UTILITY 1 ALL PUBLIC/ /

RDS/TRP 1 1 PAVED / / LIGHT

FRT

DATE	CODE	INFO.C	ID
06/28/01	P		127
06/19/01	0		333

---------- BUILDING PERMIT RECORD ----

DATE	NUMBER	AMOUNT	PURPOSE	O/C

LOCATION:

---------- NOTES ----------

NOTECD:

NOTECD:

NOTES:

-------- DWELLING DESCRIPTION ----

STORY HEIGHT	2.0	
EXT. WALL	06	ALUM/VINYL
STYLE	06	COLONIAL
YR.BUILT	1926	REMODELED
BASEMENT	4	FULL
HEATING	3	CNTRL HEAT
FUEL TYPE	1	OIL
SYSTEM	2	HOT WATER
ATTIC	2	UNFIN
TOT RMS 7 BDRMS 0 FRMS 0		
FBTHS 2 HBTHS 0 ADDN 2TOT-FIX 8		
PHYS. COND	A	AVERAGE CONDIT
INT/EXT		
MASON TRIM AREA	0	0
UNFIN.AREA	0	0
REC. ROOM AREA	0	0
FBLA	0	0
not used:	0	0
MBFP STACK 1	OPENINGS	1
PREFAB FIREPLACE	0	15949
BSMT.GAR.(NO CARS)	0	0
MSC O.F.DES	QUAN	0
MSC O.F.DES	QUAN	0
NOTES1		
NOTES2		

G.F.L.A.	728
S.F.L.A.	1,836

---- DWELLING COMPUTATIONS ----

BASE PRICE			308,261
BSMNT	4		0
HEAT	3		0
PLUMBING(TOT-	8)		10,752
ATTIC	2		20,833
OTH FEATURES			15,949
ADDITIONS			35,580
SUB TOTAL			355,800
GRADE FACTOR	C	X	1.00
C & D FACTOR			0.00
CDU			AV
RCN PSF	193.79		355,800
PERCENT GOOD		X	60%
RCNLD PSF	135.65		249,060
PCT COMP			
OBY & MISC IMP VALU			9,000
GROSS IMPRV.			0
TOT CARD VALUE			258,060

----- PARCEL SUMMARY VALUE ----

COST LAND VALUE	238,000
COST BLDG VALUE	258,060
TOTAL COST VALUE	496,060
MRA 497,100	MODEL 13

---------- L A N D D A T A ----------

QTY	ACRE/SFT/UNITS						
P LN CD	FRONT	DEPTH	PRICE	INFL-FAC	BASE SIZE	BASE RATE	INCR /DECR	LAND-VAL
S 1 1	6,000		39.67		7000.00	35	7	238,000
PRIMARY SITE							7	

---------- C A L P T A B L E ----------

MSC O.F.DES	QUAN	0
MSC O.F.DES	QUAN	0

---------- C U R R E N T A P P R A I S E D V A L U E S ----------

CURRENT LAND 238,000 BUILDING 274,700 TOTAL 512,700

RVW CD 12 REVISED MARK RSN REV REVAL VALUE DT 26-SEP-08 ID

STATUS 7

ESTIMATE LAND _____ BUILDING _____ TOTAL _____

REVIEW CODE RSN DATE ID

PREV ASMT LAND: 184,070 BUILDING TOTAL: 184,070

GROSS LN	CD	VALUE	INFLFAC	LAND-VAL

TOTAL ACRES .1377 TOTAL LAND-VALUE 238,000

LEGAL:

----- OTHER BUILDING & YARD IMPROVEMENTS -----

TYP	QN	YEAR	SIZE	GRD	MODS	C	FMD%	VALUE
RG1	1	1930	360	C		A	A 34	9000
DET GARAGE								

MISC. IMPROV 0

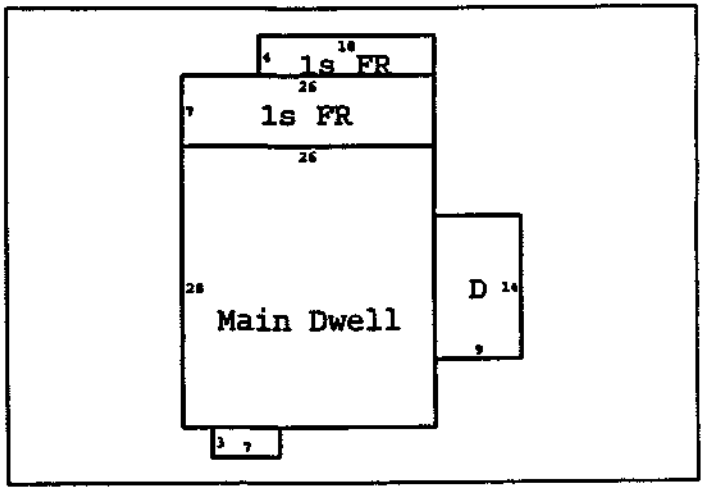
TOT OBY & MISC IMPROV VALUE 9000

GROSS BUILDING SUMMARY

DESC VALUE 0

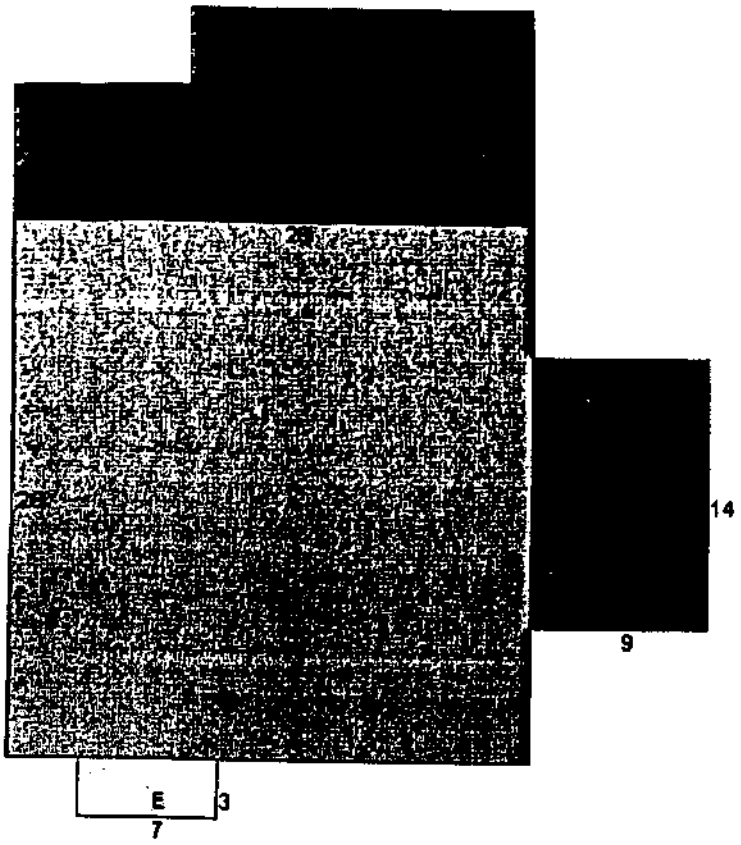
---------- A D D I T I O N S ----------

LIN	LO	1ST	2ND	3RD	AREA	VALUE	COM
0					728		
1	10				182	28,100	
2	10				72	11,100	
3	10				126	19,500	
4	32				21	600	



Thomas0077

Select Year: 2012 Select Card: Residential Additions Card# 1



CARD#	LABEL	LOWER	FIRST	SECOND	THIRD	AREA
1	A					728
1	B		1s FR FRAME			182
1	C		1s FR FRAME			72
1	D		1s FR FRAME			126
1	E		CANPY CANOPY			21

EXHIBIT 5

LIPA
Long Island Power Authority

PO BOX 9083, MELVILLE, NEW YORK 11747

May 7, 2010

121 Fourth St.
Hicksville, N. Y. 11801

Dear Mr. Thomas:

We are in receipt of your correspondence regarding the home on 121 Fourth St in Hicksville. We show in our records two electric meters. The first floor meter was installed 4/8/78 as a general purpose rate 180 residential meter. The second floor meter was installed 1/7/69 also as a general purpose rate 180 residential meter.

If we can be of further assistance, please contact us at 1-800-490-0025 Monday through Friday from 8:00 a.m. to 8:00 p.m.

Sincerely,

B. Rosenthal

B. Rosenthal
Customer Representative

BC/ljp

EXHIBIT 6

TOWN OF OYSTER BAY.
DEPARTMENT OF PLANNING & DEVELOPMENT
DIVISION OF BUILDING
AUDREY AVENUE, OYSTER BAY, NEW YORK 11771

S.B.L. COPY
POST THIS PERMIT CONSPICUOUSLY

[illegible].917 BUILDING PERMIT

CTION	BLOCK	LOT	ZONE	APPLICATION NO.	B/A CASE NO.	RECEIPT NO.	DATE ISSUED	PERMIT NO.
46	270	1 - 3	D	1282		G-2237	5/14/86	K 8262

DS/Fa	PERMITTEE: Edward & Nuala Zebart	CONTRACTOR: SAME — PHONE NO.
	STREET ADDRESS: 132 Fourth St.	PLUMBER — PHONE NO.
	POST OFFICE: Hicksville, N.Y. — TELEPHONE NO. [illegible]	HEATING — PHONE NO.
	PERMISSION GRANTED FOR CONSTRUCTION OF: FAMILY DWELLING ☐ COMMERCIAL ☐ FACTORY ☐ ☐	SANITARY — PHONE NO.

Maintain an existing 18.3' x 20.3', two car detached garage at the rear of a 2½ story frame dwelling.

Zoning Review: None.

Permit must be posted on job.
Must give 24 hours notice for inspection.

CATED ON	SIDE OF	FEET	OF	POST OFFICE	EST. VAL. CONSTRUCTION
South	Fourth St.	100' East	Jerusalem Ave.	Hicksville	$ 9,400.00

UCTURE WTH.	LENGTH	HEIGHT	STORIES	FRONT YARD	REAR YARD	SIDE YARD	SIDE YARD	Front Side Yd.
18'	20'	12'	1					

BLOCK	PRECAST	SEPTIC TANK	DRY WELLS	NO. PLUMB. FIXTURES	NO. BURNERS OIL	GAS	COAL	SEWER CONNECTION NEW	RENEW	SPRINKLER MAIN
		GAL.								IN.

TANK INSIDE	OIL TANK OUTSIDE	HOT WATER HEATERS OIL	GAS
GAUGE GAL.	GAUGE GAL.		

FEE FOR	AMOUNT
CONSTRUCTION	[illegible]
PLUMBING	
BURNER	
TANK	
SANITARY	
PLUMB. C. A.	
CONST. C. O	14.00
TOTAL FEE	[illegible]

YOUR LICENSE IS NOT TRANSFERABLE AND IS SUBJECT TO REVOCATION UPON VIOLATION.
ALL ELECTRICAL AND PLUMBING CONTRACTORS MUST BE LICENSED IN THE TOWN OF OYSTER BAY
FOUNDATION SURVEY MUST BE APPROVED BEFORE WALLS, STEEL OR FRAMING STARTS, SEE 4 *

IIS IS A PERMIT FOR CONSTRUCTION, PLUMBING, BURNER, ANK AND SANITARY WORK IF IT IS INDICATED ABOVE ND FEES HAVE BEEN PAID - N.B.: SANITARY PERMIT VALID NLY IF FILED PLANS ARE APPROVED.

Frederick [illegible]
[redacted]
DIVISION OF BUILDING

CUPANCY OF THIS NEW BUILDING OR ADDITION OR ALTERATION PRIOR TO ISSUANCE OF A CERTIFICATE OF OCCUPANCY L BE CONSIDERED A VIOLATION OF THE TOWN OF OYSTER BAY BUILDING CODE, PLUMBING CODE, AND/OR BUILDING NE ORDINANCE.

MPT NOTIFICATION BY THE VARIOUS CONTRACTORS FOR INSPECTIONS OF THEIR RESPECTIVE PARTS OF THE WORK WILL OID DELAY IN THE ISSUANCE OF THE CERTIFICATE OF OCCUPANCY.

UEST FOR INSPECTION MUST BE FILED IN WRITING AT LEAST 48 HOURS PRIOR TO TIME DESIRED, EXCEPT SANITARY IN-CTION WHICH MUST BE FILED IN WRITING AT LEAST 72 HOURS IN ADVANCE.

NSPECTIONS: Normally there are 12 or more required inspections f a new building and as many as apply to alterations and additions.

OIL CONDITIONS - Before foundation footings are poured. Forms in place.
OUNDATION FORMS & KEY - Before walls are poured.
ONCRETE WALLS & OTHER CONCRETE - When being poured.
AMING - Before insulation or lathing. (Foundation location survey)*
OUGH ENCLOSED - Before exterior finish or interior finish is applied.
NAL ON CONSTRUCTION - When ready for certificate of occupancy.
UMBING - Roughing, when ready for water test.
ANGE INSPECTION - BA Sewer connection if used.
UMBING FINAL - When ready for certificate of approval.
RNER - When installed with inside tank in place.
NKS - Outside before being covered.
NITARY (1) Excavation (2) Construction (3) Special.

CHANGES REGARDLESS OF SIZE FROM THE STAMPED APPROVED PLANS MUST BE SUBMITTED TO THE DEPARTMENT OF PLANNING AND DEVELOPMENT AND APPROVED BEFORE THE CHANGES ARE MADE. APPROVED PLANS MUST BE RETAINED ON THE JOB AND AVAILABLE TO INSPECTORS AT ALL TIMES.

ADDITIONAL NOTES:

Thomas0082

Thomas0083

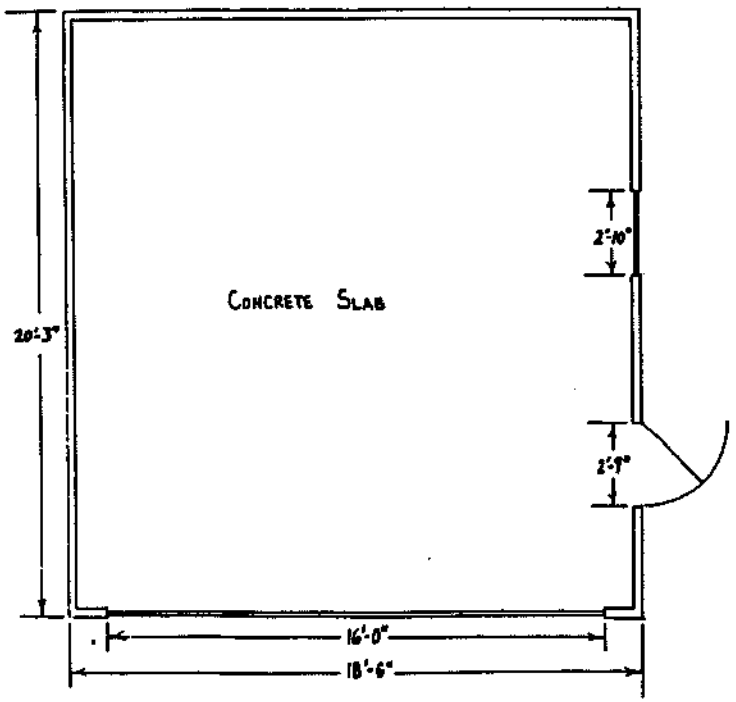
FRONT

RIGHT SIDE

001282

Thomas0084

001282



* STUDS 2×4
* CEILING BEAM 2×6
* RAFTERS 2×6
SHEATHING ½" PLYWOOD
15LB FELT PAPER
ASPHALT SHINGLES
VINYL SIDING

WALL 16" ON CENTER

K82
5-14-

GARAGE

EXHIBIT 7

JC/AD/fs

CERTIFICATE OF OCCUPANCY

No. A 11417

TOWN OF OYSTER BAY
DEPARTMENT OF PLANNING & DEVELOPMENT
DIVISION OF BUILDING
TOWN HALL, AUDREY AVENUE
OYSTER BAY, N.Y. 11771

ISSUED TO OWNER
NAME Edward and Muala Zebar
STREET ADDRESS 121 Fourth Street
POST OFFICE Hicksville, N.Y.
FOR BUILDING LOCATED ON THE TAX MAP OF THE TOWN OF OYSTER BAY IN
SECTION 46 BLOCK 270 LOTS 1-3

DATE June 9, 1986
BUILDING PERMIT No. K8262
APPLICATION No. 1181
RECEIPT No. G2237
PERMIT DATE 5/14/86
APPEAL BOARD No.
Zone D

This CERTIFIES that the Building located at South side of Fourth Street, 100 ft. east of Jerusalem Avenue, Hicksville, N.Y.
was constructed substantially in accordance with the plans filed for the above Building Permit and to all requirements of The Building Zone Ordinance and The Building Code of the Town of Oyster Bay and the occupancy is limited to the following use: Class [illegible] - 18.3' x 20.[illegible] two car detached garage

Premises zoned for one family use.

SHOULD THE OCCUPANCY CHANGE FROM THE ABOVE LIMITATION OF USE, APPLICATION MUST BE MADE FOR NEW CERTIFICATE.

PLUMBING APPROVAL No. n/a
UNDERWRITERS CERTIFICATE
N.B.F.U. No. n/a

DEPARTMENT OF PLANNING & DEVELOPMENT
DIVISION OF BUILDING

C.O. Application # 1181
Inspector's Blue Slip K8262
Permit(s) Date(s) 5-14-86
Underwriter's Certificate none
Plumbing C.A.
Sewer C.A.
Final Survey
Lumber Affidavit
Highway Division Approval
Public Lighting Approval
Engineering & Drainage Approval
Certified Check Submitted
Health Department Approval
Park Fees Paid

Thomas0086

EXHIBIT 8

DISTRICT COURT OF NASSAU COUNTY
FOURTH DISTRICT : CRIMINAL TERM

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

DARREN E. THOMAS,

Defendants..

----------x

Index No. 000022/09

Present:

Hon. David W. McAndrews

The following named papers numbered submitted on this motion.

papers numbered
Notice of Motion w/annexed supporting papers.....1-2
Defendant's Memorandum of Law w/annexed supporting papers..3
Affirmation in Opposition w/annexed supporting papers.....4
Defendant's Reply w/annexed supporting papers.....5
Sur-Reply w/annexed supporting papers.....6
Defendant's Sur-Reply w/annexed supporting papers.....7

The defendant is charged by way of a long form Information with violating two counts of the Town Code of the Town of Oyster Bay: §246-5.2 [Schedule of Use Regulations] and §93-28 [Certificates of Occupancy - When Required]. The above violations were alleged to have been observed at 121 4th Street, Hicksville, New York on December 5, 2008, by Christopher Gioia, a Town Code Enforcement Inspector. The defendant was arraigned on February 9, 2009.

The defendant moves for an order pursuant to United States Constitution Sixth and Fourteenth Amendments, and New York State Constitution Article I, Sections 6 and 11, and CPL §170.30(1)(f), dismissing the accusatory instrument on the ground that it was selectively commenced due to racial discrimination and is, therefore, a violation of the Equal Protection Clause; and/or pursuant to United States Constitution Fourteenth Amendment, and New York State Constitution Article I, Section 11, and CPL §170.30(1)(a), dismissing the accusatory instrument on the ground that the Town's non-enforcement of the two family ordinance against this property, constitutes a waiver and estops them from maintaining this prosecution; and/or pursuant to United States Constitution Fourteenth Amendment, and New York State Constitution Article I, Section 11, and CPL §170.30(1)(f), dismissing the accusatory instrument on the ground that the property is a pre-existing, non-conforming use and so is exempt from the two family ordinance; and/or pursuant to CPL §170.40, dismissing the accusatory instrument in the furtherance of justice; or pursuant to United States Constitution Fifth Amendment, declaring unconstitutional and striking the rebuttable presumption, on the ground that it is an impermissible shifting of the burden of proof; and/or for any such other and further relief which is just, equitable, and proper.

Thomas0088

The People filed an Affirmation in Opposition to defendant's motion. The defendant filed a memorandum of law, and Reply to the People's Opposition. The People filed a Sur- Reply and the defendant filed a Sur Reply.

The People initially claim that pursuant to CPL §255.20 the defendant's motion should be denied as untimely, as it was made more than two years after defendant's arraignment and more than two years since defense counsel's prior motion. This Court agrees that defense counsel's motion is grossly late. However, the Court will, in its discretion, entertain defendant's motion upon its merits.

SELECTIVE ENFORCEMENT

Defense counsel moves for a dismissal of the charges pursuant to CPL §170.30(1)(f) upon the grounds that Darren Thomas has been selectively prosecuted by the Town of Oyster Bay. The People oppose defendant's motion and claim that any racial discrimination by the Town of Oyster Bay is simply not true and insulting. Moreover, the People contend that any claim of selective enforcement must await trial and be determined by the trier of fact.

To begin with, a claim of selective enforcement is not an affirmative defense to a charge of violating a zoning ordinance, and must be raised as a pretrial motion to dismiss the accusatory instrument upon constitutional grounds (*People v. Walker*, 191 Misc 2d 522 [2d Dept 2002], *citing to People v. Goodman*, 31 NY2d 262 [1972]; *People v. Lubrano*, 31 Misc 3d 152 [A] [App Term 9th and 10th Jud Dists 2011]). Raising it at trial to be determined by the trier of fact, is improper (*Id.*).

The Doctrine of Selective Enforcement stemmed from the case of *Yick Wo v. Hopkins*, 118 US 356 [1886], which held that a law that was valid on its face, could be held invalid if it was applied in violation of the Equal Protection Clause of the United States Constitution.

In order for a Court to even consider whether a defendant has been selectively prosecuted, the defendant must overcome the presumption that the decision to prosecute was made in good faith and without discrimination (*see U.S. v. Saade*, 652 F2d 1126 [1981]; *Matter of 303 West 42nd St. Corp. v. Klein*, 46 NY2d 686 [1979]). This presumption is overcome, and an evidentiary hearing is warranted only when *prima facie* evidence is submitted by the defendant which displays a strong likelihood of success on the merits and a strong showing of intentional discriminatory enforcement (*Klein, supra*, at 695; *Matter of Di Maggio v. Brown*, 19 NY2d 283 [1967]).

Furthermore, the defendant must show that the law was not applied evenhandedly to others similarly situated and that the selective enforcement of the law was invidious and intentionally predicated on impermissible and unacceptable standards (*Klein, supra*, 46 NY2d at 693). Unacceptable standards include race, religion or other arbitrary classifications (*Matter*

Thomas0089

of DiMaggio v. Brown, supra).

A mere showing of selective enforcement or non-enforcement against others similarly situated will not suffice (*Brown, supra*, 19 NY2d at 291). "There *must* be a showing by extrinsic evidence of 'clear and intentional discrimination'" (emphasis added) (*Matter of Feigman v. Klepak*, 62 AD2d 816, 819 [1st Dept 1978]).

Moreover, the conscious exercise of some selectivity in enforcement of the law is not in itself a constitutional violation, even where a defendant may demonstrate that other, similar offenders have not been prosecuted (*see People v. Goodman*, 31 NY2d 262 [1972]).

In addition, it is not discriminatory for the People to prosecute, or not, based on the strength of their case, their enforcement priorities, their perception of the deterrence value of the prosecution, or even budgetary and personnel allocation concerns (*People v. O'Hara*, 9 Misc 3d 1113[A], 2005 WL 2333754 [Sup Ct. Kings County 2005] *citing to Wayte v. United States*, 470 US 598 [1985]). For example, selective enforcement might occur because of limited manpower or other resources, or to test a statute or new regulation, or as an efficient way to deter potential transgressors, or because only serious violations are being prosecuted or those that occur in places where violations are very frequent (*In the Matter of 303 West 42nd v. Klein*, 46 NY2d 686 [1979]).

In the instant case, the defendant submits the affidavit from Mr. Thomas, the defendant and homeowner, a Mr. Raymond Guckenberger, the defendant's neighbor, a Mr. James P. Colwell, a neighbor, a Mr. Edward Zebart, the previous owner of the subject premises, and Barbara Beisel, the former upstairs tenant.

Mr. Thomas, the defendant, who purchased the home in 2007, insists that the Town of Oyster Bay is "trying to take our family home away from us" [*see Thomas Affidavit* ¶9]. Mr. Thomas claims that the town is targeting his family because he is African American and his wife is of Puerto Rican descent. He further insists that after receiving these violations he canvassed the neighborhood and observed several other homes with multiple door bells and electric meters, and that his belief is that none of these neighbors have been prosecuted for the same offense. Mr. Thomas vehemently contends that racial motivation for these charges is the only possible conclusion.

Mr. Raymond Guckenberger, the defendant's neighbor, states that he has lived in the neighborhood for over 63 years and that his belief is that the subject house has always been a two family home.

Mr. James P. Colwell, another neighbor, who has been living in the neighborhood since 1975 also believes that Mr. Thomases' house is a legal two family home.

Defense counsel further submits the affidavit of a Mr. Edward Zebart, the previous

Thomas0090

owner of the subject premises. Mr. Zebart contends that he purchased the property in 1984 and was told from the previous owner that the house was a "legal, non-conforming two family house". Mr. Zebart also claims that while he owned the house he had a tenant residing on the second floor continuously.

In addition, defense counsel submits the affidavit of Barbara Beisel, the former tenant of the subject property. She claims that she resided at this residence with her mother for twelve years from 1984 -1996, prior to defendant's ownership of the property.

In opposition to the motion, the People supply the affidavit of Christopher Gioia, the Code Enforcement Inspector, Department of Planning and Development for the Town of Oyster Bay. Mr. Gioia contends that on December 5, 2008, he observed two separate meters on the west side of the exterior of the subject premises and two doorbells attached to the front entrance. He further states that pursuant to Section 16.2 of the Town Code, the observance of two electric meters and two door bells creates a rebuttable presumption of occupancy by more than one family.

In addition, Mr. Gioia, states any property located in an "R1-7" zone requires a special use permit and that such permit has not been granted for this premises. Moreover, the People annex the Certificate of Occupancy dated June 9, 1986, on file with the Building Department which clearly designates that the premises is zoned for one family use [*see People's Sur Reply Exhibit "A"*]. At the bottom of the Certificate of Occupancy it states: " Should the occupancy change from the above limitation of use, application must be made for new certificate".

Moreover, the People point out that the Town of Oyster Bay inspectors only respond to written complaints by a complainant who completes a "Request for Investigation Form" and that such request is the sole impetus that prompted this and every other investigation by the town. Moreover, the People assert that in the past twenty years there have been over thirty code enforcement cases lodged within two blocks of defendant's home and that the Town Inspectors have no knowledge of race when issuing citations. Moreover, the People contend that contrary to defense counsel's claims, there was an open case in 2006 against the prior owner of the subject premises, who was white, which was ultimately disposed of.

The Court finds that the defendant has not presented sufficient evidence to prove a conscious, intentional discrimination on the part of the Town of Oyster Bay. The defendant's contention that this case is racially motivated because he is African American and his wife is of Puerto Rican descent is not supported by anything other than defendant's self serving affidavit. Moreover, the fact that his neighbors 'believed' or their 'opinion' that the house is a legal two family house does not prove that there was no rational basis for the town to prosecute the defendant and that they are the victims of unconstitutional selective enforcement.

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Recognizing that "law enforcement officials are unlikely to avow that their intent was to practice constitutionally proscribed discrimination", the Court of Appeals has indicated that proof of discriminatory intent must appear "from a convincing showing of a grossly disproportionate incidence of non-enforcement against others similarly situated ..." (*In the Matter of 303 West 42nd v. Klein*, 46 NY2d 686 at 695).

In the instant case, the defendant has failed to meet that burden.

Next, this Court must consider whether defendant is entitled to an evidentiary hearing on the issue of selective enforcement. The Court of Appeals in the case of *In the Matter of 303 West 42nd v. Klein*, 46 NY2d 686 [1979], held that "an evidentiary hearing before a judicial tribunal is mandated whenever one asserting such a violation can demonstrate a reasonable probability of success on the merits of his claim".

The Court finds that the defendant has not presented sufficient evidence to demonstrate a reasonable probability of success on the merits. There is no proof that defendant received theses summonses for any other purpose other than violating the local law. Therefore, the Court denies the defendant's motion in its entirety.

NON CONFORMING USE

The defendant now moves to dismiss this action pursuant to CPL §170.30(1)(f) on the grounds that a legal impediment exists because a non conforming use was established on the premises by the Town's inspection of the property in 1986 when the prior owners rebuilt a new garage together with its "seven decades of ignoring the two family house" [*see Defense Counsel Affirmation, Notice of Motion pg* 11, ¶39].

A non-conforming use is defined as the use of land which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although does not comply with the use restrictions applicable to the area in which it is situated (*Spilka v. Town of Inlet*, 8 AD3d 812 [3d Dept 2004]). A prior non-conforming use means that any use that was legal when it was established can, if not abandoned or otherwise expressly changed, be continued indefinitely despite a change in local ordinance making such use illegal (*Town of Clarkstown v. MRO Pump and Tank, Inc.*, 32 AD3d 925 [2d Dept 2006]).

The defendant's contention that a non-conforming use exists in this case, which amounts to a legal impediment to defendant's conviction, is premature. No evidence of any prior determination has been set forth that the use of the subject property is a legal non-conforming use as defined by statute. If such prior determination had been made, ie., by the Board of Zoning Appeals, or Building Department, than such determination of a 'legal non conforming status' would be a legal impediment to prosecution.

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CPL §170.30(1)(f) reads, in relevant part, as follows:

> "After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that: ...
>
> [t]here exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or ... ".

A legal impediment to conviction as contemplated by CPL §170.30(1)(f), like the identical indictment provision (*see* CPL §210.20[1][b]), involves the absence of an element of an offense charged, rendering it impossible to obtain a conviction against a defendant (*People v. Fong*, 25 Misc 3d 1215[A] [Nassau Dist Ct 2009] *citing to People v. Gordon*, 88 NY2d 92 [1996]. The burden of proving that a legal impediment to a conviction exists, rests with the defendant (*People v. Fong*, 25 Misc 3d 1215[A], *supra*).

The Court of Appeals in *People v. Gordon*, 88 NY2d 92 [1996], discussed what type of scenarios may cause a legal impediment to a defendant's conviction. In *Gordon*, the trial Court suppressed a suggestive and improper show up identification made by a robbery victim after a *Wade* hearing. As a result of the suppression of this crucial piece of evidence, defense counsel moved for a dismissal of the indictment, on the grounds that there now existed a legal impediment to defendant's conviction.

The trial Court granted the defendant's motion to dismiss. The Appellate Division reversed the dismissal. The Court of Appeals ruled that suppression of the identification evidence did not constitute a "legal impediment" to the defendant's conviction.

The Court reasoned that:

> "while the absence of the identification evidence may create difficulty for the prosecution at trial, it certainly does not render it impossible for the People to obtain a conviction against defendant (*see People v. Avant*, 33 NY2d 265, 271). Indeed, it is always possible that another witness may surface or that evidence previously unavailable to the Grand Jury may be produced at trial. Therefore, there is no legal impediment to conviction".

In addition, the Court distinguished its holding in *People v. Swamp*, 84 NY2d 725 [1995], where a defendant was charged with possessing drugs. The Court explained that in *Swamp*, a legal impediment to convict defendant of possession of cocaine existed, when the laboratory test results yielded a negative result for the presence of cocaine. The Court reasoned

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that this negative lab result effectively stripped the People of the only demonstrable evidence they had to prove that the substance possessed was cocaine, which proof constituted an element of the crime.

In *Gordon, supra,* the Court went on to state that:

> [The situation in *Swamp*] sharply contrasts with the circumstances of the instant case, where the suppression of the identification evidence simply diminishes the quantum of proof against defendant but does not negate any elements of the charged crimes.

In the instant case, the defendant's contention that a 'legal impediment' to defendant's conviction exists is premature. Moreover, defense counsel's assertion that the five affidavits submitted (Mr. Thomas, the defendant and homeowner, a Mr. Raymond Guckenberger, the defendant's neighbor, a Mr. James P. Colwell, a neighbor, a Mr. Edward Zebart, the previous owner of the subject premises, and Barbara Beisel, the former upstairs tenant) sufficiently raises an "affirmative defense" which requires a dismissal of the charges at this juncture lacks merit.

As previously stated, no evidence of any prior determination has been set forth that the use of the subject property is a legal non-conforming use as defined by statute. If such prior determination had been made, ie., by the Board of Zoning Appeals, or Building Department, than such determination of a 'legal non conforming status' would be a legal impediment to prosecution.

As the People correctly point out, the determination of the existence of a legal non-conforming use, an abandonment of a non-conforming use, or whether a non-conforming use even applies to a parcel of real property are issues to be determined at trial, by the trier of fact (*People v. Dinome,* 21 Misc 3d 1128[A] [Nassau Dist Ct 2008]; *Town of Clarkstown v. MRO Pump and Tank, Inc.*, 32 AD3d 925 [2d Dept 2006]; *Garcia v. Holze*, 94 AD2d 759 [2d Dept 1983]; *Gilmore v. Beyer*, 46 AD2d 208 [3rd Dept 1974]; *People v. DeRaffele*, 32 Misc 3d 1204(A) [New Rochelle City Ct 2011]). As such, in the instant case, those issues must trial.

Accordingly, the defendant's motion for a dismissal pursuant to CPL 170.30(1)(f) is denied.

The portion of the defendant's motion which seeks to dismiss the charges pursuant to CPL §170.40 in the interest of justice is likewise, denied. It is well settled that a dismissal in the interests of justice requires a sensitive balancing of the interest of the individual and the state (*People v. Clayton*, 41 AD2d 204; *People v. Watson*, 182 Misc 2d 644 [Crim Ct New York City 1999]).

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While the defendant offers several arguments in support of his allegation that a dismissal in the interest of justice exists in this case, the Court has not found the existence of any compelling factor, consideration or circumstance demonstrating that conviction or prosecution of the defendant would result in injustice.

Any other remaining arguments advanced by defendant have been considered and found to be without merit.

This constitutes the Decision and Order of the Court.

SO ORDERED:

David W. McAndrews
District Court Judge

Dated: August , 2011

cc: Leonard Genova, Esq., Town Attorney for the Plaintiff
Harry H. Kutner, Jr., Attorney for the Defendant

— Thomas0095

STATE OF NEW YORK, COUNTY OF NASSAU Index No. Year

In the Matter of the Application of
DARREN E. THOMAS,

Petitioner,

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by selective prosecution violation of equal prosecution,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

ORDER TO SHOW CAUSE IN LIEU OF NOTICE OF PETITION

HARRY H. KUTNER, JR.
Attorney(s) for Petitioner

Office and Post Office Address, Telephone

136 WILLIS AVENUE
MINEOLA, NEW YORK 11501
(B) 516-741-1400
(F) 516-741-8712

To

Attorney(s) for

Signature (Rule 130-1.1-a)

Print name beneath

Service of a copy of the within is hereby admitted.

Dated:

PLEASE TAKE NOTICE:

☐ NOTICE OF ENTRY

that the within is a *(certified) true copy of a*
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order
will be presented for settlement to the HON.
within named Court, at
on **at** **M.**

of which the within is a true copy
one of the judges of the

Dated,

Yours, etc.

HARRY H. KUTNER, JR.

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF NEW YORK

----------X

DARREN E. THOMAS and MARLENE THOMAS,

CV - 11 6084

Plaintiffs,

-against-

Civil Action #

JOHN VENDITTO, LEONARD GENOVA, FREDERICK P. IPPOLITO, CHRISTOPHER GIOIA, and TOWN OF OYSTER BAY,

WEXLER, J.
BOYLE, M

Defendants.

----------X

SUMMONS IN A CIVIL ACTION

TO: JOHN VENDITTO
c/o Town of Oyster Bay
54 Audrey Avenue
Oyster Bay, New York 11771

LEONARD GENOVA
c/o Town of Oyster Bay
54 Audrey Avenue
Oyster Bay, New York 11771

FREDERICK P. IPPOLITO
c/o Town of Oyster Bay
54 Audrey Avenue
Oyster Bay, New York 11771

CHRISTOPHER GIOIA
c/o Town of Oyster Bay
54 Audrey Avenue
Oyster Bay, New York 11771

TOWN OF OYSTER BAY
c/o Town of Oyster Bay
54 Audrey Avenue
Oyster Bay, New York 11771

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
636 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

HARRY H. KUTNER, JR., ESQ.
136 Willis Avenue
Mineola, New York 11501
(516) 741-1400
File # 161-4479

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DOUGLAS C. PALMER
CLERK OF COURT

DEC 15 2011

Date: ~~December 14, 2011~~

L. Arena
Clerk or Deputy Clerk

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

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CV-11 6084

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IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ DEC 15 2011 ★
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DARREN E. THOMAS and MARLENE THOMAS,

Plaintiffs,

-against-

JOHN VENDITTO, LEONARD GENOVA, FREDERICK P. IPPOLITO, CHRISTOPHER GIOIA, and TOWN OF OYSTER BAY,

Defendants.

----------X

COMPLAINT

WEXLER, J.
BOYLE, M

The plaintiffs, DARREN E. THOMAS and MARLENE THOMAS, through their attorney, HARRY H. KUTNER, JR., complaining of the defendants, respectfully allege:

JURISDICTION

1. That this claim arises under the laws of the United States, particularly 42 U.S.C. §§ 1982, 1983, and 1988, and the Fifth and Fourteenth Amendments to the United States Constitution, along with pendent state claims.

HARRY H. KUTNER, JR.
ATTORNEY-AT-LAW
30 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

2. That this Court has jurisdiction over these claims under and by virtue of 28 USC §§ 1331 and 1343 and the principles of pendent jurisdiction.

JURY DEMAND

3. That the plaintiffs demand a trial by jury of all issues.

PARTIES

4. That at all times hereinafter mentioned, the plaintiffs were and still are residents of Hicksville, Town of Oyster Bay, County of Nassau, State of New York.

5. That at all times hereinafter mentioned, the plaintiffs were persons within the jurisdiction and entitled to the protection of the laws of the United States of America.

6. That at all times hereinafter mentioned and upon information and belief, the defendant, JOHN VENDITTO (hereinafter referred to as "VENDITTO"), was and still is a resident of the County of Nassau, State of New York.

RY H. KUTNER, JR.
ATTORNEY-AT-LAW
30 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

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7. That at all times hereinafter mentioned and upon information and belief, the defendant, LEONARD GENOVA (hereinafter referred to as "GENOVA"), was and still is a resident of the State of New York.

8. That at all times hereinafter mentioned and upon information and belief, the defendant, FREDERICK P. IPPOLITO (hereinafter referred to as "IPPOLITO"), was and still is a resident of the State of New York.

9. That at all times hereinafter mentioned and upon information and belief, the defendant, CHRISTOPHER GIOIA (hereinafter referred to as "GIOIA"), was and still is a resident of the State of New York.

10. That at all times hereinafter mentioned and upon information and belief, the defendant, TOWN OF OYSTER BAY (hereinafter referred to as "TOWN"), was and still is a municipality within the State of New York.

11. That at all times hereinafter mentioned and upon information and belief, the defendants, VENDITTO, GENOVA, IPPOLITO, and

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
190 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

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GIOIA, were officials and/or employees of the defendant, TOWN.

12. That at all times hereinafter mentioned and upon information and belief, the defendants, VENDITTO, GENOVA, IPPOLITO, and GIOIA, are named herein both personally and in their official representative capacities as officials and/or employees of the defendant, TOWN.

13. That at all times hereinafter mentioned and upon information and belief, each and all of the acts of the defendants alleged herein were done by such defendants, in concert with each other, not as individuals, but under color and pretense of the statutes, laws, ordinances, regulations, customs, and usages of the State of New York and Town of Oyster Bay, and by virtue of their authority as Town officials and/or employees.

AS AND FOR A FIRST CLAIM FOR RELIEF

(§§ 1982 and 1983 federal and state claims:)

14. That on March 9, 2007, the plaintiffs purchased a home located at 121 Fourth Street, Hicksville, Town of Oyster Bay, County of Nassau, State of New York ("subject premises").

IRV H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

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15. That the subject premises is located within the defendant, TOWN.

16. That at the time of purchase, the subject premises was listed on the official tax rolls of the County of Nassau and the defendant, TOWN, as a two family dwelling.

17. That as a pre-existing non-conforming use, there was no other way to determine that the subject premises was a two family home.

18. That the plaintiffs specifically purchased the two family house so the rental income would help pay their mortgage and taxes.

19. That at all times relevant, the property taxes were and are so high on properties in the defendant, TOWN, that many lower middle income families, even with both spouses employed as were and are the plaintiffs, need to rent an apartment within the house to be able to afford them.

20. That the plaintiff, DARREN E. THOMAS, is of African-American descent.

RY H. KUTNER, JR.
ATTORNEY-AT-LAW
30 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

21. That the plaintiff, MARLENE THOMAS, is of Puerto Rican descent.

22. That after the plaintiffs took ownership and in or about June, 2008, the defendant, GIOIA, contacted the plaintiffs, warning them to cease their use of the subject premises as a two family.

23. That during said meeting, the plaintiff, DARREN E. THOMAS, told the defendant, GIOIA, that the house was a legal two family according to the tax rolls, and that he could not afford to stay in the house if he did not have a tenant.

24. That on July 14, 2008, the plaintiffs' attorney wrote the defendants, advising them of the subject premises' two family status.

25. That thereafter, the defendants forsook the courtesy of a response and ignored the letter.

26. That after several follow-up telephone calls were ignored, and precipitated by another phone call, and on or about December 8, 2008, the defendants drafted criminal charges against the African-American

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

plaintiff, DARREN E. THOMAS, only although both plaintiffs were the record title owners.

27. That the criminal prosecution was filed with the court on or about January 5, 2009.

28. That said misdemeanor charges alleged violations of the defendant, TOWN's building ordinances, to wit: 1) two family use in a one family zone without a special use permit, and 2) two family use in violation of the house's certificate of occupancy.

29. That upon information and belief and at all times hereinafter mentioned, and based on the defendant, GIOIA's twice-sworn allegations, the subject premises is "legally non-conforming and no certificate of occupancy is required."

30. That upon information and belief, the subject premises was built in 1922.

31. That upon information and belief and at all times hereinafter mentioned, the subject premises has been a two family house since prior to the enactment of the defendant, TOWN's zoning code in 1943.

RY H. KUTNER, JR.
ATTORNEY-AT-LAW
W WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

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32. That upon information and belief and at all times hereinafter mentioned, the subject premises has had two tenants, two electric meters, two doorbells, and two mailboxes, since prior to 1943.

33. That upon information and belief and at all times hereinafter mentioned up until March 9, 2007, the subject premises was always owned by Caucasians.

34. That upon information and belief and at all times hereinafter mentioned, none of the prior owners of the subject premises were ever prosecuted for maintaining an illegal two family use.

35. That upon information and belief and in and about 1986, the defendant, TOWN's building inspector visited the subject premises approximately four different times.

36. That upon information and belief and in or about 1986, said building inspector saw the two family use as evidenced by two electric meters, two doorbells, two mailboxes, and two apartments.

37. That upon information and belief, said building inspector did not file any violations against the then Caucasian owners.

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
130 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

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38. That upon information and belief, said building inspector approved issuance of a Certificate of Completion for a garage that should not have been issued if any violations, such as an illegal two family use, were observed.

39. That upon information and belief and at all times hereinafter mentioned, in the immediate area of the subject premises, there are at least seven other homes, displaying the same indicia of multiple family use recited by the defendants as cause for the prosecution, namely multiple electric meters, doorbells, and/or mailboxes.

40. That upon information and belief and at all times hereinafter mentioned, none of said other presumptive multi-family homes are legal multi-family dwellings.

41. That upon information and belief and at all times hereinafter mentioned, none of said other presumptive multi-family homes are owned by African-Americans.

42. That upon information and belief and at all times

ARRY H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

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hereinafter mentioned, none of said other presumptive multi-family homeowners have been prosecuted as has the plaintiff, DARREN E. THOMAS.

43. That in the underlying criminal prosecution when challenged to do so, the defendants have refused to disclose how the prosecution was initiated, i.e., they have not produced a third party complaint as they alleged, albeit said procedure has been constitutionally condemned by New York law.

44. That in the underlying criminal prosecution when challenged to do so, the defendants have refused to disclose whether any of the proximate presumptive multi-family homes are legal multi-family dwellings.

45. That in the underlying criminal prosecution when challenged to do so, the defendants have refused to disclose whether any of the proximate presumptive multi-family homeowners have been prosecuted for multi-family use.

46. That in the underlying criminal prosecution when

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
138 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

challenged to do so, the defendants have refused to disclose whether any prior owners of the subject premises were ever prosecuted for multi-family use.

47. That in the underlying criminal prosecution when challenged to do so, the defendants have refused to disclose the complete file on the subject premises.

48. That upon information and belief, from the foregoing, it is concluded that the defendants have initiated and continue a racially-based, selective enforcement of the zoning laws against the plaintiff, DARREN E. THOMAS.

49. That upon information and belief, the said prosecution is designed to drive the African-American-descended plaintiff, DARREN E. THOMAS, from the white neighborhood in the defendant, TOWN.

50. That said conclusion is further supported by the fact that the prosecution was not filed against the plaintiff, MARLENE THOMAS, who is not of African-American descent.

RY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

51. That upon information and belief and at all times

hereinafter mentioned, the racial composition of the plaintiffs' neighborhood, in which there are few if any African-American homeowners and/or residents, corroborates the racially-based discrimination through selective prosecution.

52. That upon information and belief, all of the defendants' actions have been and continue to be racially-based.

53. That upon information and belief and at all times hereinafter mentioned, the defendants' said actions have and will continue to deprive the plaintiffs of the rights, privileges, and immunities as provided by the laws of the United States and the State of New York.

54. That the actions of the defendants deprived the plaintiffs of and violated the following rights, privileges, and immunities under the U.S. Constitution and N.Y. Constitution, and laws made and provided:

a. the right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and their counterparts in New York; and

b. the right to equal protection of the law under the Fourteenth Amendment to the U.S. Constitution.

ARRY H. KUTNER, JR.
ATTORNEY-AT-LAW
190 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

55. That as a result of the foregoing, the plaintiffs have suffered fear, anxiety, worry, emotional distress, and anguish that they could lose their family home.

56. That as a result of the foregoing, the plaintiffs have and will continue to incur attorney's fees and other consequential expenses to defend the criminal charges.

57. That the actions of the defendants were and are malicious, deliberate and intentional.

58. That as a result of the foregoing, the plaintiffs demand that judgment be entered against the defendants in the sum of TWO MILLION ($2,000,000.00) DOLLARS compensatory damages, plus TWO MILLION ($2,000,000.00) DOLLARS punitive damages, and for attorney's fees, costs, and disbursements pursuant to 42 USC § 1988, plus costs and disbursements, together with any such other and further relief which is just, equitable, and proper.

RY H. KUTNER, JR.
ATTORNEY-AT-LAW
30 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

AS AND FOR A SECOND CLAIM FOR RELIEF
(pendent state claim based on abuse of process)

59. That the plaintiffs repeat, reiterate an reallege each and every allegation as set forth in paragraphs "1" through "58" as though more fully set forth herein at length.

60. That upon information and belief, defendants used the prosecutional power of the State of New York for an illicit purpose.

AS AND FOR A THIRD CLAIM FOR RELIEF
(pendent state claim based on malicious prosecution)

61. That the plaintiffs repeat, reiterate an reallege each and every allegation as set forth in paragraphs "1" through "60" as though more fully set forth herein at length.

62. That said underlying prosecution was based on the defendants' racist motive to drive an African-American-descended homeowner out of his home within the defendant, TOWN.

RY H. KUTNER, JR.
ATTORNEY-AT-LAW
38 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

Thomas0112

AS AND FOR A SEVENTH FOURTH CLAIM FOR RELIEF
(*Monell* claim against defendant, TOWN only)

63. That the plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs "1" through "62" as though more fully set forth herein at length.

64. That at all times hereinbefore mentioned, the defendant, TOWN, implemented or executed an official policy, statement, ordinance, regulation or decision through its officials.

65. That at all times hereinbefore mentioned, the official policy, statement, ordinance, regulation or decision of the defendant, TOWN, caused the plaintiffs to be denied their constitutional rights.

WHEREFORE, the plaintiffs, DARREN E. THOMAS and MARLENE THOMAS, demand that judgment be entered against the defendants in the sum of TWO MILLION ($2,000,000.00) DOLLARS compensatory damages, plus TWO MILLION ($2,000,000.00) DOLLARS punitive damages, and for attorney's fees, costs, and disbursements pursuant to 42 USC § 1988, plus costs and disbursements, together with any such other and further relief which is just, equitable, and proper.

BRY H. KUTNER, JR.
ATTORNEY-AT-LAW
190 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

Dated: Mineola, New York
December 14, 2011

Yours, etc.,

/Harry H. Kutner Jr./

HARRY H. KUTNER, JR., ESQ.
Attorney for plaintiffs
136 Willis Avenue
Mineola, New York 11501
(B)(516) 741-1400
File # 161-4479

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COURT

STATE OF NEW YORK, COUNTY OF **Index No.** **Year**

DARREN E. THOMAS and MARLENE THOMAS,

Plaintiffs,

-against-

JOHN VENDITTO, et al.

Defendants.

SUMMONS AND COMPLAINT

HARRY H. KUTNER, JR.
Plaintiff

Attorney(s) for

Office and Post Office Address, Telephone

136 WILLIS AVENUE
MINEOLA, NEW YORK 11501
(B) 516-741-1400
(F) 516-741-8712

To

Attorney(s) for

Signature (Rule 130-1.1-a)

Print name beneath

Service of a copy of the within is hereby admitted.

Dated:

PLEASE TAKE NOTICE:

☐ NOTICE OF ENTRY

that the within is a *(certified) true copy of a*
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order
will be presented for settlement to the HON. **of which the within is a true copy**
within named Court, at **one of the judges of the**
on **at** **M.**

Dated,

Yours, etc.

HARRY H. KUTNER, JR.

TOWN OF OYSTER BAY
DEPARTMENT OF ENGINEERING & BUILDING
TOWN HALL, OYSTER BAY, NEW YORK 11771
WALNUT 2-3800

June 27, 1968

Re: Barry Stuber
Home Sale

Mr. Joseph A. Sodaitis
121 Fourth St.
Hicksville, L.I., New York

RE: Building Permit #54 issued 1930 to Karl Koch.
Two Family Dwelling located Section 46, Block 270, Lots 1-3 incl.

Dear Mr. Sodaitis:

In reply to your ~~letter of~~ request today, regarding the above described premises, please be advised, that the Town passed and made effective an ordinance on May 25th, 1943, requiring the issuance of a CERTIFICATE OF OCCUPANCY. Therefore, premises legally in existence prior to the above date would be legally non-conforming inthat no CERTIFICATE OF OCCUPANCY would be necessary.

We sincerely hope the above information will be of some help to you.

Very truly yours,

Edward J. Gaynor

EDWARD J. GAYNOR, Director
Dept. of Building & Zoning

EJG/gh

cc: A. Rubino
S.B.L. File

Thomas000116

TOWN OF OYSTER BAY
DEPARTMENT OF PLANNING AND DEVELOPMENT
CODE ENFORCEMENT BUREAU
74 AUDREY AVENUE
OYSTER BAY, NEW YORK 11771
(516)624-6250 Fax (516) 624-6240

55

FOR OFFICE USE ONLY
98-2006-1459
NEW CASE #
PREVIOUS CASES

REQUEST FOR INVESTIGATION

PLEASE PRINT NEATLY. Fill out all required fields and provide as much detail as possible. ANONYMOUS COMPLAINTS WILL NOT BE PROCESSED

SECTION 1 PREMISES TO BE INVESTIGATED *(Required)*

PLEASE INCLUDE CORRECT HOUSE NUMBER TO EXPEDITE INVESTIGATION. SECTION, BLOCK AND LOT IS OPTIONAL.

Number	Street Name	Town	Zip Code
121	4th Street	Hicksville, NY	11801

Nearest Cross Street: Jerusalem Ave

Tax Section | Block | Lot(s)

PREMISES TYPE: ☑ Residential ☐ Commercial ☐ Industrial ☐ Other

SECTION 2 OWNER INFORMATION

Last Name: Cahillane | First Name: Patrick | Phone Number(s): (Not Sure)

☐ SAME ADDRESS AS SECTION 1
☑ DO NOT KNOW OWNER'S ADDRESS

Number | Street Name | Town

SECTION 3 VIOLATIONS *(Required)*

PLEASE CHECK OFF ANY OF THE FOLLOWING WHICH APPLY, AND DESCRIBE IN FULL IN SECTION 4.

___ Animals and Fowl
___ Business – Wrong Zone
___ Corner Obstruction
___ Dangerous Condition
___ Dangerous or Vacant Building
___ Drainage
___ Fencing
___ Graffiti
___ Health and Welfare
___ Lights
___ Litter and Debris
___ Non-Maintenance
___ Noise
___ Peddlers
___ Swimming Pools – Non-Maintenance
___ Swimming Pool – No Permit/Fence
___ Structure – No Permits
___ Other

Illegal Housing:
☒ Basement/Cellar Apartment
☒ Illegal Apartment
☒ Multiple Dwelling

Vehicles (On Premises):
___ Commercial
___ Parking Condition
___ Unregistered

TIME: ☑ AM ☑ PM ☐ Random Times ☐ At All Times

AREA: ☐ Front ☑ Rear ☐ Side ☐ Interior

SECTION 4 ADDITIONAL INFORMATION/DETAILS *(Required)*

PLEASE PROVIDE EXPLANATIONS OF PREVIOUS SECTIONS, AND ANY RELEVANT MOTOR VEHICLE OR TENANT INFORMATION.

This is a legal two-family home, but it has an illegal basement apartment. The landlord Patrick Cahillane is in the process of selling it. I do not know if he is in Closing, but there's a potential buyer. The basement has a full working kitchen. Please look into this ASAP!

FOR OFFICE USE ONLY

SO ORDERED

CONTINUED ON OTHER SIDE

Thomas000117

TOWN OF OYSTER BAY
DEPARTMENT OF PLANNING AND DEVELOPMENT
CODE ENFORCEMENT BUREAU
74 AUDREY AVENUE
OYSTER BAY, NEW YORK 11771
(516)624-6250 Fax (516) 624-6240

SECTION 5 COMPLAINANT INFORMATION *(Required)*

Vargas (Last Name) Raymond (First Name) B. (Middle Initial)

121 (Number) 4th Street (Street Name) Hicksville (Town) NY (Zip Code) 11801

(516) 749-8862 (Home Phone) ( ) - (Business Phone)

Raymond Vargas (Signature) 11/6/06 (Date)

THIS SECTION MUST BE COMPLETED IN ORDER TO PROCESS THE COMPLAINT. ANONYMOUS COMPLAINTS WILL NOT BE ACCEPTED.

AT TIMES IT MAY BE NECESSARY FOR THE INSPECTOR TO HAVE ACCESS TO YOUR PROPERTY IN ORDER TO VIEW THE ALLEGED VIOLATIONS DESCRIBED IN THE COMPLAINT.

ALL COMPLAINANT INFORMATION IS KEPT CONFIDENTIAL.

CODE ENFORCEMENT
CASE INFORMATION SHEET

Case # 98-2006-1459
Date Rec'd 11/9/06
Previous Case(s)
Date Entered 11/20/06

Address being investigated: _____

S.D.____ Section____ Block____ Lot(s)____ Cross St. _____

Owner/Contact Information

NAME	TEL	ADDRESS	TITLE

Property Tax Information

Owner/Taxpayer _____

Address _____

Bank Code _____

Bank Name and Address _____

Mortgage Number _____

Premises Classification: 1-family___, 2-family___, Multi-Residence___, P/C___, Other___

Observations

Date(s)_____

☐ Electric Meters ☐ Doorbells ☐ Gas Meters ☐ Cable Splits ☐ Mail Boxes

☐ Miscellanious _____

Action

☐ Notice of Violation #_____ Date Issued_____ Date Returnable_____

☐ Notice of Violation #_____ Date Issued_____ Date Returnable_____

☐ Notice of Violation #_____ Date Issued_____ Date Returnable_____

☐ Summons #_____ Date Issued_____ Date Returnable_____

☐ Personal Service ☐ Non Personal Service

Is premises owner occupied: ☐ yes ☐ no

Zoning Board of Appeals

Application to Z.B.A. for: _____

Date Received _____

Date of Decision _____

Decision _____

Appeal # _____

Building Department Information

Application and Permit required for: _____

Appl.#_____ Date Rec'd_____ Permit #_____ Date Rec'd_____ Exp. Date _____

Appl.#_____ Date Rec'd_____ Permit #_____ Date Rec'd_____ Exp. Date _____

Appl.#_____ Date Rec'd_____ Permit #_____ Date Rec'd_____ Exp. Date _____

C of O: Date Issued_____ C of O #_____ Issued for _____

C of O: Date Issued_____ C of O #_____ Issued for _____

_____

_____

_____

_____

_____

_____

Notice of Violation 1342

Department of Planning and Development (516) 624-6250 | 74 Audrey Avenue, Oyster Bay N.Y. 11771 FAX (516) 624-6240

Location of Violation: 121 4TH ST Hicksville
Section: 16 Block: 270 Lot(s): 1-5 Zone: R1 Case Number: 98-2006-1459
Person Served: PATRICK CAHILLARE

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
11/21/2006

Time of Inspection:
01:31 PM TO

Inspection Type:
Followup/Unresolved

Defendant:
PATRICK CAHILLARE

121 4TH ST
HICKSVILLE, NY 11801

Action Taken:
Notice of Violation served

Inspector's Comments:
Observed wood framed 2 story dutch colonia style dwelling with a 2 car detached garage to the rear on the east side of the property. Observed 2 doorbells by the front door. No one home; Left NOV to call. Observed for sale sign on front lawn - Laffey Associates 933-2200.

Next Inspection Date:
11/29/2006

NOV Number:
N1342

TOWN OF OYSTER BAY
DEPARTMENT OF ENGINEERING & BUILDING
TOWN HALL, OYSTER BAY, NEW YORK 11771
WALNUT 3-8800

June 27, 1968

Re: Barry Stobey
Home Sale

Mr. Joseph A. Sodaitis
121 Fourth St.
Hicksville, L.I., New York

RE: Building Permit #54 issued 1930 to Karl Koch.
Two Family Dwelling located Section 46, Block 270, Lots 1-3 incl.

Dear Mr. Sodaitis:

In reply to your ~~letter/AE/~~ request today , regarding the above described premises, please be advised, that the Town passed and made effective an ordinance on May 25th, 1943, requiring the issuance of a CERTIFICATE OF OCCUPANCY. Therefore, premises legally in existence prior to the above date would be legally non-conforming inthat no CERTIFICATE OF OCCUPANCY would be necessary.

We sincerely hope the above information will be of some help to you.

Very truly yours,

Edward J. Gaynor

EDWARD J. GAYNOR, Director
Dept. of Building & Zoning

EJG/gh

cc: A. Rubino
S.B.L. File

Thomas00012

Department of Planning and Development

Code Compliance Inspector's Report

Date: 11-21-06 Time of Inspection: Start 1:31 Finish _____ Case Number: 98-2006-1459

Location of Inspection: 121 4th St Hicksville

Section ~~12~~ 46 Block 270 Lot(s) 1-3 Zone R1-7

Type of Inspection: ☐ Initial ☐ Follow-up/Unresolved ☐ Follow-up/Compliance ☐ Service of Summons ☐ Town Attorney/Compliance ☐ Conditional Discharge ☐ Other

Name	Telephone	Address	Title
PATRICK CAHILLARE			OWNER

Violation	Alleged	Actual
Business/Improper Zone		
Improperly Secured Work Site		
Certificate of Occupancy Required		
Structure/Existing without Permits		
Construction without permit(s)		
Stop Work Order		
Building Permit not posted		
Building Violation(s)		
Expired Permits		
Illegal Apartment	X	
Sidewalk Obstruction		
Dangerous Condition		
Non-Maintenance		
Corner Obstruction		
Noise		
Town Board Approval Required		
Non-Compliance Town Board		
Zoning Board Approval Required		
Non-Compliance Zoning Board		
Unregistered Vehicles		
Inadequate Parking		
Illegal Signs		
Public Assembly Law		
Multiple Residence Law		
New York State Uniform Fire Prevention and Building Code		
Inadequate Handicapped Facilities		
Litter and Debris		
Other		

Action Number of Previous Inspections ☐

☐ Case Closed

- ☐ No Violation
- ☐ Insufficient evidence
- ☐ Compliance Achieved via Notice
- ☐ Compliance Achieved via Summons
- ☐ Other

☐ Notice of Violation

Number 1342

Compliance Date 11-28-06

☐ Summons

Number

Date Returnable

☐ No Action

- ☐ No One Home
- ☐ Unable to gain access
- ☐ Uncooperative occupant(s)
- ☐ Insufficient evidence: additional inspection(s) required
- ☐ Unable to find location
- ☐ In compliance with Conditional Discharge
- ☐ Other ROUTE 11-29-06

Source	Research Date	Information	Copies Attached
S.B.L.	11-21-06	ONE FAMILY - TWO CAR DETACHED GARAGE	✓
Microfiche			
Computer			
Z.B.A.			
Town Board			
Coles Directory			
Town Attorney			
Post Office			
Motor Vehicle		DLP-2493	
Other			

Information/Observation/Comments Photographs Attached ☐

OBSERVED WOOD FRAMED TWO STORY DUTCH COLONIAL STYLE DWELLING. WITH A TWO CAR DETACHED GARAGE TO THE REAR ON THE EAST SIDE OF THE PROPERTY. OBSERVED TWO DOORBELLS BY THE FRONT DOOR. NO ONE HOME, LEFT NOW TO CALL.

OBSERVED FOR SALE SIGN ON FRONT LAWN - LAFFEY ASSOCIATES 933-2200

Inspector's Name Inspector's Signature

Thomas000122

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
11/21/2006

Time of Inspection:
01:31 PM TO

Inspection Type:
Followup/Unresolved

Defendant:
PATRICK CAHILLARE

121 4TH ST
HICKSVILLE, NY 11801

Action Taken:
Notice of Violation served

Inspector's Comments:
Observed wood framed 2 story dutch colonia style dwelling with a 2 car detached garage to the rear on the east side of the property. Observed 2 doorbells by the front door. No one home; Left NOV to call. Observed for sale sign on front lawn - Laffey Associates 933-2200.

Next Inspection Date:
11/29/2006

NOV Number:
N1342

Notice of Violation 1342

Department of Planning and Development
(516) 624-6250

74 Audrey Avenue, Oyster Bay N.Y. 11771
FAX (516) 624-6240

Location of Violation 121 4TH ST Hicksville
Section 46 Block 270 Lot(s) 1-3 Zone R1 Case Number 98-2006-1459
Person Served PATRICK CAHILLARE - Owner

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
11/21/2006

Time of Inspection:
01:31 PM TO

Inspection Type:
Followup/Unresolved

Defendant:
PATRICK CAHILLARE

121 4TH ST
HICKSVILLE, NY 11801

Action Taken:
Notice of Violation served

Inspector's Comments:
Observed wood framed 2 story dutch colonia style dwelling with a 2 car detached garage to the rear on the east side of the property. Observed 2 doorbells by the front door. No one home; Left NOV to call. Observed for sale sign on front lawn - Laffey Associates 933-2200.

Next Inspection Date:
11/29/2006

NOV Number:
N1342

Notice of Violation 1342

Department of Planning and Development (516) 624-6250 — 74 Audrey Avenue, Oyster Bay N.Y. 11771 FAX (516) 624-6240

Location of Violation 121 4th ST Hicksville

Section 46 Block 270 Lot(s) 1-3 Zone R1 Case Number 98-2[illegible]

Person Served PATRICK CAHILLANE [illegible]

Address (if different)

Method of Service: In Person [ ] Left on Premises [X] By Mail [ ]

An Inspection of the above described premises revealed the following violations of the Town of Oyster Bay Code of Ordinances:

○	Violation	Action Required to Comply
1	Business - Improper Zone	WE ARE
2	Improperly Secured Work Site	INVESTIGATING
3	Certificate of Occupancy Required	A Report of
4	Structure/ Existing without Permits	An Allegation
5	Construction without permit(s)	Illegal APARTMENT
6	Stop Work Order	
7	Building Permit not posted	
8	Building Violation(s)	
9	Expired Permits	
10	Illegal Apartment X	
11	Sidewalk Obstruction	PLEASE CALL THE
12	Dangerous Condition	OFFICE
13	Non-Maintenance	
14	Corner Obstruction	
15	Noise	
16	Town Board Approval Required	Thank you
17	Non-Compliance Town Board	
18	Zoning Board Approval Required	
19	Non-Compliance Zoning Board	
20	Unregistered Vehicles	
21	Inadequate Parking	
22	Illegal Signs	
23	Public Assembly Law	
24	Multiple Residence Law	
25	New York State Uniform Fire Prevention and Building Code	
26	Inadequate Handicapped Facilites	You must comply with the above noted requirements no later than: 11-28-06
27	Litter and Debris	
28	Other	

Please Note Failure to correct the above described violations within the prescribed time period will result in the issuance of a summons and criminal prosecution in Fourth District Court, Hicksville, New York. Please contact the Inspector noted below prior to the compliance requirement date of this notice so that compliance may be verified.

Inspector's Name	Initials	Telephone Ext.	Office Hours	Date
T T Tatarski	[illegible]	7473	9-4[illegible]	11-21-06

Thomas000125

Department of Planning and Development

Code Compliance Inspector's Report

Date: 11-29-06 Time of Inspection: Start 2:41 Finish 2:52 Case Number: 98-2006-1459

Location of Inspection: 121 4TH ST Hicksville

Section 46 Block 270 Lot(s) 1-3 Zone R1-7

Type of Inspection: [ ] Initial [X] Followup/Unresolved [ ] Followup/Compliance [ ] Service of Summons [ ] Town Attorney/Compliance [ ] Conditional Discharge [ ] Other

Name	Telephone	Address	Title
PATRICK CLHILLANE	631 232-3103	98 SAMPSON AVE.	OWNER
work #	631-757-9700 x 230	ISLANDIA NY	
Cell #	631-672-7644		

Violation	Alleged	Actual
Business Improper Zone		
Improperly Secured Work Site		
Certificate of Occupancy Required		
Structure Existing without Permit		
Construction without permit(s)		
Stop Work Order		
Building Permit not posted		
Building Violation(s)		
Expired Permits		
Illegal Apartment	X	
Sidewalk Obstruction		
Dangerous Condition		
Non-Maintenance		
Corner Obstruction		
Noise		
Town Board Approval Required		
Non-Compliance Town Board		
Zoning Board Approval Required		
Non-Compliance Zoning Board		
Unregistered Vehicles		
Inadequate Parking		
Illegal Signs		
Public Assembly Law		
Multiple Residence Law		
New York State Uniform Fire Prevention and Building Code		
Inadequate Handicapped Facilities		
Litter and Debris		
Other		

Action Number of Previous Inspections 1

[ ] Case Closed
- [ ] No Violation
- [ ] Insufficient evidence
- [ ] Compliance Achieved via Notice
- [ ] Compliance Achieved via Summons
- [ ] Other

[ ] Notice of Violation
- Number
- Compliance Date

[ ] Summons
- Number
- Date Returnable

[ ] No Action
- [ ] No One Home
- [ ] Unable to gain access
- [ ] Uncooperative occupant(s)
- [ ] Insufficient evidence: additional inspection(s) required
- [ ] Unable to find location
- [ ] In compliance with Conditional Discharge
- [ ] Other ROUTE 12-4-06

Source	Research Date	Information	Copies Attached
S.B.L.			
Microfiche			
Computer			
Z.B.A.			
Town Board			
Coles Directory			
Town Attorney			
Post Office			
Motor Vehicle			
Other			

Information/Observation/Comments Photographs Attached [ ]

OWNER CALLED IN RESPONSE TO NOV

HE ① ADMITTED TO BASEMENT APARTMENT

② HE STATED HIS C.O IS FOR A NON-CONFORMING TWO FAMILY

③ HE STATED ~~GROUND~~ A DISPUTE HAPPENED WITH GROUND FLOOR TENNANTS, THEY HAVE BEEN EVICTED

④ HE IS SELLING THE DWELLING,

⑤ HE PUT IN CALLS TO THE REMAINING TENNANTS TO LET THEM KNOW THE MUST VACATE

⑥ HE WILL CALL ME AFTER HE SPEAKS TO TENNANTS, ~~THEN~~ AND WE WILL SCHEDULE AN INSPECTION

Inspector's Name Inspector's Signature

Thomas000126

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
11/27/2006

Time of Inspection:
02:41 PM TO

Inspection Type:
Followup/Unresolved

Defendant:

Action Taken:
No Action - Other

Inspector's Comments:
Owner called in response to NOV. He (1) admitted to basement apartment (2) He stated his CO is for a non-conforming two family (3) He stated a dispute happened with ground floor tenants. They have been evicted. (4) he is selling the dwelling (5) He put in calls to the remaining tenants to let them know they must vacate. (6) He will call me after he speaks to tenants, and we will schedule an inspection.

Next Inspection Date:
12/04/2006

Department of Planning and Development

Code Compliance Inspector's Report

Date: 12-4-06 Time of Inspection: Start 3:22 Finish 3:26 Case Number: 98-2006-1459

Location of Inspection: 121 4TH STREET Hicksville

Section 46 Block 270 Lot(s) 1-3 Zone R1-7

Type of Inspection: ☐ Initial ☐ Follow-up/Unresolved ☐ Follow-up/Compliance ☐ Service of Summons ☐ Town Attorney/Compliance ☐ Conditional Discharge ☐ Other

Name	Telephone	Address	Title
PATRICK	631-232-3103	98 SAMPSON ST. ISLANDIA NY	OWNER

Violation	Alleged	Actual
Business Improper Zone		
Improperly Secured Work Site		
Certificate of Occupancy Required		
Structure/Existing without Permits		
Construction without permit(s)		
Stop Work Order		
Building Permit not posted		
Building Violation(s)		
Expired Permits		
Illegal Apartment	X	
Sidewalk Obstruction		
Dangerous Condition		
Non-Maintenance		
Corner Obstruction		
Noise		
Town Board Approval Required		
Non-Compliance Town Board		
Zoning Board Approval Required		
Non-Compliance Zoning Board		
Unregistered Vehicles		
Inadequate Parking		
Illegal Signs		
Public Assembly Law		
Multiple Residence Law		
New York State Uniform Fire Prevention and Building Code		
Inadequate Handicapped Facilities		
Litter and Debris		
Other		

Action Number of Previous Inspections

☐ Case Closed
- ☐ No Violation
- ☐ Insufficient evidence
- ☐ Compliance Achieved via Notice
- ☐ Compliance Achieved via Summons
- ☐ Other

☐ Notice of Violation
- Number
- Compliance Date

☐ Summons
- Number
- Date Returnable

☒ No Action
- ☒ No One Home
- ☐ Unable to gain access
- ☐ Uncooperative occupant(s)
- ☐ Insufficient evidence: additional inspection(s) required
- ☐ Unable to find location
- ☐ In compliance with Conditional Discharge
- ☐ Other ROUTE 12-11-06

Source	Research Date	Information	Copies Attached
S.B.L.			
Microfiche			
Computer			
Z.B.A.			
Town Board			
Coles Directory			
Town Attorney			
Post Office			
Motor Vehicle			
Other			

Information/Observation/Comments Photographs Attached ☐

OBSERVED NO CHANGE AT DWELLING I CALLED OWNER AND LEFT VOICE MAIL MESSAGE FOR HIM TO CALL WITH AN UPDATE ON WHEN APARTMENT WILL BE VACATED AND AN INSPECTION SCHEDULED

Inspector's Name Inspector's Signature

Thomas000128

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
12/04/2006

Time of Inspection:
03:22 PM TO

Inspection Type:
Followup/Unresolved

Defendant:

Action Taken:
No Action - No One Home

Inspector's Comments:
Observed no change at dwelling. I called owner & left voice mail message for him to call with an update on when apt will be vacated & an inspection scheduled.

Next Inspection Date:
12/11/2006
12/18

Department of Planning and Development (516) 624-6200 | 74 Audrey Avenue, Oyster Bay, New York 11771-1592 FAX (516) 624-6200

Code Compliance Inspector's Report

Date: 12-12-06 Time of Inspection: Start _____ Finish _____ Case Number: 98-2006-1459

Location of Inspection: 121 4 ST ST Hicksville

Section 46 Block 270 Lot(s) 1-3 Zone R1-7

Type of Inspection: [ ] Initial [X] Follow-up/Unresolved [ ] Follow-up/Compliance [ ] Service of Summons [ ] Town Attorney/Compliance [ ] Conditional Discharge [ ] Other

Name	Telephone	Address	Title
Patrick	631-232-3103	98 Sampson Islandia	Owner

Violation	Alleged	Actual
Business/Improper Zone		
Improperly Secured Work Site		
Certificate of Occupancy Required		
Structure/Existing without Permits		
Construction without permit(s)		
Stop Work Order		
Building Permit not posted		
Building Violation(s)		
Expired Permits		
Illegal Apartment	X	
Sidewalk Obstruction		
Dangerous Condition		
Non-Maintenance		
Corner Obstruction		
Noise		
Town Board Approval Required		
Non-Compliance Town Board		
Zoning Board Approval Required		
Non-Compliance Zoning Board		
Unregistered Vehicles		
Inadequate Parking		
Illegal Signs		
Public Assembly Law		
Multiple Residence Law		
New York State Uniform Fire Prevention and Building Code		
Inadequate Handicapped Facilities		
Litter and Debris		
Other		

Action Number of Previous Inspections [ ]

[ ] Case Closed

- [ ] No Violation
- [ ] Insufficient evidence
- [ ] Compliance Achieved via Notice
- [ ] Compliance Achieved via Summons
- [ ] Other

[ ] Notice of Violation

Number

Compliance Date

[ ] Summons

Number

Date Returnable

[X] No Action

- [ ] No One Home
- [ ] Unable to gain access
- [ ] Uncooperative occupant(s)
- [ ] Insufficient evidence:additional inspection(s) required
- [ ] Unable to find location
- [ ] In compliance with Conditional Discharge
- [ ] Other ROUTE 12-22-06

Source	Research Date	Information	Copies Attached
S.B.L.			
Microfiche			
Computer			
Z.B.A.			
Town Board			
Coles Directory			
Town Attorney			
Post Office			
Motor Vehicle			
Other			

Information/Observation/Comments Photographs Attached [ ]

Owner Called Property is vacated. He stated he has a plumber scheduled to remove a kitchen. He will call me next week to schedule an inspection

Inspector's Name Inspector's Signature

Thomas000130

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
12/12/2006

Time of Inspection:
10:10 AM TO

Inspection Type:
Followup/Unresolved

Defendant:

Action Taken:
No Action - Other

Inspector's Comments:
Owner called propety is vacated. He stated he has a plumber. Scheduled to remove a kitchen. He will call me next week to schedule an inspection.

Next Inspection Date:
12/22/2006

Department of Planning and Development (516) 624-6200 | 74 Audrey Avenue, Oyster Bay, New York 11771-1592 FAX (516) 624-6240

Code Compliance Inspector's Report

Date: 12.21.06 Time of Inspection: Start 12:51 Finish 1:07 Case Number: 98-2006-1454

Location of Inspection: 121 4TH ST Hicksville

Section 46 Block 270 Lot(s) 1-3 Zone R1-7

Type of Inspection: [ ] Initial [X] Followup/Unresolved [ ] Followup/Compliance [ ] Service of Summons [ ] Town Attorney/Compliance [ ] Conditional Discharge [ ] Other

Name	Telephone	Address	Title
Patrick		98 Sampson St Islandia	Owner

Violation	Alleged	Actual
Business - Improper Zone		
Improperly Secured Work Site		
Certificate of Occupancy - Required		
Structure/Existing without Permits		
Construction without permit(s)		
Stop Work Order		
Building Permit not posted		
Building Violation(s)		
Expired Permits		
Illegal Apartment	✓	
Sidewalk Obstruction		
Dangerous Condition		
Non-Maintenance		
Corner Obstruction		
Noise		
Town Board Approval Required		
Non-Compliance Town Board		
Zoning Board Approval Required		
Non-Compliance Zoning Board		
Unregistered Vehicles		
Inadequate Parking		
Illegal Signs		
Public Assembly Law		
Multiple Residence Law		
New York State Uniform Fire Prevention and Building Code		
Inadequate Handicapped Facilities		
Litter and Debris		
Other		

Action Number of Previous Inspections

[ ] Case Closed
- [ ] No Violation
- [ ] Insufficient evidence
- [ ] Compliance Achieved via Notice
- [ ] Compliance Achieved via Summons
- [ ] Other

[ ] Notice of Violation
- Number
- Compliance Date

[ ] Summons
- Number
- Date Returnable

[X] No Action
- [ ] No One Home
- [ ] Unable to gain access
- [ ] Uncooperative occupant(s)
- [ ] Insufficient evidence: additional inspection(s) required
- [ ] Unable to find location
- [ ] In compliance with Conditional Discharge
- [ ] Other ROUTE 1-8-07

Source	Research Date	Information	Copies Attached
S.B.L.			
Microfiche			
Computer			
Z.B.A.			
Town Board			
Coles Directory			
Town Attorney			
Post Office			
Motor Vehicle			
Other			

Information/Observation/Comments
Photographs Attached [ ]

~~Bo~~ MET OWNER, ~~[illegible]~~ WHO STATED DWELLING IS IN CONTRACT FOR SALE. OWNER STATED NOT CONFORMING TWO FAMILY. OBSERVED A GROUND LEVEL AND SECOND FLOOR DWELLING UNIT EACH CONSISTING OF A KITCHEN TWO BEDROOMS A FULL BATH WITH TUB AND A LIVING AREA

OBSERVED BASEMENT DIVIDED INTO SEVERAL ROOMS A FULL BATHROOM WITH BATHTUB AND A WALL WITH HOLES AND A PIPE PROTRUDING FROM IT

OBSERVED IN DETACHED TWO CAR GARAGE

Inspector's Name [illegible] Inspector's Signature

Thomas000132

98-2006-1457
12-21-06

4 STOVE AND REFRIGERATOR PAGE 2 OF 7

1 INSTRUCTED OWNER THAT
~~BAS~~ CELLAR PLUMBING MUST BE
CAPPED OFF AND ENCLOSED
BEHIND FINISHED WALL
HE IS TO CALL WHEN COMPLETED.

Town Of Oyster Bay
Department of Planning and Development
Code Enforcement Bureau
Inspection Report

Inspector Name:
Jim Jazwinski

Premises:
Case No.: 98-2006-1459
121 4TH ST
Hicksville

Date of Inspection:
12/21/2006

Time of Inspection:
12:51 PM TO

Inspection Type:
Followup/Unresolved

Defendant:

Action Taken:
No Action - Other

Inspector's Comments:
Met owner, who stated dwelling is in contract for sale. Owner stated non-conforming 2 family. Observed a ground level & 2nd floor dwelling unit. Each consisting of a kitchen, 2 bedrooms, a full bath with tub & a living area. Observed basement divided into several rooms, a full bathroom with bathtub, and a wall with holes & a pipe protruding from it observed in detached 2 car garage.

Next Inspection Date:
01/08/2007

To be argued by:
HARRY H. KUTNER, JR.
Time requested (20 minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

----------X

In the Matter of the Application of

DARREN E. THOMAS,

Petitioner-Appellant,

AD Dkt #
2014-10276

for an order pursuant to CPLR Article 78 prohibiting the respondents from further prosecuting the petitioner as barred by a selective prosecution in violation of equal protection,

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents-Respondents.

----------X

BRIEF FOR APPELLANT

Submitted by :

HARRY H. KUTNER, JR., ESQ.
Attorney for appellant
136 Willis Avenue
Mineola, New York 11501
(516) 741-1400

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT
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AD Dkt # 2014-10276

-against-

TOWN OF OYSTER BAY, HON. JOHN VENDITTO, and THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents-Respondents.

----------X

STATEMENT PURSUANT TO CPLR 5531

1. The index number in the court below was 017161/11.

2. The full names of the parties are set forth above, and there has been no change.

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

4. The order to show cause in lieu of notice of petition and verified petition were issued on December 8, 2011. The respondents filed an Affirmation in Opposition on December 14, 2011.

5. The object of this Article 78 special proceeding in the nature of prohibition is to bar further prosecution (Town Code misdemeanors) of appellant by respondent, Town of Oyster Bay, in the Fourth District Court, Nassau County, on the ground that it is a racially selective prosecution.

6. The appeal is from an order of the Hon. Michele M. Woodard, former Justice of the Supreme Court, County of Nassau and entered on August 26, 2014.

7. The appeal is being perfected on the full record.

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QUESTIONS PRESENTED

I. WHERE APPELLANT UNCONTRADICTORILY PROVED THAT HIS HOME WAS A LEGAL NON-CONFORMING TWO FAMILY FOR OVER SEVENTY YEARS, AND ALL PRIOR OWNERS OF HIS HOME AND THE PRESENT OWNERS OF EIGHT NEARBY TWO AND THREE FAMILY HOMES WERE WHITE, AND ONLY HE, THE ONLY AFRICAN-AMERICAN, HAD EVER BEEN PROSECUTED FOR AN ILLEGAL TWO FAMILY IN ORDER TO DRIVE HIM OUT OF THE NEIGHBORHOOD, WAS IT ERROR TO DENY THE PETITION ?

POINT I. THE PETITION SHOULD HAVE BEEN GRANTED.

A. Respondents' actions, never denied by them, as judged by the standard analysis, are a hornbook example of "selective prosecution."

B. Respondents' repeated but unproven excuse that the prosecution was initiated not by their racism but by a civilian complainant, does not immunize them, as it is yet another condemned form of selective prosecution.

C. Whether motivated by respondents' own racism, or instigated by the unknown motives of some alleged but never-proven civilian complainant, a writ of prohibition should have been issue to end the proven selective prosecution.

D. The only evidence presented was interpretable solely as a

Thomas000142

racist selective prosecution, especially in light of respondents' actions in concealing town records belying their sworn position that the house was an illegal two family. Any doubt was thereby incontrovertibly erased.

E. The order appealed from did not decide whether petitioner's substantial evidence, unrebutted by respondents, established racist-based selective enforcement.

II. DID RESPONDENTS' OPPOSITION OVERCOME THE MOUNTAIN OF EVIDENCE SO AS TO JUSTIFY DENIAL OF THE PETITION ?

POINT II. RESPONDENTS' ARGUMENTS WERE UNSUPPORTED BY THE LAW AND EVIDENCE.

A. Article 78 proceedings (prohibition) against District Court judges must be commenced in the Supreme Court and not the Appellate Division as respondents incorrectly argued.

B. Appellant's voluminous proof from every available source proved that this is a race-based selective prosecution, and clearly violates appellant's constitutionally right to equal protection.

C. The petition is not a collateral review of district

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court's refusal to dismiss.

D. A racist basis for a selective prosecution may be established through circumstantial evidence.

E. The Town supervisor, as the Chief of the Executive Branch, is responsible for the unlawful prosecution, and a necessary party.

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PRELIMINARY STATEMENT

This appeal seeks to reverse the denial of an Article 78 petition (prohibition) to bar, as a racially based selective prosecution of appellant for Town Building Code misdemeanor charges for maintaining a 72 year pre-existing, non-conforming two family house in a one family zone in Hicksville.

The denial was based on the lower court's finding that the Article 78 could not be maintained since appellant had previously been unsuccessful in the criminal court, and thereby it was a collateral interlocutory review of a pending criminal case [*contra*, Point II-C, *post*].

Emanating from a town whose housing discrimination policies have spawned multiple federal investigations and consent decrees, its instant attempt to drive the African-American appellant out of what its own records admit to be a 72 year, Code-pre-existing, legal two family home, is regrettably consistent. Proof that the prosecution is racially based and selective against the only African-American homeowner in the all-white neighborhood, normally a difficult task, was established not just by the extensive affidavits, depositions, and records, but

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beyond doubt by the Town's misbehavior in hiding from the court its own records listing the house as a "legal two family home" [180, 187], the fact that the African-American appellant and his wife (not African- American) were the owners and yet the Town only prosecuted appellant [68-69], the fact that appellant's home was previously owned only by whites and yet in the at least last 72 years none had ever been prosecuted for the second floor apartment [one had been prosecuted, but just for an illegal third apartment in the basement, during which the Town official noted that the tenant and that the house was a "legal two family home," (187), the fact that there were eight other two and three family homes within one block [214] that were all white-owned and none ever so prosecuted, not even after the Town received that list in appellant's papers, and finally the most damning proof of this Town's guilty motive, the Town's affirmation misleading the District Court in the criminal case that it had no records about the two family status of the home [291 (¶ 14)], later exposed as false when its newly-assigned and less experienced attorney unwittingly included records from 1968 and 2006 in which two different officials, one the then Building Department head, listed the house as "pre-existing, legally non-conforming, no CO necessary" [180] and a "legal two family home' [187].

"Selective prosecution" is a violation of the Fourteenth Amendment's

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equal protection clause based on a government's singling out an individual for prosecution based on an invidious purpose. This case raises two different methods of selective prosecution: 1) racially motivated, and 2) civilian complaint initiated. Both have been declared unconstitutional, and while the first is bitterly denied by respondents, the second has been curiously repeatedly and stubbornly volunteered by them as a supposed absolution-excuse from racist-based motives, although unaware that it too is prohibited and constitutes an unconstitutional prosecution.

Respondents' defenses in the lower court were all based on a misreading of the law. Their first and presumably strongest defense asserted that the petition lacked jurisdiction as CPLR § 506(b)(1) required it to be directly filed in the Appellate Division [964-966]. Since none of the respondents was a County Court judge, that argument failed.

They also defied the caselaw by asserting that a racial selective prosecution does not deprive a court of its jurisdiction [966-970].

Their third argument that an Article 78 writ of prohibition is improper to resolve a selective enforcement issue, and was being used as an impermissible

interlocutory appeal of the District Court dismissal motion's denial. That too was easily disposed [Point II-C, *post*]. A writ of prohibition is not just the proper remedy, but the recommended one.

Since appellant overwhelmingly established a selective prosecution, respondents fourth defense that the petition was based on "unsupported beliefs and accusations" [972-974] simply held no water.

Appellant serially and conclusively rebutted each of their arguments, and while the order painstakingly laid out all the truistic procedural standards for an Article 78 (prohibition of a prosecution) [7(17) - 9(1)], it never addressed the question whether petitioner's proof established that an illicit "selective prosecution" had occurred [9(2) - 12(7)], instead summarily denying the petition as a collateral interlocutory review of the criminal case [7(12-16)]. None of the records from the Town itself [70-85], nor affidavits-depositions from all the white prior owners back to 1962 [293-611], not the affidavit of a prior 13 year second floor apartment resident [727-728], not even the adjourning homeowners [612-726], *nor especially even the Town's having not just concealed but affirmatively misled the criminal court as to the existence of its records listing the zoning status of appellant's home as a legal two family* [291 (¶ 14)], were ever addressed in

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deciding the selective prosecution issue [6(2)-9(7)].

The extensive information confirming the house's two family legality, surprising as to appellant's fortune in being able to trace prior owners and lucky enough to have the adjoining neighbors attest to it having resided there since 1943 [612-672] and 1975 [673-726], had it been reviewed at all, should have been found to be conclusive as to the issue. But it was never mentioned in the analytical part of the order [9(2)-12(7)] in deciding whether the Town's prosecution came from an "unequal hand" in singling appellant out, because of an "evil eye" motive of racism, having been summarily determined to be an impermissible collateral appeal of the criminal case [7(12-16)].

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STATEMENT OF FACTS

I. Procedural history

There have been three different forums in which this situation has been litigated, and a brief history is necessary to understand how the wealth of information establishing the selective nature of the underlying prosecution was acquired.

Soon after appellant and his wife purchased their first home on March 9, 2007, on record as a two family according to the County Assessor and title company [189-193, 248], a Town building inspector dropped by and claimed the second floor apartment was illegal and would have to go. Appellant's family, like many of the house's prior owners, was a young couple who bought the house specifically to use the tenant rental to afford the mortgage. Without the tenant, appellant told the inspector they would have to move [832(22)-837(3)]. Over the next eighteen months, the inspector stopped by several times, ignored their attorney's telephone calls and letters advising him it was a two family [269, 271-272], and finally in late 2008 began a prosecution charging them with two Town Code misdemeanors [68-69].

A District Court motion to dismiss based on the ground of a selective

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prosecution was denied [87-94]. Limited information proving that the house was a legal two family and hence the prosecution was selective had already been obtained [189-214, 248, 496-498, 612-613, 673-674, 727-728] but much, much more had yet to be uncovered.

This Article 78 proceeding was filed on December 8, 2011 seeking to bar the prosecution as selectively racially based [14-94]. At the time, the Town's own records confirming the house was a legal two family [180, 187] were still being withheld while its prosecutor (not an ADA) misled the court in an affirmation that none existed [291 (¶ "14"], and documentary proof that there had been no prior prosecutions of any of the all white previous owners [293-495, 499-611] had yet to be obtained.

Nearly simultaneously a federal 42 USC § 1983 action was also filed. Respondents were being represented by two sets of attorneys: the in-house Deputy Town Attorney on the Article 78 who removed it to federal court on the ground that a substantial federal question was involved [871-877], while in the federal suit outside counsel sought its transfer to state court on the ground that no federal question existed [902-904].

It was in opposition to the Article 78 and in support of its removal, that the unseasoned Deputy Town Attorney (who had no involvement with the Deputy Town Attorney prosecutor) included the two documents that belied the prosecutor's averment of no records regarding the house's two family status [180, 187, contradicting 291 (¶ "14")].

Subsequently, painstaking searches located all of the house's prior owners back to 1962 [293], and discovery in the federal action led to their depositions [293-495, 499-611, 614-672, 675-726].

After the year of depositions, the federal court deferred to the Article 78 and stalled the § 1983 action until this was resolved, and this proceeding was then revived [13], further papers filed and submitted for decision resulting in the order appealed from [4-12].

II. House bought, Town inspector soon appears

Appellant's first home at 121 Fourth Street, Hicksville [177-178] was bought as a two family home [291 (¶ 16(f)), 229-230], repeatedly listed on the County Assessment card as a two-family, and taxed for years as such [189-193], and also reported as a two family in their title search [248]. The two family status

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was crucial for the family to be able to afford the monthly mortgage payment.

Within a few short months after they moved in on March 9, 2007 [266-268], the Town building inspector showed up, harassed them to remove the tenant knowing that it would force them out [832(22)-837(3)], and finally filed criminal charges in late 2008 [68-69] claiming (but never proving) a civilian complaint as its instigation [281(18) and 290 (¶ 9)]. According to the Court of Appeals, that "excuse" worsens the Town's position as it is a different kind of condemned selective prosecution [Point I-B, *post*].

III. Prosecution

In December, 2008, the prosecution was filed [68-69] . Repeated discovery demands led to the Deputy Town Attorney's 2011 affirmed responses, unknown at the time by appellant to be false, denying that any records existed as to the property's two family status [273-274 vs. 291 (¶ 14)].

Without the later-obtained two records of the Town, in August, 2011 appellant's motion to dismiss the criminal case on the ground of selective prosecution was denied [87-94].

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Unknown at that time by appellant, the Town had withheld decisively crucial evidence from the District Court, as its Deputy Town Attorney's representation to the court and appellant that it had no records of the two family status was false. Months later after the filing of this Article 78, two of the Town's own records included in its opposition listed the house *in 1968* as *a* "pre-existing, legally non-conforming, no CO necessary" [180] *and in 2006* as a "legal two family home" [187]. No wonder that information was buried by Town officials since it contained information fatal to the Town's prosecution, the first by its Building Department Director in 1968, and then 38 years later in its 2006 inspector's note. Both were attached to the Town's Article 78 opposition by a different, in-house Deputy Town Attorney who was unaware of the Town prosecutors' prior criminal court denials of any records. Since the Building Department head's opinion in 1968 had to have been based on some prior records, it is highly likely that there are more relevant and damaging records that the Town has still not released, namely the original 1930 building permit #54 [referred to in the 1968 letter, 180], and the electrical permit file in 1969 [181], and the dozen or more inspections in 1986 when the garage was re-built [184, in smallest type, 13-14 lines up from bottom in lower left corner, "Inspection: Normally there are 12 or more required . . .].

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Most importantly, even conclusively for this appeal, the Town's hiding those records exposed not just their perfidy, but that it was done for a motive that they had to conceal, i.e., a racist prosecution. Otherwise, what harm would there have been for it to admit a simple mistake without a racist motive - the Town could just admit the "Oops!" and dismiss the case. But not when the truth would expose something much worse than an "Oops."

While the criminal court did not have the benefit of those records because the Town hid them, Supreme Court did but never considered the proof of their value, i.e., that they established that the Town knew its prosecution was malicious, and racist, and decided it could never disclose them.

IV. Unrefuted evidence

Appellant established the following facts, *none of which, not once, in any way, has been denied by respondents*, and *none of which were evaluated by Special Term* [9(2)-12(7)]:

A. any of the facts proving this to be a selective prosecution:

1) not a single prosecution of any prior owners of this *at least* 72 year (since 1943) continuous two family use

Thomas000155

home [180, 187, 189-213, 293-726];

2) it had always been a two family home with two meters, two doorbells, and two mailboxes [294-611, 727-728], the same observations relied on by the Town in the accusatory instrument to establish the two family use [68-69];

3) every prior owner was white [293-611];

4) petitioner is African-American;

5) petitioner's wife is Hispanic;

6) of the two owners, the Town only prosecuted the African-American owner;

7) although the two abutting houses are two and three family homes, with two and three electric meters, doorbells and mailboxes, and white owners, they have never been prosecuted [612-726];

8) six other houses, four of which are on the same block [214, #'s 1-6], are two-three family homes, have multiple electric meters, mailboxes, and doorbells, none are owned by African-Americans, and none have been

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prosecuted for their multi-family use;

B. any of the facts proving this home has always been a pre-existing, non-conforming, two family and thus the Town's prosecution was baseless, and racist:

1) in 1968, the Town's Building Department Director issued a letter acknowledging the Thomases' two family house to be a "pre-existing, legally non-conforming, two family . . . no CO necessary" [180];

this was one of the records concealed by the Town;

2) in 2006, the Town investigated a complaint about an illegal third apartment in the basement; the very first page of the Town's records contained the inspector's acknowledgement that "This is a legal two-family home" [187 (Section 4)];

3) the 72 year unbroken two family use (since 1943); Mr. Guckenberger's affidavit and testimony established that his parents bought the house next door in 1944, but moved into it in 1947, and the Thomases' home was a

two family then, and has always been since [612-672 esp. pp. 624-644];

in fact Mr. Guckenberger's testimony was so devastating that at Special Term, respondents adopted the deadly strategy of ignoring him because his testimony was unassailable;

4) the incontrovertible LIPA (formerly LILCO) records proving the *replacement* of the second floor apartment's meter in 1969 [194-213]; since the then electric meters had an approximate 25-50 year life span, and in 1969 LILCO replaced the already-existing second meter, the two family use dates back to at least 1944, corroborating Mr. Guckenberger;

5) the Town's 1986 building inspector never produced, visited the house for work progress checks at least twelve times in 1986 when the garage was re-built and later the garage CO issued by the Town, and at the time it was a two family [182, lower left corner, highlighted; see also 727-728];

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those inspection records, repeatedly demanded, were never produced, nor any excuse made, thus compelling an adverse inference;

6) the prior owner (1984-86), Mr. Zebart's statements that it had been a two family when he bought it in 1984, and was still such when he re-built the garage in 1986 (when the inspector visited at least twelve times), and when he then sold it later that year [496-609];

7) Ms. Beisel, a former tenant in the house for thirteen years (1984-1996), living in the second floor apartment during the 1986 re-building of the garage when the Town's building inspector was repeatedly at the house [727-728];

8) the other next door neighbor, James Colwell, on the other side from Mr. Guckenberger, also ignored by respondents, who confirmed its two family use since 1975 when he moved in [673-726];

9) the Nassau County Assessor's record listing it and taxing it as a two family [189-193], reported to appellant in his

Thomas000159

title search [248 "two family dwelling"], and as represented by seller to appellant [219 at ¶ 16(f), 229-230].

That the prosecution is racially motivated and selective is not overwhelming, it is conclusive. *That is why not even one of the above facts has been disputed nor countered by respondents.*

V. Order appealed from [4-12]

The order is comprised of three sections: the introduction [4-7(16)], the recital of the applicable legal principles [7(17) - 9(1)], and the analysis [9(2) - 12(7)].

The order was decided based on the court's acceptance of respondents' argument that it was a collateral interlocutory appeal of the criminal court's denial of a dismissal motion [7(12-16)]. That premise has been decidedly rejected by the Court of Appeals [please refer to Point II-C, *post*].

The third section contains no evaluation of the evidence, nor application of the principles to that unrefuted evidence detailed in appellant's last section of this brief [IV. Unrefuted evidence].

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The order mentions but draws no adverse inference from the Town prosecutor's dissembling under oath in denying that any records of the house's two family status existed [282(10-13), 291 ¶ "14"], only later to be accidentally divulged [123-124, 180, 187]. The strongly if not conclusively persuasive adverse inference that should have been drawn, was not.

The order failed to evaluate the quality and quantity of petitioner's evidence of the selective prosecution, as well as the constitutionally prohibited racist reason for it, and make a finding as to its impact on those twin issues posed by the petition.

VI. Respondents' cross-motion

Respondents cross-moved to dismiss the petition arguing there was no subject matter jurisdiction and that the petition failed to state a cause of action because it 1) was not filed directly in the Appellate Division, 2) no selective prosecution occurred, 3) appellant was interlocutorily appealing the District Court denial of the motion to dismiss, 4) that appellant had produced no "smoking gun" direct evidence of racism, and 5) that the individual respondent chief town executive was an improper party [958].

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The initial jurisdictional argument was based on a misreading of CPLR § 506(b)(1), purporting that the Article 78 was required to be filed directly in the Appellate Division because the respondent was a county judge [964-966]. Since the respondents were Nassau County District Court Judges, that argument was groundless.

Respondents' second ground generally insisted no selective prosecution occurred despite the mountain of proof submitted by appellant. Respondents could not and so did not specifically challenge any part of appellant's evidence [966 - 970].

Their third argument ended up being the one relied upon by the court in denying the petition, insisting that the writ was inappropriate as a *de facto* interlocutory appeal of the criminal court's denial of a motion to dismiss [Point II-C, *post*].

The fourth argument had long ago been undercut by the Court of Appeals' common sense holding that racism is rarely if ever proven by direct evidence, by its nature usually only provable circumstantially [Point II-D, *post*].

As the Town's chief executive branch official, the individual

Thomas000162

respondent is responsible for all subordinates including the Building Department who filed the prosecution for the putative racist motives as well as the prosecutors who covered up the *Brady* material and pressed it in spite of the revelations it contained [970-972].

VII. Court order

The court below dismissed the petition, accepting respondents' second motion ground that the petition was an improper collateral review of the criminal case denial of dismissal [7-12].

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POINT I-A

RESPONDENTS' ACTIONS, NEVER DENIED BY THEM, AS JUDGED BY THE STANDARD ANALYSIS, ARE A HORNBOOK EXAMPLE OF "SELECTIVE PROSECUTION."

A. "Selective prosecution" - generally

"Selective prosecution" is the colloquial term for a violation of the Fourteenth Amendment's guaranty of equal protection in treatment by the law. When an individual is improperly singled out for prosecution, due to an impermissible criterion such as race, creed, gender, or national origin, the government runs afoul of this prohibition, barred based on the Equal Protection clauses of both the Fourteenth Amendment and New York State Constitution's Article I, § 11.

A two step analysis is used to preliminarily decide if an individual has been selectively prosecuted: 1) that other individuals in the same circumstances as the defendant were not prosecuted [the "unequal hand"], and 2) that the reason for their non-prosecution and the defendant's prosecution was due to an impermissible basis such as race, creed, gender, or natural origin [the

Thomas000164

"evil eye"], *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886); La *Trieste Rest. & Cabaret Inc. v. Vill. Of Port Chester,* 40 F.3d 587 (2d Cir. 1994); *People v. Blount*, 90 N.Y.2d 998, 999 (1997); *303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979).

B. Racist-based selective prosecution

A racially-motivated selective prosecution follows the same two element analysis: 1) other individuals of a different race (usually the predominant white), committing the same conduct, not being prosecuted, while the individual prosecuted is a member of a minority, and 2) the reason for their non-prosecution and the defendant's prosecution is due to race, *Yick Wo v. Hopkins, supra*; *U.S. v. Armstrong*, 517 U.S. 456, 466-469 (1996); *MacPherson v. Town of Southampton*, 738 F. Supp.2d 353 (EDNY 2010).

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POINT I-B

RESPONDENTS' REPEATED BUT UNPROVEN EXCUSE THAT THE PROSECUTION WAS INITIATED NOT BY THEIR RACISM BUT BY A CIVILIAN COMPLAINANT, DOES NOT IMMUNIZE THEM, AS IT IS YET ANOTHER CONDEMNED FORM OF SELECTIVE PROSECUTION.

Without first researching the constitutional propriety of civilian complaint instigated prosecutions, first in the District Court prosecution [281 (¶ 15) and 290 (¶ 9)] and later in opposition [108 (¶ 26)] to the Article 78 petition's charge that the specific building inspector's prosecution was racially-based, respondents first generally claimed, not for this situation, that generally prosecutions are instigated by civilian complaint. However, repeatedly dared to do so, they never 1) swore that this prosecution was in fact initiated by a civilian complaint, nor 2) ever identified the complainant. Thus it can only be concluded that a civilian complaint never existed, and the prosecution truly grew from the racially-motivated building inspector.

Respondents did attach a complaint from a Raymond Vargas, which

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they also falsely insisted was the one which precipitated the challenged prosecution [973, bottom paragraph]. It was sleight-of-hand: that complaint was made by Vargas in 2006 against Cahillane, the owner prior to appellant regarding the illegal basement apartment. Worse, respondents' citing that complaint drips with irony as it is one of the two *Brady* documents hidden, and plainly at the bottom declaring, appellant's house to be a "legal two family home" [187].

However, in urging the "civilian complaint" excuse as absolution for a racial selective prosecution, and even if it ever turned out to be true, respondents unknowingly walked into a different theory of *per se* selective prosecution, one not requiring proof of any racist motivation, in the constitutional trap described by the Court of Appeals in 1975:

> "As found by the courts below, . . . (this particular violation of law) has fallen into a sort of desuetude by law agencies . . . , unenforced, *save upon complaint*. And then perhaps it is unenforceable in an even-handed and fair manner. Indeed, it is not an exaggeration to say that enforcement has been totally surrendered to private parties and interest groups who without constraint may manipulate the law for purely private purposes. *This is an unseemly state of affairs openly inviting discrimination and harassment of one group by another*." [*Italics* supplied]
>
> *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 331 (1975).

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An interesting question should be pondered: in relying on the civilian complaint excuse, why would the Town assume that the never-proven-to-exist civilian, even if he did exist, had not used the Town for his own base, racist motives when he filed the complaint against only the lone African-American-owned two family house of the eight-two-three family houses in the neighborhood [214] ? As condemned by the Court of Appeals, such a Town practice allows control of government prosecutorial might to be wielded in this case by a never-proven to exist individual who would have been a racist.

Ironically, to avoid a politically destructive revelation that they engaged in their own racist selective prosecution, respondents were willing to accept the same fate of a writ of prohibition but on the politically harmless basis that it was a civilian complaint-initiated selective prosecution. One could wryly observe that they realized that being called ignorant [of the law as to civilian-initiated selective prosecution] is certainly more palatable than being proven to be racist. However the result should have been the same: a writ of prohibition.

Respondents' never-proven shirking "excuse" that the racist-based selective prosecution was not instigated by them but by a civilian, makes the prosecution no less intolerable nor immune from issuance of a writ of prohibition.

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Thus whether a civilian instigated the prosecution is irrelevant to the issue of selective prosecution.

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POINT I-C

WHETHER MOTIVATED BY RESPONDENTS' OWN RACISM, OR INSTIGATED BY THE UNKNOWN MOTIVES OF SOME ALLEGED BUT NEVER-PROVEN CIVILIAN COMPLAINANT, A WRIT OF PROHIBITION SHOULD HAVE BEEN ISSUED TO END THE PROVEN SELECTIVE PROSECUTION.

A. Remedy: a writ of prohibition barring the criminal trial

As far back as 1886, the U.S. Supreme Court upheld the Law's right to preclusively and preemptively terminate prosecutions selectively brought for improper racially-harassing purposes, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The theory for not requiring it to be used as an affirmative defense in the criminal prosecution and/or await appellate review of a later conviction as incorrectly urged by respondents first in the criminal prosecution [283, 289] and in the Article 78 [970-972], is that the state forfeits its right to prosecute when it selectively does so, rendering it a jurisdictional issue to be decided pre-trial, *Matter of Steingut v. Gold*, 42 N.Y.2d 311, 315 (1977); *Matter of Carey v. Kitson*, 93 A.D.2d 50 (2nd Dept. 1983).

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An Article 78 writ of prohibition is the proper remedy to preemptively block a selective prosecution, *Matter of Kovarsky v. H.D.A.*, 31 N.Y.2d 184, 191 (1972); *Ohrenstein v. Morgenthau*, 153 A.D.2d 342, 348 (1st Dept. 1989).

Selective enforcement is a preliminary issue of law to be decided pre-trial, *303 West 42nd Street Corp. v. Klein*, supra at 693; *People v. Goodman*, 31 N.Y.2d 262, 269 (1972); *People v. Utica Daw's Drug Co.*, 160 A.D.2d 12, 15 (4th Dept. 1962). Once appellant established the overwhelming and not just *prima facie* case, the burden shifted to the Town to establish an acceptable reason for it. Alleging a never-produced "civilian complaint," they not only did not sustain their burden, but actually established a coordinate and equally prohibited selective prosecution theory, and thus this issue should have been and should now be summarily resolved in appellant's favor by granting the petition.

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POINT I-D

THE ONLY EVIDENCE PRESENTED WAS INTERPRETABLE SOLELY AS A RACIALLY SELECTIVE PROSECUTION, ESPECIALLY IN LIGHT OF RESPONDENTS' ACTIONS IN CONCEALING TOWN RECORDS BELYING THEIR SWORN POSITION THAT THE HOUSE WAS AN ILLEGAL TWO FAMILY. ANY DOUBT WAS THEREBY INCONTROVERTIBLY ERASED.

Non-enforcement of the same statute against other similarly-situated individuals establishes the first element of an impermissible selective prosecution, *People v. Utica Daw's Drug Co.*, 160 A.D.2d 12, 15 (4th Dept. 1962). This element was irrefutably established [177-214, 248, 293-870].

Respondents' denials could never overcome the content of their later-exposed records from 1968 and 2006 [180, 187] listing the property as a legal two family, and their still concealed original 1930 building permit #54 as well as the 1986 dozen or more building inspections of the house then occupied by two families [184], and conclusively importantly their behavior in District Court

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hiding their records that the house is a legal two family [291 (¶ 14)]. There was nothing they could have said nor done to rebut that quality and quantity of evidence.

Appellant's established racist-based first selective prosecution ground, requires the second element of a racial motive, which the courts have astutely observed is never confessed by government but must be inferred from the circumstances [please refer to Point II-D, *post*]. Here, it is submitted that these circumstances are incontrovertible.

The second kind of prohibited selective prosecution, i.e., civilian complaint-initiated, is conclusively established by the Town's repeatedly raising it and confessing to it [281(18-21) and 282(14-20), and 290(¶ 9)].

There are three distinct and conclusively-proven lines of evidence establishing both elements of selective enforcement, none of which can be credibly challenged by respondents because they are undeniably true:

1. the subject house has continuously been used as a two family since before 1944 [179-213, 293-728];
2. until the African-American appellant moved into the house, the

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Town had always treated the house as a legal two family [179-188, especially 180, 187], and concealed those records because of their insurmountable content [291 (¶ 14)]; and

3. that the prosecution is racist:

   a. all prior owners were white;

   b. no prior owners were ever prosecuted for their maintaining the two family home;

   c. the current owner-petitioner is African-American;

   d. many homes in the same neighborhood, and especially the six on the very same block [Exhibit 214, #s 1-6], are being maintained as two and even three family homes, and have never been prosecuted, bear the same external evidence of multi-family use cited by the Town in the criminal complaint [68-69], i.e., two or three electric meters, doorbells, mailboxes, but are not owned by African-Americans.

Respondents have previously been and will continue to be unable to overcome that evidence. Thus, a racially selective prosecution was established.

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Whether the prosecution is civilian complaint initiated and/or textbook-classically racially-selective by the Building Department, it should be barred.

POINT I-E

THE ORDER APPEALED FROM DID NOT DECIDE WHETHER PETITIONER'S SUBSTANTIAL EVIDENCE, UNREBUTTED BY RESPONDENTS, ESTABLISHED RACIST-BASED SELECTIVE ENFORCEMENT

Selective enforcement's two issues of the "unequal hand" and "evil eye" [*ante*, Point I] must be established by a "clear preponderance" of the evidence, *People v. Utica Daw's Drug Co.*, 160 A.D.2d 12, 18 (4th Dept. 1962), a determination that Special Term never made. The standards of review for a writ of prohibition were recited [7(17) - 9(1)], but never applied to the facts in the analytical section [9(2) - 12(7)]. Had appellant's evidence, in any view insurmountable as there was no spin nor "interpretation" possible due to its sources (former homeowners of same house, lifelong abutting homeowners, municipal and utility records, and most conclusively the Town's own hidden records), been applied to the two prongs, the evidence could only have led to a finding of a racially motivated selective prosecution.

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Appellant established the first prong of an "unequal hand" of his being singled out for prosecution by the submission of the list of eight abutting and nearby homes that were two and even three families, bearing the same indicia recited in the accusatory instrument [68-69] of multiple electric meters, mailboxes, and doorbells, not "legal" in the sense that they were not pre-existing non-conforming, and were zoned single family and only had a single family CO, AND that they had never been prosecuted [214, 612-726].

The second prong, i.e., the "evil eye" motivation for a malevolent and constitutionally forbidden motive, here "race-based", was established by the Town's only prosecuting the African-American petitioner [30-31, 740-746, 832-835], for a reputed reason belied by the house's history of never having had any of the prior all-white owners prosecuted [293-611, 727-728], on a pretext so phony that all available County, Town, and utility records [179-213], the title search [248], and the prior owners' testimony [293-611], as well as the surrounding multiple family homes [214], not just preponderantly but conclusively proved it to be a pretext for the racism.

Even if somehow the proof above were found to not surpass the "preponderance" standard, the Town sought to ensure the court would be certain it

was racist when it *Brady* concealed its records listing the house as a "pre-existing, legally non-conforming, no CO necessary" and "legal two family home" [180, 187]. Had the prosecution not been an "evil eye" racist selective prosecution to force an African-American out of "their" Town, there would be no need to engage in a cover-up requiring intentionally false sworn statements by their Town attorney denying the existence of those records [291 (¶ 14) vs. later uncovered 180, 187]. If it had been an innocent mistake (really caused by the non-existent "civilian complainant"), and the Town sloppily failed to pre-investigate, later learning that its records listed it as a two family, a simple confession and apology would have been done. Instead, it engaged in such a risk as its egregious sworn denial and later cover-up, only necessary if it was malevolent from its inception. Respondents could have simply come clean, admit their *innocent* mistake, and dismiss the case with apologies. *But they didn't* - they concluded they had to hide those documents, because something more sinister than an innocent mistake was behind petitioner's prosecution - their racist motive in bringing it.

The Court below did mention this last logically bullet-proof reasoning, albeit in passing [9(10-13)], but not only did not explain its impact, but immediately then incorrectly re-cast it as petitioner's arguing that District Court

was legally incorrect in its refusal to dismiss [9(16-17)]. That respondents' argument nullified by petitioner's court of Appeals citation that a prior adverse criminal court decision refusing to find selective enforcement was of no effect on a later petition for a writ of prohibition, *Matter of Corbin v. Hillery*, 74 N.Y.2d 279, 285 (1989). Submitted to Special Term on the issue, that case was not mentioned.

Objectively far exceeding the necessary "preponderance" standard of proof, appellant went to incredible lengths in producing affidavits and depositions from over fifty years of prior owners, a long ago tenant, the abutting owners, the Town's own taxing it as a two family and the County Assessor's same records, National Grid and LIPA records back to at least 1943, and appellant and his wife's testimony. But a single conclusion can be reached: that the house has always been a legal non-conforming two family, and has been since at least World War II.

Appellant also established that eight other homes just in the immediate area are multi-family but have never been prosecuted.

So the "uneven hand," unchallenged by respondents, was proven.

The entire body of evidence, of the surrounding homes, appellant's home, municipal and utility records, the prosecution of just the African-American appellant but not his wife, and most probatively the Town's covering up of its records that it is a legal two family, bespeak the "evil eye" motive of racism.

Had it not been for the Town's concealment of its own records listing appellant's house as a "legal two family," and the grave risk taken in doing so by swearing to a court that they did not exist, it would have been tough but one might have still been able to doubt the circumstances as merely coincidental (no prosecutions of the prior all-white owners, many similar unprosecuted nearby all white-owned multi-family homes, prosecution of just the African-American owner soon after moving in, not answering appellant's attorney's letters, the County Assessor and Town tax records listing it as a two family). But respondents unwittingly delivered the conclusive proof through their cover-up.

Appellant yeomanly produced overwhelming evidence that the house was a legal two family, and that he was being prosecuted selectively. Ignored below in the order, it is submitted that the petition should have been granted.

POINT II-A

ARTICLE 78 PROCEEDINGS (PROHIBITION) AGAINST DISTRICT COURT JUDGES MUST BE COMMENCED IN THE SUPREME COURT AND NOT THE APPELLATE DIVISION AS RESPONDENTS INCORRECTLY ARGUED.

Respondents argued that CPLR § 506(b)(1) mandated that this Article 78 special proceeding had to be commenced in the Appellate Division, and since this petition was instituted in the Supreme Court, it was jurisdictionally defective and should therefore be dismissed [964-966].

A plain reading of CPLR § 506(b) and the relevant case law makes clear that Article 78 special proceedings against District Court Judges are required to be commenced in the Supreme Court, *not* the Appellate Division, *Green v. Judges of County Court of Nassau County*, 51 A.D.2d 968, 968 (2d Dept. 1976). Respondents' jurisdictional argument completely misapprehended the law.

POINT II-B

APPELLANT'S VOLUMINOUS PROOF FROM EVERY AVAILABLE SOURCE PROVED THAT THIS IS A RACE-BASED SELECTIVE PROSECUTION, AND CLEARLY VIOLATES APPELLANT'S CONSTITUTIONALLY RIGHT TO EQUAL PROTECTION.

The Court of Appeals has consistently held that prohibition lies where a clear legal right exists and a court acts in a matter over which it lacks subject matter jurisdiction or exceeds its authorized powers in a proceeding over which it has jurisdiction, *Matter of Steingut v. Gold*, 42 N.Y.2d 311, 315 (1977) (internal citations omitted). Respondents argued that petitioner failed to identify a clear legal right and that the District Court did not act without jurisdiction [966-970].

The right not to be subject to a selective prosecution based on an impermissible characteristic such as race is steeped in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the New York State Constitution and is incontrovertibly fundamental, *303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979). The petition's core is appellant's racially selective prosecution, a violation of a clear

and fundamental constitutional right.

The second requirement for a writ of prohibition, i.e., respondent prosecutors and District Court's acting without or in excess of their jurisdiction by continuing the prosecution, is also satisfied. The selective prosecution's continuation violates appellant's fundamental constitutional right to the equal protection. As far back as 1886 in *Yick Wo v. Hopkins*, 118 U.S. 356, the Supreme Court held that the state forfeits its jurisdiction when it is used to racially selectively prosecute. Thus, respondents' racially selectively prosecuting appellant would by definition mean that they are operating "without or in excess" of their jurisdiction, *Milonas v. Schwalb*, 65 Misc. 2d 1042 (Sup. Ct. N.Y. Co. 1971) (prohibition issued to prevent violation of First Amendment rights); Siegel, N.Y. Practice § 559 (5th Ed.).

If it is found that appellant has been racially selectively prosecuted, then it is submitted prohibition can and should issue.

POINT II-C

THE PETITION IS NOT A COLLATERAL REVIEW OF DISTRICT COURT'S REFUSAL TO DISMISS.

Respondents argued that appellant was improperly using this Article 78 as an interlocutory appeal of District Court's refusal to dismiss. Submitted to be wholly incorrect [970-972], this argument was nonetheless the basis for Supreme Court's dismissal of the petition [7(12-16)].

Appellant's loss of the motion before the District Court expressly does not prevent the bringing of this special proceeding, *Matter of Corbin v. Hillery*, 74 N.Y.2d 279, 285 (1989). Thus, the basis for the order below was erroneous.

The Court of Appeals has held that where constitutional violations are involved, such as equal protection here, "gravity" is sufficiently established making a later appeal an inadequate alternative that need not be considered, *Kraemer v. County Court of Suff. Co.*, 6 N.Y.2d 363, 365 (1959). In fact, prohibition exists to prevent this exact situation, i.e., to stop an irretrievable

harm from occurring, *Milonas v. Schwalb*, 65 Misc. 2d 1042 (Sup. Ct. N.Y. County 1971). If the writ is not issued appellant would not only be forced to defend himself against an illegal prosecution but he will be at risk of being convicted. Such an outcome would be a miscarriage of justice which the issuance of prohibition will readily prevent.

"If . . . a court acts without jurisdiction, or acts or threatens to act in excess of its powers, and it affirmatively appears that this will be done in violation of a person's, even a party's rights, but especially constitutional rights, prohibition will lie to restrain the excess of power," *La Rocca v. Lane*, 37 N.Y.2d 575, 580 (1975) (underlining added). Appellant does not seek a review of the District Court decision, but rather he seeks to bar his continued unlawful, selectively-based prosecution which violates the equal protection guarantees of both the United States and New York State constitutions. If the underlying prosecution is not barred, appellant's right to equal protection will be trampled.

This proceeding properly seeks a writ of prohibition to prevent the violation of appellant's fundamental constitutional right to equal protection, of not a review of the District Court, and is therefore proper and permissible.

POINT II-D

A RACIST BASIS FOR A SELECTIVE PROSECUTION MAY BE ESTABLISHED THROUGH CIRCUMSTANTIAL EVIDENCE.

Respondents argued that because there was no direct evidence that their prosecution was racially motivated, prohibition should not have been issued [972-974]. That argument misapprehends the law governing selective prosecution cases.

It has been held that since it is usually impossible to acquire direct evidence of racism, racist discrimination can be proven through circumstantial evidence, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Vlahadamis v. Kiernan,* 2013 WL 357583, at *7 (EDNY 2013) (holding that racial animus may be inferred in a selective enforcement case).

It is highly unlikely that respondents will ever openly admit to being racist. However the available circumstantial evidence, as insurmountable as strong circumstantial evidenced can be, recited repeatedly herein, unerringly points to a racist motive. and once again, the analysis must fall back to the one otherwise inexplicable action by respondents in their having records contradicting their central prosecution element that appellant's home is an illegal two family, but stooping not just to concealment of the *Brady* material, but having their attorney

affirm that those records did not exist [291 (¶ 14)].

Additionally, as established by the Court of Appeals, in the "civilian complaint" cases where a governmental body has surrendered its enforcement responsibility to the whims of private citizens who may "manipulate the law for purely private purposes," selective enforcement is established as a matter of law and no further direct evidence is necessary, *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 331 (1975). Contrary to respondents' efforts to distinguish this case from *Acme Markets* [972-974], the cases are analogous. Both address selective prosecution in situations where the laws are not actively enforced but rather the entity charged with enforcement relies on private citizens to initiate enforcement. Respondents have admitted that they only enforced zoning laws based upon private citizen complaints [1055(2-21)]. This practice coupled with the fact that out of eight nearby multi-family homeowners [214], only the African-American petitioner was prosecuted, constitutes a constitutional violation warranting prohibition as a matter of law as mandated by the Court of Appeals.

Appellant circumstantially established that he was being selectively prosecuted based on his race in violation of fundamental constitutional principles and direct evidence is not required.

POINT II-E

THE TOWN SUPERVISOR, AS THE CHIEF OF THE EXECUTIVE BRANCH, IS RESPONSIBLE FOR THE UNLAWFUL PROSECUTION, AND A NECESSARY PARTY.

Respondents argued that the petition should have been dismissed against the Town Supervisor because no personal involvement had been alleged against him.

Pursuant to CPLR § 7803, "[a] proceeding pursuant to CPLR Article 78 . . . must be brought against the body or officer whose performance is sought," *D.B.C.G., Inc. v. Town of Ramapo*, 97 A.D.2d 533, 533 (2nd Dept. 1983). As respondents conceded, the petition alleged that he is the chief executive of the respondent Town [974-975]. As the chief Town official, he has the power and responsibility to determine whether or not this prosecution or any other acts of the Town and its agencies and subdivisions are carried out and the manner in which they are performed. Thus, since he is concededly the highest town official, appellant sufficiently stated a cause of action and the petition should not be dismissed against him.

CONCLUSION

It is submitted that the order should be reversed, and a writ of prohibition should be issued barring the selective prosecution.

Dated: Mineola, New York
November 6, 2015

Respectfully submitted,

HARRY H. KUTNER, JR., ESQ.
Attorney for appellant
136 Willis Avenue
Mineola, New York 11501
(B) (516) 741-1400

To: GOLDBERG SEGALLA LLP
Co-counsel for respondents,
TOWN OF OYSTER BAY and
HON. JOHN VENDITTO
200 Garden City Plaza, Suite 520
Garden City, New York 11530
Attention: CHRISTOPHER KENDRIC, ESQ.
(B) (516) 281-9816

LEONARD GENOVA, TOWN ATTORNEY
Co-counsel for respondents,
TOWN OF OYSTER BAY and
HON. JOHN VENDITTO
Town Hall, Audrey Avenue
Oyster Bay, New York 11771
Attention: MATTHEW ROZEA, ESQ.
(B) (516) 624-6184

152 A.D.3d 777
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Darren E. THOMAS, appellant,
v.
TOWN OF OYSTER BAY, et al., respondents-respondents, et al., respondent.

July 26, 2017.

Synopsis
Background: Criminal defendant brought Article 78 proceeding seeking relief in the nature of prohibition to prohibit town from proceeding with underlying criminal action against him. The Supreme Court, Nassau County, Woodard, J., dismissed petition. Criminal defendant appealed.

[Holding:] The Supreme Court, Appellate Division, held that, as a matter of apparent first impression, a claim of selective prosecution is not so fundamental as to implicate the legality of the entire proceeding for purposes of a collateral challenge under Article 78.

Affirmed.

West Headnotes (5)

[1] Prohibition ⇐ Proceedings in criminal prosecutions

While allegations of selective prosecution implicate basic constitutional rights, that alone does not guarantee that prohibition of a criminal action is available, for not all constitutional claims are cognizable by way of prohibition. McKinney's CPLR 7803(2).

Cases that cite this headnote

[2] Prohibition ⇐ Want or Excess of Jurisdiction

For prohibition to lie, the constitutional error complained of must be of such nature as to implicate the legality of the entire proceeding, so that even though the act complained of was not made without jurisdiction, it can be said to have exceeded the powers and authority of the person making it. McKinney's CPLR 7803(2).

Cases that cite this headnote

[3] Prohibition ⇐ Proceedings in criminal prosecutions

In the criminal context, the determination whether a constitutional error is so fundamental as to implicate the legality of the entire proceeding, such that prohibition is available, is very similar to, although not coterminous with, the question of whether a constitutional error goes to the very heart of the criminal justice process, so as to survive a plea of guilty. McKinney's CPLR 7803(2).

Cases that cite this headnote

[4] **Prohibition** ⇐ Proceedings in criminal prosecutions

The class of constitutional errors potentially giving rise to prohibition is narrower than the class of constitutional errors that survive a plea of guilty. McKinney's CPLR 7803(2).

Cases that cite this headnote

[5] **Prohibition** ⇐ Proceedings in criminal prosecutions

A claim of selective prosecution is not so fundamental as to implicate the legality of the entire proceeding for purposes of a collateral challenge under Article 78. McKinney's CPLR 7803(2).

Cases that cite this headnote

Attorneys and Law Firms

**417 Harry H. Kutner, Jr., Mineola, NY, for appellant.

Kendric Law Group, P.C., Garden City, NY (Christopher Kendric of counsel), for respondents.

REINALDO E. RIVERA, J.P., CHERYL E. CHAMBERS, JOSEPH J. MALTESE, and BETSY BARROS, JJ.

Opinion

*777 In a proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit the respondents from proceeding with an underlying criminal action entitled *People v. Thomas*, pending in the District Court, Nassau County, under Index No. 22/09, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Nassau County (Woodard, J.), dated August 25, 2014, which granted that branch of the motion of the respondents Town of Oyster Bay and John Venditto which was pursuant to CPLR 3211(a) to dismiss the petition as procedurally barred, and denied the petition and dismissed the proceeding.

ORDERED that the order and judgment is affirmed, without costs or disbursements.

The petitioner was charged in the District Court, Nassau County, with maintaining a two-family residence in violation of certain provisions of the Code of the Town Oyster Bay. The District Court denied the petitioner's motion to dismiss the accusatory instrument, inter alia, on the ground of racially-based selective prosecution. Thereafter, the petitioner commenced this proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit the respondents from proceeding with the criminal action pending in the District Court. The Supreme Court granted that branch of the motion of the respondents Town of Oyster Bay and John Venditto (hereinafter together the Town respondents) which was pursuant to CPLR 3211(a) to dismiss the petition as procedurally barred, and denied the petition and dismissed the proceeding. The petitioner appeals.

Unless "otherwise provided by law," CPLR article 78 expressly prohibits the review of a determination "which was made in a civil action or criminal matter" (CPLR 7801). As an exception to this rule, relief in the nature of prohibition serves to restrain judicial or quasi-judicial officers from "proceeding or threatening to proceed without or in excess of jurisdiction and then only when the clear legal right to relief appears and, in the court's discretion, the remedy is warranted" (*Matter of Town of Huntington v. New York State Div. of Human Rights*, 82 N.Y.2d 783, 786, 604 N.Y.S.2d 541, 624 N.E.2d 678 [internal quotation marks omitted]; *see* CPL 7803[2]).

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*778 Here, the Town respondents do not dispute that they acted as judicial or quasi-judicial officers in prosecuting the petitioner before the District Court. They contend, however, that the petitioner's allegations of selective prosecution, even if true, do not establish that the Town respondents acted "without or in excess of jurisdiction" within the meaning of CPLR 7803(2). We agree.

[1] [2] While allegations of selective prosecution implicate basic constitutional rights, that alone does not guarantee that prohibition is available, "for not all constitutional claims are cognizable by way of prohibition" (*Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354, 509 N.Y.S.2d 493, 502 N.E.2d 170). Indeed, for prohibition to lie, the constitutional error complained of must be of such nature "as to implicate the legality of the entire proceeding" (*Matter of Rush v. Mordue*, 68 N.Y.2d at 353, 509 N.Y.S.2d 493, 502 N.E.2d 170), so that **418 even though the act complained of was not made without jurisdiction, it can be said to have exceeded the powers and authority of the person making it (*see Matter of Hogan v. Court of Gen. Sessions of County of N. Y.*, 296 N.Y. 1, 8, 68 N.E.2d 849; *Appo v. People*, 20 N.Y. 531, 541, 1860 WL 7814).

[3] [4] In the criminal context, the determination whether a constitutional error is so fundamental as to "implicate the legality of the entire proceeding" (*Matter of Rush v. Mordue*, 68 N.Y.2d at 353, 509 N.Y.S.2d 493, 502 N.E.2d 170) is very similar to, although not coterminous with, the question of whether a constitutional error goes "to the very heart" of the criminal justice process, so as to survive a plea of guilty (*People v. Parilla*, 8 N.Y.3d 654, 659, 838 N.Y.S.2d 824, 870 N.E.2d 142; *see People v. Hansen*, 95 N.Y.2d 227, 230–231, 715 N.Y.S.2d 369, 738 N.E.2d 773). For example, in *Matter of Plummer v. Rothwax*, 63 N.Y.2d 243, 244 n. 4, 481 N.Y.S.2d 657, 471 N.E.2d 429 the Court of Appeals noted that prohibition was available to vindicate the constitutional proscription against double jeopardy, and in *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 the United States Supreme Court held that a constitutional double jeopardy claim survives a plea of guilty. By contrast, in *Matter of Johnson v. Hunter*, 239 A.D.2d 127, 657 N.Y.S.2d 38 the Appellate Division, First Department, held that prohibition was not available to correct a *Batson* error (*see Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69), and in *People v. Green*, 75 N.Y.2d 902, 554 N.Y.S.2d 821, 553 N.E.2d 1331 the Court of Appeals held that a *Batson* error does not survive a plea of guilty. Moreover, the class of constitutional errors potentially giving rise to prohibition is narrower than the class of constitutional errors that survive a plea of guilty. In *People v. Blakley*, 34 N.Y.2d 311, 314, 357 N.Y.S.2d 459, 313 N.E.2d 763 the Court of Appeals held that a constitutional speedy trial claim survives a plea of guilty, while in *Matter of Rush v. Mordue*, the Court stated that prohibition does not lie where the claim is that the right to a speedy trial has been denied (*see Matter of Rush v. Mordue*, 68 N.Y.2d at 354, 509 N.Y.S.2d 493, 502 N.E.2d 170).

[5] *779 The Court of Appeals has held that a claim of selective prosecution does not survive the entry of a plea of guilty (*see People v. Parilla*, 8 N.Y.3d at 659, 838 N.Y.S.2d 824, 870 N.E.2d 142; *People v. Rodriguez*, 55 N.Y.2d 776, 447 N.Y.S.2d 246, 431 N.E.2d 972). This indicates that such a claim neither relates to a jurisdictional matter nor concerns rights of a constitutional dimension that go "to the very heart" of the criminal justice process (*People v. Hansen*, 95 N.Y.2d at 230–231, 715 N.Y.S.2d 369, 738 N.E.2d 773). In light of that conclusion, we hold that such a claim is not so fundamental as to "implicate the legality of the entire proceeding" for purposes of a collateral challenge based on CPLR 7803(2) (*Matter of Rush v. Mordue*, 68 N.Y.2d at 353, 509 N.Y.S.2d 493, 502 N.E.2d 170).

Accordingly, the Supreme Court properly determined that the issue presented by the petitioner was not the type for which prohibition lies, and properly granted that branch of the Town respondents' motion which was to dismiss the petition as procedurally barred and denied the petition and dismissed the proceeding. In light of our determination, we do not reach the parties' remaining contentions, and express no views on the merits of the petitioner's underlying selective prosecution allegations.

All Citations

152 A.D.3d 777, 59 N.Y.S.3d 416, 2017 N.Y. Slip Op. 05828

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

-against-

DARREN E. THOMAS,

Defendant.
----------x

March 22, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCHOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

KENDRIC LAW GROUP P.C.
1225 Franklin Avenue, Suite 450
Garden City, New York 11550
BY: CHRISTOPHER KENDRIC, ESQ.

TOWN OF HEMPSTEAD
Town Attorney
54 Audrey Avenue
Oyster Bay, New York 11771
BY: PAUL S. EHRLICH, ESQ.
MATTHEW M. ROZEA, ESQ.

THE LAW OFFICES OF HARRY H. KUTNER, JR.
Attorney for Defendant
136 Willis Avenue
Mineola, New York 11501
BY: HARRY H. KUTNER, ESQ.
SHERYL CHANNER, ESQ.

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record, docket 22F of 2009, the People of the State of New York Versus Darren E. Thomas.

MR. KENDRIC: Thank you, your Honor.

Good afternoon ladies and gentlemen. First off on behalf of the Town and I'm on sure on behalf of Mr. Thomas, thank you for giving your time to be here with us today and for sitting as jurors on this case. As you've now heard, the defendant has been charged with two violations of the Town of Oyster Bay town code. One violation involves the defendant's use of his residence as a two-family dwelling when it is zoned exclusively for one family use. In simple English, he rented out part of his house without obtaining a permit essentially a waiver from the Town to do so. The second violation is directly related. It involves the defendant not having a certificate of occupancy to use the home as a two-family dwelling.

The Town of Oyster Bay code explains why certain uses are permitted as a matter of right, that is to say no prior approval needed and why certain uses of one's home require the homeowner to first obtain a permit. The Town Board has found there are instances in the town of owners of properties exploiting their buildings by maintaining or creating

illegal occupancies of their premises. These illegal occupancies expose the residence --

MR. KUTNER: Objection, your Honor. This is not an opening this isn't part of the charges. This is explaining why they didn't pass an ordinance. It has nothing to do with an opening irrelevant to the case.

MR. KENDRIC: The jury will hear testimony regarding why these code sections were enacted.

MR. KUTNER: It doesn't matter.

MR. KENDRIC: It does matter. I'm going to ask the Court to take judicial notice of these sections anyway.

THE COURT: Mr. Kutner, I'm going to allow it to some extent. Briefly on the subject.

MR. KENDRIC: Yes, it's a short passage. The Town Board has found there are instances in the town of owners of properties exploiting their buildings by maintaining or creating illegal occupancies of their premises. These illegal occupancies expose the residence therein to substandard rooms or apartments. Such practices are in dirigation of health, safety and welfare of members of the public who are entitled to such suitable and safe housing as is assured by the cap under code of

the cap. Such illegal occupancies has a detrimental affect --

MR. KUTNER: Objection, your Honor. This is an opinion this has nothing to do with this case. I ask that it be stricken from the record.

MR. KENDRIC: I'm not editorializing. This is straight out of the town code.

THE COURT: It's from the town code, overrule.

MR. KENDRIC: Such illegal occupancies have a detrimental affect on town services to the community. Accordingly, enforcement of applicable code provisions is a legitimate governmental obligation which requires appropriate consideration.

Now, in this case, and your Honor, for the record, that's section 246-16.1 of the town code of the Town of Oyster Bay.

MR. KUTNER: He is not charged with any violation of that section.

THE COURT: Correct. It's a policy statement, correct?

MR. KENDRIC: Correct. Now, in this case, you will hear the defendant has never been turned down for a permit to use his home as a two-family dwelling. He has never been denied a permit because he has never

even applied for one. You will hear that in 2007, let me say it again, in 2007 another resident of the community complained to the town that defendant was renting out part of his home. And in 2008 the town sent out one of its inspectors to see if there was any legitimacy to the complaint.

He went out five times to inspect the home, looking to speak with the homeowner to see if there was any legitimacy with the complaint before issuing him a summons. Because the idea is not to write violations, the idea wherever possible is to have the homeowner voluntary bring himself into compliance with the town code. And you will hear on the fifth visit, this is December 5, 2008, this inspector saw from the outside of the house, what he had seen on his four prior visits; that at the front door of the house, there were clearly two separate door bells, and there were two separate electric meters servicing the house. And under town code, ladies and gentlemen, that is considered presumptive evidence of more than just one family living in the house. It is a rebuttal presumption, meaning, the homeowner can say no town, you're wrong, I only have one family, no more living in this house.

I don't think the defendant plans to argue

that. I think instead he's going to try and show how this house has been used since before the town code was ever enacted; ever came into be. That was back in May of 1943. Some 65 years before the date of the violation involved in this case, in December of 2008. And that's fine if that's the way he wants to go. But I must let you know, right up front, that under the town code, if there is a gap of one year or more, from before May 25, 1943 to December 5, 2008, meaning, if there is a gap of one year or more in '65, the defendant's entire argument is unproven and legally meaningless.

MR. KUTNER: Objection, your Honor. That's not the law. That's their burden, it's not law. Even if it goes more than a year, it has to be with the intention of abandonment.

MR. KENDRIC: Why are you having speaking objections?

MR. KUTNER: Why don't you tell the Judge --

THE COURT: Counsel, please. Just keep going. Mr. Kutner, you'll have a chance.

MR. KUTNER: Sorry, Judge.

MR. KENDRIC: The defendant will argue that because his house was built in 1925, 1926, That that general timeframe and of course this is well, well

before, May 1943, that his structure, the building, does not need a certificate of occupancy; and he's entirely correct about that. We agree that the house that's to say the physical structure, does not need a certificate of occupancy. But that's not what the defendant has been charged with in this case. He's been charged with not having a certificate of occupancy for using the house as a two-family when it is zoned only for a one family.

Does the defendant need a certificate of occupancy for his house? No, he does not. It's so old that it has been grandfathered in, but under the town code, he absolutely does need a certificate of occupancy if he intends to use the house as anything other than a one family.

So again, thank you for being here and thank you for giving both sides your equal attention.

THE COURT: Mr. Kutner?

MR. KUTNER: Yes, sir.

May it please the Court, Mr. and Ms. Thomas, citizen of this great country and this great state and jurors last but certainly not least. You can see why we're here for a trial, we can't agree on the day of the week Mr. Kendric and I. He told you that the house was built in 1926, what he didn't tell you is

that every day since then the Town has treated it as a two-family, a legal two family up to the point of two and a half months before this gentleman and his wife bought the house on March 9, 2007.

The Town's prosecution has never been honest. They have hidden records that you will find out about. They have produced partial records that you found out about, they've swore there are no records at all about this house by one of their attorneys in 2011. And I'm going to bring her in try to find out why she would do something like that, when the later attorney handling it for them, not knowing what she had said leaked out a couple of records. And guess what? In 1968 the Town said regarding that two family house, it's okay. And then two and a half months before they bought it, there was another investigation. The complaint was twofold, an illegal third apartment in the basement and a possible multifamily dwelling violation, meaning that it was supposed to be a one family and it's being used as a two-family.

The building inspector went there. The building inspector, you'll hear, spoke to the owner actually was shown by the owner the upstairs, showed him both apartments. He asked the owner get rid of

the basement apartment, that's absolutely a no, no, that's dangerous a person can die down there from carbon monoxide or in a fire. That's a no no in every municipality -- that's not true. So the owner did what he was told, he dismantled the walls, capped all the appliance pipes, removed all the appliances, hid all of the connections behind the wall and that was it. And guess what the inspector did about the multifamily when the owner told him it was a pre-existing non-conforming use, and doesn't need a CO, and doesn't need a Special Use Permit because that's the basis of a pre-existing non-conforming. You're not subject to laws that are passed after your house was built. So he tells you he didn't apply for a Special Use Permit he doesn't have to, he doesn't tell you that.

Now, this house was built either in '26 or 1930. The Town records say the building permit number 54 in 1930 was issued. But they never produced it. So we don't know if it was originally built as a two-family or it became a two-family sometime between then and 1943 when they passed the Town code, or sometime later, we have no idea, but they have the burden of proof. Usually when somebody withholds something from you it's because it is not going to

help them out.

MR. KENDRIC: I'm going to object.

THE COURT: No, I'm going to allow it.

MR. KUTNER: Three times over the years beside the letter of 1968, they looked at the Building Department, regarding a two-family house at 121 4th Street, given to the then owner who is selling to the next owner to prove that it was a legal two family house. And it says right on that Mr. Sodaitis was the then owner we'll show you the Deed. And then Town head of the building Department said everything okay? He didn't say refer to prosecution, nobody spoke to him. He didn't say it's not a two-family, no. He typed it out, saying a two-family, I'm sorry from their typewriter. Three times in the interim, later that year, when the new owner bought, it was only a 50 amp house. For most of you that own a house, we know in this day age we need 200, 250 or 300 amps, back then 50 was enough, when he bought it in '69, he upped it to 100. That building permit has been one shop. The first thing you're going to see is blank building permits. You're going to see blank building permit application. For sewer and electric, and one of the first question they ask is it a one family or two family? I wonder why they didn't provide those copies

of the building permit applications? Could it be because those owners back then checked off two family and it would show further acknowledgment by the Town that it was a two-family where they did nothing about it because they acknowledge it was a legal two family.

In 1980 -- '69 it was the electrical permit, in 1980 it was a sewer hookup, when they sewered Nassau County, they finished sewering all of the County including down to Wantagh. At that time he had to get a building permit. You'll see that the building permit application for that time says, one family or two family you have to check off the boxes, they didn't provide the permit application. In 1986, a lady Mrs. Montorro, her husband attempted to murder her and her son by locking them in the two car garage and pouring gasoline around trying to burn the garage down, and she escaped out a back window, thank God she wasn't murdered, he was sent away. The next owner, Mr. Zebart, rebuilt the two car garage. The two family you're going to hear has never been changed since it was built in 1928 or '30, it has never been changed, it's the same as it always was.

When the garage was rebuilt, you'll see on the application, that one we have, it appears that they changed the form from '68 to '80 and '86. In

that one on the bottom it says it will be, I believe a minimum of eight inspections. You have the footing, you have the foundation et cetera all the way up to the framing, electrical; they didn't produce any of the inspection reports. You're going to hear from the tenant who was living there at the time of the month. She was a young lady who was going to high school at Hicksville High and now she's living out in Massapequa. She is going to come in and testify and tell you she was there for the rebuilt she was the tenant of the Zebart's and became the tenant of the next owners, the Cahillane's. Patrick Cahillane - he was the one who added the illegal third apartment in the basement and dismantled. But he still had the two upstairs and guess what this building inspector did I don't know if I told you no violation of a two-family.

You will hear that the normal processes in the Town of Oyster Bay is if you found a violation, serve a notice of violation on the gentleman, which is what they did for Patrick Cahillane. But what did they do for Darren Thomas. He and Marlene own the house. They didn't give a violation, they filed criminal charges against him that's why we are here today. To convict a man never arrested in his life. A man who works for the U.S. Postal Service for

decades as a supervisor at Kennedy Airport and they are going to convict him for doing something that every owner did before him the Town knew about it and didn't do anything about it. I think you are starting to get the flavor.

Now, sometimes great changes or incremental progress in society is made by little people. The lady who exposed I don't know I'm drawing a blank on that name. Rosa Parks sitting on a bus, Martin Luther King walking over that bridge.

MR. KENDRIC: Objection.

MR. KUTNER: There are different ways that little people can cause major changes. And in this case this isn't a major change. What you have to understand and what the first thing you have to get over in looking at this case is, this still goes on. This still goes on that they're going to prosecute a person using a power of government for something that is not illegal.

You're going to hear that he wanted to live the American dream with his wife and buy a house with their two boys, TJ and Coby, and then they are punished for it and have to fight it for 12 years. Absurd. Absolutely absurd. We just passed the 12th anniversary of their ownership of the house. It was a

trepidation time not a celebratory time. When you're facing this type of pressure. You have to ask, why the Town just name Mr. Thomas? They are on the Deed. Darren and Marlene Thomas are the owners, but they only file against him not Marlene. They never prosecuted any prior owners you are going to hear that, of this house, nor did --

MR. KENDRIC: Objection, Judge. Sidebar.

(WHEREUPON, MOTIONS WERE HEARD OUTSIDE THE PRESENCE OF THE JURY.)

THE COURT: Mr. Kendric.

MR. KENDRIC: Yes, Judge. Mr. Kutner is dancing around your ruling. And so far no violations, however, when defense counsel starts talking about, this is the only man whose been prosecuted intimating that on this house that goes directly to him not being able to discuss unequal prosecution of laws.

MS. CHANNER: But nobody else would get that unless you are a lawyer.

THE COURT: I think he said, that nobody else has been prosecuted for this house. That's what he said.

MR. KUTNER: Absolutely and that is true.

MR. KENDRIC: I think he was heading in a different direction.

THE COURT: Something was an issue that came up I just double checked this and I don't want to get into an issue in this case. I have the town code in front of me about abandonment and this is what it says and I underlined so I want you both to see. The irrespective of whether intention abandonment or non-conforming use make themselves the intention is irrelevant.

MR. KUTNER: I will show you caselaw if you like.

THE COURT: That's in the town code.

MR. KUTNER: The second Department overruled that.

THE COURT: Well you are going to have to show me specifically. But I'm just showing you that in the town code itself it says that intention to abandon is irrelevant; that's what it says so if there is something else.

MR. KUTNER: I'm not even touching that.

THE COURT: Okay, I'm just saying if that is going to become an issue in this case I need to have that specific law so I can look at it but that's what the law is.

(WHEREUPON, A BRIEF RECESS WAS HELD.)

THE COURT: Counsel, I need to talk to you

for a second. The court officer just informed me that one of the jurors was inquiring about taking notes.

MR. KENDRIC: I'm against it.

MR. KUTNER: I'm against it. I think it's within the Court's discretion.

MS. CHANNER: It's within the Court's discretion. As long as you give them a note pad.

MR. KUTNER: Some judges allow it some don't.

MR. KENDRIC: Here's why I object. I acknowledge it's completely within this Court's discretion one way or the other it's just if there's one guy taking notes and the others are not and they all look back at his notes.

MS. CHANNER: If you give everybody a pad and pencil they can each decide.

THE COURT: Then others may not take notes, I rather not.

THE CLERK: During deliberation, if need be, they can always request a read back.

THE COURT: I rather not get into the note issue.

Mr. Kutner, I just want to take care of that issue with the jury. The court officer brought up with me that there was a request of one of the jurors

about possibly taking notes and the counsel and I have spoken, we're not going to go that route. We want you to listen. You will hear later on you will be entitled to when you go to deliberate you will be entitled to have read backs of testimony anything you want. You will be able to look at photographs of anything introduced into evidence. So if the Town has a witness who testifies and you want to hear that testimony whole or in part you will be able to. If the defense decides to put some witnesses on, then you will be able to hear read backs of that testimony, if you want to clarify something or get the flavor of it whatever. Is that clear? Don't feel that you're going to get overwhelmed here. We want to make sure you are comfortable and you'll understand and you will get everything and everything you need to make a fair and partial verdict. Fair enough.

MR. KUTNER: The second thing you have to accept is to buy the Town's sales pitch is and they claim that this was an illegal two family house, is the history. Never did a single previous owner ever get violated, a notice of violation nonetheless prosecuted the defendant despite this house, with two meters you will find from the testimony that the meters go back at least to 1940 and probably before

them because of when the second floor meter comes with a first floor meter, obviously, the second floor meter was replaced in 1968, you will hear testimony from LIPA.

What you are going to find out is the only thing - the only event that changed the Town's attitude toward this house was Marlene and Darren Thomas buying it and moving in. Up until then, when we did the title search and we saw the -- oh, by the way, it's taxes are a two-family, funny Mr. Kendric didn't tell you that. And so the tax assessor's enrolled as a two-family, funny he didn't tell you that. He also didn't tell you that every year since 1938, when the tax -- the Nassau County administrative code was put in effect, and the charter was adopted, we're the only county in the state that has a tax assessor. All the other town's municipality do their own. This county does it for the town's municipality not vice versa. So this county has a tax assessor put in 1938. Every year at least three times, first week in January they're given an initial assessment and they're notified the town as to the taxation of this house. Now this only applies since 1988 and I'll tell you why, but then they tell them around the first week in April, I think it's April 1st, but it could just be

the first week in April, of the tenant assessment, during that time the people can grieve their taxes. And then there's a final assessment and there can be others, if there's a grievance then they'll notify you again if there's a dispute. And the Town at least since 1988 never had a fault with collecting getting their grubby hands on the tax money --

THE COURT: Mr. Kutner, two minute warning.

MR. KUTNER: They didn't say anything. They collected and they're still collecting taxes as a two-family. When he bought it, the tax assessor's card said 220.1, which is a two-family house. The Town knew it, we had to rely on that, because you can't get a feel for pre-existing non-conforming use, again something Mr. Kendric forget to tell you about. It's unavailable. And that's why the '68 letter says we can't tell you if it is legal or illegal because it pre-exists we don't know, if they don't know how can they convict this man beyond a reasonable doubt.

What they didn't plan on is for a client an individual, a citizen, having the guts to fight City Hall. And that's to that gentlemen's credit and his wife because it takes a lot of expenses, a lot of agita, a lot of uneasy times for the last 12 years wondering if they were going to lose their home. If

they are going to lose their tenant, they have to move. They have to sell their house they can't pay their mortgage, they are a young couple. Now they are in different circumstances but in the beginning years yes, they had to worry about it on a daily basis. Is this going to be my house or are we getting thrown out? What kind of town would do that to a citizen?

THE COURT: Mr. Kutner.

MR. KUTNER: Okay. Legality decides the motive and the motive decides the legality. If the Town's motive is to --

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained. Mr. Kutner let's wrap it up now, come on.

MR. KUTNER: Just use your common sense and you will have no problem with your verdict. Thank you very much for hearing me.

THE COURT: At this point would the Town like to --

MR. KUTNER: Could we grab a bathroom break, please?

THE COURT: Sure. We'll take a ten minute break. Is that a good for you? We'll begin at 3:35.

(Whereupon, a recess was taken.)

COURT OFFICER: All rise.

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Before we begin with the testimony, the sergeant was mentioning that the jurors were asking questions specifically about the case. Court personnel, and anybody cannot specifically talk with you about the case, okay? The only thing you can hear is what you hear in here, okay? Remember there's a court reporter here, and she's taking down every word in this case, and anything that is said, you can have read back to you at the appropriate time, okay, fair enough?

Don't feel overwhelmed. There's going to be testimony. There is going to be documents. I'm a learning about the case like you are, and everybody in the audience, we are all listening to the case. I'm going to learn about it as you learn about it, so don't feel overwhelmed because the attorney has the obligation to try to explain their case to you and their position, which they did in their opening, fair enough? Any questions about anything?

(No response by the jury members.)

THE COURT: No? Good. Thank you.

Okay, Mr. Kendric.

MR. KENDRIC: Yes, thank you very much, your

Honor.

We had premarked a number of exhibits. I'll lay them out for the record, okay?

THE COURT: Okay.

MR. KENDRIC: And obviously, Judge, these are all for identification only?

THE COURT: Right.

MR. KENDRIC: People's Exhibit 1, is 17 pages in total, taken directly from the People's witness list, and trial exchange, referable to the subject property located at 121 4th Street, in Hicksville.

MR. KUTNER: Judge, I object. We didn't premark it. Premarking means there's a joint effort to premark exhibits. I haven't seen these, and I object to them being characterized on the record in front of the jury.

THE COURT: Okay, let's just call the witness. Let's just do it that way.

MR. KENDRIC: Okay.

THE COURT: Who is the witness you want?

MR. KENDRIC: Michael Esposito.

(Whereupon, the witness takes the stand.)

THE CLERK: Remain standing. Raise your right hand, please.

Do you swear or affirm the testimony you're

about to give, will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Lower you hand. Have a seat. State your name and address for the record.

THE WITNESS: Michael Esposito, 97 Ashford Drive, Syosset, New York.

MR. KENDRIC: Thank you, your Honor.

DIRECT-EXAMINATION

BY MR. KENDRIC:

Q. Good afternoon, Mr. Esposito. Tell the jury please, with whom are you employed?

A. The Town of Oyster Bay?

Q. And for how many years have you been with the Town of Oyster Bay?

A. A little over eight years.

THE COURT: How many years?

THE WITNESS: A little over eight years.

Q. Currently, what is your job capacity, or job title, or position?

A. I am the bureau chief for the Code Enforcement Bureau.

Q. Now can you explain first, what is code enforcement as it pertains to your job?

A. We enforce the code of the Town of Oyster Bay?

Q. And how do you do that?

A. When we receive complaints, an inspector will go out to verify the actual violation is taking place, and act accordingly.

Q. And you're looking to enforce, tell me if I'm wrong, you are looking to enforce the town code of the Town of Oyster Bay?

MR. KUTNER: Objection, leading.

THE COURT: I'll allow it.

A. We enforce the town code, the Town of Oyster Bay code.

Q. Now Mr. Esposito, have you reviewed certain code inspection reports and photographs relating to the defendant's property located at 121 4th Street, in Hicksville?

A. Yes?

Q. Have you reviewed other materials in connection with this matter?

A. Yes?

Q. And are you generally familiar with the two violations charged against the defendant?

A. Yes, I am?

Q. Generally, sir, what did these two charges involve?

MR. KUTNER: Objection. We don't need

general, judge. We have specific --

THE COURT: Sustained. You have to be specific.

MR. KENDRIC: Sure.

Q. Mr. Esposito, what was the defendant charged with?

A. He was charged with a violation of Chapter 246-5.2, which is zoning. And also, Chapter 93, which is a violation of a Certificate of Occupancy?

Q. Now, we've had this package premarked as --

THE COURT: No, why don't we mark it right now.

MR. KENDRIC: Well, it's been marked People's 1 for identification.

COURT OFFICER: People's 1 marked for ID being shown to the witness.

(People's 1: Town of Oyster Bay Inspection reports. Marked for identification.)

Q. Sir, are these the inspection reports in the photographs that you reviewed?

A. Yes, they are?

Q. We're going to hear from code enforcement Inspector Christopher Gioia (ph.) as to what he personally saw and did, but with respect to these materials, were they generated in the regular course of Town of Oyster Bay

business?

A. Yes.

Q. Generated by whom, sir?

A. Inspector Gioia writes the report, brings it into the office, and the clerical staff will type up the report.

MR. KUTNER: Move to strike the answer, Judge, for two reasons.

One, he wasn't employed when these reports were issued in 2007 and 2008, and that's hearsay. He doesn't know who issued the reports. They just got names on it. He is reading from a piece of paper that's not in evidence.

MR. KENDRIC: I'm laying a foundation for a business record.

MR. KUTNER: Judge, he wasn't an employed at that time, so he cannot provide the foundation. That's the basis of my objection.

MR. KENDRIC: He's reviewed the Town of Oyster Bay records pertaining to these records, your Honor.

THE COURT: Mr. Kendric, I have to see you both. Off the record.

(Whereupon, an off-the-record conference ensued outside the presence of the jury members.)

THE COURT: People, apparently they were premarked. We'll start over and mark them as we go a long, that's number one.

Number two, Mr. Kendric, what Mr. Kutner is saying is, at the time these reports were made, I guess in 2007, 2008, if I understand it correctly, your witness was not employed by the town, so how would he know what the town practice was? I'm just telling you what his objection is.

MR. KENDRIC: Yes. I'm laying a foundation. The practice hasn't changed, and he has reviewed Town of Oyster Bay records. He is the head of code enforcement. He is in charge of the Department that maintains these records.

MS. CHANNER: But if Mr. Gioia is going to testify, can't those records go in through Mr. Gioia?

MR. KENDRIC: Judge, I choose to put them in with this witness, and then I can discuss them in terms of what Gioia personally did and saw, but I'm laying the foundation for that purpose.

THE COURT: Mr. Kendric, I'm just going to ask this question. Wouldn't it be better, if Mr. Gioia goes in first? He can testify these are the records, instead of going through this whole thing? I don't know what this adds to this, having this witness

go on like this. I don't quite understand.

MR. KENDRIC: It gives the jury an understanding of what the case is going to be about, and then we drill down with the actual code inspector.

MS. CHANNER: But the witness has to be relevant.

MR. KENDRIC: This is the way I choose to present my case, Judge, and the witness is relevant. I'm not bringing some guy off the street that doesn't know anything about the Town of Oyster Bay. He is the head of code enforcement.

MR. KUTNER: Since 2011, apparently, not since 2007 and 2008.

THE COURT: Well, Mr. Kutner, why can't he testify at least that these are the records the town is maintaining at the present time concerning this property; what's wrong with that?

MR. KUTNER: Because the foundation requires that they be established, that they be made at or about the time of the events that they recite, and it was the practice of the town at that time, to keep these records during the ordinary course of business, he can't lay the 4518 foundation.

MR. KENDRIC: He can cross-examine on that, he can voir dire him on that.

MR. KUTNER: But you have to lay a foundation first.

MR. KENDRIC: I am laying a foundation, Judge.

MR. KUTNER: I don't get why the curve ball?

THE COURT: I'm going to sustain the objection, but I will, and I'm doing that. And one thing, obviously they can't bring people in from 1943, you know, okay?

MR. KUTNER: I don't know. I know, it's a problem for both sides.

THE COURT: I'm going to allow the records to go in. The fact that they are maintained right now concerning the property. To that extent, Mr. Kutner, I'm changing my mind on it. Mr. Kutner, I'm going to allow them in.

MR. KUTNER: He didn't even offer them yet? Can I just take a look at it? Maybe we can short circuit this whole exercises. I don't understand the purpose of it. What I'm suspecting is, this is going into a little further into an expert opinion, and that's where --

MR. KENDRIC: Why is he speculating as to what I'm going to do? I'm putting on my case.

THE COURT: I know. Let's just go.

(Whereupon, the hearing resumes.)

THE CLERK: Back on the record.

THE COURT: Mr. Kendric?

MR. KENDRIC: Yes.

THE COURT: I'm going to allow testimony on the records.

MR. KENDRIC: I understand, your Honor.

MR. KUTNER: Just to speed things up, can I look at them?

THE COURT: Sure. Why don't we show it to him.

MR. KUTNER: No objection.

THE COURT: They're in evidence. You want the witness shown back the records, or you want to keep going?

COURT OFFICER: People's 1 marked in evidence.

(People's 1: Town of Oyster Bay inspection reports. Marked in evidence.)

THE COURT: You want them shown before the witness? They are in evidence.

MR. KENDRIC: And I agree with your Honor. I don't know I'm necessarily going to ask questions of the witness.

THE COURT: Then we'll take them back.

MR. KENDRIC: I have a certified zoning map which was premarked.

THE COURT: Show it to Mr. Kutner.

MR. KUTNER: No objection.

THE COURT: So we'll mark it as exhibit 2, and its in evidence.

COURT OFFICER: People's 2 marked in evidence.

(People's 2: Zoning map. Marked in evidence.)

THE COURT: You want the witness to identify it?

MR. KENDRIC: You want to do it piece-meal like this?

THE COURT: Yes, I do. It makes it easier for the jury to understand what is going on.

Go ahead, Mr. Kendric.

(BY MR. KENDRIC:)

Q. Mr. Esposito, let's take the image marked as People's 1 in evidence. Please tell these good folks, what is People's 1?

THE COURT: This is People's 2?

MR. KENDRIC: I'm talking about People's 1.

COURT OFFICER: What you just handed him is People's 2.

MR. KENDRIC: I understand. The first package that we marked is People's 1. Let's give him back the package and --

THE COURT: Give him "1." He'll have "1" and "2."

COURT OFFICER: People's 1, given to the witness.

THE COURT: Go ahead.

Q. Can you please explain --

A. This exhibit?

THE COURT: Exhibit 1?

MR. KENDRIC: Exhibit 1.

A. These are Inspector Gioia's inspection reports from the property, and some photos attached that he took. They are handwritten by Inspector Gioia, and they are typed up by the clerical staff.

MR. KUTNER: Judge, can I have a brief voir dire? I know they're already in but -- nevermind, I'll do it at closing.

Q. And now with respect to the map marked as People's 2 in evidence, would you please tell the jury what that is?

A. This is the zoning map of the property in question, which was certified by the town clerk of the Town of Oyster Bay.

THE COURT: Mr. Kutner, you agree People's 3 will go into evidence?

MR. KUTNER: Yes.

THE CLERK: People's 3, marked People's 3 in evidence.

(People's 3: Certificate of Occupancy. Marked in evidence.)

Q. Mr. Esposito, please tell the jury what you are looking at there in People's 3 in evidence?

A. This was a Certificate of Occupancy that was issued by the Town of Oyster Bay for a two-car detached garage on June 9, 1986.

Q. At what property location, is this, please?

THE COURT: Can the jury hear him okay?

A. 121 4th Street, Hicksville, New York?

Q. And on that Certificate of Occupancy, is there an indication as to how the premises are zoned?

A. Yes. It states on here the premises are zoned for one-family use.

COURT OFFICER: People's 4 marked for ID.

(People's 4: Stipulation by both parties. Marked for identification.)

THE COURT: It's a stipulation by both parties being shown to the witness.

MR. KENDRIC: Can we finish with the

marking, and resume with the questioning, Judge?

THE COURT: Would that be easier?

MR. KENDRIC: I think so.

THE COURT: No, I'd rather do it this way because it's just as easier, it's a better flow.

MR. KENDRIC: All right. So, I've handed defense counsel --

THE COURT: You have "4" now. You have to ask about "4."

MR. KENDRIC: Okay, let me ask you about "4."

Q. Mr. Esposito, please tell the jury what are you looking at there?

A. This is a letter generated by the Town of Oyster Bay, the Department of Engineering and Buildings of June 27, 1968, as to the property at 121 4th Street?

Q. Okay, we'll come back to it then.

THE COURT: That takes care of exhibit 4, which is in evidence.

(People's 4: Stipulation by both parties. Marked in evidence.)

THE COURT: Now we have exhibit 5, that has not been marked yet, right?

MR. KENDRIC: I'm showing it to counsel.

MR. KUTNER: No, Judge, I have an objection

to this.

THE COURT: We'll have that marked and shown to the witness. Show it to the witness.

MR. KUTNER: Judge, this isn't his document. I'm going to object to any questions about it whatsoever. It's from the town -- it's from the County Board of Assessors.

THE COURT: Okay, let's just mark it, let's show it to him, and then we can deal with it, okay, fair enough?

COURT OFFICER: People's Exhibit 5 marked for ID being shown to the witness.

(People's 5: Property card generated by the Nassau County Department of Assessment, January 11th. Marked for identification.)

Q. Mr. Esposito, are you familiar with what that document is, please?

A. It seems to be a copy of the property card generated by the Nassau County Department of Assessment, January 11th.

MR. KUTNER: Objection, your Honor. He's reading from a document not in evidence. He is not from that Department. He doesn't know what that is, and I frankly have never seen it before either.

MR. KENDRIC: It's certified from the County

of Nassau.

MR. KUTNER: I have problems with both, and I would like to be heard on the record at the end of the day, please, if we could just put that aside.

THE COURT: We'll put that aside.

MR. KUTNER: As to 6, Judge, no objection.

THE COURT: So we'll mark that as exhibit 6, and show it to the witness, and he can identify it.

COURT OFFICER: People's Exhibit 6, marked for ID, being shown to the witness.

(People's 6: Property cards generated by Nassau County. Marked for identification.)

MR. KENDRIC: I think that's in evidence.

THE COURT: Yes, it's in evidence.

Mr. Kendric, you want him to offer it so the jury understands what it is?

Q. Mr. Esposito, please tell the jury what this document is?

A. These are property cards generated by the Nassau County.

THE COURT: Of the assessment department?

THE WITNESS: I'm not 100 percent sure, Judge, who exactly generates these records.

THE COURT: That's from Nassau County; is that correct?

THE WITNESS: Yes, from Nassau County.

MR. KUTNER: Judge, may I ask a question?

VOIR DIRE EXAMINATION

BY MR. KUTNER:

Q. You're not from that Department, are you?

A. No, I am not.

Q. And you don't know what they are?

A. They are property cards.

Q. When did they stop using those property cards?

A. I don't know.

Q. In 1984?

A. I don't know.

MR. KUTNER: That was the nature of my objection.

THE COURT: They are in evidence. It's already been agreed to.

Q. Those are Nassau County records, correct?

A. Correct.

THE COURT: Is that a certified Deed for the house?

MR. KENDRIC: Yes, sir, correct.

THE COURT: Owned by the defendant?

MR. KENDRIC: Yes, sir, correct.

(People's 6: Property cards generated by Nassau County. Marked in evidence.)

THE COURT: Exhibit 7, doesn't have to be shown to the witness. What it is, is a certified Deed showing that the defendant owns the house in question.

Does everybody understand that?

(People's 7: Certified Deed showing that the defendant owns the house in question. Marked in evidence.)

MR. KUTNER: The defendant and his wife, Judge.

THE COURT: And his wife. The defendant and his wife.

MR. KENDRIC: Can I continue, Judge?

THE COURT: Yes. Are there any other Exhibits?

MR. KENDRIC: Not at this time.

MR. KENDRIC: Sir, everything except for exhibit 5, is in evidence at this point?

THE COURT: That is correct.

(BY MR. KENDRIC:)

Q. So Mr. Esposito, have you had an opportunity to review the certified zoning map, which I believe is People's 2 in evidence?

A. Yes.

Q. Can you tell us based upon that map, how the defendant's property located at 121 4th Street in

Hicksville has been zoned?

A. It is an R1-7 zone.

Q. Was it in an R1-7 zone, in December of 2008?

A. Whenever the zoning map was generated, yes.

Q. In an R1-7 zone, what use or uses are permitted under the town code?

A. One-family dwellings.

Q. Anything else?

A. There are other uses permitted, if they're granted variances.

Q. Can you explain to the jury the concept of a principal permitted use, and an allowed use?

A. If somebody wants to get a variance to use a property a different way then they are zoned for, they have a right to appeal to the Zoning Board of Appeals, to get a variance to get a Special Use Permit issued for that property.

Q. So just to be clear, as things stand now and back in December of 2008, Mr. Thomas' property was zoned R1-7, correct?

A. Correct.

Q. And the only permitted use without approval from the Zoning Board of Appeals was what?

A. A one-family use.

Q. A one-family dwelling, okay. And are these

uses, one-family dwelling as a principal permitted use, or a two-family with a Special Use Permit as issued by the Zoning Board of Appeals, are those uses set forth in the town code?

A. Yes, they are.

Q. Where; where are they set forth?

A. They're in the schedule of use of I believe Section 246-5.2.

Q. Mr. Esposito, I want you to assume an inspection of a residence located in an R1-7 zone revealed two door bells located at the front entrance, and two separate electric meters. Can you tell us please, based upon your knowledge of the town code, the significance, if any, of those findings?

MR. KUTNER: Objection. It's leading.

THE COURT: He said, "the significance, if any." I'll allow it.

A. Based on the code and what you just described, it's a rebuttable presumption if two or more items are evidence, that illegal housing is at that property.

Q. And I'm not asking you to give a legal answer. I'm asking you to give an answer as the bureau chief as the Code Enforcement Bureau. Explain to the jury the concept of rebuttable presumption?

A. In our town code --

MR. KUTNER: Objection, your Honor. That's an issue of law specifically for the Court.

MR. KENDRIC: Judge, I'm asking him to explain it as to the --

THE COURT: Overruled.

MR. KUTNER: Judge, that's for you to charge the jury at the end what a rebuttable presumption is. You cannot ask a lay witness who is not even an attorney no less without any experience, to specify for the record as to what this is.

THE COURT: I will allow it, if you want what the practice of the town is, how they carry something like that out.

MR. KENDRIC: Yes. I'm going to adopt the Judge's question.

Q. The practice of the town, can you explain the concept to the jury, of the rebuttable presumption under the town code.

A. There's a list of items under 245-16, a chapter in our code book, that specifies certain things an inspector should look for to determine whether he -- if he cannot do an interior inspection of the house, whether he can determine, if there is possible illegal housing at that property.

Q. Okay. And the rebuttable part?

MR. KUTNER: Objection.

Q. You told us about the presumptive evidence part --

MR. KUTNER: Judge, "rebuttable" is a term of art in the law.

MR. KENDRIC: Judge, it's right in the town code, your Honor.

MR. KUTNER: It doesn't matter whether it's in the town code. Your Honor, it's a matter of -- it's an issue of law.

THE COURT: I will ask it this way.

How would a person rebut an allegation that it is an alleged illegal two-family?

MR. KUTNER: I'm sorry, Judge, I couldn't hear.

THE COURT: What I asked him -- would the reporter read back my question?

(Whereupon, the record was read back.)

MR. KUTNER: Thank you.

I have to object to the Court's question. Again the rebuttal --

THE COURT: How the town carries that out, that's what I want to know. That's allowed. Go ahead.

A. The answer is for the homeowner to allow us to do an interior inspection of the house, to determine there's not an illegal housing situation.

Q. Mr. Esposito, you mentioned before that a residence zone for one-family use as is the case here, can be granted legal two-family status by a Special Use Permit issued by the Zoning Board of Appeals, correct?

A. Correct?

Q. And has the defendant, Darren Thomas, ever been denied such a permit?

A. I don't believe he has ever applied for a permit.

MR. KUTNER: That we concede, Judge.

THE COURT: Right.

Q. The option that you spoke about having the code enforcement inspector coming into the house and saying, "town, "you're wrong, I'm not using it as a two-family. Here is the proof." Is that set forth in the town code?

A. It's set forth, if we don't see those --

MR. KUTNER: Objection. Move to strike. It's either "yes" or "no," and I object to the question.

THE COURT: I didn't quite hear, Mr. Kendric. You have to speak up a little.

MR. KENDRIC: I apologize, Judge.

THE COURT: Because sometimes you drop, and I didn't catch that. The court reporter is having the same problem.

MR. KENDRIC: I apologize to all.

THE COURT: What I'm going to ask you to do, could you just rephrase the question again.

MR. KENDRIC: Of course, your Honor.

Q. Mr. Esposito, the homeowner who is being charged with using the house as a two-family when as in this case it's zoned exclusively for a one-family, you spoke with us just a moment ago about how the homeowner can permit the inspector into the house and say, "Here, I'm rebutting your thought that it's being used contrary to the zoning code." And my only question is, is that option that's open to the homeowner, is that set forth right there in the town code?

MR. KUTNER: Objection, leading.

THE COURT: No, he's just asking if it is in the town code. I'm going to allow it. I don't think it's leading, Mr. Kutner.

A. It's set forth in the town code, if it meets certain criteria.

Q. Did the defendant ever ask for the inside of his house to be inspected in this manner that you've just testified about?

MR. KUTNER: Objection. That's Fifth Amendment. That's just fundamental first day law school. My client has no duty to say anything about it to anybody. He is charged with a crime here.

THE COURT: No, he's not. That's not your client who is testifying. Overruled.

MR. KUTNER: Judge, you can't use his silence against him.

THE COURT: Mr. Kutner, he is asking, if he ever... Overruled.

THE WITNESS: Could you please repeat the question?

MR. KENDRIC: Madam reporter, would you mind restating the question to the witness?

(Whereupon, the record was read back.)

THE COURT: Mr. Kendric, I'm going to sustain the objection as to foundation for that.

MR. KENDRIC: Let me do it this way, your Honor.

Q. Mr. Esposito based upon your review of the code inspection reports that are in evidence as People's Exhibit 1, is there any indication in any of those code inspection reports of the defendant having asked your bureau, the Bureau of Code Enforcement, to come inside and look for themselves?

MR. KUTNER: Objection.

THE COURT: Overruled, you can answer.

A. Not to my knowledge.

Q. Did the town attempt to schedule or conduct such an interior inspection?

THE COURT: Say it again, Mr. Kendric, I'm sorry.

MR. KENDRIC: Yes.

Q. Did the town attempt to schedule, or conduct such an interior inspection?

MR. KUTNER: Hearsay, objection.

THE COURT: Sustained.

Q. Mr. Esposito, based upon your reading of the code inspection reports in evidence as People's 1, did the town make efforts to schedule or conduct an inspection of the interior of the residence?

A. Yes. Inspector Gioia on a couple of occasions attempted to speak to the defendant to get in the house and-or his wife.

Q. And finally, sir, can you tell us the basis for charging the defendant with a violation of Section 93-28 of the town code?

MR. KUTNER: Your Honor, objection. He wasn't even an employee then when it was done. We have Inspector Gioia coming in. Why are you

introducing problems?

THE COURT: Mr. Kendric, don't we have the town inspector coming in to testify next week?

MR. KENDRIC: Yes. Let me pivot, Judge.

Q. Mr. Esposito, what I would like you to do please, is I'd like you to explain to this jury the difference between a Certificate of Occupancy for the physical structure the building, as opposed to a Certificate of Occupancy for the use of that structure.

A. The Certificate of Occupancy is generated only for the person or persons to occupy the dwelling. It's not related at all to the use of the dwelling?

Q. Okay. Now in this instance, the home is believed to have been constructed well before the enactment of the town code, like perhaps 1925, 1926, okay.

Does the structure, the building, does that require a Certificate of Occupancy from the town?

A. The town did not issue the Certificate of Occupancy until May of 1943?

Q. Okay, so the answer to my question, please.

A. So there was no Certificate of Occupancy issued for a house that was built prior to 1943?

Q. Nor needed, correct?

A. Nor needed.

Q. Okay, but talking about how the homeowner uses

the structure or building, does a homeowner who is zoned R1-7 attempting to use his house as a two-family dwelling, does he need a Certificate of Occupancy in order to use the house as a two-family dwelling?

A. Well, he needs a Special Use Permit and then once the building inspection is done, he will get a Certificate of Occupancy.

Q. Now let me just please have you pull out that letter from 1968. Do you have that before you?

COURT OFFICER: People's 4.

MR. KENDRIC: People's 4, thank you.

COURT OFFICER: People's 4 being shown to the witness.

Q. Mr. Esposito, tell me, please, what is that letter referring to?

A. It's stating that the town did not issue a Certificate of Occupancy.

THE COURT: For the record, it's a short letter. I can see it from here. Read the whole thing to the jury.

A. "In reply to your request today regarding the above-described premises, please be advised that the town passed and made effective an ordinance on May 25, 1943 requiring the issuance of a Certificate of Occupancy. Therefore premises, legally in existence prior to the

above-date, would be legally nonconforming in that no Certificate of Occupancy would be necessary. We sincerely hope the above-information would be some help to you." And it's signed by Edward Gainor (ph.), director of the Department of Building and Zoning.

Q. Is that letter referring to the house, the physical structure, or something else?

MR. KUTNER: Objection. We don't need an interpretation. The documents speaks for itself, and it's in evidence.

MR. KENDRIC: I agree.

There's a property card that we have in evidence. It should be People's 6 in evidence.

COURT OFFICER: People's 6 in evidence being shown to the witness.

Q. Mr. Esposito, who generates that property card; is that the Town of Oyster Bay?

A. No, Nassau County.

Q. And that property card contains a property classification "210.11," does it not?

A. Yes, it does.

Q. Can you tell me, please, what is that property classification referring to?

A. It refers to a one-family dwelling.

MR. KENDRIC: Your Honor, I move to put

People's 5 into evidence. This is the one that we needed to speak about, apparently.

MR. KUTNER: We're going to go over until Monday.

THE COURT: We really need to go over to Monday on this, okay, because it's 4:15. I just have to read the jury some instructions. I think it's time we end the testimony. We are going to end today. I'm just going to read you some instructions, so you can step down. I will see you Monday at 2:00.

MR. KENDRIC: I agree.

MR. KUTNER: Before the witness leaves, would you please instruct him?

THE COURT: Yes. You can't speak to anybody about your testimony.

THE WITNESS: Okay.

MR. KUTNER: Thank you, your Honor.

THE COURT: Counsel, what I'm going to do now is I'm going to read the jury their duties on this case, and that will be it for the day.

Unfortunately, you're going to have to hear this a lot from me, and it's very important that you follow this, so we can have a fair and impartial trial and verdict on this case.

During the time you sit as a juror in this

case, there are certain rules of conduct. You will hear this over and over on every break when selected as a juror, which you already have.

You are not to discuss this case among yourselves or with anyone else. Do not converse either among yourselves or with anyone else about anything relating to the case until you go into deliberation, that's the only time you can do it. You may tell the people with whom you live and your employer that you are a juror, and give them information about when you will be required to be in court, but you may not talk with them or anyone else about anything else relating to the case. Do not at any time during the trial request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial. You must promptly report to the Court, meaning me, any incident within your knowledge involving an attempt by any person to improperly influence any members of the jury. You are not to permit any party to discuss the case with you, or attempt to influence you. If anyone does, you are to immediately report it to the court, do not tell the jury. You are not to visit the site of the incident. Do not visit or view the premises or

place where the charged crime was allegedly committed, or any other premises or place involved in this case. You must not use Internet maps or Google Earth, or any other programs or device to search for, and view any location discussed in the testimony. You are not to read or listen to any comment regarding it in the media. Do not read, view, listen to or accounts or discussions of the case reported by newspaper, television, radio, the Internet, or any other news media. Your decision must be based solely on the testimony, and other evidence presented in this courtroom. Do not attempt to research any fact, issue, or law, relating to the case, whether by discussion by others, by research in the library or on the Internet, or other means or source. In this day and age of instant electronic communication and research, I wants to emphasize that in addition to not conversing fact-to-face with anyone about the case, you must not communicate with anybody about the case by other means including telephone, text messages, email, Internet chat, or chat rooms, logs or social websites, such as Facebook and Twitter. You must also not Google or otherwise search for any information about the case or the law which applies to this case, or the people involved in this case, including the

defendant, the witness, the lawyers, or the Judge. You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting and information about the case, or what you are doing in this case, or on any device or Internet site, including blogs, chat rooms, social websites, and any other means. You're to keep an open mind until all the evidence has been presented and you're charged as to the law. I am from this moment again, instructing each and everyone of you on the rules of conduct.

Any questions?

(No response from the jury members.)

THE COURT: Okay, see you Monday 2:00. Have a nice weekend.

Counsel, are you going to have request to charges on Monday?

MR. KENDRIC: Judge, my colleague has something to say to the Court on the record.

MR. EHRLICH: Your Honor, just in terms of the calendar, I am the prosecutor on Monday morning in front of Judge Meli for all the town code cases. My principal witness is Mr. Esposito on those, so in the course of it, I will be in the room with other people with him. There certainly will be no discussion about

this, but I just want to be upfront with the Court, that I will be in orbit of Mr. Esposito.

MR. KENDRIC: Unless the court notes otherwise, Mr. Kutner has been in the room, so he's aware of the Monday morning.

THE COURT: He is saying on Monday mornings they have town prosecution down in room 155.

MR. KUTNER: Judge, I would not object.

THE COURT: You have no problem with that?

MR. KUTNER: I don't see -- I know they have other prosecutors. I don't see why someone else can take his place for Monday morning because it's only going to be the one time, but --

MR. KENDRIC: If the Court directs it, we can sincerely do that.

MR. KUTNER: Judge, maybe it's better that they --

THE COURT: So why don't we do that?

MR. KENDRIC: Thank you.

MR. KUTNER: Thank you.

THE COURT: So just to go over some housekeeping.

Do you plan on having proposed jury charges on Monday, or is that going to be an issue?

MR. KENDRIC: No issue.

MR. KUTNER: We're not going to be able to finalize them until we see what Gioia is going to be testifying to, Judge, so it may be a day or two.

THE COURT: Okay. The other question is, are we going to have some case law; I'm dealing with this EBT testimony.

MR. KENDRIC: Yes.

MR. KUTNER: You mean from Mr. Guckenberger?

THE COURT: Yes. I will like to get that resolved. I have already gone through the deposition. I've read through it once, but I am going to read it three or four times frankly before we come back Monday.

And then we have an issue about exhibit No. 5. I know you're object to that going into evidence, just give that some thought, Mr. Kutner, over the weekend about whether that is being put in or not. That's up to you, if you decide that. But if there's any case law on that, that I need to see, so please bring that in on Monday so we can get that resolved too.

MR. KUTNER: Sure.

THE COURT: I just want to move this along as quickly as we can.

Are there any other matters --

MR. KUTNER: Do you want to address it now, Judge?

My objection to exhibit 5 was not about case law legally. It's the term that apparently that's printed out only within the last months or so, and it deals with -- it recites something that I know that is not true. It has a classification and tax classification of --

THE COURT: Can I suggest something?

MR. KUTNER: Sure.

THE COURT: Why don't you two go outside and just talk about that a minute?

MR. KUTNER: Yeah, I'll talk to him.

THE COURT: Just talk to him. You want a copy made for you?

MR. KUTNER: Yes, please, Judge.

THE COURT: Could we make a copy of exhibit 5.

MR. KUTNER: Lastly on the record, your Honor, one more thing.

Under CPL 260.30 and also the case of People versus Kurtz, K-U-R-T-Z, which is -- I only have one copy. I'll supply additional copies on Monday. It's 51 N.Y. 2nd 380, I move to dismiss the case based upon the inadequacy of the People's opening statement.

They did fail to make out a case legally and factually in the opening statement as to either of the two charges, and I ask that be dismissed.

THE COURT: We'll deal with that on Monday. It's 4:30 right now, and I'm not doing something like that on a 4:30 on a Friday, okay?

Any other housekeeping matters, counsel?

MR. KENDRIC: No, Judge.

MR. KUTNER: No, sir.

THE COURT: Thank you for a good days work, and I'll see you Monday at 2:00.

(Whereupon, the proceedings concluded.)

* * *

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4TH DISTRICT
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

Plaintiff

-against-

DARREN E. THOMAS,

Defendant.
----------x

March 25, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T:

Darren E. Thomas - Defendant

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record No. 22F, Docket 22F of 2009. People of the State of New York against Darren E. Thomas, on for trial hearing.

Appearances for the record.

MR. KENDRIC: Yes, of course.

Good afternoon, your Honor. Good afternoon, Mr. Kutner, Ms. Channer, Mr. Thomas.

Christopher Kendric, Kendric Law Group, P.C., attorney for the prosecution.

MR. ROZEA: With Mr. Kendric, Deputy Town Attorney, Matthew Rozea, 54 Audrey Avenue, Oyster Bay, New York 11771.

THE COURT: Good afternoon.

MR. KUTNER: Harry Kutner for the defendant, with Sheryl Channer, and Mr. Thomas. Good afternoon.

THE CLERK: Is there anything that needs to be put on the record before the jury is ready to come in?

MR. KUTNER: No, sir.

MR. KENDRIC: Judge, I've got that memorandum with respect to Guckenberger. I can hand it up, or we can wait, no problem.

MR. KUTNER: Judge, I was going to ask that we just put that off. I spoke to him this morning. He's going to ask for Thursday Morning, or for

Wednesday night. We'll know by Friday what his condition is, and whether he can appear the following week.

THE COURT: We'll hold off until when it becomes an issue.

COURT OFFICER: Jurors entering.

(Whereupon, the members of the jury enter the hearing room.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Good afternoon. Hope you had a good weekend. We're going to expedite this as quickly as we can because we know your time is very valuable, okay? Thank you for coming. Jurors ready?

(Jurors respond in the affirmative.)

THE COURT: Okay.

MR. KENDRIC: Can we recall Mike Esposito to the stand, please?

THE COURT: Yes.

THE CLERK: Mr. Esposito, please be reminded you are still under oath.

CONT'D DIRECT-EXAMINATION

BY MR. KENDRIC:

Q. Good afternoon, Mr. Esposito.

A. Good afternoon.

Q. Can you explain to the jury, please, why the town attempts to regulate having more than one family occupying a house which is zoned for one-family use?

A. Well, you're looking out for the welfare of the residents of Oyster Bay, and it could be issues with, you know, fire, egress from the house, additional kitchen in the house. There's a few safety issues that you're looking to address.

Q. Expand a little bit, just so the jury gets an understanding.

MR. KUTNER: Objection, your Honor. This is a code enforcement inspector. He is not a policy maker in the town of Oyster Bay, and I think we're wasting the jury's time.

THE COURT: No, I'm going to allow it. Go ahead.

A. If a house is zoned one-family, we want to make sure one family is living in that house. There's means of egress for people in that house, if there is a fire. I want to make sure to look out for their safety.

Q. Mr. Esposito, would you please explain to the jury, is there a difference between needing a Certificate of Occupancy on a house, meaning on the physical building structure, and needing a Certificate of Occupancy on the use of a house?

MR. KUTNER: Objection. Lack of foundation, and qualification of this witness to answer that.

THE COURT: Okay.

MR. KENDRIC: I didn't hear a word you said to me.

MR. KUTNER: I object to the lack of foundation for no qualifications for this witness to be able to testify.

THE COURT: Just do a foundation.

Q. Mr. Esposito, are you knowledgeable as to why your Certificate of Occupancy may not be needed on a physical fracture, but may be needed on the use of that structure?

A. It's needed for the occupancy of that house to make sure everything that was built in that house, is to code, for the safety of the inhabitants of the house.

Q. All right. Now in this particular instance, the Thomas house we believe was built in 1925 or 1926 perhaps. Does that house, does that structure need a Certificate of Occupancy?

A. It did not need one at that point in time because the law was not instituted until May of 1943.

Q. Okay. How about the use of the house as a two-family, even though it's zoned exclusively for one-family use. Does it need a Certificate of Occupancy

for that?

A. Yes. If it was change of use, yes, they'll need a new Certificate of Occupancy.

Q. Can we say the use and the structure are two completely different things?

A. Yes.

Q. Okay, now --

THE COURT: Could you explain? I didn't understand what do you mean by "change by use"?

THE WITNESS: If you apply for a variance, anybody's entitled to apply for a variance for the change of their permitted use in that zone, but you need a special use permit and-or variance granted by the ZBA, to change the use of that R1-7 zone.

MR. KENDRIC: Just a moment, please... Officer, can you show the witness what we've already marked in evidence as People's Exhibit 3.

THE COURT: Just show it to Mr. Kutner.

MR. KUTNER: I have no objection.

COURT OFFICER: People's 3 being shown to the witness.

Q. So Mr. Esposito, I asked you on Friday, when we last met, and you told me that the Certificate of Occupancy which the jury will see at some point, says "premises, zoned for one family use."

Now here's my question. What occurred on or about June 9, 1986, that required a Certificate of Occupancy?

A. From this document, I could tell that in May of 1986, a permit was issued to erect a two-car detached garage.

Q. Okay. Is that different than the house?

A. Yes.

MR. KENDRIC: Thank you, sir.

MR. KUTNER: Is he finished?

MR. KENDRIC: Yes, I am. I thought by saying, "thank you," and then sitting down...

THE COURT: Mr. Kutner, would you like to cross now?

MR. KUTNER: It would be my pleasure, your Honor.

THE COURT: This is cross-examination by the defense counselor.

CROSS-EXAMINATION

BY MR. KUTNER:

Q. Mr. Esposito, you have been working with the town for eight years, approximately?

A. Yes.

Q. You must have had an investigative background to get the position as a code inspector?

A. No, I did not.

Q. Not a detective in New York, NYPD?

A. No.

Q. Not Nassau County, any police agency?

A. No.

Q. What was your experience in life from the time you left high school?

A. I was in the construction business for a while. I owned a wholesale meat business for a while. I worked some other construction jobs, and then I passed a code enforcement inspector's test.

Q. What kind of construction jobs did you have; road construction, commercial construction, residential, what?

A. Concrete construction, residential and commercial, and some road work.

Q. Concrete, you put in foundations for buildings that were going to go up?

A. It was mostly flat-walk, sidewalk, curbs.

Q. Sidewalks, and streets, and curbs?

A. Right.

Q. Did you take a civil service exam to be appointed, sir?

A. I took a civil service exam, yes.

Q. And after that, did you then get sent to code

school?

A. I was sent to a code school for New York State certification.

Q. And you were certified as a code inspector?

A. Yes.

Q. Are you a Republican committeemen?

MR. KUTNER: Objection.

THE COURT: Sustained.

Q. Are you in the Syosset executive area, sir?

A. I live in Syosset, yes.

Q. And is that the executive area of the Republican Syosset --

MR. KENDRIC: Objection.

THE COURT: Sustained, Mr. Kutner.

Q. You know Joe Saladino personally?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Fred Eppolito?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Now the bureau chief job, is that civil service?

A. Yes.

Q. And did you take a test for it?

A. No.

Q. How did you happen to get that job; were you appointed by the Town Board?

A. I was appointed by the Commissioner of Planning and Development.

Q. And at the time who was that?

A. Fred Eppolito.

Q. I'm sorry?

A. Fred Eppolito.

Q. E-P-P-O-L-I-T-O?

A. I believe so.

MR. KUTNER: I'm just spelling it for the record.

Q. Now, when a complaint comes in, if you have no agenda in the town, there's some things you do to investigate whether that complaint has some rational basis, do you not?

MR. KENDRIC: Objection.

THE COURT: Can I just hear back the question again?

MR. KENDRIC: Your Honor, this is exactly what he was told not to do.

THE COURT: I just want to hear the question, counselor. I didn't quite hear it. Mr. Kutner, could you just speak up a little bit, I didn't hear that question.

Q. If a complaints comes in and you want to investigate it professionally to find out if it has any merit, you do certain things do you not; yes or no?

A. Yes.

Q. And if for purposes of my cross-examination, sir, if I ask you a question and it calls for a "yes" or "no," if you would be kind enough to give me just "yes" or "no," so we don't have motions to strike, and just waste the jury's time, okay, please?

A. Yes.

MR. KUTNER: Thank you.

Q. So there's been -- I believe the town claims that it only investigates buildings based upon complaints; is that right?

A. Yes.

Q. And if a complaint comes in and it's from a citizen and not a directed complaint -- you know what a directed complaint is?

A. No, I do not.

Q. Okay. Suppose there was an agenda by Mr. Eppolito --

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Suppose that someone was told to file a complaint to give you an excuse. What would you do in

order to find out if that complaint had merit?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Just because a neighbor files a complaint, he could have any one of a million motives, couldn't he?

MR. KENDRIC: Objection with the motives, Judge.

THE COURT: That's okay. I'll allow that.

Q. Is that right?

A. To answer your question, anybody could write anything they want on a complaint form.

Q. Exactly.

A. It's an allegation.

Q. So just because it comes in as a complaint, it doesn't mean it has merit, do we agree?

A. I agree.

Q. So before you spend this much time out of your life as a code compliance inspector, you would like to find out if it has some-some-some basis, would you not?

A. Yes.

Q. So, now in this particular case, Mr. Thomas' case, a complaint allegedly came in from someone that the town has never told us about?

MR. KENDRIC: Objection.

THE COURT: Sustained.

MR. KUTNER: Judge, they haven't. Would you like to tell us now?

THE COURT: Sustained.

MR. KENDRIC: It's a speaking objection after speaking objection.

THE COURT: Right. Mr. Kutner, please.

Q. As a code inspector, you've been taught that there are a list of no-no's under the Fair Housing Act, that you're not allowed to prosecute a complaint, true?

A. No, I have not been taught anything along those lines.

Q. And about religion? If somebody objects to a next door neighbor because of his or her religion, that's not a valid basis for a complaint, is it?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Do you do anything to find out if it is done because of cultural identity, race, religion, gender?

MR. KENDRIC: Objection.

THE COURT: Sustained. Sustained.

Q. Is it your testimony, that the town mutually investigates every complaint that comes in?

A. Yes.

Q. Before you would do an illegal two-family complaint, I'm guessing you would want to check the town

records, would you not?

A. If we had the time, yes, we do.

Q. And everything is computerized nowadays, is it not?

A. Not everything, but a fair amount is.

Q. If you wanted to check out a particular address, you would just punch in "121 4th Street, Hicksville," would you not?

A. Not for everything, sir.

Q. But it does have some information in the computer?

A. Yes, it does.

Q. And one of the things would be building permits, would it not?

A. Yes.

Q. And legal status, correct?

A. Yes.

Q. And taxable status, correct?

A. Yes.

Q. What's a 220.1?

A. That is a two-family residence.

Q. And are you aware that the town had the tax records for this house since 1988, listing this house as a 220.1?

THE COURT: Did you say "1988"?

MR. KUTNER: 1988, sir, yes.

A. I'm not aware of that, no.

Q. Did you do any preparation for your testimony on Mr. Thomas' case?

A. I reviewed the file, yes.

Q. What did you review in the file, sir?

A. We reviewed the paperwork that's attached to the file.

Q. You didn't go into the computer and pull it up on the computer?

A. I don't believe I did, no.

Q. Is his last name pronounced Goya (ph.) or Joya (ph.)?

A. Gioia.

Q. Did you review Mr. Gioia's paperwork in this particular case?

A. Recently or?

Q. Anytime before you testified.

A. Yes.

Q. How recently did you first become aware of Mr. Thomas' case?

A. I believe I heard about this maybe four or five years ago.

Q. In what context?

A. I heard that there was still a District Court

case proceeding, and you know, I really didn't look into it any deeper.

Q. When did you actually start looking into the records about this case?

A. Only when I knew we were coming to trial.

Q. How recently is that, sir?

A. Maybe the last two weeks.

Q. Up until two weeks ago, you did no in-depth research on this particular case?

A. Correct.

Q. And how long ago were you appointed the code enforcement bureau chief?

A. July of 2013.

Q. 2013. Have you ever asked for updates from Mr. Gioia regarding this particular case?

A. No, I have not.

Q. From the town attorney?

A. Have I asked for updates?

Q. Yes.

A. No.

Q. Have they given you such updates to you?

A. No. This has been a long drawn-out, and it's really been off our radar.

Q. Just this afternoon you said that there's a difference between a "use" and a "building," remember that?

A. Yes.

Q. If a house is a pre-existing structure, then it doesn't need a C.O. for the structure, does it?

A. If it's a nonconforming house built before 1943, it does not need a Certificate of Occupancy.

Q. What about the use, are you saying that even if the use predates 1943, it needs a C.O.; is that your testimony, sir?

A. Could you repeat that question, please?

Q. Sure. There was a distinction trying to be made by Mr. Kendric. I'm trying to find out in my mind, the law makes no such distinction. I want to find out from you, is there a difference between a "nonconforming use" and a "nonconforming structure" as far as law for a C.O. is concerned; yes or no?

A. I'm not -- I don't --

Q. Yes or no?

A. -- I can't answer that question.

Q. In asking a question, it implied that there is a difference, isn't that true; yes or no, sir?

A. Yes.

Q. Isn't it a fact, that if this property is a two-family use for a long time and recognized by the town as such the use is legal, true; yes or no?

A. No, that's not true.

Q. So if the town recognizes it as a legal use, the town is wrong all these years when he bought the house?

A. When the garage was built in 1986, the C.O. that was issued specifically said this was a one-family dwelling.

Q. No, it didn't, sir. Look at the C.O. again. It says it's zoned one-family. Is that the area, or the structure, sir?

A. Premises is zoned for a one-family --

Q. The premises. That's in a one-family zone R1-7, correct?

A. Correct.

Q. But if the house is a legal two-family use at that point in 1986, then it would be legal would it not; yes or no, sir?

A. No, it would not be.

Q. Okay, you answered the question. Thank you.

In your review of the file, did you review the head of the building department's letter in 1968, sir?

A. Yes, I did.

Q. I'm sure you and Mr. Kendric discussed it, did you not?

A. We reviewed it, yes.

Q. And you saw that it was typed on a typewriter, did you not?

A. I did.

Q. And back then there were no word processors, word processors hadn't come in yet, no less computers, correct?

A. Correct.

Q. And it was typed on the town of Oyster Bay form, was it not?

A. I believe so, yes.

MR. KUTNER: May I go up and get the exhibit, please?

THE COURT: Yes.

MR. KUTNER: Judge, could we get an easel at some point, please. I just figured it would be best for the jurors, if we can display it and not have to produce it.

THE COURT: Mr. Kutner, please do me a favor and show it to Mr. Kendric.

MR. KUTNER: Sure.

THE COURT: There's two ways you can do it. Do you want that marked as a separate exhibit?

MR. KUTNER: Why don't we mark it as a separate exhibit, Defense A, please.

THE COURT: Mr. Kendric, is there any objection?

MR. KENDRIC: No, sir.

THE COURT: I just wanted to make sure, on that form, is there any objection?

MR. KENDRIC: Thank you, and no objection.

THE COURT: On all the exhibits, I'm going to ask you to be specific and to the point. Make sure we have no issue with anything, okay?

MR. KENDRIC: No problem.

THE COURT: And if there is a problem, just let me know and we can discuss it outside.

COURT OFFICER: Defendant's A in evidence.

(Defendant's A: Document. Marked in evidence.)

THE COURT: Mr. Kutner, you have permission to show it to the jury.

MR. KUTNER: Can I publish it?

THE COURT: Yes. Why don't you make sure everybody can see it. If anybody has trouble reading it, let me know and we'll show it to you individually.

Did all the members of the jury have a chance to see it?

Did you need to see it, Mr. Henry?

A JUROR: Yes.

THE COURT: Pass it down. If you each want to take a look, you can do that.

Okay, Mr. Kutner you can go ahead and

examine this document.

(BY MR. KUTNER:)

Q. Presumably, that was typed by Edward J. Gaynor's secretary, "GH." Do you see that in the lower left-hand corner?

A. Yes, I do.

Q. I'm going to direct your attention first to the reference. The first three before the comma. "Building permit No. 54." Where in the name of God, is that building permit, sir?

A. I've never seen a building permit.

Q. Did you ever look for it?

A. I believe we have looked for it, and we have not found it.

Q. Are you aware that Mr. Thomas, since these charges were filed, he was arraigned in February of '09 over ten years ago, he has been seeking building permit No. 54?

A. No, I'm not aware of that.

Q. Isn't it true, that if building permit No. 54, was issued for a two-family use and structure in 1930, then that property is a legal two-family, do we agree?

MR. KENDRIC: Objection to the form of the question.

THE COURT: Could I have the question read

back? I need to hear this.

(Whereupon, the record was read back.)

THE COURT: Are you asking if the No. 54 was issued in 1930 for a two-family, that would make it a two-family now rather than back in 1968?

MR. KUTNER: That would make it a nonconforming use, "use" not "structure," both, but "use."

MR. KENDRIC: I'm objecting to the form of the question.

THE COURT: Sustained.

Q. You don't know if building permit 54 was for a two-family structure, do you, sir?

A. No, I do not.

Q. But you didn't look for the permit, did you?

A. I believe we looked through the file for the permit.

Q. Would it be fair to say that the town has done this and in its entire prosecution, blinding itself to everything except to prosecuting, Mr. Thomas?

MR. KENDRIC: Objection.

THE COURT: Sustained. Mr. Kutner, if you want to ask if whether they tried to find it, is different.

MR. KUTNER: Sure. I have another box of

files in the closest, can I get that, Judge, access it? I'm going to offer more items in evidence. I can continue while we wait.

Q. The next question is, in good conscious how can you prosecute Mr. Thomas, if you don't know what --

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. -- building permit No. 54 provided?

THE COURT: Sustained.

MR. KUTNER: Judge, may I have the basis? That's the essence of the case.

THE COURT: Mr. Kutner, we will do it outside, not here. Let's move on.

MR. KUTNER: There's smaller exhibits over there, can I approach your Honor, and get that?

THE COURT: Mr. Kutner, are you going to use each of them?

MR. KUTNER: At one point.

Q. The next clause in that reference refers to -- the second line of the reference, I'm sorry, quote "two-family dwelling located Section 46 Block 270 Lots 1 through 3," do you see that?

A. Yes.

Q. That section, lot, and block is 121 4th Street, is it not?

A. I believe it is.

Q. And reference to two-family dwelling, that shows that the Town Building Department had on June 27, 1968, recognized that house as a two-family dwelling, does it not?

A. Seems to be what it says.

Q. Is there anywhere -- you see the addressee of the letter, Mr. Joseph A. Sodaitis?

A. Yes.

Q. Are you aware in your preparation for your testimony, that Mr. and Mrs. Sodaitis, were the then owners of 121 4th Street?

A. I'm not aware of that, but I would imagine that was the owner in 1968, if that's who the letter is addressed to.

Q. Are you aware that Barry Stokey (ph.) and his wife were the buyers under contract to buy the house on June 27, 1968?

A. No, I'm not.

Q. Are you aware that Mr. and Mrs. Sodaitis were selling to Mr. and Mrs. Stokey, the house as a two-family use?

A. I'm not aware of that, no.

Q. If you had been aware of that, would that have affected your investigation, I mean yours, the town's

investigation as to the charges for Mr. Thomas?

A. Back in 1968, I can't speak for what would have been done back then.

Q. Same town, right, same Town of Oyster Bay; just yes or no?

A. Same town, yes.

Q. And that was the head of the Building Department, right?

A. Director, Department of Building and Zoning, yes.

Q. That's what the Buildings Department was called in 1968, was it not?

A. I do not know that, Mr. Kutner.

Q. Current is Planning and Development Department?

A. Yes.

Q. But that's head of the building function, correct?

A. Yes.

Q. Now, in your investigation, did you seek to find out if Mr. Gaynor referred this piece of property for prosecution of Mr. Sodaitis or later, Mr. and Mrs. Stokey for an illegal two-family dwelling?

A. No, I did not.

Q. And Mr. Gaynor --

MR. KUTNER: G-A-Y-N-O-R

Q. -- knew the house was being used for two-family and there's no evidence that --

MR. KENDRIC: Objection, here we go again.

MR. KUTNER: Here we go again what? This is the essence of the case.

MR. KENDRIC: Interspersing "use" and "structure," like they're interchangeable which they're not.

Q. Is there any evidence that you found that Mr. and Mrs. Sodaitis -- well, make it Mr. Sodaitis, was ever prosecuted for an illegal two-family use of this particular property?

A. Not to my knowledge.

Q. How about the fact -- was there any evidence that the Sodaitises were prosecuted for a two-family illegal structure?

A. Not to my knowledge.

Q. What about the Stokeys, who bought from them in August of '68?

A. I do not have any information about any suit brought against them.

MR. KUTNER: Judge, can I approach and get the box out of the closet, please?

THE COURT: Mr. Kutner, are you done with this exhibit?

MR. KUTNER: I'm still using it.

With the Court's permission, if I could have this marked next as Defendant's Exhibit B for identification, and shown to Mr. Kendric for his review.

It's a county clerk certified copy, and for the record, a deed. I will put the particulars in later, just in case you want to identify it.

COURT OFFICER: Defendant's B marked for identification is being shown to the witness.

(Defendant's B: Deed. Marked in evidence.)

MR. KUTNER: Any objection?

MR. KENDRIC: Yes. Can we approach?

(An off-the-record discussion ensued.)

THE COURT: I'll tell you what, why don't we give you a break untill 3:00. How about five after 3:00.

(Whereupon, a recess was taken.)

THE CLERK: All rise.

MR. KENDRIC: The first issue, which I think we could probably clear up in two seconds flat, is we agreed back in the deliberation room, that we would put in a certified copy of the deeds. Mr. Kutner, do you have like a certified copy?

MR. KUTNER: That's it.

MR. KENDRIC: I understand that.

MS. CHANNER: He wants to see the actual certified copy. This is a copy.

MR. KENDRIC: You may as far as I know.

MS. CHANNER: The Court has the original.

MR. KENDRIC: So, we have resolved that.

THE COURT: So Mr. Kutner, that's in evidence.

MR. KUTNER: The one I have is a chain of them, I think they're seven deeds.

MR. KENDRIC: We can bang them out right now, if you want to.

MR. KUTNER: That's the Deed, March 30th.

THE COURT: Before we put that in, do you want to have them marked chronologically?

MR. KUTNER: That's what I did.

THE COURT: Is that the first in time you're doing it?

MR. KUTNER: That's the first in time I'm doing it.

THE COURT: Okay, so they are all going to be chronological.

MR. KENDRIC: A larger issue for me, Judge, is questions to the witness concerning "are you aware of a prior owner of the property having been

prosecuted." I feel, Judge, that is off limits and here's why. What he's trying to do is he's trying to show in a back door way, that this is a selected prosecution, and we have already gone through the fact that that is impermissible, but yet he keeps trying to do it by asking "are you aware." "Are you aware," is a crazy way to ask the question, Judge, because either he is or he is not, but it doesn't matter because legally it's irrelevant to this case. We're prosecuting this defendant for his use of this house as of December 5, 2008. Things that happened way in the past in 1968 coming forward in time, is completely irrelevant to the case, and it don't even advance his defense because he's been told he can't offer a selected prosecution defense.

THE COURT: He knows that, but Mr. Kutner, you want to answer him?

MR. KUTNER: I don't think I have to. The fact that his argument is self-contradictory. If it doesn't help defense, then why is he objecting to it?

THE COURT: Let me ask it this way, okay --

MS. CHANNER: But Judge, if Mr. Thomas purchased the house and shortly thereafter -- when he purchased the house -- it was --

MR. KENDRIC: It doesn't matter.

MS. CHANNER: Excuse me, I allowed you to finish, Counsel. Thank you.

At the time he purchased the house he purchased it as a two-family. When he purchased it, it was being used as a two-family. Part of his defense is when he got the house, that's what the house was, a two-family. So how are you going to stop him from going into the fact, that no one else was prosecuted or whether or not --

THE COURT: That's what I was going to ask. Actually I have two things to ask. I'm confused on something, and I'd tell you what I'm confused on, but let me come to my confusion in a minute because if I'm confused I think maybe the jury is confused.

MR. KUTNER: It's all about the nonconforming use.

THE COURT: No, counselor. If it is a two-family right along, and the town is not prosecuting people, doesn't that -- I understand your client, he is not going into a selective enforcement, we're not going there. If it is being used as a two-family and the town doesn't do anything about it all these years does that --

MR. KENDRIC: No, it doesn't even come into play with all due respect to Ms. Channer. It doesn't

matter how he bought the house. It doesn't matter what the previous owner was doing with the house.

THE COURT: I agree. I agree. Well, do the records of the town indicate any prior prosecution before Mr. Thomas?

MR. KUTNER: No.

MR. KENDRIC: Well, to answer your question directly, Judge, the person who sold the house to Mr. Thomas was given a notice of violation for an illegal apartment. He was investigated, there was a complaint that was lodged, and it was investigated --

THE COURT: Is that for a basement, or upstairs?

MS. CHANNER: Basement.

MR. KUTNER: Thank you, Judge, that was for the basement.

THE COURT: Counsel, please.

MR. KUTNER: Judge, it's misleading --

THE COURT: We're talking nobody is hearing us, we are talking among ourselves.

MR. KENDRIC: He was investigated, and he voluntarily brought himself into compliance, which is why the code enforcement case was closed. Judge, let me just please say this.

THE COURT: I'm not rushing you. You can

say all you want.

MR. KENDRIC: It doesn't matter how he bought the house. It doesn't matter what representation was made to him by the prior owner.

THE COURT: I agree.

MR. KENDRIC: In order to make out pre-existing nonconforming use --

THE COURT: I know what the law is. Believe me, I've researched this extensively. I have a proposed jury charge already directly on this.

MR. KUTNER: I agree with Mr. Kendric maybe for the first time since we met each other. The people who represented it to him has little use, except as to what they -- what happened to them. But all of this, the lack of prosecution shows what the town believed it was. That's the essence.

MR. KENDRIC: How do you make that jump?

MR. KUTNER: Please don't interrupt me.

MR. KENDRIC: How do you make that jump?

MR. KUTNER: Logically.

THE COURT: Please, Counsel. I don't want to go there with any of this stuff. We've been getting along.

MR. ROZEA: Judge, the town --

MR. KUTNER: Excuse me, I haven't finished

the towns --

THE COURT: Let him speak, then they speak, and you speak.

MR. KUTNER: The towns actions were inactions, and never prosecuting this despite knowledge, shows what they believed the house was, whether it was legal or an illegal two-family. That's why he is fighting it because he knows the damaging affect of all of that information coming before the jury.

THE COURT: Can I just see that letter for a second. Let me just look at this... what I'm not clear about is, Mr. Kutner, you should hear this.

MR. KUTNER: I'm listening.

THE COURT: What I don't understand, and you got to explain this to me, when does it require, okay -- if you have a prior nonconforming before 1943, and that continues nonconforming up until today, does the town code require some sort of document to show that it is okay? That's what it seems to be --

MR. KENDRIC: No, Judge.

THE COURT: There is no requirement that they go affirmatively and get a document saying everything is okay?

MR. ROZEA: The code itself says exactly

what a homeowner needs to establish.

THE COURT: Right so in the 1980s, you have this new garage being built.

MR. ROZEA: Right.

THE COURT: And the C.O. says I'll give you the benefit of the doubt on it, that it's a legal one-family. Okay my question is, that's referring to the whole house, that certificate in 1986 on the garage?

MR. KENDRIC: The Certificate of Occupancy is issued on the garage because it's new construction.

THE COURT: But it has nothing to do with the house?

MR. KENDRIC: Well, it has to do with the house only to the extent that it states for the world to see, anyone who wishes to research premises zoned for one-family use.

MS. CHANNER: But isn't the house under that, okay, I understand that the C.O. is for the garage. But doesn't the structure of the house fall under that letter?

MR. KENDRIC: Let me respond like this. Because the house was built in 1925, 1926 --

THE COURT: Or '30, in that area.

MR. KENDRIC: or '30. There was never a C.O.

and Mr. Thomas does not need a C.O. for the house. The use of the house is completely different.

THE COURT: And for that, do you need a document?

MR. KENDRIC: Yeah, you need the document. If you're going to change the use of the house --

THE COURT: If it's a nonconforming, then the use of the house never changes, then why do you need something from the town, that's what I don't understand. That is not what is clear to me.

MR. KENDRIC: You need a Certificate of Occupancy for the use, if your use is different than how --

MR. KUTNER: Judge, could we have the witness excluded? I didn't realize he was still here.

THE COURT: He's here, but the witness should be out. Go ahead.

(Whereupon, the witness leaves the stand.)

MR. KENDRIC: I forgot where I was.

THE COURT: We're talking about a requirement for the town of a use of a document that says that use is okay.

MR. KENDRIC: Judge, I pray that you're not getting confused between a pre-existing nonconforming use --

THE COURT: I know what a pre-existing --

MR. KENDRIC: -- and a pre-existing nonconforming structure.

THE COURT: I understand that. I got the nonconforming use at the present time would make it legal, if that's true and nothing is required from the town, if that's the case. That's what I'm trying to find out.

MR. KENDRIC: Say it to me again?

THE COURT: Do it this way, very simple. If the house is built in 1925, and from 1925 until the year 2019, if the house is continuously used as a legal two-family house, is there any documentation needed from the town to show that it's a legal nonconforming use?

MR. KENDRIC: If he can establish the uninterrupted continuous use then --

THE COURT: No, but what I'm asking, does the town have to issue a document in reference to that at all, if it is a continuous legal nonconforming use from the day one to the present time --

MR. ROZEA: Your question exactly answered, if he can show continuous use, there's no document.

THE COURT: There's no document needed, okay. Then where do we get into the requirement about

change of use on the house?

MR. ROZEA: That comes out of the town code.

THE COURT: For what in this case? That's what I don't understand. Where does that come in?

MR. KENDRIC: Because it is evident to the code inspector that the house is being used in a manner inconsistent with how it's zoned.

THE COURT: Right, I understand that.

MR. KENDRIC: So pardon me for a second. So the code inspector looking at the outside of the houses, because obviously he's not in the inside of the house, he sees certain criteria --

THE COURT: I got it. Two meters, two door bells. I got it.

MR. KENDRIC: Correct, which to him is --

THE COURT: Is indicia of a two-family use.

MR. KENDRIC: Absolutely correct. Without any -- without a Special Use Permit in the file from the Zoning Board of Appeals, or a Certificate of Occupancy showing he's allowed to use it this way.

THE COURT: But if --

MR. KENDRIC: If either of those documents would have appeared in the file, he never would have received a --

THE COURT: I got it, but what I'm confused

about just explain this to me. What I'm confused about is if -- if it's a legal nonconforming use from 1930, say that's when the house was built, up to the present time and they have two door bells and two meters, where does the requirement come into go to the town of Oyster Bay, to have a document in? I don't understand that, and that's what I'm confused about. Am I clear on what I'm saying?

MR. ROZEA: I think so, so let me try. If the homeowner -- the homeowner we've established, if the homeowner shows continuous use during that entire period, there is no document required, right.

THE COURT: Correct, that's what you said to me.

MR. ROZEA: And there would be no document in the file. Now the code inspector goes out, and they see the two indicia that we just walked about --

THE COURT: I understand.

MR. ROZEA: -- and does not see in the file the Special Use Permit or the Certificate of Occupancy, allowing two-family use. So that there is the basis for the charge.

THE COURT: I got it.

MR. ROZEA: Right.

THE COURT: So that's the basis for the

charge?

MR. ROZEA: Right.

THE COURT: And that would be -- then it would be incumbent upon him to come forward to show it's a legal conforming use.

MR. ROZEA: Right, that's correct, and that's what we're doing right now. So the file is devoid of either a Special Use Permit, or a two-family Certificate of Occupancy, it's not there.

THE COURT: Because your contention is that there's no evidence of a legal nonconforming use; is that basically what you're claiming?

MR. ROZEA: There is no evidence of a continuous use.

THE COURT: That's your position?

MR. ROZEA: That's right. The chain of use was interrupted.

MR. KENDRIC: Let me say this --

MS. CHANNER: When was the chain of use interrupted?

MR. KENDRIC: Well, I can tell you -- just let me answer the Judge's question for a second. I lost my train of thought.

THE COURT: Take your time. There's no rush, I want to get this straight.

MR. KENDRIC: We are not arguing in any sense at all that Mr. Thomas does not own a pre-existing nonconforming house. He does, and he is not being prosecuted for that. He is perfectly within his rights on that. The issue has to do with the use of the house inconsistent with how the neighborhood is zoned.

MS. CHANNER: Excuse me, he has to answer my question.

MR. ROZEA: No, no, I'm going to answer it. How do we know that? Because around all the civil litigation that Mr. Kutner brought, we've taken the deposition testimony of the individuals, and there is a gap, there's a gap.

MR. KENDRIC: There are several gaps actually.

THE COURT: Okay, and that's what we are going to find out. And don't forget, I am going to charge so you all know this right up front, that on the nonconforming use affirmative defense, I am going to use the town code as the basis, you know, for when nonconforming use goes out the window or not.

MR. KENDRIC: I agree with that. That's the law that we --

THE COURT: A one-year provision.

MR. KUTNER: I've got law prepared. A one-year provision does not apply.

THE COURT: So far that's what we --

MR. KUTNER: We talked about it on Friday, and I prepped it over the weekend.

THE COURT: This is my ruling. Mr. Kutner, forget the politics, please no more of that. Let's just try the case. There's enough here for the jury to digest on this case, believe me. You got a lot of things to argue about, so just keep it to that, please. Okay. Believe me, you're going to be better off in the end. I am going to allow a question that if there was prior prosecution for people on a legal two-family house before, about -- the other one about the basement. I will allow that one question, that you can ask. And Mr. Kutner, that covers the whole thing, fair enough? I think that's fair.

MR. KUTNER: Judge, do you want to do the deeds right now?

THE COURT: Yeah, we'll do the deeds right now.

Do you agree that the deeds go in?

MR. KENDRIC: Yes. I just want to confirm that there --

THE COURT: Mr. Kutner, why don't you take a

minute and show it to him. I'll be right back.

(Whereupon, a recess was taken.)

COURT OFFICER: Jury entering.

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Okay. We had some evidentiary issues that we've resolved, and it took a while to resolve them. This is what happens during trials, unfortunately, but it's something we need to do as part of the law, okay, and it has to be done without you presence because everybody is going back and forth, okay. It has no reflection on the case one way or the other, it's things we have to do as lawyers and judges.

Bring the witness back up, please.

THE CLERK: Mr. Esposito, as I said before, you are reminded that you are under oath.

THE COURT: Okay, Mr. Kutner, what do you want to do now?

MR. KUTNER: Thank you, judge.

(BY MR. KUTNER:)

Q. Mr. Esposito, do you see on the lower-left corner underneath the "cc to," the carbon copy abbreviation "cc"?

A. Yes.

Q. And there is a colon it says, "A. Rubino" (ph.) Do you have any idea who "A. Rubino" was?

A. No, I do not.

Q. And underneath that is "S.B.L.S. file," correct?

A. Correct.

Q. That stands for "section, block, and lot," does it not?

A. Yes.

Q. That's a routine way of referring to a piece of property in the land field, do we agree?

A. Yes.

Q. Now the town at 1968 and still to this day, maintains an SBL file for this piece of property, does it not?

A. Yes.

Q. Did you refer to that file prior to testifying?

A. The file itself? No, I did not.

Q. Is it true that --

MR. KUTNER: Withdrawn.

Q. Mr. Gioia is one of your employees under your supervision?

A. He was one of my code enforcements back then. He's since been transferred.

Q. To a different Department?

A. Yes.

Q. And what Department is he in now?

A. Trees and sidewalks.

Q. I'm sorry?

A. Trees and sidewalks.

Q. And that's the interaction of trees with sidewalks, lifting sidewalks, they enforce it?

A. Yes. The removal of trees and repair of the sidewalks, yes.

Q. Is that again in the Building Department?

A. No, that's in Syosset CVM, central vehicle maintenance building.

Q. Are you aware what the background was that Mr. Gaynor referred to or referenced, in coming to that determination that he put in his letter that was typewritten on June 27, 1968?

MR. KENDRIC: Objection, how could he possible know?

THE COURT: Sustained.

Q. Did you look back for a file opened by Mr. Gaynor in 1968, as far as the inquiry made by Mr. Sodaitis?

A. No, I did not.

Q. Presumably Mr. Gaynor is the head of the Building Department would have referenced whatever

materials he could find regarding this particular property, in coming to that opinion, correct?

MR. KENDRIC: Objection. Officer, could we move the exhibit?

MR. KUTNER: Do we need a copy of it?

MR. KENDRIC: No. I have an objection to the question. I have an objection to the pending question.

THE COURT: Sustained. Mr. Kutner, please rephrase it.

Q. Mr. Gaynor referenced building permit No. 54 in coming to his determination, true?

A. Seems to be that way, yes.

Q. That's a reasonable conclusion to reach from the recital, correct?

A. Yes.

Q. Am I correct?

A. Yeah.

Q. And you can't find building permit 54, correct?

A. Correct.

Q. So it would be reasonable for the jury to conclude that the building permit 54, contained an authorization for this house to be a two-family, would it not?

MR. KENDRIC: Objection to the form of the

question.

THE COURT: Sustained.

Q. Because you didn't reference the SBL file, you don't know if Mr. Gaynor attached a copy of this letter, a carbon copy --

MR. KUTNER: Withdrawn.

Q. In 1968, there were no photocopy machines either, were there?

A. Not to my knowledge.

Q. And the only way you could have a copy of something was through duplicate, triplicate, quadruplet carbons that you insert, are you aware of that?

A. Yes, I believe that to be true.

THE COURT: You're making us old now, Mr. Kutner.

MR. KUTNER: I remember the first copy machines, Judge.

Q. So you don't know if Mr. Gaynor --

MR. KUTNER: Withdrawn.

Q. You didn't find the original or a carbon of this letter in the town files at all, did you?

A. I did not look at the town files at all.

Q. And you don't know if possibly Mr. Gaynor attached whatever reference materials he used, including building permit 54, in order to come to this opinion?

A. I do not know that, sir, no.

Q. And I ask you, how is the town prosecuting this gentleman?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. On Friday you made a distinction on a permitted use, and an allowance use, do you remember that?

A. I don't recall, but if you say I did, I believe you.

Q. In your code, there's no such thing, is there?

THE COURT: As what?

MR. KENDRIC: As what?

Q. There's no definition of a permitted use; no definition of an allowed use, is there?

MR. KENDRIC: Objection, and objection, and objection.

THE COURT: Sustained.

Q. Do you want me to show you the code; do you know the code well?

A. I know the code fairly well, but it's very extensive, and we look things up on a regular basis.

Q. Chapter 246 is zoning, is it not?

A. Yes, it is.

Q. And chapter 93, is certificates of occupancy?

A. And building.

Q. And the beginning of 246, if you need I can show you the code, there's a section right at the beginning I think it's the second subsection in that particular chapter, that defines all the terms used in this zoning chapter, correct?

A. I would have to look at it.

Q. Is it --

A. I would have to look at it.

Q. -- I want to refer you to --

MR. KUTNER: Judge, may we have this marked for identification, please. I think we are up to "J" just for ID.

For the record it's Article 246 of the Town of Oyster Bay Building Code.

THE COURT: Show it to the town.

MR. KUTNER: Do you need a copy?

COURT OFFICER: Defendant's J, marked for identification, shown to the prosecution.

(Defendant's J: Article 246 of the Town of Oyster Bay Building Code. Marked for identification.)

MR. KENDRIC: Your Honor, to speed things along, we're only marking it for ID?

MR. KUTNER: Yes.

MR. KENDRIC: Only for ID.

THE COURT: For ID.

MR. KENDRIC: It's going to take me a while to go through this.

THE COURT: You want it shown to the witness?

MR. KUTNER: I'm sorry?

THE COURT: You want it shown to the witness?

MR. KUTNER: Yes, please, judge.

COURT OFFICER: For identification.

MR. KUTNER: Judge, would you like one for reference?

THE COURT: Sure, if you have one.

MR. KUTNER: Judge, I'm sorry. I don't have an extra copy.

THE COURT: Okay.

Q. If I refer you to the second subsection "246-2 definition and word usage." Do you see that, sir?

A. Yes.

Q. It goes on for some ten, twenty pages, up to page 21?

A. Okay.

Q. And there is no definitions in there for either term --

MR. KENDRIC: You know what, Judge, I apologize.

Q. -- permitted or --

MR. KENDRIC: I apologize. He's asking the witness about a document which is not in evidence, and I can't put it into evidence because I'm being presented with it for the first time right now.

MR. KUTNER: I'm just showing it to refresh his recollection. I'm not going to ask him anymore questions about the document, just about the town code.

Q. After looking at that, just tell me when you're ready.

A. I think it's missing the 246-5.2 the schedule of use.

Q. No, it's not.

A. It's in here?

Q. Unless -- it's from the town clerks. I took one right off-line. If it's missing it's because they missed it, not me. I have another one for you if you need to see the court's file?

A. It gives you the permitted uses in each --

Q. Yes, I'm pretty sure it's there because that's the charge.

MR. KENDRIC: Your Honor, perhaps I could expedite -- I could hand up a copy of the court information to which is attached a copy of the

schedule of use 246-5.2, it's a charge.

THE WITNESS: Which is not in here.

THE COURT: Mr. Kutner, he says it's not in there.

MR. KUTNER: I can give you mine. We can mark this J2 for identification, Judge, as to one page.

MR. KENDRIC: Judge, instead of marking something that's been pulled off the Internet which I object, why don't we go to the actual court information with the scheduled use.

THE COURT: Do you want that marked as an exhibit?

MR. KUTNER: No, your Honor.

THE COURT: Why don't I take a minute to look at it?

Q. Referring to count one, Mr. Esposito, just so we don't waste time.

A. Okay.

Q. That's 5.2, the charge.

A. Yes.

Q. Now, you seem to make -- on Friday make a distinction as to "permitted use" and "allowed use." First of all, those two words are synonymous, are they not?

A. A "permitted use" and --

Q. A "permitted" and "allowed," are they synonymous words?

A. No, I wouldn't say that.

Q. Now in the town code, there is no definition distinguishing between a "permitted use" and "allowed use," do we agree on that?

A. Well, what I'm saying --

Q. I'm looking at the town code, sir, that's what's charged here, 5.2.

A. Is there a definition for "permitted use"?

Q. Yes, and a distinction between that and an allowed use.

A. I do not see a definition for "permitted use" under the definition.

Q. Thank you.

MR. KENDRIC: Once again, Judge, he is reading through something, or looking through something which is not in evidence.

THE COURT: Sustained.

Q. Mr. Esposito, have you ever gotten an undergraduate degree in any field of land usage, planning, and zoning law?

A. No.

Q. Have you ever attended any seminars, courses, or other types of educational events, seminars, whatever,

over days that educated you in land usage, zoning, and enforcement?

A. We take 24 hours of continuing education annually, on various topics concerning the code.

THE COURT: Is that state mandated?

THE WITNESS: Yes.

THE COURT: State mandated?

THE WITNESS: Yes.

Q. Before testifying, you obviously met with Mr. Kendric to prepare your testimony, sir?

A. Yes, I did.

Q. Over how many days?

A. We met one or two days, maybe an hour.

Q. An hour total, or an hour each day?

A. Maybe an hour each day.

Q. Was Mr. Rozea, was he also present?

A. He was present the first time we met, but I do not believe he was present the second time we met.

Q. What about Mr. Ehrlich?

A. Mr. Ehrlich was not present the first time, and I believe he was there the second time.

Q. Did you go into this testimony about "permitted" against "allowed," in order to avoid the impact of the '68 letter?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Were you trying to say that the town allowed the use, but it wasn't permitted? I'm just trying to find out what your testimony is.

MR. KENDRIC: I don't even understand the question.

THE COURT: Neither do I.

Q. On Friday, you were asked about "allowed" and "permitted use." Is there a difference; yes or no?

A. To me there is a difference.

Q. It doesn't matter to you, sir, how about the law?

MR. KENDRIC: Objection, argumentative.

MR. KUTNER: I'll withdraw it.

Q. In the Town of Oyster Bay code, is there any distinction between "permitted use" and "allowed use"; yes or no?

A. No.

MR. KUTNER: Thank you.

Q. Now Mr. Kendric also asked you about a "rebuttable presumption" on Friday. Do you remember that?

A. Yes.

Q. And he asked you what it meant. Are you an attorney?

A. No, I am not.

Q. Did you ever take any legal courses in Land Use Law?

A. No, I have not.

Q. So the extent of your knowledge about rebuttable presumption is whatever you heard from Mr. Kendric, Mr. Ehrlich, and Mr. Rozea?

A. No, it's specific in our code 246-16.

Q. And it spells out what's needed, but you don't know the legal effect. On Friday you were testifying about the impact about a rebuttable presumption.

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. You said on Friday in connection with the rebuttable presumption, that the homeowner didn't allow us to do a home inspection, meaning Mr. Thomas, true?

A. That's what I got from Inspector Gioia's report.

Q. Would you just tell me, tell the jury, please, when you go into the computer in the Building Department, do you go in by section, block, and lot numbers, or do you go in by address?

A. Both.

Q. You can go in either way?

A. Yes.

Q. Once you get in there, it pumps up the history

on the screen, does it not?

A. It pumps up the history in the permit system. It only goes back certain amount of years. It doesn't pump up everything.

Q. How many years does it go back?

A. I believe on the computer it's now back to 1995.

Q. So certainly in 2007, it would have gone back three months, would it not?

A. 2007.

Q. In 2007, 2008, it extended back past a couple of months?

A. Yes.

Q. It wasn't your intent to convey the idea that Mr. Thomas was obligated in any fashion to allow you in to do an inspection, was it?

A. Every homeowner has a right to refuse us entry into the property.

Q. And Mr. Gioia presuming he was accurate in his testimony, went in the computer in the town to research the history of the property, he would have pulled out a complaint that was less than a year before for the same property, would he not?

A. I can't speak to what Mr. Gioia pulled out or did not pull out.

Q. I'm saying. If you punch in 46-271-3 or 121 4th Street, a complaint less than a year before would certainly pop up, would it not; yes or no?

A. No, not necessarily.

Q. Were you aware the prior homeowner, Mr. Kahalin either in your preparation, or in talking to Mr. Kendric in any way possible before testifying on Friday, that Mr. Kahalin had allowed an inspection of the interior of those apartments; yes or no, sir?

A. Yes.

Q. And that was in November and December of 2006, was it not?

A. I don't recall exactly when it was.

Q. Mr. Kahalin told the building inspector Jim Jazwinsky something?

THE COURT: Your voice drops so low, we couldn't hear you.

MR. KUTNER: He told Mr. Jazwinsky something.

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Mr. Jazwinsky was the building inspector on the 2006 complaint, was he not?

A. I'm not fully aware of who the building inspector was.

Q. Did you look at the file to prepare for your testimony?

MR. KENDRIC: Objection, asked and answered.

THE COURT: He said he did. He said he looked at a file.

Q. And were you aware that Mr. Kahalin invited the inspector in to look?

A. I wasn't aware of that. I only reviewed what was given to me.

Q. And who was giving you things, Mr. Kendric?

A. Mr. Kendric, yes.

Q. Were you given that letter?

A. Yes.

Q. So, you saw the letter?

A. Yes.

Q. But you didn't see the 2006 investigation results, did you?

A. I don't believe I did, no.

Q. And those 2006 investigation results, would it surprise you to find out that the owner stated it was a legal nonconforming pre-existing two-family house?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. You were totally unaware that in November of 2006 and December 2006, that an inspection was conducted

and the two-family use was established?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. There is no secret in this trial that this house has been used as a two-family, correct?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Mr. Esposito, Mr. Thomas is not claiming that he's not using the house as a two-family, he freely admits it, true?

A. I believe so.

Q. There is no dispute about that, right?

A. I believe so.

Q. And do you think that in preparing your testimony, that you prepared neutrally to see what the truth was?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Well, let me ask you, doing an investigation do you go out with a preset goal as to what you're going to find, or do you go in neutrally to find out what the truth is?

A. When we go out to do an investigation, we are looking at the alleged violation that somebody has written to us, and we have to investigate to see if there is any

validity to their complaints. So we don't go out with a preconceived notion that there is a violation, we have to see it.

Q. And you did those investigations, did you not?

A. Yes, I did.

Q. And I'm guessing that you did them for two-family homes that were complained of as being illegal, did you not?

A. I might of during the course of my time there, yes.

Q. Would you say that's a fairly frequent complaint, sir?

MR. KENDRIC: Objection.

THE COURT: What is a fairly frequent complaint?

MR. KUTNER: Illegal two-family.

THE COURT: What, in general; or what?

MR. KUTNER: In the town of Oyster Bay.

A. Would I say it's fairly? I received some complaints, definitely.

Q. Would it be fair to say that before you traveled to the scene, you could just type in the computer and see whether it's legal or illegal according to the town records; is that right?

A. It is right, but it's not always done that way.

Q. Not in this case, would you agree?

A. I don't know how it was done in this case. I'm just saying in general.

Q. I'm sorry?

A. I'm saying in general, the research is not always done prior to the initial inspection.

Q. You don't tell your employees before you even leave the office and waste time on a complaint, that might be -- if someone says there's an illegal two-family house, if there's a record in the town that says there is a C.O. for the family, he doesn't have to leave his desk does he; yes or no?

A. That would be yes, if he had the time to do that.

Q. Well, does he have more time to punch up a computer for 30 seconds, or to drive to the place for 45 minutes and drive back for 45 minutes, let's say from Massapequa to Oyster Bay?

MR. KENDRIC: Objection.

THE COURT: I'll allow it. It's cross-examination. Go ahead.

A. There are many occasions where you can look in the premise system on the computer, and all of the necessary information may not be there, and you may have to do further research. And if you don't have time to do it,

you got to get out on your inspections and you do it.

Q. Mr. Esposito, I thought I asked you if it was the first step. It might be inconclusive, but the first step would be go to the computer, would it not?

A. Ideally, yes.

Q. Ideally, or just logically, commonsensically, correct?

A. You are not always capable of getting it done.

Q. So, you're saying if you get at least two, three, or five complaints in a day, the first thing you do on each complaint and you tell your employees, you don't have to look in the computer, just go out and take time; is that right; yes or no?

A. That's not right.

Q. Now let's assume that your employees have common sense and logic, and he gets a complaint about a proposed illegal two-family home. Wouldn't the first step be to go look in the computer because if there is a C.O. there, he doesn't have to do anymore work, he doesn't have to waste his time; are we right so far?

A. Yes.

Q. But if the computer would reveal that only a couple of months before another inspector investigated a complaint of an illegal two-family, and didn't serve a notice of violation, and didn't file a prosecution, that

could derail that agenda, could it?

MR. KENDRIC: Objection.

THE COURT: What do you mean, in general? I'm not sure Mr. Kutner --

MR. KUTNER: I'll rephrase, your Honor.

THE COURT: Yeah, I think you need to be specific here what you're getting at.

Q. If the prior complaints had revealed that the building inspector took a complaint about an illegal two-family, and closed it out without a violation or a prosecution, that would not have been consistent with prosecuting Mr. Thomas, would it?

MR. KENDRIC: Objection. The question, it's like it doesn't even make sense, Judge. It's like a non-sequitur. He's lumping two things and saying, "Isn't that true; yes or no?"

THE COURT: Mr. Kutner, you're calling for speculation. I'm sustaining it. Mr. Kutner, let's just go to it. If you want to bring that up specifically, and you have specific documents on that, on what was done and specifically what was inspected, then please bring it up. Let's not do "what if, what if, what if." That would resolve this whole thing.

MR. KUTNER: Okay.

Q. Today you -- no, on Friday, you said that the

C.O. is addressed to the structure, and there is no C.O. for a house pre-1943; still true, right?

A. Yes.

Q. And on Friday you testified that even if the use predated 1943, that the owner would need a Special Use Permit. Is that your testimony on Friday, sir; yes or no?

A. I don't recall what I said Friday. You require a change of use from the zone you're in, you need to file an application for a variance.

Q. That's another thing you talked about on Friday, a change of use. "Who, what, when." The old "W's" that we were taught in the police department and the Marine Corps." Who allegedly filed for change of use?

A. Anybody can file a change of use.

Q. In this particular property, was there a change of use at some point?

A. I don't believe anybody did file for a change of use.

Q. No, I said, was there a change of use at some point?

A. In my eyes, it is a one-family dwelling.

Q. I didn't ask you that, Mr. Esposito. That is very clever, Mr. Esposito.

MR. KUTNER: Move to strike your Honor as unresponsive.

THE COURT: Both things are unclear. Mr. Kutner, you have to distinguish between post 1943, and pre-1943. There is a distinction there. You really got to make it so the jury understands it. Both sides have to. I think I know where you are going, but you have to really be clear about that, okay?

MR. KUTNER: Yes, sir.

Q. A pre-existing nonconforming use, means it is an illegal use of the property, does it not?

A. Yes.

Q. And in order to be a pre-existing nonconforming, it has to predate the zoning ordinance which in this case in the Town of Oyster Bay is May 25, 1943, correct?

A. Correct.

Q. Now on Friday you talked about at some point there was a change of use, didn't you?

MR. KENDRIC: I don't know if he said that, Judge. I mean the juror's recollection would control.

Q. Did you say that there was a change of use in this property?

MR. KUTNER: All of us heard it.

A. I believe based on the information I see, that this is zoned for one-family use, and now it is being used as a two-family. That is a change of use.

Q. What does a zoning have to do with this piece of property that was build in 1930 for building permit 54?

A. When the detached garage was erected, it specifically said this premises is zoned for one-family use.

Q. The premises is not zoned, the whole area of Hicksville was zoned one-family use, are we right?

A. Parts of it.

Q. You don't spot-zone, that's illegal. You know what spot-zoning is?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Zoning is not passed on an address basis is it, it's passed on area basis?

A. Correct.

Q. So there's no zoning applicable only to 121 4th Street, it's to an entire area, true?

A. Correct.

Q. Now in this particular case on Friday you said there was a change of use. I'm asking you what in your records did you find that indicated that at some point 121 4th Street was changed from a one-family to a two-family use; did you find anything?

MR. KENDRIC: Objection to the form of question.

MR. ROZEA: It's cross-examination, your Honor.

THE COURT: Yes, I understand. I'll allow it.

A. Based on Inspector Gioia's observation of the two door bells and two mail boxes, I have to assume that it is a two-family dwelling.

MR. KUTNER: You should be a politician the way you conduct your questioning.

MR. KENDRIC: Objection, your Honor.

THE COURT: Sustained.

Q. I'm asking you. You said something under oath on Friday that this was a change of use. I'm just asking something simple, and you are wasting everybody's time by ducking all --

MR. KENDRIC: Objection.

THE COURT: Sustained.

MR. KENDRIC: He's wasting time.

THE COURT: Mr. Kutner, please.

Q. What in the records shows that it was ever changed from a one-family to a two-family, simple enough?

MR. KENDRIC: Objection to the form of question.

THE COURT: Sustained. Let's go on to a different question, please.

MR. KUTNER: Judge, if I may? This is critical to his credibility.

Q. You said there was a change of use. What indicated that to you?

You said Gioia's records. What in Gioia's records indicated a change of use?

MR. KENDRIC: Asked and answered.

THE COURT: I'll allow it one more time, and that's it you'll be moving on, Mr. Kutner.

MR. KUTNER: And if he don't answer, your Honor?

THE COURT: Let's go on, Mr. Kutner. Let him answer.

A. Based on Inspector Gioia's inspection of the property, he saw the two items. He saw the two doorbells, the two mailboxes, which we can assume it is being used as a two-family dwelling.

Q. Do you know when they were installed, the two doorbells?

A. No, I do not.

Q. Do you know if they were installed before or after 1943, May 25th?

A. No, I do not.

Q. Do you know when the two mail boxes were installed?

A. No, I do not.

Q. So then when was the use changed from a one-family to a two-family?

A. No, I do not know.

Q. You don't know. So your testimony on Friday was incorrect?

MR. KENDRIC: Objection.

THE COURT: Sustained. Let's move on Mr. Kutner, please. We're done with that subject.

Q. When a building inspector does an inspection, they issue a report, do they not?

A. Yes.

MR. KUTNER: Excuse me one second, your Honor...

Q. Do you know how many inspections are done typically when a person is constructing a garage?

A. Approximately four or five.

Q. Would it surprise you to see that the town claims there would be at least 12 inspections?

A. That would surprise me, yes. But that was back in 1986. I don't know what they did back then.

Q. In 1986? Then there would had been more inspections, right?

A. You are saying 12. I don't know when you're saying the 12 took place.

Q. You and Mr. Kendric had made much about the garage reconstruction, did you not?

MR. KENDRIC: Objection.

THE COURT: Sustained.

MR. KUTNER: Judge, may we have this marked for identification. We're up to "K," please.

COURT OFFICER: Defendant's K, marked for identification, being handed to the witness.

(Defendant's K: Document. Marked for identification.)

THE COURT: Why don't you take a couple of minutes. Look at it, and let me know when you're done.

MR. KENDRIC: Judge Fairgrieve, I'd like an offer of proof as to how this is relevant. I take the position --

THE COURT: Then we are going to have to go out. I'll leave the jury here. We are just going outside to talk about it for a minute. I think we will go until about 4:30 today, is that okay with everybody? Then we will break. And then I have to read you those warnings again. Everybody we'll go for another half hour. Does anybody need a bathroom break at this point? Just give us a couple of minutes, we'll take care of it and be right back.

(Whereupon, an off-the-record discussion was held outside the presence of the jury members.)

MR. KENDRIC: So Judge, I'm asking defense counsel for an offer of proof on this document, which is a building permit on the garage. We're not here to talk about the garage. The garage has nothing at all to do with this case.

MR. KUTNER: Then why did you introduce the C.O.?

MR. KENDRIC: Because it clearly states, and it puts your clients on notice that the premises are zoned for one-family use.

MR. KUTNER: You opened the door, sir.

MR. KENDRIC: I don't think I opened the door to nonsense, Mr. Kutner.

THE COURT: Can I read this?

MR. KENDRIC: Yes, of course.

THE COURT: I haven't had a chance to read this. Where specifically are you referring to? Just show me.

MR. KUTNER: Right here, "inspections." "Normally there are 12 or more required inspections on a new building, and as many as applied to alterations and additions."

THE COURT: Mr. Kutner, okay, in the

document, you're right. It does say, "normally there are 12 or more required inspections of a new building."

MR. KUTNER: Um-hmm.

THE COURT: What does that have to do with anything?

MR. KUTNER: This permit that was issued, they have again concealed records. One of them being the permit application. Permit application in 1986, had a listing, a little box, one-family or two family. I would guess it says, "Two-family," because they didn't produce it. It's a fair conclusion to reach --

MR. KENDRIC: May I say this --

MR. KUTNER: It's not an adverse inference to say that.

MR. KENDRIC: May I say this? Years ago, at least six-and-a-half or more years ago, I provided Mr. Kutner with a certified copy of the section, block, and lot file. I've also provided him with hundreds upon hundreds of other documents -- hear me out, Judge.

THE COURT: I am. I'm listening.

MR. KENDRIC: Okay. I take offense to this idea that anything has been withheld from the defendant, I say it has not. It has not been. This

dovetails with our discussion back in the deliberations room. We were in federal court, Judge. I handed over all of the documents, okay. Now Mr. Kutner says to this court because this court doesn't -- may not have been -- pardon, May not be as aware of the federal court proceedings as I am. But what I'm saying is, I have looked in the context of the federal court litigation this is to stay the habeas corpus proceeding in front of Judge Bianco, in Eastern District. I showed the Court and I showed Mr. Kutner that part of that certified package from that section, block, and lot file was indeed, sir, indeed, the application for building permit on the garage.

Mr. Kutner is dead wrong. He is correct in the sense that there are little boxes, but when they are building the garage, no one checked off the box as to how many families were going to be living in this garage. Both boxes, and I'll bring it in tomorrow, both boxes are left blank.

THE COURT: You have it.

MR. KENDRIC: I absolutely have it, and so does he.

MR. KUTNER: I don't have it.

MR. KENDRIC: That's absolutely incorrect.

MR. KUTNER: He claims he gave it to me

before, give it to me again. He's never given it to me.

THE COURT: Give it to him tomorrow.

MR. KENDRIC: I will give it to him, and I will to this court proof, that he has been served with this years ago.

THE COURT: We need to get going with this not fight over with the stuff.

MR. KENDRIC: Next.

MR. ROZEA: So what's the relevance of the number of inspections?

THE COURT: So I'm not going to deal with this now. Let me deal with it tomorrow when he turns over the other documentation.

MR. KUTNER: So Mr. Esposito is coming back then tomorrow?

MR. KENDRIC: Yeah, sure. What's this?

MR. KUTNER: That's the computer printout that was supplied by the town.

THE COURT: Printed out about what?

MR. KUTNER: About this premise, 121 4th Street. This was the investigation in 2007. There were two investigations, 2006-1459, and 2007-1598. Same house, about a year apart.

THE COURT: Inspection of what part?

MR. KUTNER: The house, the two-family.

THE COURT: Mr. Kutner, that's what's not clear. You know it maybe, I don't.

MR. KUTNER: This is Mr. Thomas' inspection, so why is it -- this is irrelevant?

THE COURT: What do you mean?

MR. KUTNER: This is Mr. Thomas' investigation.

THE COURT: Right, to him by the inspector.

MR. KUTNER: Right.

THE COURT: So what does it have to with --

MR. KUTNER: I'm just going to prove how easy it is to pull this up.

THE COURT: And what does it show?

MR. KUTNER: About what the complaint says, and whether it's closed or open.

THE COURT: We'll deal with this tomorrow. When you bring the other --

MR. KENDRIC: That's fine.

THE COURT: Mr. Kutner, what is not clear to me is there was this complaint before Mr. Thomas owned the property about a year before give or take.

MR. KUTNER: Three months.

THE COURT: About three months, an illegal basement apartment, is that correct?

MR. KUTNER: No, it's not correct. Again it's omissive. There were two complaints. Illegal two-family, and illegal basement apartment. Mr. Kendric keeps focusing on one.

THE COURT: Concerning the prior owner?

MR. KUTNER: Yes. The inspector who actually inspected heard from the owner saying that "this is a legal nonconforming two families. Why don't you go upstairs." And he went upstairs and looked and confirmed, two kitchens, two bathrooms and totally separate apartments.

MR. KENDRIC: This is Mr. Kutner editorializing and wildly editorializing.

MR. KUTNER: Judge, can I just say something, Judge? If I've editorialized one word, how about you give a trial order of dismissal? That's an out-right falsehood claim.

THE COURT: Mr. Kutner --

MR. KUTNER: Judge, you want to see the complaint? I was waiting for him to make that statement. That's not an outright falsehood? An illegal apartment and illegal basement apartment? Where's the falsehood, Mr. Kendric?

MR. KENDRIC: That's not the complaint.

THE COURT: Just bring the records in

tomorrow.

MR. ROZEA: Obviously, we oppose a trial dismissal.

MR. KUTNER: How is Cafe Al Dente doing?

MR. ROZEA: Mr. Kutner, what does that have to do with anything?

THE COURT: Counsel, counsel, please. We have a trial to run. Can we go on to something else, or are you pretty much done?

MR. KUTNER: No, I was going to go into this now, just to establish the printouts.

THE COURT: Do you need this witness for anything else; but you need him tomorrow, right, for the other stuff that he was going to bring in, you need him for that?

MR. KUTNER: Yes.

THE COURT: So you need him to come back tomorrow for further crossing?

MR. KUTNER: I was hoping to finish him today, so we can go on to Gioia, but if we can't, we can't.

THE COURT: I don't know, I'm not clear --

MR. KUTNER: There's other things I can go into now. Finish for today and mop up tomorrow.

MR. KENDRIC: Let's do that.

THE COURT: I think it's better because I'm kind of up in the air with what is what. What I have is incomplete records before me involving the prior inspection. I can't make any ruling one way or the other to be fair to both of you until I have everything in front of me. I suggest, Mr. Kutner, if you're talking about prior inspection reports and you want to ask questions about it, just bring the reports in.

MR. KUTNER: I am.

THE COURT: Look, I'm suggesting you give it to the witness, let him look at it, and let him review --

MR. KUTNER: Sure.

THE COURT: -- that's the easiest way instead of "what about this, what about that." We're just wasting time on that. Get to it. That's all I'm suggesting, okay, fair enough?

MR. KUTNER: Yes, sir.

THE COURT: Back on the record.

Counselor, ready to proceed?

MR. KUTNER: Yes, sir.

THE COURT: Jury ready?

(Whereupon, the jury members respond in the affirmative.)

THE COURT: Go ahead.

(BY MR. KUTNER:)

Q. Have you ever read the file 2006 -- 98-20061459?

A. I'm sorry, could you repeat that?

Q. Let me take a step at a time.

Every time a complaint comes into your office, it's given an index number, or a file number. What do you call that, a complaint number?

A. If we open a code case, it's given --

Q. A case number?

A. -- it's given a case number, yes.

Q. And the case number is divided into three numbers with a dash in between them, correct; yes or no?

A. Now it is. It wasn't years ago.

Q. In 2006 and 2007, first it was the district, the area of the town divided into at least 98 different districts?

A. I don't recall how it was done. I wasn't there then, I don't know how --

Q. Is it done the same way now?

A. Now all cases get a case number, and a section, block and lot. They're opened under the section block and lot, and a case number.

Q. Now the case number is divided into three

separate parts, is it not, now?

A. (No response.)

Q. Now?

A. Yes. It's divided. It has the year and the case number for the year.

Q. And it also has the district that it's in, does it not?

A. No, it does not.

Q. No more?

A. It never did -- it never did while I was there.

MR. KUTNER: Can you show the witness exhibit "L" and "M," please, so he sees two of them.

MR. KENDRIC: I would like to see what "M" is.

MR. KUTNER: I gave it to you.

MR. KENDRIC: No, you certainly did not.

COURT OFFICER: "L" and "M" marked for identification being shown to the witness.

MR. KUTNER: Judge, copies were handed to Counsel.

MR. KENDRIC: Just to be clear for the record, I object to "L" and "M." We went out in the hallway, your Honor, I asked for an offer of proof. We weren't given an offer of proof.

THE COURT: We are going to deal with it

tomorrow. Mr. Kutner, we are going to deal with it tomorrow.

MR. KUTNER: Let me just do the preliminaries, Judge.

THE COURT: Mr. Kutner, if you need the documentation for tomorrow to continue, we can break now.

MR. KUTNER: I don't want to break now. I would like to get more time in, and get it done.

THE COURT: Then keep going.

Q. They're given a year and a complaint number, a serial complaint number, are they not?

A. They're opened under a case number, and an SBL number. I don't know what else you're asking me for.

Q. The first number is the date 2006, 2007, and then there's a dash -- Mr. Esposito, would you please let me finish, we need to get through this for God's sake.

There is a year, right, and then there is a dash and then serially, each complaint that comes in is numbered consecutively from the one before, true?

A. What I'm saying to you is, that was before my time and I don't know what process was done back then.

Q. Well, you looked at the records for this case. Why are you testifying, if you never looked at the records?

MR. KENDRIC: Objection.

THE COURT: It's cross-examination.

Q. Did you look at the records?

A. I did.

Q. Did you look at the two investigations that were conducted in 2006, 2007; yes or no?

A. No.

Q. So, how are you -- you were brought in on a case to convict a man on two misdemeanors --

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. -- and you didn't prepare by looking at the two investigations?

THE COURT: Sustained, Mr. Kutner.

Q. If you didn't look at the two investigations, what did you look at?

A. I looked at the inspection reports from December 5th on.

Q. December 5th of what year?

A. 2008.

Q. In an investigation, the 2007 investigation.

A. The date that the summons was issued.

Q. And that investigation No. 98-2007-1598; yes or no?

A. I don't know the case number. I'm looking at his written report, that's all I'm looking at.

Q. And every written report has a case number on it, does it not?

A. If you let me look at the report, I'll look and if there's a case numbers I'll tell you.

Q. You don't know? You looked at them yourself, sir.

A. Mr. Kutner, I've seen thousands of reports every year.

Q. And each one has a case number on it?

A. Yes, but not in that form any longer. That's what I'm saying to you. When did it change, I don't know exactly when it changed.

THE COURT: When did it change?

THE WITNESS: I don't know. I believe it was sometime 2012, 2013.

MR. KUTNER: Judge --

Q. The inspection reports you're talking about were inspections that were continued to be done by inspectors going past Mr. Thomas' house after the prosecution has begun, do we agree?

A. Correct.

Q. You said it was started on December 5, 2008, correct?

A. I believe that's the date the summons was issued, yes.

Q. You didn't look at the -- why did you cut it off at that point, sir?

A. I was not even employed with the town at that time.

Q. I didn't ask you that. Why did you choose -- when the charge was filed, there was inspections done for a whole 14 months before that, are you aware of that, sir?

A. I'm not aware of exactly what transpired.

Q. In Mr. Gioia's investigation 98-2007-1598, the first inspection was done by Inspector Curcio, do you know Curcio?

Q. C-U-R-C-I-O.

A. Yeah. He used to be an inspector.

Q. And Curcio made the first four inspections until March of 2008, true?

A. I do not know. I did not review those inspections.

Q. Gioia didn't make his first inspection until July of 2008, are you aware of that?

A. I am not aware of that, no.

Q. What I'm asking, you sir, is for the jury and your credibility.

How did you start on December 5, 2008 of Gioia's investigation when he made three inspections -- no, four inspections before December 5th?

A. I'm just going from the date forward that the summons was issued.

Q. So you see a file, and you just page the earlier pages, you push them aside because you don't want to read them to testify about something that is a criminal prosecution, sir; is that what you are doing?

A. No, that's not what I'm doing. I'm trying to --

Q. Were you afraid to read something that would be inconsistent with your testimony, sir?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Was there a reason why you decided not to read the prior inspection reports?

A. I only read what was given to me that I discussed with my attorney.

Q. I'm sorry?

A. We only discussed certain sections that I discussed with my attorney.

Q. And he only gave you part of the file; is that your testimony?

A. I'm only saying what I saw.

Q. So if anybody omitted something, it was Mr. Kendric, not you?

MR. KENDRIC: Objection, Judge. There was no

omission.

THE COURT: Sustained.

Q. Who was the attorney who only gave you part of the file?

A. Listen, I don't recall, exactly.

Q. Now you don't recall that?

A. I may have looked at --

Q. Pick a name.

A. -- I may have looked at previous inspections, but I just don't recall them offhand.

MR. KENDRIC: They're in evidence, Judge. If Mr. Kutner wants to ask him a question about it, they're all in evidence.

THE WITNESS: I would be glad to look at them.

MR. KUTNER: Can I have exhibit No. 1 please, that's been marked.

COURT OFFICER: People's 1 being shown to the witness.

A. Okay, I see the reports Inspector Gioia did prior to December 5th.

Q. There was one on -- I think the first one was on June --

A. June 2nd.

Q. June 2nd. And he followed it up on July 2nd I

believe?

A. July 2nd, yes.

Q. And the next one is July 27th?

A. I believe it's July 29th.

Q. If you look at the handwritten report I believe it's crossed out, the second digit and the date. One says, "27" and one says, "29," correct?

A. I don't see any cross-out.

Q. And then there's no more inspections between July 27th and December 8th, true?

A. There's one on 9/19/2008.

Q. An inspection?

A. Yes.

Q. So, I did say four prior ones before December 8th, but you didn't see them?

A. I might have seen them, yes. I just don't recall.

Q. Now the operative date in this case is December 5, 2008, when Mr. Thomas is accused of having an illegal dwelling, do you know that from the --

MR. KENDRIC: Objection. Not an illegal dwelling. An illegal use of the dwelling.

THE COURT: Sustained.

Q. The illegality is charged from December 5th, that's the date of the inspection, but it's written up in

the charge dated December 8th, true?

A. December 5th of 2008.

Q. The date of the occurrence?

A. That's the date of the report.

Q. Now have you ever gone by 121 4th Street?

A. I did at one point in time, yes.

Q. And when did you do that?

A. I don't recall. I believe sometime in 2011 or something. I was asked to drive by the house and nobody was home.

Q. And that was a couple of years into the prosecution of this case, correct?

A. Correct?

Q. And when you say someone asked you to drive by the home, that was Fred Eppolito?

A. I don't recall who asked me. It might have been my supervisor at the time, but I don't recall who instructed me to go by there.

Q. But the prosecution was already in the hands of the Town Attorney's Office, correct?

A. Correct.

Q. So what was the purpose of going by Mr. Thomas' house, was it to spy on him?

A. A lot of times after a summons is issued, we will do subsequent inspections of the property before the

defendant comes to trial to see if we can, you know, come to some kind of disposition based on an inspector's inspections.

Q. So you were inspecting for good cause for a goal of seeing that maybe Mr. Thomas just capitulated and changed it back to a one-family house, is that what you are saying?

A. I don't recall why I was there. It was eight years ago.

Q. Again, you have no idea if this house was a two-family house from its origin, correct?

A. Correct.

Q. Let me just go into basic procedure with you as head of the building compliance --

THE COURT: Mr. Kutner, we have five minutes now.

MR. KUTNER: I think we can finish up a little more.

THE COURT: Keep going.

Q. There are a couple of ways you can handle a complaint, we agree?

A. Yes.

Q. The most obvious would be, you go out and find that the complaint is unfounded, it's incorrect?

A. Possibly, yes.

Q. And that would be if you looked at your records and you found that an illegal two-family complaint was according to the records, a legal two-family use house, true.

A. Possibly, that's one way.

Q. And if you don't find the records, and you're convinced that maybe the complaint has some merit, you can serve the owner with a notice of violation, that's the first run; is that right?

A. Yes.

Q. That wasn't done to Mr. Thomas was it, sir; yes or no?

A. I don't recall if Mr. Gioia issued one. I do not see any in here, so maybe he didn't. A lot of times different inspectors do things differently. He may have left his business card asking the owner to give him a call to schedule an interior inspection. Each inspector has their own way of doing things.

Q. The drastic last step is to start a prosecution is it not, that's the worst case scenario?

A. Yes, and to issue a summons.

Q. Now are you aware that in the 2006 investigation by Mr. Jazwinsky, he did serve Mr. Patrick Kahalin (ph.) a notice of violation?

A. I don't recall seeing that, no, but I'd have to

look at the file.

Q. Did you purposely not want to find out --

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained, Mr. Kutner.

A. And again what I said --

THE COURT: I sustained an objection, that's it.

Q. Now are you aware, that Mr. Gioia was mailed two letters by Mr. Thomas' attorney, me, telling him that it was a pre-existing nonconforming legal two-family?

MR. KENDRIC: Objection. Your Honor, is he going to go into his own hearsay about what he said in a letter?

THE COURT: I think it's relevant.

MR. KENDRIC: All right.

THE COURT: Mr. Kutner, it's right around 4:30. We're going to stop. This is a whole new subject matter, and it's going to take a while.

MR. KENDRIC: Let the record please reflect, I'm objecting to these letters. These are self-serving letters.

THE COURT: I'll deal with it tomorrow. I have to give the jury the instructions. You can step down. I'll see you tomorrow 2:00.

(Whereupon, the witness exits the

courtroom.)

THE COURT: Let me just read these to you again, and then you'll go home for the night, and I'll see you tomorrow at 2:00.

One, you're not to discuss this case among yourselves with anybody else. Do not converse either among yourselves, or with anyone else about anything related to this case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court, but you may not talk with them or anyone else about anything related to this case. Do not at any time during the trial request, accept, agree to accept, or discuss with any person the receipt, or acceptance of any payment or benefit in return for supplying any information concerning the trial. You must promptly report directly to the court any incidents within your knowledge involving the attempt by any person improperly to influence you, or any member of the jury. You're not to permit anybody to discuss the case with you or attempt to influence you. If anyone does, you are to immediately report it to the court, not to other jurors. You are not to visit the site of the incidents. Do not visit or got to the premises or place where the charged crime was

allegedly committed, or any other premises or place involved in the case. You must not use Internet maps, Google Earth, or any other program or device to search for, and view any location discussed in the testimony. You're not to read or listen to any comments regarding the media. Do not read, view, or listen to any accounts or discussions of the case reported by newspaper, telephone, television, radio, Internet or other media. Your decision must be based solely on the testimony, and other evidence presented in this courtroom. And do not attempt to research any fact, issue or law, relating to the case either by discussion with others by research in a library or Internet or by any other means or source. In this age of instant electronic communication for research, I want to emphasize that in addition to not conversing fact-to-face with anyone about the case, you must not communicate with anyone else about the case by any other means including by telephone, text message, email, Internet chat, or chat rooms, blogs, or social websites such as Facebook or Twitter. You also must not Google or otherwise search for any other information about the case or the law which applies to this case or the people involved in this case, including the defendant, the witnesses, the lawyers,

and the Judge. You must not provide any information about the case to anyone else by any other means whatsoever, and that includes posting information about the case, or what you're doing in the case, or any device on the Internet, including blogs, chat rooms, social websites, and other means. You are to keep an open mind to all the evidence that's been presented, as you are charged on the law. I'm at this moment again placing each and everyone of you under the rules of conduct.

Thank you. See you tomorrow. Just tell the witness not to discuss anything with you, or with anyone else, okay?

MR. KENDRIC: Okay.

MR. KUTNER: Thank you.

THE COURT: Anything else for today?

MR. KUTNER: For the record, no, sir.

MR. KENDRIC: Thank you.

THE COURT: But please, tomorrow before we begin, I would ask you to go over documentation so we can speed this along, get him off the stand, and get into the inspector, okay?

MR. KUTNER: Yes, your Honor.

THE COURT: Thank you.

(Whereupon, the proceedings concluded.)

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

-against-

DARREN E. THOMAS,

Defendant.
----------x

March 26, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T

Darren E. Thomas - Defendant

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record No. 22F of 2009 People of the State of New York against Darren Thomas.

MR. KENDRIC: Yes. Christopher Kendric, Kendric Law Group P.C, co-counsel for the town.

MR. ROZEA: And with Mr. Kendric, Matthew Rozea, Deputy Town Attorney, Town of Oyster Bay, New York, for the People.

Good morning -- good afternoon.

MR. KUTNER: Good afternoon, Judge.

Harry Kutner, K-U-T-N-E-R, 136 Willis Avenue, Mineola, New York with Sheryl Channer, co-counsel, and Darren Thomas.

THE COURT: We'll bring the jury in now.

MR. KUTNER: Yes.

COURT OFFICER: Jury entering.

(Whereupon, the jury members enter the courtroom.)

THE CLERK: Jurors and alternates are present, Judge.

Mr. Esposito, we'll continue Mr. Kutner's cross-examination.

Please be reminded you are still under oath.

THE COURT: Counsel, are there any witnesses in the courtroom?

MR. KUTNER: No, Judge.

MR. KENDRIC: No, Judge.

THE COURT: We're going to continue with cross-examination of this witness by Mr. Kutner.

Thank you for coming and being prompt, I appreciate it.

CONT'D CROSS-EXAMINATION

BY MR. KUTNER:

Q. Now Mr. Esposito, you mentioned and through you, the Certificate of Occupancy for the rebuilt garage in 2006 was entered in evidence, do you recall a couple of days ago?

A. Yes.

MR. KUTNER: Officer, could we have this marked -- could you show the witness "K" for identification, please.

MR. KENDRIC: Yes, Judge. The Defendant's K for identification is the subject of our sidebar at the end of the day yesterday, which was not resolved.

THE COURT: Let me take a look at it. Mr. Kutner is this "K," is this the one?

MR. KUTNER: That's it.

THE COURT: Can I see it, please. You've seen this before?

MR. KENDRIC: I have it. Yes, Judge.

THE COURT: I'm going to let him show it to

the witness, and we'll take it question by question. That's how we're going to do it.

Mr. Kutner, the witness has it.

Q. Exhibit 3 was the C.O. Do you remember that sir, for the garage?

A. Yes.

Q. And that was just for the garage, right?

A. Yes.

Q. It didn't cover the house?

A. No.

Q. It doesn't need to cover the house because the house predates the ordinance?

A. Correct.

Q. By the way, the zoning ordinance that's in effect in 2008, when the criminal charges were filed, was passed on March 27, 2001, correct, sir?

A. I'm not aware of the date of the passage. I would have to look at the code book.

Q. Would you like to see a copy of the code?

A. If you would like to show it to me.

Q. Would that refresh your recollection, sir?

A. If I could see it, yes.

MR. KUTNER: Judge, you want this marked -- let me show you this.

MR. KENDRIC: Quick sidebar. Off the record.

(Whereupon, an off-the-record bench conference was held.)

Q. The C.O. that you laid the foundation for Mr. Esposito -- may I see exhibit 3?

Exhibit 3, the C.O., references the permit number there, does it not?

And would you compare the two, please, "82262."

THE COURT: Mr. Kutner, you spoke too low.

MR. KUTNER: "K8262."

A. Yes, the building permit number matches the number on the C.O. K8262 building permit.

Q. Okay, and the exhibit which has just been shown to you which has been labeled "K" for identification, is the building permit that eventually lead to that C.O., true?

A. Yes.

MR. KUTNER: I offer that at this time.

MR. KENDRIC: Objection, relevance.

THE COURT: Overruled. It's in evidence.

MR. KUTNER: Would you show the witness exhibit "K," please, in evidence.

Q. Mr. Esposito, I'm going to direct your attention to the yellow area down at the bottom that starts in bold all caps "instructions," do you see that, sir?

A. "Inspection"?

Q. "Inspection." Did I say "instructions"? Sorry about that.

Does it read, "normally there are 12 or more required inspections of a new building, and as many as applied to alterations and additions." Did I read it correctly?

A. Yes.

Q. Now I haven't seen any inspection reports, have you?

A. No, I have not.

MR. KENDRIC: Objection, Judge.

THE COURT: Everybody hold back. He raised an objection, but he didn't hear you. You have to speak up. He didn't hear you.

MR. KUTNER: I didn't realize you were talking.

MR. KENDRIC: Yes, I will do that.

THE COURT: He has an objection.

Mr. Kutner, do me a favor, I lost the track because of the way it went down. Start over with your question, please, okay?

MR. KUTNER: Sure.

Q. Did you ever find any inspection reports for this particular garage that you entered the C.O. for?

MR. KENDRIC: Objection to the form of the question.

THE COURT: No, overruled. He can answer that.

A. I never found any inspection reports, no.

Q. Did you even look?

A. No, I did not.

Q. One of the things that --

MR. KUTNER: Withdrawn.

Q. Were you aware that there were two families living at the house at that time?

MR. KENDRIC: At what time, Judge?

THE COURT: Sustained.

Q. 1986.

A. No, I was not aware of that.

Q. You never heard the name of Bicell (ph.)?

MR. KENDRIC: Yeah, Judge. We can't have hearsay in the question like that.

MR. KUTNER: This is cross-examination. Judge, I can stuff words in his mouth, that's from the Court of Appeals.

MR. KENDRIC: That's not true.

THE COURT: Let's go on to the next question.

Q. One of the things that an inspector is supposed

to do, is look for violations of the zoning code; am I correct, sir?

A. A code enforcement inspector?

Q. A building inspector is suppose to look to make sure the building is going up properly, and there are no violations; is that right so far?

A. A building inspector is inspecting the construction of the garage.

Q. So if the foundation is going in and he sees that it's going to be a six-story prostitution house, he doesn't put anything in his report saying, "Hey, this is suppose to be a one-family house, and they're building something else"?

A. He is inspecting the foundation. If it meets the plans that are on the site, he will approve it.

Q. That was your -- before you went to work for the town, you did concrete?

A. I did concrete.

Q. You also have framing inspections, right?

A. Yes.

Q. Just off the top of my head, footings, right?

A. Excavation.

Q. Excavation and footings?

A. Yes.

Q. And foundation walls?

A. Yes.
Q. And then the framing?
A. Yes.
Q. Electrical?
A. We do not do electrical inspections.
Q. If there is electrical involved, it has to have an electrical inspection?
A. A licensed electrician has to be on the application in a permit, but the actual inspection is a UL certification after the job is complete.
Q. So then where are the other 12; are there multiple inspections for the foundation, multiple -- it says, "At least." What are the "at least 12"?

MR. KENDRIC: Objection. It does not say in the document "at least 12."

THE COURT: Sustained.

MR. KUTNER: I'm sorry, "12 or more." I thought it means synonymous with "at least 12," but maybe my English is bad.

A. Depends on the scope of the construction. This particular job, there was probably one inspection.
Q. Of that one inspection report, if the man noted "hey, there's an illegal two-family house here," that would be pertinent to this prosecution, would it not?
A. No, he is inspecting the garage construction.

Q. Mr. Esposito, you've been doing that now for two days with me --

MR. KENDRIC: Objection.

THE COURT: Sustained.

MR. KUTNER: I move to strike his answer as unresponsive, your Honor.

THE COURT: Overruled. No, the answer stands.

Q. Mr. Esposito, if I ask you a question, if you can just answer the question I ask, please, so we can get through this.

A. That's what I'm attempting to do, sir.

MR. KUTNER: Thank you.

Q. Okay, if the inspector was there and noted a two-family use, in a one-family zone, it's right on the C.O. "premises zoned for one family."

MR. KENDRIC: Objection. If a building inspector is there, he is to inspect a building.

MR. KUTNER: Now you're a building --

MR. KENDRIC: He's interposing code enforcement, and a building inspector.

THE COURT: Mr. Kutner, that's what he said. He was there to inspect the garage.

Q. So you're telling -- is it your testimony that if the building inspector is there to inspect the garage

and saw a violation, he would not put it in his report ever?

A. I can't speak for the building inspector, sir. I don't know what the building inspector would put in the report.

Q. You did work with building inspector in your private jobs, did you not; before you went to work for the town?

A. Very little. Mostly it was homeowner work, okay.

Q. But you didn't even look for the report to see if maybe there was one report or 12 reports, you didn't even look for them, did you?

A. No, I did not.

Q. Were you afraid of what you would find?

MR. KENDRIC: Objection.

THE COURT: I'll allow that.

A. No, I'm not. I would have found, if I believe because this is a maintain --

MR. KUTNER: I move to strike everything else as unresponsive.

MR. KENDRIC: Either he wants to hear the question or he doesn't, Judge.

THE COURT: You can redirect on it.

MR. KUTNER: Could you show the witness...

take the exhibits away, and give him "L, M, N" for identification.

MR. KENDRIC: Once again, "L, M," were the subject of the sidebar of that document.

THE COURT: You know what, I'm going to rule on each one. We'll take it one at a time. We have to move this trial along. They're marked for identification. Take a couple of minutes, if you need to, and let us know when you had a chance to look at them both, okay?

THE WITNESS: Okay.

THE COURT: You looked at both?

THE WITNESS: Yes.

THE COURT: Okay, Mr. Kutner, which one do you want to begin with?

Q. I'm going to direct your attention to "L" first. That's for the investigation that resulted in the charge against Mr. Thomas; is it not?

THE COURT: He wants to know what is this document, how would you describe "L"?

THE WITNESS: This seems to be a printout from our computer system showing the case that was opened, based on the complaint that was filed, who filed the complaint, and who the owner of the property is.

MR. KUTNER: I offer that at this time.

MR. KENDRIC: Objection.

THE COURT: Overruled. It's in evidence. "L" is in evidence.

COURT OFFICER: So marked.

THE COURT: Mr. Kutner, you want him to have "L" again, or you want him to take it away?

MR. KUTNER: He can keep "L" for just one or two questions then I'll move on.

Q. "L" lists a Nassau County tax code on it, does it not, sir?

A. Yes, I see that.

Q. And it lists as the tax code "22001," correct?

A. Yes.

Q. There's no decimal point in there?

A. No, there is not.

Q. The tax code normally has a decimal point after the first three digits, does it not?

A. Yes, it does.

Q. So if you read it that way, it would be 220.01?

A. Correct.

Q. And that is for a two-family dwelling, is it not?

A. Yes, it is.

Q. And that was entered in your computer, that it

was a two-family dwelling?

A. This is from our computer, yes.

Q. Now if you would look at "M," please.

A. Okay.

Q. First that involves the same house at 121 4th Street in Hicksville, sir?

A. Yes, it does.

Q. The same section, block and lot, as in "L," exhibit "L"?

A. Yes.

Q. And was that -- was that for a complaint in 2006 regarding this particular house?

A. Yes, I believe that to be true, yes.

Q. And directing your attention to the second page, does that indicate a complaint -- two complaints, one for an illegal apartment, and one for a multiple dwelling?

A. Yes.

MR. KUTNER: I offer that at this time.

MR. KENDRIC: Same objection.

THE COURT: Overruled. It's in evidence.

COURT OFFICER: So marked. Both are in evidence "L" and "M."

Q. In "M" it also has the same two-family dwelling code of 220.01, sir?

A. Yes, 220.01.

THE COURT: And that's from your computer, correct?

THE WITNESS: Correct.

Q. And that was for an entry that was made in 2006 in the fall, correct?

A. November 20th of 2006.

Q. And are you aware that Mr. and Mrs. Thomas bought the house on March 9, 2007?

A. I am not aware of the exact date of the purchase.

Q. But the owner at that time, "Raymond" -- no. On the third page, is Patrick Kahalin?

A. Yes.

Q. And the owner on the later complaint is Darren Thomas, true?

A. Yes.

Q. Now a couple of times you talked about a change to this premises. The only change was in the tax status in 1987, as a result of the garage going up, correct?

MR. KENDRIC: Judge, objection to the form of the question.

THE COURT: Sustained.

Q. Are you familiar with what happens with -- between the town and the County Assessor's Office, when a building permit is issued and then completed with a C.O.?

A. I believe -- I'm not fully aware, but I believe the permit is sent to the Nassau County Tax Assessor.

Q. And that usually occasions a reinspection of the property, correct?

A. By Nassau County, yes.

Q. And if the property predated the county charter, you know the county charter is 1938, are you aware of that?

A. I'm not aware that, no.

Q. Well, if it predates 1943, if the house was built in 1930, then there would have been no reason to access it after 1938's original assessment, correct?

A. Sir, I'm not going to speak to what Nassau County did or didn't do.

Q. According to the Town of Oyster Bay records, the only time the county reinspected the property since 1938 was in 1987; am I right?

MR. KENDRIC: Objection. This is hearsay inside of his question.

THE COURT: Mr. Kutner, you have to establish a foundation for your questions.

MR. KUTNER: Judge, the assess would be in. I just thought if he knew, we could establish it a lot more quickly.

Q. If you don't know, you don't know.

A. I do not.

Q. Yesterday, we were talking about the investigation that goes into determining whether a complaint is valid, and what should be done with it. Do you remember that?

A. Yes.

Q. And are you aware that letters were sent to Mr. Gioia and the Building Department regarding Mr. Thomas' home?

A. No, I am not.

Q. Did you review them at all before testifying today?

A. No, I have not.

Q. Not either of the two letters?

A. I never saw any letter.

MR. KUTNER: Judge, if I may just check with Ms. Channer, please.

(Whereupon, Counsel confer.)

MR. KUTNER: No further questions. Thank you, Mr. Esposito.

THE COURT: Would the town like to do some redirect?

MR. KENDRIC: Yes, please.

THE COURT: Do you need a minute to talk to your co-counsel?

MR. KENDRIC: No. I would like that enlargement of -- it's Defendant's A in evidence.

THE COURT: You want to put it on the easel, or you want to show it to the jury; what do you want to do?

MR. KENDRIC: I'll show it to the jury.

THE COURT: Would you like to see it again, or you're good?

(Whereupon, the jury members respond in the affirmative.)

THE COURT: Okay.

REDIRECT-EXAMINATION

BY MR. KENDRIC:

Q. Mr. Esposito, let me please direct your attention to what's in evidence as one of the People's exhibits, but also as Defendant's A, this letter.

Now does this letter make any reference at all to the use of the house?

A. I do not see anywhere where it says anything about the use.

Q. It's talking about the structure, is it not?

A. Correct.

Q. By the word "premises;" is that correct?

A. Correct.

MR. KENDRIC: Officer, can I please have

Defendant's Exhibits "L" and "M" in evidence?

Q. So Mr. Esposito, just a moment ago, defense counsel is asking you about this number "22001" which presented differently has a decimal in it to make it 220.01, do you recall that?

A. Yes.

MR. KENDRIC: Show it to the witness, please.

THE COURT: You want "L" and "M" shown to the witness.

MR. KENDRIC: Yes, sir.

THE COURT: Please show it the witness.

Q. Mr. Esposito, that information "22001" it's entered in what field; what's the field it's entered in?

A. I believe it says under the "NC" code.

Q. "NC"?

A. "NC code."

Q. "NC" stands for?

A. Nassau County.

Q. So that information is how Nassau County is assessing this property for tax purposes?

MR. KUTNER: Objection. This is direct, leading.

MR. KENDRIC: He opened the door.

THE COURT: Overruled.

MR. KUTNER: I didn't open the door to leading questions.

THE COURT: Mr. Kutner, overruled. He can answer.

A. Yes.

Q. Okay, "NC" Nassau County. It don't say, "TOB, Town of Oyster Bay," it says, "NC" code, correct?

A. Correct.

Q. And that's because the Town of Oyster Bay is not assessing how to tax this man on this property; isn't that so?

A. That is correct.

Q. It has to do with has Nassau County --

MR. KUTNER: Objection, leading.

THE COURT: Overruled.

Q. -- it's how Nassau County is assessing his property, for tax property --

MR. KUTNER: Objection. Who's testifying here?

THE COURT: Overruled.

Q. -- is that correct?

A. Correct.

MR. KENDRIC: If you would, officer, please show the witness People's 6 in evidence.

THE COURT: Take a minute to read it

carefully, and when you're done, let me know. Don't rush it. I'm sure there's going to be maybe some recross.

Q. Mr. Esposito, please remind the jury what is People's 6 in evidence.

A. This is a property card generated by Nassau County.

Q. And on that particular property card that's in evidence, what is the property classification?

A. Class is "210.11."

Q. Which corresponds to what property classification?

A. A one-family dwelling.

Q. So on that property card generated by Nassau County, they're considering his property, defendant's property, as a one-family dwelling; is that correct?

A. That's correct.

Q. And on the other two, the screen shots, the printout that you were asked about, they have a different numeric code, correct?

A. Correct.

Q. But do you know, if for example, Mr. Darren Thomas ever went to Nassau County and grieved his taxes and said, "Hey, Nassau County, you're taxing me as a two-family, but the Town of Oyster Bay is saying to me that

under the law I'm only a one-family," do you know if that happened?

MR. KUTNER: Objection, your Honor.

THE COURT: Sustained.

MR. KUTNER: Question, please.

Q. Does how Nassau County assesses the defendant's house for it's own tax purposes, does that have anything to do with how the town views his house in terms of use, and in terms of compliance with the zoning code?

THE COURT: Whose house?

MR. KENDRIC: Mr. Thomas's.

THE COURT: You weren't clear on it.

MR. KENDRIC: I apologize.

THE COURT: Say it again, please.

Q. Okay. Does how Nassau County for it's own taxation purposes classify the defendant's house -- does that have anything to do with how the Town of Oyster Bay views the use of his house in terms of compliance with the zoning code?

MR. KUTNER: Again it's leading, Judge.

THE COURT: I'll allow it. Overruled.

A. The Town of Oyster Bay -- you have to repeat that question.

MR. KENDRIC: Would you read it back for Mr. Esposito.

(Whereupon, the record was read back.)

THE COURT: Sir, he wants to know if Nassau County assesses the property, does that have anything to do with how the Town of Oyster Bay enforces its zoning code?

THE WITNESS: The answer is, no.

MR. KENDRIC: I want to mark one document please, People's Exhibit 7.

THE COURT: Counsel, show it to Mr. Kutner, please.

MR. KUTNER: He is not offering it. It's just being admitted.

THE COURT: Correct, I have no idea what it is, Mr. Kutner.

COURT OFFICER: So marked.

THE COURT: Sir, take as much time to read it, and let me know when you're finished.

Q. Okay, now on cross-examination, you were asked some questions about where in the town code do the words "principal permitted use of a building" versus "special permit use" as authorized by the ZBA.

And my question is, can you please tell the jury number one, those terms and maybe I said them inartfully, but you can correct me if I said them inartfully.

Do those terms appear in the town code?

A. Yes.

Q. Okay. Would you tell the jury, please, where do they appear; where can anyone take a look and see those exact terms?

A. In Chapter 346-5.2, there's a schedule use of regulations for residential districts.

Q. Now Mr. Thomas' property is located in an R1-7 zone, correct?

A. Correct.

Q. And in an R1-7 zone, what use of the property -- what use -- pardon me.

What use can the property be used for as a matter of right? Meaning, you don't need anyone's prior approval.

A. One-family dwellings are permitted principal use in an R1 zone.

Q. And in that same zone, R1-7, what uses can you also use it for with approval? Let just leave it at that.

MR. KUTNER: Judge, would you take -- have the exhibit taken away? He is reading from an item that is not in evidence. He can refresh his recollection, but cannot read from it, please.

THE COURT: Are you offering it into evidence?

MR. KENDRIC: Yeah, I'm offering it in

evidence right now.

MR. KUTNER: Then I don't need to make the objection, if it's an accusatory instrument it doesn't go into evidence.

THE COURT: Is that the accusatory instrument?

MR. KUTNER: It's the accusatory instrument.

MR. KENDRIC: The schedule of use is attached to the code information.

MR. KUTNER: Can't do it.

MR. KENDRIC: But he can still refresh his recollection.

MR. KUTNER: He can't read from it.

THE COURT: He could do it without it.

MR. KENDRIC: All right.

THE COURT: Please take it away.

MR. KUTNER: Thank you, your Honor.

Q. Please tell the jury.

A. A two-family dwelling is permitted in an R1-7 with a Special Use Permit, which is granted by the Zoning Board of Appeals.

MR. KENDRIC: Okay, thank you very much.

THE COURT: You're done with redirect?

MR. KENDRIC: I'm done with my redirect.

THE COURT: Mr. Kutner, do you have any

recross?

MR. KUTNER: Yes, sir.

RECROSS-EXAMINATION

BY MR. KUTNER:

Q. First of all, Mr. Esposito, yesterday when I cross-examined you, you couldn't point to anyplace in the code where "permitted" and "allowed," where there was a distinction in the use?

THE COURT: Mr. Kutner, I didn't hear you. Please say that again, please.

Q. Yesterday, when I cross-examined you, you couldn't find anyplace in the code where there was a distinction made between "permitted" and "allowed," correct?

MR. KENDRIC: Objection.

THE COURT: I'll allow the question. Go ahead.

A. The code book --

Q. Just "yes" or "no," sir.

THE COURT: Can you answer him with a "yes" or "no"?

THE WITNESS: No, I can't, sir.

Q. You don't recall answering my question, yesterday; that first of all there is no definition in the definitional section in those two words, are there?

A. Yes. You're correct, yes.

Q. And then overnight, what did you do in order to address this particular topic?

A. I didn't do anything overnight.

Q. You know -- did you do something this morning?

A. No.

Q. You know you are under restrictions not to talk to Counsel in the middle of cross-examination, right?

A. Absolutely.

Q. So now without doing any research and without talking to Counsel, how did you know that Mr. Kendric would ask you these questions, and that you would be looking into this all over again?

A. I didn't know.

Q. So how did you change your answer from yesterday?

MR. KENDRIC: Objection. He didn't change his question from yesterday.

A. Yesterday you gave me 246, Chapter 246, but it didn't have the schedule of use regulation that should be attached to the back of the code. That's where you get the information from, not in the definition.

Q. The schedule does not -- not the ordinance, the schedule is part of the supplement to the ordinance, correct?

MR. KENDRIC: Objection, it is the ordinance.

THE COURT: What's in evidence does the schedule have, is it part of the code?

THE WITNESS: Yes, it's definitely part of the code. It gives you what's allowed in every district.

A. It's part of the code. It gives you what's allowed in every district. The schedule of use let's you know what's permitted in what zone, and if it's not permitted, how you could get a change of use. It goes into all of that, but that was not attached to what you gave me yesterday.

Q. It was in the book, but you didn't page to it?

A. I looked, sir.

Q. Again, you didn't talk to Mr. Kendric, right?

A. I did not.

Q. Now he brought up the fact of this June 27, 1968 letter, and he is again trying to split hairs between "use" and "structure," true?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. He asked you just now on redirect whether there was a difference in here between "use" and "structure," correct?

MR. KENDRIC: Objection. That's not what I asked.

Q. Did he ask you if anyplace here there was any reference to "use"?

A. Yes.

Q. And you said, "No, there's no reference to use"?

A. No, there is.

Q. What in the name of God would you call a reference to a "two-family dwelling located at;" is that a use two-family, or is that a structure?

A. (No response.)

Q. Sir, is it a "use" or a "structure"?

A. I believe it's a structure.

Q. Is that true for all the rest of your testimony here, sir, over the last three days?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained. Mr. Kutner, please.

Q. A two-family dwelling is a structure, not a use?

A. A home is a structure.

Q. A dwelling is not a structure?

A. Yes, a dwelling is a structure.

Q. Could the term "two-family dwelling," be both a "use" and a "structure"?

A. I guess it could be perceived that way.
Q. But it certainly includes use, does it not?
A. I believe so.
Q. Do you know how many times a year Nassau County notifies the Town of Oyster Bay, what they're going to assess a particular property as?
A. No, I do not.
Q. Do you know it can be as many as nine times?
MR. KENDRIC: Objection.
THE COURT: Sustained. Unless you're going to tell us? He said he didn't know, Mr. Kutner.
Q. The 210.01 that Mr. Kendric asked you about, that tax status was changed right after the garage was rebuilt?
MR. KENDRIC: Objection, Judge, hearsay. There's no foundation for this question.
THE COURT: Well, Mr. Kutner, why don't you ask, if you can establish the fact.
MR. KUTNER: Mr. Kendric is trying to -- withdrawn.
Q. Mr. Kendric asked you on redirect particularly about the Nassau County assessor's field code sheet --
THE COURT: About the classification?
MR. KUTNER: No, it's not just classification, there's a particular term for that.

Q. The card, the assessor's card, that's called the assessor's card, is it not?

A. The property tax card.

Q. And That assessor's card has six stickers on it, does it not?

A. Six what?

Q. There are six stickers on the assessor's card?

A. I do not know how many stickers are on there. I would have to look at it again.

Q. Are you aware how the stickers were put on every time someone changes ownership, the assessor puts a different sticker on it?

A. No, I am not aware of that.

Q. And are you aware that the classification even regardless of what it actually was as a two-family, was kept as a one-family since 1938, the first assessment?

MR. KENDRIC: Objection, Judge, hearsay.

THE COURT: If you know.

A. I only see what I see on the card. I can't tell what was done over the last 50, 80 years.

Q. Mr. Esposito, you visited the house in April 2010, 2011, once, right?

A. Yeah, I believe I was there once.

Q. Do you remember the house?

A. Not at all.

Q. If I showed you pictures of it, would you remember what it looks like?

A. It was eight years ago. I'm not 100 percent sure, but I'll look.

MR. KUTNER: Would you please mark this in the order, I'm handing it to him.

MR. KENDRIC: May I see, Judge?

THE COURT: Yes, you may.

MR. KENDRIC: Quick sidebar, Judge?

THE COURT: Mr. Kutner?

MR. KUTNER: I'm just offering them kind of for entertainment value, but just to show what the house looks like to the jury.

THE COURT: Would you like to show it to the jury?

MR. KUTNER: Yes, if I could, please.

THE COURT: Jury members we have three photographs. It's been stipulated among counsel, these will go in evidence. This is a general view of this gentleman's home, so for that purpose only.

MR. KUTNER: This is exhibit N that is being published to the jury now, Judge.

I realize we have been talking about a house for five days and nobody seen a picture of it.

THE COURT: That's a good idea.

Q. The property card that you looked at exhibit 6, did you also see in Mr. Gioia's file the attachments -- the property card is a two-page document, is it not?

A. Two pages, yes.

MR. KUTNER: If this could we have marked for ID please. I think we're up to "Q."

MR. KENDRIC: Just noting an objection. Not to it being marked.

THE COURT: Mr. Kutner, would you like it to be shown to the witness?

MR. KUTNER: If I may?

COURT OFFICER: "Q" marked for identification.

THE COURT: So marked.

(Defendant's Q: Document. Marked for identification.)

Q. Mr. Esposito, if you could look at it. When you're finished, if you can just indicate that to us, please, sir

A. Okay.

THE COURT: Mr. Kutner, he has looked at it.

MR. KUTNER: Thank you, Judge.

THE COURT: You want him to keep that?

MR. KUTNER: Yes, if you could, please.

Q. Now certain information that's located on that

property card, it's a matter of public record?

A. I believe so, yes.

Q. And is that involving the house and the property known as 121 4th Street, Hicksville, New York?

MR. KENDRIC: I'm objecting, Judge. This is -- this entire document is hearsay. There's no authentication. There's no foundation for this.

THE COURT: Have you ever seen this before?

THE WITNESS: I can't say that I have, Judge.

THE COURT: Okay, he said he can't say that he's seen it before.

Q. Is there anything on there that would make your recollection change as to the tax listing for the property at the time Mr. Thomas bought the house in 2006, 2007?

MR. KENDRIC: Objection.

THE COURT: Sustained.

MR. KUTNER: All I am asking him is if --

Q. After looking at your document, would you want to change any of your testimony regarding the assessment of this particular house --

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

MR. KUTNER: Defendant's R for ID.

COURT OFFICER: Defendant's R for

identification is so marked.

(Defendant's R: Document. Marked for identification.)

COURT OFFICER: Shown to the witness.

Q. And finally just to re-emphasize your testimony at the very end of your redirect, you spoke about Special Use Permit as it applied to any particular piece of property, true; you were talking about that?

A. Yes.

Q. A Special Use Permit when I spoke to you yesterday, and I questioned you yesterday, you admitted that it has no application, if the house is a pre-existing nonconforming use, do we agree; that's still the law?

A. Could you please repeat that? I'm not quite sure what you mean.

Q. Sure. If this house was a two-family use that predated the ordinance, it doesn't require a Special Use Permit, correct; yes or no, sir?

A. I believe that to be true, yes.

MR. KUTNER: Thank you. No further questions.

THE COURT: Okay, thank you very much for coming.

(Whereupon, the witness exits the courtroom.)

THE COURT: Okay I think we're going to take a break now. How much would you like, would you like a ten or 15 minute break? It's about 3:15, and we come back here 3:25, and I believe we're going to have the building inspector, and he will start testifying.

(Whereupon, a recess was taken.)

THE COURT: Let's bring the jury in.

COURT OFFICER: Jury entering.

(Whereupon, the jury members enter the courtroom.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: We're going to go to 4:30, 4:25, 4:30 and I'll read you the warnings again, and you're out of here. Tomorrow is at 2:00, okay? And we're going to do that each day. I've asked the attorney to try to expedite this as much as they can. Again, they are both going to present evidence. We are going to try to expedite this for you, so you get a complete picture, okay, fair enough?

(Whereupon, the jury members respond in the affirmative.)

THE COURT: Mr. Kendric, you have a witness?

MR. KENDRIC: Yes, please. Christopher Gioia.

THE CLERK: Raise your right hand.

Do you swear or affirm the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Lower your hand. Have a seat. Please state your name.

THE WITNESS: My name is Christopher Gioia. I live at 12 South Hampton Drive, Massapequa, New York.

THE COURT: Counsel, you want to begin?

MR. KENDRIC: Yes. Thank you very much.

DIRECT-EXAMINATION

BY MR. KENDRIC:

Q. Good afternoon, Mr. Gioia.

A. Good afternoon.

Q. With whom are you employed?

A. The Town of Oyster Bay.

Q. And can you tell us, for how long have you been employed with the Town of Oyster Bay?

A. Since 6/8/2006.

Q. June 8, 2006?

A. June 8, 2006, Town of Oyster Bay.

Q. Now currently today, what is your job title or position?

A. I work as a code enforcement inspector, but presently I work for the Department of Highways, Highway Department, Town of Oyster Bay.

Q. Before this current assignment, in what Department did you work?

A. I work for the Department of Planning and Development, Town of Oyster Bay as a code enforcement inspector.

Q. Now during the calendar year 2008, tell the jury, please, where you were working and in what capacity?

A. I was an inspector with the Town of Oyster Bay, code enforcement. My job was to take any complaints, to investigate, to write reports, issue violations, issue summonses, do a lot of research. I worked in the field. Whatever assignment I have, whatever caseload I was assigned to do to investigate, go to houses. I meet with the public.

Q. Let's take it one small step at a time, okay.

Did you receive training to be a code enforcement inspector?

A. Yes.

Q. Tell the jury initially, what training you received?

A. Initial training was in job training from a senior inspector, or a couple of senior inspectors who I

went out in the field with, almost like a training-type position, as well as I received training from the state as far as going to school.

Q. Tell the jury about the education that you received from New York State?

A. Okay. I think in order to be certified as a code enforcement inspector, you must go through several hours of in-house class training that the state authorizes. Once that's completed, then you can be -- then you're certified as an inspector, and you have to go back every year and take 24 credits of all different types of training, whether it be code enforcement, building, learning all building codes. It can be anything to do with property maintenance code. It's New York State Building, Town of Oyster Bay codes, all that stuff through training.

Q. Mr. Gioia, at some point in 2008 approximately 11 years ago, did you receive an assignment to conduct an inspection of the defendant's property located at 121 4th Street, in Hicksville?

A. Yes, I did.

Q. And did you conduct an exterior inspection of the property on December 5, 2008?

A. Yes, I did.

Q. What did you see at that time?

A. I'd have to see my notes.

MR. KENDRIC: Okay, so your Honor, I'd ask that People's 1 in evidence be shown to the witness.

THE COURT: Show it to the defense.

COURT OFFICER: This is People's 1.

THE COURT: Let the record reflect he has Exhibit 1.

Do you need a couple of minutes to review this?

THE WITNESS: Yes.

THE COURT: Counsel, let him go through each page because we are going to have direct and cross, I'm sure.

MR. KENDRIC: Sure thing.

THE COURT: Take your time. Let me know when you are done. There's no rush.

COURT OFFICER: People's 8 (sic.)

Q. So Mr. Gioia, directing your attention, please, to your inspection conducted on December 5, 2008, can you tell us, what did you see?

A. So I was at the premises, and I noticed two door bells, two electric meters, and not much else.

Q. Mr. Gioia, did you document, and that is to say, did you record what you personally observed during that December 5, 2008 inspection?

A. Yes.

Q. How?

A. I wrote an inspection report.

Q. Anything else?

A. I issued a summons.

Q. Hang on we're not there yet. I'm asking you how did you document what you saw. Did you take photographs?

A. Yes, I took photographs of the premises.

Q. And tell us what -- well here, first of all, take a look and tell us what you were trying to capture in those photographs taken on December 5, 2008, what information you were trying to document.

A. Right. So there's normal protocols to take photos of the premises itself to view the premises, and look at the premises and study what's on the premises to indicate. So at this time, what I would document was the doorbells, and the electric meters of the house, the two electric meters on the house.

Q. Mr. Gioia, I know that I skipped ahead right to December 5, 2008, but my question to you, sir, is had you been to that house previously?

A. I have, yes.

Q. And the items that you saw and took photographs of, the two doorbells, the two electric meters servicing the house, did you see those same items during your prior

visits, and that is to say, sir, prior, before December 5, 2008?

A. Yes.

MR. KENDRIC: Can we please hand Mr. Gioia, I think it has been marked as People's 8 in -- pardon me, for identification. This is the court information, Judge.

THE COURT: Mr. Kendric, do you want him to take back that document?

THE WITNESS: Can you just identify what that document is?

THE COURT: Mr. Kendric, do you still want him to have People's 1?

MR. KENDRIC: I don't think it's necessary right now. You know what, officer, let me switch back to People's 1 in evidence. I just want --

Q. Can you confirm for us, that each of those are inspection reports that you prepared, and photographs that you personally took of this property 121 4th Street in Hicksville?

A. Okay, well, the typed ones someone else typed them. The written ones, these are my written inspection reports. These are my photographs. These are all my photographs. Am I supposed to be going onto to 9/19 or?

Q. I'm asking the package as a whole, so that the

jury when they get it, they can understand what that is.

A. So these are all my inspection reports. These are my photographs. The ones that are typed up are not typed up of me though.

Q. Are they typed-written versions of your handwritten inspection reports?

A. These are typed-written versions of my handwritten inspection reports, that's correct.

MR. KENDRIC: Now officer, if you don't mind, let's just show him the --

COURT OFFICER: Talking back People's 1.

MR. KENDRIC: Yes. Thank you very much.

COURT OFFICER: People's 8 for identification to the witness.

Q. Mr. Gioia, are you familiar with that document?

A. Yes.

Q. Well, what is that document?

A. This is my court information. My "swear to."

Q. And does it bear your signature?

A. Yes, it does.

Q. And you swore that the information contained in your code information was true?

MR. KUTNER: Judge, relevance. Judge, he's talking about something that is not in evidence, and can't go into evidence.

MR. KENDRIC: I offered it in, and he said he didn't want it in.

THE COURT: He is objecting it to going into evidence.

MR. KENDRIC: I'm asking the witness very particularly if his statements in that court information were true when he signed his name to it?

THE COURT: I'll allow that.

MR. KUTNER: There was no objection to that question.

THE COURT: Go ahead.

MR. KUTNER: There was no objection to that question.

A. Can you repeat that?

Q. Sure, sir. The statements that you made in that court information, were those statements true when you signed your name to it?

A. Yes.

MR. KENDRIC: Good. Thank you very much. I'm temporarily finished.

MR. KUTNER: Temporarily, or are you finished?

MR. KENDRIC: Let me be more clear, for Mr. Kutner. I'm done with my direct-examination of Mr. Gioia. He is free to cross-examine him.

CROSS-EXAMINATION

BY MR. KUTNER:

Q. Mr. Gioia, you were assigned a complaint in 2008, around June of 2008, were you not?

A. Yes.

Q. And that complaint has a complaint number, did it not?

A. I don't remember.

Q. I'm sorry?

A. I don't remember.

Q. Well, don't all complaints get numbers, Mr. Gioia?

A. Not necessarily, no.

Q. This one did, didn't it?

A. I'm not sure.

MR. KUTNER: Could you show him Exhibit 1.

Q. You just looked at your notes, right?

COURT OFFICER: People Exhibit 1.

A. I didn't see a complaint there. It's not a complaint. This is my inspection report.

Q. That's not what I asked you. Do you want to look on there, and see if there is a complaint number.

A. I don't see a complaint number.

Q. The Hicksville area where 121 4th Street is located is in --

A. Oh, okay, I'm sorry. There is a case number.

Q. Let me guess it's "98-2007-1598," am I close?

A. That's what it says, yes.

Q. And when you got it, that had already had been investigated for a period about eight months by Inspector Curcio, C-U-R-C-I-O, right?

A. I'm not sure.

Q. Before testifying today, did you look at any records of the town regarding this particular case?

A. Not today, no.

Q. How about last night?

A. No, I did not.

Q. How about in the last six weeks?

A. Can you explain to me -- can you rephrase that; explain to me. What do you mean as far as looking at records?

Q. Can you raise your voice?

A. Can you explain to me what you mean by "records." What type of "records" are you referring to?

Q. Yeah. A record is some information that's been recorded somewhere for this particular house owned by Mr. Thomas.

A. The paperwork that I looked at before I was here, was the paperwork that my attorneys provided for me. So the inspection reports --

Q. And your attorneys are who?

A. The Town of Oyster Bay attorneys.

Q. Who?

MR. KENDRIC: That's me.

A. Chris Kendric and Matt.

Q. Matt's got a last name?

A. I forget Matt's last name.

Q. And What about Paul?

A. Paul, yes.

Q. Any others?

A. I'm sorry, what's the question?

Q. Yeah, who did you meet with, list everybody that you met with.

A. Not today?

Q. I don't care about today.

A. I met with Chris Kendric. I met with Matt. I met with Paul.

Q. How did you find out that you were going to be testifying?

A. Chris Kendric.

Q. Did he send you a note, an email, a text message, called you up, what did he do?

A. I received a phone call.

Q. How long ago?

A. Last week.

Q. You had no idea this was coming to trial until last week?

A. No, that's not true. I was told at least a year, two years ago.

Q. I'm sorry?

A. I was told several years ago, a couple of years ago. I was informed prior, yes.

Q. Do you remember this particular investigation except for your notes; do you have any independent memory of it all?

A. I have no independent memory.

Q. Now can you just tell the jury what records did you look at just itemize it, every single item that you looked at?

THE COURT: Is that in preparation for the trial?

MR. KUTNER: Yes, sir.

THE COURT: In preparation for the trial.

A. In preparation for the trial, okay.

Nassau County tax assessors records, that are online. The Town of Oyster Bay's Certificate of Occupancy. I looked at the tax records and the certificate of records. Whatever is on file for the Town of Oyster Bay in the C.O. room, I researched that. And from the computer as well as.

Q. So you looked on the computer?

A. Yes.

Q. And what did you type in to the computer, an address, or section, block, and lot?

A. Section, block, and lot.

Q. Where did you get that? Obviously you don't remember section, block, and lot all these years. So where did you get that information from?

A. From the complaint form, from the file itself.

Q. I'm trying to get the steps.

A. Okay.

Q. Mr. Kendric called you up and said, "We're going to trial soon, you better bone-up, and look at your records"?

A. No, that's not -- I researched this years ago.

Q. Forget about years ago.

A. Okay.

Q. For years you didn't touch this file I'm presuming, for about eight years; am I right?

A. At least that many, yeah.

Q. And now sometime very recently when you found out a trial date was set, you started to look back at your records, right?

A. Yeah, I looked a little bit, yeah.

Q. And that trial date was set back on February 7th, was it not?

A. I don't know when it was.

Q. So let's take February 7th to today.

A. Okay.

Q. What records did you look at exactly?

A. Only computer records, and whatever was presented to me.

Q. In the top file?

A. Yes.

Q. Now in the computer records, how many different records did you look at in there?

A. There's a section, block, and lot files, yup.

Q. I'm sorry?

A. There was section, block, and lot file, yes..

Q. There was an SBL file?

A. There's a section, block, and lot file, yeah, that has the card and stuff on it.

Q. What card and stuff?

A. The Nassau County Tax Assessor card. That's what I looked at.

Q. And what other stuff?

A. The permit section, C.O. section, yes, so.

Q. And what about the 1930 building permit No. 54, it has that in it obviously?

A. I don't remember.

Q. What about the June 27th --

MR. KUTNER: Do you have that letter, exhibit A, Defendant's A?

THE COURT: You want him to look at it?

MR. KUTNER: Yes, please.

Q. That was in your file too?

A. Yes, I viewed that, yes.

Q. Now you reviewed that now, or did you review that back in 2008 when you --

A. No, I don't remember if I viewed that, or viewed that in 2008, but the other day I did look at that.

Q. Do you remember at one time saying that you never saw this before?

A. I don't.

Q. Let me finish the question.

The problem is the court reporter can't take down two people when they speak at once. If you could just pause after my question to make sure I am finished, okay, Mr. Gioia?

A. Yes.

Q. Now you remember back in 2008 when you first assigned this claiming --

MR. KUTNER: Withdrawn.

Q. In 2011 when you were deposed claiming you had never seen this paper before filing the criminal charges, do you remember testifying that way?

MR. KENDRIC: Objection. That's improper use of deposition testimony. He's asking the man if he remembers one of 400 questions asked back in 2011.

THE COURT: Sustained for now, Mr. Kutner.

Q. This is in your file now that you looked at preparing for trial?

A. I viewed that on the computer.

Q. It's now entered in the computer?

A. I have viewed that on the computer, on the town -- I viewed that on the computer in the section, block, and lot files.

Q. When did you view that on the computer?

A. Two days ago.

Q. Two days ago?

A. Yes.

Q. Who entered it on the computer?

A. I have no idea.

Q. When was it entered on the computer?

A. I don't know when.

Q. When you -- you remember when you first began the investigation, it was assigned to you by Mr. Eppolito?

MR. KENDRIC: Objection, Judge. He didn't begin the investigation, he's a field guy, Judge.

THE COURT: No, he can ask if he got assigned.

Mr. Kutner, why don't you lay a foundation question?

MR. KUTNER: Sure.

Q. Mr. Eppolito was your boss back then, he was the head of the Department?

A. He was the building commissioner.

Q. And the commissioner was the head of the Building Department?

A. Yes.

Q. And your branch code enforcement was one of the divisions under the auspices that control the power of Mr. Eppolito, were you not?

A. I don't know what that word means.

Q. What word?

A. "Auspices."

Q. Mr. Eppolito was the boss of the Building Department, right?

A. Yes.

Q. And under the boss of the Building Department, was your division code enforcement in the Building Department?

A. Yes.

MR. KUTNER: Thank you.

Q. Now if we could review the history of the case. If you don't understand me, please stop me, and we'll go

through it, agreed?

A. Yes.

Q. If this house was a legal nonconforming two-family house, then Mr. Thomas is not guilty, true?

MR. KENDRIC: Objection, Judge. He is asking for a legal conclusion.

THE COURT: Sustained.

Q. If this is a legal nonconforming house, then Mr. Thomas should never had been charge, agreed?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Do you know why -- what the charges are that you drafted?

A. Yes.

Q. On the first one it is that Mr. Thomas illegally had a two-family house in a one-family zone. Is that a nice good summary?

A. A use of the premises.

Q. As a two-family?

A. That's correct.

Q. So if it was a legal two-family nonconforming, then that charge would fall?

MR. KENDRIC: Objection to the form of the question, Judge. And he is also asking for a legal conclusion.

THE COURT: Sustained.

Q. Mr. Gioia, if the house is a legal nonconforming two-family, then Mr. Thomas is entitled to operate it as a two-family?

MR. KENDRIC: Objection to the form of the question, Judge. Once again interspersing "use" and "structure." They're not the same.

THE COURT: Sustained. Mr. Kutner, there's a different way of asking that question.

Q. Mr. Gioia, do you understand Mr. Kendric's distinction of "use" and "structure"?

A. No.

MR. KUTNER: I don't think he does either.

MR. KENDRIC: Oh, I understand it, Mr. Kutner.

THE COURT: Sustained. Please Counsel, let's just try the case.

Q. When you talk about a two-family pre-existing nonconforming use, by definition that refers to the use, does it not Mr. Gioia, you agree?

A. I'm sorry?

Q. Does that require thought?

A. Can you rephrase that? I'm sorry.

Q. Sure. When we talk about a two-family nonconforming use, just from the word "use," does it refers

to a "use," does it not?

A. Yeah, it would.

Q. Now if it's a pre-existing nonconforming use, that makes it legal, yes?

MR. KENDRIC: Objection. Objection to the form of the question.

MR. KUTNER: It can't be on cross-examination. No, objection to form.

MR. KENDRIC: If the question is so muddled that I don't understand what he is asking of the witness, then I need to object to the form of the question.

MR. KUTNER: Judge a speaking objection, he's cluing the witness to say, "I don't understand."

THE COURT: Gentlemen, let's go outside.

(Whereupon, an off-the-record discussion was held outside the presence of the jury members.)

THE COURT: Go ahead.

MR. KENDRIC: I have a continuing objection to asking the witness for a legal conclusion. I have a continuing objection to the form of the question because as I said in open court, defense counsel is interspersing the "use" and the "structure," and his questions are formulated in such a way that no one can understand what it is that he is really asking the

witness.

THE COURT: Mr. Kutner, what do you want to say in reference to that?

MR. KUTNER: The essence of this case is whether it is a pre-existing nonconforming use.

THE COURT: Yes, I know, I get it.

MR. KUTNER: And I'm asking the witness, if it is a pre-existing nonconforming use.

THE COURT: Counsel, I know where you're going with it. I just want to clarify it.

MR. KENDRIC: I mean the law is the law. If he puts on his affirmative defense --

THE COURT: Yeah, Mr. Kutner, please --

MR. KUTNER: I was just talking to my associate.

THE COURT: No, you can't. We have to talk it out here. I'm trying to get through this. I'm telling you, the jury wants to hear this case. We have to move it.

My question is, Mr. Kendric, what is the problem with Mr. Kutner asking if this gentleman knows what a pre-existing nonconforming use is, and then if he has any knowledge about it, concerning this residence.

MR. KENDRIC: He never even asked those

basic questions.

THE COURT: Mr. Kutner, what about that; what about asking those basic questions going from that foundation? Do you follow where I'm getting at?

MR. KUTNER: Ask it again.

THE COURT: First of all, does the witness know what a nonconforming use is, and does he have any knowledge to this particular home of the use of the nonconforming use, and let's see what he has to say about that.

MR. KENDRIC: And also while they're thinking --

THE COURT: Let them talk, please.

MS. CHANNER: I think Mr. Kendric wants to say something else.

MR. ROZEA: I think you should hear the answer because that's going to clear up a lot.

THE COURT: Mr. Kutner, you have a problem with that I think?

MR. KUTNER: He swore to a criminal charge that says my client is operating a nonconforming --

THE COURT: I know what he said, Mr. Kutner, but we're in testimony now, and I'm trying to get this done and get through with it. I know what you're trying to ask. He's objecting to it. So what I'm

suggesting to you, is that there's a way of doing it.

MS. CHANNER: Also the same exact language is in the complaint.

THE COURT: Can we do it this way? I think it gets exactly what you want. Does he know what a nonconforming use is? I would assume he's going to say, "Yes." And if he does, then you can ask him does he have any knowledge in reference to Mr. Thomas' house use as a nonconforming use. Did he research that, does he have any knowledge of that.

MS. CHANNER: That's fair.

THE COURT: That's personal knowledge. That's direct and to the point, agreed?

MR. KENDRIC: Agreed.

THE COURT: Let's go outside and do it. Let's see if we can get it done.

THE CLERK: Back on the record with the continued trial.

THE COURT: Just so the members of the jury know, we had an evidentiary issue, which I think we resolved, and we're going to continue with cross-examination of the witness now.

THE CLERK: People's 8 being presented to the witness.

(BY MR. KUTNER:)

Q. If -- let me ask you a simple question, Mr. Gioia. Sir, an investigation should begin without a preconclusion to be reached, do we agree?

A. Yes.

Q. You don't go in to investigate something claiming to already know the answer, true?

A. Yes.

Q. So a neutral or a professional investigation should go in unbias, without any advanced conclusions, just to find out what the truth is, agreed?

A. Yes.

Q. And if it were determined in your research from records in the town file that would indicate that this house was a legal two-family, then the conclusion would have been reached not to bring the prosecution, right?

MR. KENDRIC: Objection. Same objection to the form of the question.

THE COURT: I'm allowing it.

MR. KENDRIC: A legal two-family? What are we talking about?

THE COURT: I'll allow that.

Q. Mr. Gioia, for the purpose of the exam, if I'm talking about a two-family, a legal two-family, I'm not talking about the building, I'm talk about the use, so we doesn't have to repeat "use, use, use," until people are

sick of hearing the word. Do you accept that, sir, you and me?

A. Yes.

Q. So now if this was a legal two-family use, then there would have been no reason to bring charges in your mind, true?

A. Yes.

Q. And in order to come to that conclusion, you would need to look at all the records relevant to this particular house, true?

A. Yes.

Q. On the other hand, if you already have a preset conclusion to reach an agenda, that would not be a fair investigation, true?

MR. KENDRIC: Objection to the "agenda."

THE COURT: Overruled. I'm going to allow that.

A. Yes.

Q. Now were you brought into Mr. Eppolito's office to begin the investigation?

A. I don't remember.

Q. Two other -- how many building inspectors were there back in 2006, 2007, and 2008? Code enforcement inspectors.

A. How many building inspectors?

Q. How many code inspectors were there in 2006, 2007, and 2008?

A. I can list them?

Q. Just give me a number.

A. Four.

THE COURT: Does that include you?

THE WITNESS: No.

THE COURT: So there's five including you; five including you?

THE WITNESS: If I can think it over again.

THE COURT: Give the names.

THE WITNESS: I can give names, Anthony Curcio, Jimmy Jazwinski.

MR. KUTNER: J-A-Z -- let me just spell it for the reporter. J-A-Z-W-I-N-S-K-I. Go ahead.

A. Joe Siampa (ph.) And Nicholas Domingo (ph.) I'm not sure if Eileen Canasaro (ph.) was inspector at that time.

Q. There weren't 98 building inspectors, were there?

A. No.

Q. But there were at least 98 different sections of the town sectors, or segments, or sections, however they were numbered in the town's jurisdiction?

A. I don't understand what you are talking about.

I don't understand the question.

Q. This one is labeled "98-2007-1598."

A. That's the case number, that's correct.

Q. And didn't you tell me that the "98" refers to a section, a geographical area of the town, Hicksville, that particular area?

A. I don't believe so.

Q. What does the "98" mean?

THE COURT: I don't think that was covered.

MR. KUTNER: No, not here.

Q. But in the past, didn't you tell me that "98" was referred to a section?

MR. KENDRIC: Objection.

THE COURT: Sustained. Mr. Kutner, why don't you ask him.

Q. Mr. Gioia, what does the "98" refer to?

A. I don't know.

Q. Well, there are not 98 building inspectors, we agree?

A. Correct.

Q. Mr. Jazwinski and Mr. Curcio had previously been investigating this particular property, were they not?

A. I don't know.

Q. When you came into it, the complaint was labeled I believe it was September 20, of 2007, was it not?

A. Yes.

Q. And you only came into it in June of 2008 for the first time, did you not?

A. That is correct.

Q. And when you came into it, you had to find out what had gone on so far investigating the complaint, right?

A. No.

Q. So you took it without reading the notes of Curcio and his building inspections?

A. That would be correct, yes.

Q. That's incorrect?

A. That is correct.

Q. So everything Curcio did, he just wasted his time?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Why did you not want to read Curcio's notes about the same complaints?

MR. KENDRIC: Objection. That wasn't the testimony.

THE COURT: Look, it's cross. I'm going to give him some latitude. I'll allow that.

Q. Mr. Gioia why didn't you read the prior notes on this complaint?

A. I was assigned the case.

Q. You were assigned an agenda to get him out of Hicksville?

MR. KENDRIC: Objection. Objection.

THE COURT: Sustained. Mr. Kutner, please.

Q. You didn't need to read the notes?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Mr. Gioia, you just said a professional investigator goes out, tries to get all the information and make a determination. Somebody had already investigated in November I believe it was four visits, November, December, January, March and March, is that right; Curcio had done at least four visits?

A. I don't know.

Q. You never saw any notes in the file about an inspection on November 20, 2007, sir, by Mr. Curcio?

A. I don't recall.

Q. How about on December 7, 2007?

A. By who?

Q. Mr. Curcio?

A. I don't recall.

Q. How about February 20, 2008?

THE COURT: By whom, Mr. Kutner?

MR. KUTNER: Mr. Curcio.

A. I don't recall.

Q. Regardless of who they are, I'll just give a date. How about April 28, 2008? Again, Mr. Curcio.

A. I don't remember.

Q. "I don't recall, I don't remember." You're here in support of the People's case to try to convict Mr. Thomas. Did you think it was not important to review the entire file before testifying, sir?

MR. KENDRIC: Objection.

THE COURT: I'll allow it.

Q. An answer, Mr. Gioia?

A. I reviewed whatever was in the file. Whatever I wrote.

Q. Presumably, if I got them they are in the file Mr. Kendric gave them to me, so you didn't see them?

A. I didn't see them, no.

Q. Well, you didn't look at them?

A. I don't remember viewing other inspector's reports.

Q. Why, are you afraid to find something that didn't agree with your conclusion?

MR. KENDRIC: Objection.

THE COURT: Sustained. Mr. Kutner, can we go on another subject now? I think you covered it, okay?

Q. You saw two meters and two door bells, did you

not?

A. Yes.

Q. And you took pictures upclose of the electrical meters and the electrical connections, did you not?

A. Relatively close, yes.

Q. You walked up to the front door -- you walked on the property and took pictures, and hid behind the bushes, did you not?

A. No, I did not.

MR. KUTNER: Could I have the original of Mr. Gioia's pictures, please?

MR. KENDRIC: Excuse me. Now we're getting into the area. I don't know if these are Gioia's pictures. There are not dated, Judge.

MR. KUTNER: Let me see them, and I'll identify them.

THE COURT: Let him look at it. Where are they?

MR. KENDRIC: What are we talking about?

MR. KUTNER: Mr. Gioia's pictures, that's the last thing I remember talking about, Mr. Kendric.

MR. KENDRIC: I'm listening to what the Judge is asking me, Mr. Kutner.

THE COURT: Mr. Kutner, let's do it this way. Let's fix the date first. What date are you

talking about?

MR. KUTNER: Whenever he took the pictures. I don't know, I wasn't there with him.

MR. KENDRIC: People's 1 in evidence are his photographs.

MR. KUTNER: I'm looking for the pictures that were shown to us that are not in evidence yet. Mr. Gioia's pictures that he took, part of the Rosario material.

MR. KENDRIC: For clarity of the record, the photographs are already in evidence as People's 1.

THE COURT: Why don't you show it to Mr. Kutner?

COURT OFFICER: Can I take People's 8 for identification?

MR. KUTNER: No, he is going to be needing them.

Q. Mr. Gioia, I'm going to show you this photograph which is the fifth last page of Exhibit 1. It's an angled shot of the northwest corner of the Thomas' home. Do you see that, sir?

A. Yes.

MR. KENDRIC: Can I see it?

MR. KUTNER: Yes.

MR. KENDRIC: There two different pictures,

Judge.

MR. KUTNER: Even I could tell that, Mr. Kendric.

MR. KENDRIC: The enlargement is different than the picture.

MR. KUTNER: Let me conduct my cross-examination, please.

MR. KENDRIC: Your Honor, why is he showing it to the jury, when it's not in evidence? Please.

MR. KUTNER: It is in evidence.

THE COURT: It is in evidence.

MR. KUTNER: You're wrong again.

THE COURT: It is in evidence. Everybody, please. Mr. Kutner, what is your question?

Q. Mr. Gioia, if you look at that picture in your Exhibit 1, do you see that, sir?

A. (No response.)

Q. Do you see that it's approximately taken standing on the lawn right in the position here where the tree used to be; you're standing right there when you took the picture over there, where the birch that used to be there?

A. I don't know exactly where I was standing.

Q. You were standing on the property though?

A. I see a tree here. I don't see a tree in your

picture.

Q. Take a look at the picture. You're standing on lawn taking that picture?

A. I don't know where I was standing.

Q. Look at that picture. Do you see any sidewalk in the picture?

A. No.

Q. Did you have a search warrant to go on this property?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. You walked onto the property to take the picture?

MR. KENDRIC: Again, objection.

Q. Didn't you walk on the property, Mr. Gioia?

MR. KUTNER: Don't look at him for the answer.

THE COURT: Mr. Kutner, please.

Q. What do you have to look at him for the answer, sir?

THE COURT: Mr. Kutner, please.

Do you know where you were located when you took that picture?

THE WITNESS: I don't remember where I was located when I took the picture.

Q. When you went to the property that day to do your investigation, why did you go there?

A. What day?

Q. On December 5th?

A. I'm an inspector with the Town of Oyster Bay. It is my job to do an inspection and to enforce the code, and that case was assigned to me. One of many cases that are assigned to me.

Q. Let's take it a piece at a time.

You get a complaint that's already been worked up. How did you get it, by paper, or by computer?

A. By paper.

Q. So someone gave you a file on "2007-1598"?

A. Someone assigned, yes.

Q. And who is the someone who gave it to you?

A. I don't remember exactly.

Q. Who was the boss of the code compliance section at that time?

A. Diana Aquiar.

MR. KUTNER: A-Q-U-I-A-R.

Q. And when she handed you the file, was there anything in it?

A. I don't know if she was the one who handed me the file.

Q. When you were handed the file by whomever that

was, was there anything in that file?

A. I don't remember.

Q. Was it empty?

A. No.

Q. It had something in it?

A. Yes.

Q. And presumably it had Curcio's reports, so why didn't you read them?

THE COURT: Mr. Kutner, we've already been over this, so let's go onto something else. I am not repeating this. Go onto a different subject, please. The jurors heard it already.

Q. The first thing you did is you went in the computer, did you not?

A. I don't remember.

Q. By the way, when you told the jury before that you reviewed some things before testifying, you didn't mention your deposition. Did you read that?

A. When?

Q. I'm sorry?

A. When?

Q. Did I ask you as to when you read it, or did I ask you if you read it, Mr. Gioia; could you please be direct with me, please?

A. Okay, I read it.

Q. Good. Since February 7th?

A. Yes.

Q. A couple of days ago, maybe?

A. I grazed through it.

Q. How many times did you read through it?

A. Maybe once.

Q. Maybe once. Could it had been twice, three times maybe?

A. No. I don't think twice.

Q. Maybe twice you read through it, and once you breezed through it?

A. No. Once I read it, and then I breezed through it.

Q. Did you make any notes while you were going through it?

A. I did not.

Q. Did you refer to any other papers as you were going through it, to check the accuracy of what you said back then?

A. I don't know.

Q. The first thing when you see -- when you get a complaint, would be I guess you would check town records to see what's in the records about this particular property?

A. The first thing we get is a request for an investigation form.

Q. No, Mr. Gioia, listen to my question, and answer only my question. Every time we repeat it we're just drawing out the time. I want to get to the end, please.

MR. KENDRIC: Your Honor, he is going over the same grounds even though he's been instructed by the court to move ahead.

THE COURT: Mr. Kutner, why don't you ask him the procedure he followed, okay?

Q. I didn't ask you when you first got the -- when you got the file, what was the first things that you did?

A. I don't remember.

Q. Well, did you go to the scene, or did you go on the computer?

A. I don't remember.

Q. Three hundred and eighty-eight times you said you don't remember in your deposition --

MR. KENDRIC: Objection, Judge.

A. It was 11 years ago.

THE COURT: Sustained.

Q. Was your memory back in 2012 better as to the events of this case, or worse than today?

A. I would assume they would be better.

Q. Now you see in exhibit A, Defendant's A when it referred to building permit 54, did you go look for that

permit?

A. I don't remember.

Q. You didn't even see this letter back in 2008, did you sir?

A. It's possible.

Q. And could you give the jury a reason why -- I'm not going to ask you about what Diana acquired.

Was there any reason expressed to you, told to you why --

MR. KUTNER: Withdrawn.

Q. Jim Jazwinski had done a previous investigation on this particular house in late 2006, just 18 months before you got the file, right?

A. I don't know.

Q. So you went in the computer, and you didn't see any information in the computer from Jim Jazwinski?

A. I don't remember.

Q. You don't know, you don't remember.

Did you refresh your memory before the trial as to what you remembered back then?

A. A little bit.

Q. And did your memory get refreshed that you saw that Jim Jazwinski had done a prior investigation literally months before Mr. and Mrs. Thomas bought this particular house, did you see that?

A. No.

Q. You don't remember, you don't recall, or the answer is "no"?

A. I said, "No."

Q. How many ways are there to resolve a complaint?

A. Many ways.

Q. If you get a complaint for an illegal two-family house, one of the first things you do, is you go knock on the door and introduce yourself, and tell the people you're going to investigate that complaint?

MR. KENDRIC: Objection to the form of the question. "Use" or "structure."

THE COURT: I'm going to allow it. Go ahead.

A. Repeat it?

MR. KUTNER: Could I have it read back, Judge?

THE COURT: You were asking about procedures about going and knocking on the door.

MR. KUTNER: Thank you.

Q. What's the first thing you do in your routine at that time, while you are a code compliance enforcement officer?

A. Sometimes I go out there do an inspection. Take a look at the house and document what I see first.

Q. Before you even go on the computer?

A. Yes, sometimes.

Q. Does that make sense to you, sir?

A. It can, yes.

Q. Suppose you were to go on the computer and it has it listed that Jim Jazwinski found that it was a legal two-family dwelling, then you wouldn't have to go to their house, right?

A. That's not what I would do.

Q. No?

A. No.

Q. You wouldn't do what?

A. Say that again? Sorry.

Q. If you look in the town's records and it shows that this is a legal two-family house, you won't have to go to that house, would you?

MR. KENDRIC: Your Honor, I'm objecting to the form of the question. He is introducing all sorts of things in his question, which is simply not true.

THE COURT: Sustained.

MR. KENDRIC: So in effect, he is asking a hypothetical.

THE COURT: Sustained. Sustained.

Q. If you investigated a complaint of an illegal two-family home and it turns out that that house is legal

with a C.O. on record, you don't have to go any further, do you?

A. Correct.

Q. Now the problem comes when it's a pre-existing nonconforming use, correct?

A. Correct.

Q. And there's no written record that would declare it to be a pre-existing nonconforming use?

A. There's no record of what?

Q. And there is no record that would say definitively "this is a pre-existing nonconforming use"?

THE COURT: Mr. Kutner --

MR. KUTNER: Let me withdraw.

Q. By definition a "pre-existing nonconforming use" doesn't have a written record, it pre-exists the statute?

A. It would pre-exist the May 25, 1946 statue.

Q. So when you get a complaint of an illegal two-family dwelling, if you went into the record and there was nothing about the house, then you would have to make sure that it's not a nonconforming use, true?

A. Please repeat that? Sorry.

Q. If one of the things you have to determine in examining whether or not the house is a pre-existing nonconforming use, is whether there's any record about that

in the town file?

A. Yes.

Q. If there's no record, then the next step you have is to determine if it's a pre-existing nonconforming, if it predates the statue?

A. Correct.

Q. And if the house was built after May 25, 1943 that would give you one clue that it's pre-existing nonconforming, would you agree?

A. Yes.

Q. If it was built in 1930, then it could be a pre-existing nonconforming use, agreed?

A. Yes.

Q. And if you saw that there was a building permit No. 54 issued in 1930 to build this house, that would be very critical evidence, would it not?

A. Yes.

Q. And yet you never looked for that, did you?

A. I never saw it.

Q. You never looked for it?

A. I did my research, yes.

Q. I didn't ask you that. You never looked for building permit No. 54?

A. I don't know what "building permit 54" is.

Q. So, if you don't know what it is, you never

looked for it?

MR. KENDRIC: Objection. I don't get what --

MR. KUTNER: By definition.

MR. KENDRIC: By whose definition?

THE COURT: Counsel, why don't you tell him what you are referring to, okay, Mr. Kutner?

Q. Again, you remember that you claim at one time that you had never seen this before you did your investigation?

A. Yes, I do.

Q. You remember saying that you hadn't seen that?

A. Yes.

Q. Now your investigation was in 2008. The first date that you had contact with this was June 2, 2008, right?

A. In 2008, yes.

Q. In Exhibit 1 up there, you don't have anything from before December 5th, do you?

A. I do have before December 5th. Exhibit 1 is different than the other exhibits.

Q. I'm sorry, I can't hear you.

A. In this cluster of my inspection reports, I do have inspection reports before December 5, 2008. I have "7/29/2008."

anything relating to the case. You may tell the people with whom you live and your employer that you are a juror, and give them information about when you will be required to be in court, but you may not talk with them or anyone else about anything else relating to the case. Do not at any time during the trial request, accept, agree to accept, or discuss with any person the receipt or acceptance of any payment or benefit in return for supplying any information concerning the trial. You must promptly report directly to the court, meaning me, any incident within your knowledge involving an attempt by any person to improperly influence any members of the jury. You are not to permit any party to discuss the case with you, or attempt to influence you. If anyone does, you are to immediately report it to the court, do not tell the jury. You are not to visit the site of the incident. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in this case. You must not use Internet Maps, Google Earth, or any other programs or device to search for, and view any location discussed in the testimony. You are not to read or listen to any comment regarding it in the media. Do not read, view, or listen to any discussions or

Q. You have "7/2/2008"?

A. I have "7/2/2008."

Q. And "6/2/2008"?

A. I have "6/2/2008," yeah.

Q. And at the time you got that, you didn't know that there was a prior investigation in 2006, did you?

A. That's correct.

MR. KUTNER: Judge, could we break there for today?

THE COURT: Yeah, I think so. See you tomorrow, sir. Watch yourself coming down. You are not to speak to anybody about your testimony, either your attorneys or anybody else, okay? You remain silent and keep it to yourself.

(Whereupon, the witness exits the courtroom.)

THE COURT: Okay, Mr. Kutner?

MR. KUTNER: Thank you, Judge.

THE COURT: I'm just going to read you what I have to read you and then you are on your way, see you tomorrow at 2:00, we'll continue the cross of this witness, okay?

You are not to discuss this case among yourselves or with anybody else. Do not converse either among yourselves or with anyone else about

accounts of the case reported by newspaper, television, radio, the Internet, or any other news media. Your decision must be based solely on the testimony, and other evidence presented in this courtroom. Do not attempt to research any fact, issue, or law, relating to the case, whether by discussion by others, by research in the library or on the Internet, or other means or source. In this day and age of instant electronic communication and research, I wants to emphasize that in addition to not conversing fact-to-face with anyone about the case, you must not communicate with anybody about the case by other means including telephone, text messages, email, Internet chat, chat rooms, blogs or social websites, such as Facebook and Twitter. You must also not Google or otherwise search for any information about the case or the law which applies to this case, or the people involved in this case, including the defendant, the witnesses, the lawyers, or the Judge. You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in this case, or on any device or Internet site, including blogs, chat rooms, social media websites, and any other means. You're to keep an open mind

until all the evidence has been presented and you're charged as to the law. Again, you're bound by these rules of conduct.

Any questions?

(No response from the jury members.)

THE COURT: Okay, everybody. I'll see you tomorrow.

(Whereupon, the jury members exit the courtroom.)

THE CLERK: All rise. Is there anything else for the record before we break today?

MR. KENDRIC: Yes, there is. I know we spoke about the witness. I know we spoke about the defendant's intended witness, Raymond Guckenberger in the context of whether or not you will allow his deposition testimony to be read in lieu of his appearing live here in this courtroom.

Your Honor, the People move to preclude Raymond Guckenberger altogether. I have a memorandum, I have a copy. I'm handing it to Mr. Kutner and handing one to the court. In a word Mr. Guckenberger's testimony is unreliable, and we're asking the court to exercises its gatekeeper function to prevent this case from spiraling any further.

THE COURT: Mr. Kendric, I thought that Mr.

Kutner indicated that there is a possibility that this gentleman may come here next week testifying depending on the medical issue involved.

MR. KENDRIC: Yes, I heard that.

THE COURT: I'm not making any ruling on it.

MR. KENDRIC: I'm not asking you to. I'm handing up my memorandum so you can have my information and a read it at your leisure, I'm not asking for a decision, but that is my motion to preclude his testimony altogether.

MR. KUTNER: He is trying to preclude his live testimony I believe.

THE COURT: No, his live testimony?

MR. KENDRIC: His live testimony.

THE COURT: I apologize I thought you meant his deposition testimony?

MR. KENDRIC: Let me be clear. Up to this point in time, we've been talking about Guckenberger's deposition testimony. And what I'm saying now is, that memorandum that I handed up, your Honor, goes specifically to our argument to preclusion from testifying at all, and the reasons are set forth. However, just to summarize his testimony on the issue of a pre-existing nonconforming use, is entirely unreliable, and I'm asking the court to exercises its

gatekeeper function.

THE COURT: How do I make a ruling, if this gentleman walks in here and can start testifying to certain facts in the case, how do I preclude that?

MR. KENDRIC: He can't. He can't reliably testify to them. And that's set forth in the --

THE COURT: You know what, I'm not making any ruling on it now. It's 4:30 and this is much more important of an issue and, we frankly got to get through your witness first and then we got to start dealing with the defendant's case, so I'm not making any ruling on it now. That's it for the day.

Anything else?

MR. KENDRIC: No, sir.

MR. KUTNER: No, sir.

(Whereupon, the proceedings concluded.)

* * *

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District

THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

-against-

DARREN E. THOMAS,

Defendant.

March 27, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T

Darren E. Thomas - Defendant

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record docket 22F/09, the People of State of New York versus Darren E. Thomas. Appearances for the record please.

MR. KENDRIC: Christopher Kendric from the Kendric Law Group, P.C., attorney for the People.

MR. ROZEA: With Mr. Kendric for the People Matthew Rozea Deputy Town Attorney.

MR. KUTNER: For the defense, Harry Kutner, K-U-T-N-E-R, Mineola, New York and Sheryl Channer who just stepped out for a moment and Mr. Thomas.

THE CLERK: Any housekeeping matters?

MR. KENDRIC: Nothing.

MR. KUTNER: Judge, if I could just have two items from the County Clerk marked for identification shown to Mr. Kendric and I'm going to offer them -- mark them and offer them simultaneously. First is a deed. First is a deed dated February 17, 1944, a copy, which including the certification from the County Clerk is being handed to Mr. Kendric and that's the original deed September 2nd 1969 again certified by County of Clerk.

THE CLERK: This is S and this will be T.

MR. KUTNER: The last one I'm asking to be marked Exhibit U which is a deed dated October 15th, 1973.

THE COURT: Mr. Kutner, you're putting four deeds into evidence?

MR. KUTNER: Three. Three additional deeds

MR. KENDRIC: I'm objecting.

THE COURT: You're objecting.

MR. KENDRIC: This doesn't have to do with the Thomas property but with other property so the objection is on relevance.

THE COURT: We'll have to deal with each one he is objecting. He says it is not involving the Thomas property.

MR. KUTNER: They're the adjoining properties and the reason for the People's objection is because they would corroborate the next door neighbors would be testifying as to the exact date they moved into the property.

THE COURT: So it's relevance in terms of people not testifying.

MR. KUTNER: Yes, yes, sir.

THE COURT: They're in evidence. So Mr. Kutner, they're three deeds you're putting in?

MR. KUTNER: Yes, sir.

THE COURT: You want to just read it into the record the dates and names on the deeds.

MR. KUTNER: Fine. The first one your Honor which is S in Evidence now is a deed dated February 17th, 1944 from a family named - I can't make out the first two names Kiesleng, K-I-E-S-L-E-N-G, to Anna Guckenberger and her

husband who's name the first name I can't make out because it's a negative for the date. Then the one from 1969 which is Exhibit T, dated September 22, 1969, is from Anna Guckenberger as surviving tenant by the entirety to her and husband to her son Raymond Guckenberger, the gentleman who's going to the hospital tomorrow and we're dealing on a separate issue. The third one is a deed dated October 15, 1973 from Gerard and Anne Austin to James and Deloris Colwell, C-O-L-W-E-L-L.

THE COURT: So all three are in evidence. Any other housekeeping matters before we call in the jury?

MR. KUTNER: No, sir.

MR. KENDRIC: No.

THE COURT: Mr. Kutner you are continuing with your cross examination?

MR. KUTNER: Yes.

THE COURT: Could you call them in.

MR. KUTNER: I'm just thinking we are going to need our defense witness Friday if I can get some idea from the People so we don't make the jury wait. I'm just trying to figure out scheduling.

THE COURT: Gentleman come on up. Before we bring in the jury. Off the record.

(WHEREUPON, A DISCUSSION TOOK PLACE WHICH WAS HELD OFF THE RECORD.)

THE CLERK: Good afternoon, Mr. Gioia. Please be reminded you are still under oath.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Everybody can sit. Members of the jury, I just want to give you a little bit of a timeframe work. We were discussing this case and doing a lot of evidentiary issues trying to move things along. So Mr. Kutner is going to continue his cross examination from what I understand the People may not have any other witnesses for their case. From what I understand, maybe tomorrow the defense will start their case. Hopefully, some time next week, I don't know exactly what day we'll have the testimony finished and then we will have the charge to the jury on the law so you should get the case next week. What day? I'm not sure whether it will be Tuesday, Wednesday, Thursday but that's the timeframe. Everybody is trying to move this along because they're very sensitive to your schedule. We know you are very busy people have a lot of responsibilities other than being here so we are just letting you know that we are trying to work to present a fair and partial case for both sides but also to let you know we are very much aware of your time

elements and your requirements. Any questions or anything? Great. Mr. Kutner you can start.

CONTINUED CROSS EXAMINATION

BY MR. KUTNER:

Q. Mr. Gioia, let me start by showing you Plaintiff's Exhibit number --

MR. KUTNER: I ask that be marked as Defendant's V please as in Vincent.

THE CLERK: It was marked as R.

MR. KUTNER: Right. Okay. If you could just show that to the witness, please.

Q. Mr. Gioia, after you're finished looking at that please indicate to me if you would.

A. Yes.

Q. You remember that particular document?

A. Yes.

Q. And that's one of the Nassau County Board of Assessor's card, sir?

A. I believe that is the Town of Oyster Bay's.

Q. That's your handwriting?

A. Nassau County tax Assessor office.

Q. Mr. Gioia, I know it's not the way people speak out on the street, if you could just wait until I finish my question so the reporter can take it down. The question sometimes you know where they're going just wait until I finish them. All right.

The hand printing on the typewritten and the form is your hand printing, is that right?

A. Yes.

Q. And you acquire that particular card and the information back before the charges were filed against Mr. Thomas, correct?

A. I believe so.

Q. Now, when we have a break, I'm going to ask of certain redaction of some hearsay matters other than that I will offer it at this time subject to redaction?

THE COURT: I'll deal with that at the break.

MR. KENDRIC: Your Honor, the People haven't seen this yet.

THE COURT: I'm not dealing with it right now.

Q. Let me ask you questions. According to -- if I were to tell you that is definitely Nassau County Board of Assessor card would you accept that just for the purpose of our questioning?

A. Yes.

Q. You believe it is from the Town but it's actually from the County Board Assessor?

A. No, I believe that's from Nassau County Tax Assessor office, that's what I believe.

Q. Now before you looked at that charge and bring the charges against Mr. Thomas, you see what's labeled on the card

as to the information right at the top?

THE COURT: You want to look at it, counsel?

MR. KENDRIC: Yes, please.

THE COURT: Mr. Kutner let me ask you this question, do you need to try to get this into evidence before you question him?

MR. KUTNER: If there is going to be objections to referring to a document that's not in evidence, then yes, if there is no objection then I'm going about the information.

THE COURT: Mr. Kendric?

MR. KENDRIC: I'll hold off on the objection.

THE COURT: Do you want a ruling on it now? Do you want a ruling and move this along because he is going to ask questions about this document.

MR. KUTNER: Judge, can I have one moment with Ms. Channer, please? Judge, I'll offer it un-redacted.

MR. KENDRIC: No objection.

THE COURT: The document is in Evidence as R, correct?

MR. KUTNER: Yes, sir.

THE COURT: Could we publish it to the jury.

MR. KUTNER: I was going to say after some preliminary questions so they know what to look at.

Q. Up on the top year, it mentions the tax roll year,

R-O-L-L, you see that on the top left?

A. Yes.

Q. That's 2009, 2010. That comes out a year early so that would had been obtained by you some time to mid to late 2008, true?

MR. KENDRIC: Objection to the form of the question. He's including information within the question that may or may not be accurate.

MR. KUTNER: Then he cannot agree with me.

THE COURT: Why don't you ask what year it comes out.

Q. The tax year is 2009, 2010, specified on the document, right?

A. Yes.

Q. Isn't it true that count is issued by the county Board of Assessors six months before in the 2008 calender year?

A. Yeah, I don't know.

Q. In any event, right next to land title, on the top right, you see where it says two-family year dash round residence?

A. Yes.

Q. Yesterday you testified that the house was listed on the tax rolls as a one family house, that was in accurate, wasn't it?

A. No.

Q. No. Okay. Just down to the left, one line down or two lines down, it says "property class code" that's on the form and typed in is 220.01, true?

A. Yes.

Q. The next line down from there, item number 13, and it says under land description, that's part of the form, a two family dwelling constructed to accommodate a year round occupancy include duplex single owner, correct? Did I read that correctly?

A. Yes.

Q. Now in the information, the particular information that the assessor used about six, seven, eight lines down in the left-hand column, it lists a category, living units, you see that, sir?

A. Yes.

Q. What number is next to that?

A. Number 2.

Q. In the right hand column the third item down is full bathrooms, next to that what number is typed in on the right hand column third from the top?

A. Two.

Q. Now, down in the year built is 1926, correct?

A. Yes.

Q. And presumably that was your pen or pencil circling 1926, true?

A. Yes.

Q. Because the significance of that is it predates the code and it could be a non-conforming use, correct?

A. Can you rephrase the question?

Q. Sure. Out of all the material in the form above, you didn't circle two-family year round residence, did you, sir?

A. No.

Q. You didn't circle 220.01, did you?

A. No.

Q. Nor did you circle a two-family dwelling duplex, you didn't circle any part of that?

A. No, I did not.

Q. There were no other living units or as to full bathrooms two you didn't circle neither one of them?

A. No, I did not.

Q. And you did circle, only one item, and that's year built 1926. That's because it has relevance to whether or not this is a non-conforming pre-existing use, yes or no?

A. I don't know why I circled 1926.

Q. Now, it's true, correct, after looking at that, you did no additional research to determine what the basis was for their listing this as a two-family use?

A. Could you repeat that? Could you rephrase that question, please?

Q. After you saw Exhibit R, you didn't do any research to

track down and find out what the basis was for their information that this was a legal two-family dwelling, did you?

A. I've done all the research to determine what the building is zoned as and whether it was a one or two family house. I have done all the research, that's the answer to the question.

Q. Nowhere in your notes is there a listing of the date the exact date where you accumulate or acquired Exhibit R?

A. That's Exhibit R?

Q. Yes.

A. No.

Q. Down at the bottom in your hand printing it says returnable February 9th. So we know it's after you drafted the charges on December 8th but before February 9th, fair to say?

A. Yes.

Q. The certificate of occupancy that you note in your printing in the lower left, A11417, that had to do with the garage in 1986, did it not?

A. It does.

Q. As a matter of fact there had been no additions alteration anything that you could find in the town records to the actual house itself, since it was built in 1926, correct?

A. Other than the double car garage you're speaking of, that would be correct, yes.

Q. The garage is detached, correct?

A. Yes.

Q. So the house building structure, itself, there were no alteration, demolition no changes in that house when it was built as far as the records that you found, is that right?

A. Yes.

Q. There were two -- withdrawn.

Let's set the scene if we could, Mr. Gioia. 121 4th Street is the first house in from Jerusalem Avenue, which is the four lane kind of a major north/south road runs from Hicksville down to Levittown, true?

A. I believe so.

Q. It crosses Hempstead Turnpike and keeps on going and Ts at Jerusalem Avenue down in North Bellmore?

A. Say that again.

Q. Jerusalem Avenue is a north/south road first, right?

A. Yes.

Q. It ends on the north end in Hicksville, just north of Old Country Road?

A. Yes.

Q. And it goes all the way south and T intersects ends at Jerusalem Avenue I believe in North Bellmore, right?

A. I don't know.

Q. In any event 4th Street intersects Jerusalem Avenue?

A. Yes.

Q. It's an east/west street?

A. Yes.

Q. On the corner is a house owned by a Mr. Colwell, C-O-L-W-E-L-L for the record, right?

A. I don't know.

Q. He is the gentleman you spoke to at one point?

A. Yes, I spoke to a gentleman, a neighbor, yes, to the right.

Q. His house has an address, because it faces on Jerusalem Avenue, 235 Jerusalem Avenue, true?

A. I believe that's the house to the right of where the dwelling is.

Q. And when you met him -- he's an elderly gentleman, is he not?

A. Pretty elderly.

Q. Now that's to the west of Mr. Thomas and Mr. and Mrs. Thomas' house, correct?

A. Yes.

Q. And Mr. Thomas' house is the first one abutting Mr. Colwell's house?

A. I believe so.

Q. Now the next side just east again, on the other side of the Thomas' property is the house owned by a Mr. Guckenberger?

A. I have no knowledge of who that is.

Q. Now, you had this information from the Nassau County

Board of Assessors where it was listed as a two-family, and you're trying to make a determination you claim professionally and without any bias, true? This investigation you're conducting?

A. Yes.

Q. A detective -- wouldn't you say maybe the two adjoining neighbors may have some relevant information that they can impart and relay to you about the status of that particular house, would that be fair to say?

A. Can you rephrase the question, please.

Q. Sure. Wouldn't the next door neighbors people do look out their blinds, and people know other people's business to a certain extent, wouldn't you go knock on their door and say hey, you know, was this house converting to a two-family recently, did you do that?

MR. KENDRIC: Objection to the form of the question.

THE COURT: No, I'm going to allow it. Go ahead.

A. What I remember was speaking to the neighbor himself actually. That's what I remember.

Q. Do you remember if it was the neighbor on the corner or the neighbor on the other side?

A. On the corner on the left side.

Q. Just for the sake so we don't have to identify him by location every time we can say Mr. Colwell. If you would accept

that was Mr. Colwell, still is Mr. Colwell's house, okay?

A. Yes.

Q. By the way, did you go to the county clerk and pull the deed? You know what pulling a deed is? Did you ever heard that term?

A. Yes, of course.

Q. Did you ever pull the deed of Mr. Colwell's house to find out when he bought his house?

A. No.

Q. Would it surprise you you have no knowledge of it at all?

A. Of what?

Q. Of Mr. Colwell when he first moved in?

A. No.

Q. If you had pulled the deed and found out that he moved in 1973, would that have piqued your interest as to what he might had been able to tell you as to when this house - if it ever did change or was it always a two-family?

A. The conversation I had with Mr. Colwell --

Q. I'm not asking you that question. I'm asking you just before you even took a step to do anything on this investigation you already told us you didn't even look at Cursio's notes, so you are already doing this from scratch. For whatever reason you're doing it from - whoever charged you with doing it?

A. That's not true.

Q. You get the investigation, you don't look at Cursio's notes you see that he's charged with and illegal or the complaint is an illegal two-family, right?

A. I'm sorry, say that again?

Q. The complaint was that this house was being run illegally as a two-family?

A. The complaint that I received, is that what you are talking about?

Q. Yes. 2007-1598, right?

A. There was a request of investigation for me, okay that's what I go by.

Q. And that was the nature of the complaint, an illegal two-family house?

A. Yes.

Q. So I'm just wondering, this whole cross examination is going to be directed to whether or not you had a prejudged determination as to where you were going to go with this or you were independently, unbiasedly looking and trying to find out the truth. That's all I want to do on this cross, agreed?

A. Okay.

Q. That's where I'm going. No secret about it, okay?

A. Yes.

Q. Now I'm asking you, if you didn't have an agenda, you didn't have a preset finish line as to where you wanted to go, you would not just take this professionally wherever it led and

solve the problem. Why didn't you pull the deed of Mr. Colwell, find out if he was there in '73 and go over and ask him what do you know how long has this house been a two-family?

A. That is something that we would not normally do that. That is not the procedure.

Q. So you are going to charge somebody with a crime without going through a procedure?

MR. KENDRIC: Objection, your Honor.

THE COURT: Sustained.

Q. How about the house on the other side? Did you ever pull the deed from Mr. Guckenberger's house?

A. No.

Q. Did you ever learn that Mr. Guckenberger bought their house in 1944?

A. No.

Q. Do you think it might have been a relevant piece of information to talk to Mr. Guckenberger and find out what he knew about this house being a two-family and for how long? Do you think that would have been important to your investigation if you didn't have a preset conclusion to reach?

A. Well, I didn't have a preset conclusion to reach?

Q. Well why didn't you pull the two deeds, sir?

A. I didn't pull the two deeds.

Q. Exactly. That's what we are trying to find out.

A. So can you rephrase the question for me then, please.

Q. If you had learned that Mr. Guckenberger's family had lived there since 1944, don't you think he might had some relevant information to be able to give you regarding the status of a two-family house?

MR. KENDRIC: Objection, Judge. I'm going to --

THE COURT: Sustained.

MR. KENDRIC: Could we have a sidebar?

THE COURT: Yes. Off the record.

(WHEREUPON, A DISCUSSION TOOK PLACE WHICH WAS HELD OFF THE RECORD.)

THE COURT: Mr. Kendric, you're up.

MR. KENDRIC: Thank you very much, Judge. I understand your Honor I do, that because it's cross examination certain amount of latitude needs to be afforded to defense counsel. At the same time, question after question after question in terms of why didn't you get into the tax assessor's office? Why didn't you pull the deed and so forth? The subject matter, itself, is not probative or material to the defense which is a pre-existing non-conforming use.

Mr. Thomas was charged because the plain visual evidence supported a rebuttable presumption that a house which we know for fact was situated in a one-family zone was being used. This is a rebuttable presumption that it was being used as a two-family dwelling. We could go on

all day and if the Court wants to maybe we should, but I'm making my argument for the record. I feel that in view of the fact that we are going to start losing jurors pretty soon now, this is all a big waste of time.

MS. CHANNER: Your Honor as part of Mr. Gioia's testimony when he was directed by counsel, he said he does a thorough investigation before he filed charges. That was when he described his job and how he does that job. Part of doing a thorough investigation if you don't have a preconceived determination of where you want your investigation to go you make sure you dot all your I's and dot all your T's. And part of that is to check since the building was built in 1926 before the cold, whether or not this property falls on the pre-existing non-conforming use.

MR. KENDRIC: Judge, Ms. Channer misremembers what I asked during my direct examination. I certainly never asked Mr. Gioia did you conduct a thorough inspection or a thorough investigation.

THE COURT: I don't remember that.

MS. CHANNER: No, Judge, he didn't ask that question, he's correct, you did not. It's the way he answered that question regarding his job and how he investigate.

MR. KUTNER: And the beginning of my cross I asked Mr. Gioia if he considered his investigation professional,

thorough and unbiased and he said yes. And I'm entitled to go into how unbiased and thorough he was.

THE COURT: I'm giving you latitude. I'm just going to suggest you keep going over and over you are going to lose the jury.

MR. KUTNER: I appreciate Mr. Kendric's heartfelt concern for the jury possibly turning on the defense --

THE COURT: I'm not questioning that. I'm suggesting that you just asked him what he did and didn't do and just move on, they got it. I've got it. And you need to move on.

MR. KUTNER: They are not as smart as you are.

THE COURT: They're smart but you don't want to lose them. That's all.

THE CLERK: Back on the record.

THE COURT: Mr. Kutner, I would ask you to try to move this along.

MR. KUTNER: Sure. May I have People's Exhibit 1, please?

Q. At some point you spoke to Mr. Colwell, did you not, sir?

A. Yes.

Q. And you spoke to Mr. Colwell before you filed the charges?

A. Yes.

Q. And Mr. Colwell told you that the two-family house existed for more than thirty years ago, correct?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Where did you meet Mr. Colwell?

A. Outside the premises, I believe in front of his house.

Q. It was a chance meeting was it not?

A. Yes.

Q. You didn't call and set up an appointment with him to try to learn what he knew about the two-family status of this house, true?

A. That is correct.

Q. At the time you were doing this investigation you kept a memo book you would jot down notes about the investigation, correct?

A. I don't recall.

Q. And isn't it a fact that you did keep a memo book and that you destroyed it after you transcribed your notes?

A. I don't believe so.

MR. KUTNER: I'm calling the Court's attention to page 85, 7 through 11.

MR. KENDRIC: One second please.

MR. KUTNER: It would be followed by 86.

THE COURT: Page 85 what?

MR. KUTNER: Seven through 11 first, your Honor.

THE COURT: So the jury knows - I just want to let the jury know, there was a prior deposition of this witness back on October 10, 2012 where Mr. Kutner asked questions of this particular witness. So Mr. Kutner is going to use what's called a transcript of that testimony in terms of cross examining this witness, okay? Do you understand? Go ahead, Mr. Kutner.

MR. KUTNER: Question -- and this again starts on line 7.

"QUESTION: What was it then if it wasn't a standard practice?

ANSWER: Sometimes I write notes to myself in my memo book what the complaint is and go and investigate."

MR. KUTNER: Now skipping down to page 86 line 24 to 87, 3:

"QUESTION: Where is the memo book, sir? You just testified under oath you put notes in a memo book, where is it?

ANSWER: Different pieces of paper."

MR. KUTNER: Now skipping down to line 22 on that same page:

"QUESTION: Do you have them still, sir?

ANSWER: No.

QUESTION: What did you do with them when they fill up?

ANSWER: Throw them out.

QUESTION: You throw out memos from work where you make entries in this memo book?

ANSWER: We're talking notes, note pad.

QUESTION: You throw them out?

ANSWER: Yes."

MR. KUTNER: Do you recall being asked those questions under oath at that time and giving those answers under oath at that time?

A. Yes.

Q. And they were true when you gave them in 2012, correct?

A. Yes.

Q. It's unusual for a complaint assigned to one inspector to be reassigned to another one, is it true?

A. I'm not so sure I use the word "unusual" that's what I would say to you. But not often.

Q. And is it the practice of the Code Compliance Bureau that if a complaint is assigned to one officer one inspector, usually it stays with that officer?

A. Things have changed overtime, so things have change over the times.

Q. I'm asking back in 2008 when you were doing this investigation?

A. Yeah, I don't remember exactly.

Q. Do you remember what you answered on this?
A. You would have to tell me.
Q. Before we go into it, do you remember that the usual practice was that the complaints stays with one inspector until it was closed out, yes or no?
A. I can't say, I can tell you that's pretty much the policy now I don't know if it was a policy but.
Q. The complaint in 2006 on this particular house was with James Jazwinski, correct?
A. I know I wasn't the only inspector on the house. I wasn't the first inspector that inspected the house. I know that James Jazwinski did an inspection at the house, yes.
Q. In 2006?
A. I don't know what year it was but I know it was before I went there.
Q. You and Jazwinski started just about the same time and went to the code school at the same time?
A. That's correct.
Q. Just about the same seniority?
A. Yes.
Q. And Jazwinski had a prior complaint about this particular house that he investigated from start to finish, correct?
A. I don't know if it was from start to finish but I do know there was a prior request for an investigation form that he

investigated.

Q. That's the one that you said you never read before filing the criminal charges in this case, true?

A. I don't recall. I don't believe I read that before, I don't remember.

Q. Before you filed the charges, what type of research did you do, sir?

A. Research the section and block and lot files with the Zone Department with the Town of Oyster Bay. Shall I continue?

Q. You said you accessed the computer?

A. I took a look at that as well.

Q. I'm sorry?

A. I researched this as well. That's also part of the tax records on the computer with the Town of Oyster Bay as well.

Q. Mr. Gioia you were referring to Exhibit R?

A. Yes.

Q. If you don't say that the record is not clear.

A. Right.

Q. Did you ever contact any - either of the owners by phone, just call up, either Guckenberger or Colwell and say I'd like to talk to you about the house?

A. No, I did not.

Q. Now, when you were first given the complaint, it was taken from Cursio and given to you, right?

A. I don't remember.

Q. You know that Cursio is on this particular complaint before you, right?

A. I'm not sure about that.

Q. When you went to -- your case is built upon your visual inspection of the property after the complaint was filed about an illegal two-family dwelling, correct?

A. Yes.

Q. And you went to the property and saw that there were two meters and two door bells, right?

A. Yes.

Q. And at that point you believed that's it, that's the case, right?

A. No.

Q. And what other evidence did you seek that told you that this house was not always a two family? Name anything.

A. The Nassau County Tax Assessor's Office there's old records in there that I haven't seen yet.

Q. You didn't even see the 1968 letter. You didn't delve that deep in your research that you came up with a letter from your own building department head in '68, did you?

A. I don't know what letter you're talking about.

Q. Exhibit A?

A. Could I see it close, please. Okay.

Q. Your investigation was so deep and thorough you didn't even come up with that letter, did you, sir?

A. I saw that letter on the computer the other day, when I was researching.

Q. Back in 2008 when you were doing this exhaustive investigation you didn't even find that letter?

A. I don't know if I found that letter or not.

Q. Are you aware that the letter was in the computer back then?

A. I don't believe it was.

Q. That's where James Jazwinski found it in 2006 a year before yours?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. What if we were told Mr. Esposito, now the Chief Code Bureau, is in the computer and still in the computer right now?

MR. KENDRIC: Objection to the question.

THE COURT: Sustained the question.

Q. As a code compliance officer, I think the title says what you are supposed to do; you are supposed to enforce the town building code, true?

A. And New York State Building code as well.

MR. KUTNER: May I have these two marked? May I have them marked V-1 and 2, Judge?

THE COURT OFFICER: V-1 and V-2.

THE COURT: After you mark them as an exhibit show it to co-counsel the People.

MR. KENDRIC: Approach, please?

THE COURT: Mr. Kutner?

(WHEREUPON, A DISCUSSION TOOK PLACE WHICH WAS HELD OFF THE RECORD.)

Q. You're trained to spot violation of the town code, are you not?

A. Yes.

Q. And when you were there without an agenda now against Mr. Thomas, you were there on the block on 4th Street on six occasions? Before the charges were found five occasions before the charges were filed?

A. Seems accurate.

Q. And did you always turn onto the block from Jerusalem or did you come from the east side at some point?

A. I don't recall.

Q. Being at the Thomas house, you said what brought your attention besides the complaint is the multiple meters, that's the first thing?

A. I don't remember saying that.

Q. Okay. Well would that be a fair assumption to make the biggest thing to see are the two meters are the easiest things to spot?

A. Wait, you are talking about the Thomas house?

Q. Mr. and Mrs. Thomas?

A. Yes.

Q. And how about the house next door with three meters?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained, Mr. Kutner. Sustained.

Q. Mr. Gioia, your credibility is at issue here. There are eight other houses on that block with multiple --

MR. KENDRIC: Objection.

Q. -- did you charge --

THE COURT: Sustained. No more. I told you that. Go on to something else right now.

MR. KUTNER: Judge, this is an issue of credibility.

THE COURT: Good. Sir, go on to something else right now.

MR. KUTNER: The Court is antagonist --

THE COURT: Mr. Kutner, I told you up here, no. I don't want to hear about it, let's go.

MR. KUTNER: I'm not offering it in evidence, I'm just questioning the witness.

THE COURT: Right, and I sustained it.

Q. Your credibility, sir, is at issue here as to whether you had an agenda to drive him out of town or not.

MR. KENDRIC: Objection.

THE COURT: Sustained, Mr. Kutner. Let's go on the next topic.

Q. You didn't have your eyes focused only on that house?

THE COURT: Mr. Kutner, let's go. Next topic.

Q. One of the members in the audience noticed the other day Mr. Gioia when you testified at the end of the day that when you drove onto the block, did you have your up looking in the surrounding areas?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Now, are you insisting, sir, that you never looked at James Jazwinski's prior case, are you sure of that?

A. I don't recall whether or not.

Q. I didn't ask you if you recall. This is important to Mr. and Mrs. Thomas. I need to find out if you looked at the case because of findings that Jazwinski made. Did you look at that file before you filed criminal charges, yes or no?

A. I don't remember.

Q. You don't think it's important to remember?

A. I don't remember.

Q. You don't remember because of the findings of Jazwinski, is that right? You don't want to admit to.

MR. KENDRIC: Objection, Judge.

MR. KUTNER: Can we have this marked for identification as Defendant's W, please?

THE COURT OFFICER: So marked.

Q. Before we show him that, referring to A one more time Mr. Gioia, would you have filed a prosecution against Mr. and

Mrs. Thomas if you had seen the 1968 letter?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Mr. Gioia, after seeing that letter, is your conclusions changed about the pre-existing non-conforming use?

A. No.

Q. It doesn't give you even a little doubt? Forget about reasonable doubt maybe a little more?

MR. KENDRIC: Objection to form.

THE COURT: Sustained.

Q. Is the reason is not changing your mind is because you were told to prosecute him?

MR. ROZEA: Objection.

THE COURT: Sustained.

MR. KUTNER: Now, if you could show him W, please Officer?

Q. Can you identify that document, sir?

A. Yes.

Q. It's an enlargement of what?

A. My receipt for the summons that was certified mail.

Q. And who was that certified mail sent to?

A. Darren Thomas.

Q. And who told you certified mail instead of serving this man with a summons?

A. I don't recall.

Q. That was the cover sheet, forget about the receipts the certified mail receipts, the background the form itself, that was the cover sheet for this investigation was it not?

A. Yes.

Q. Filled out with your handwriting?

A. Yes.

Q. Not by Cursio's handwriting?

A. No, that's my handwriting.

MR. KUTNER: I offer this in Evidence at this time?

MR. KENDRIC: Relevance?

THE COURT: Overruled. It's in Evidence.

Q. Mr. Gioia, if I could publish this to the jury first and then I'm going to publish again later on.

Now, Mr. Gioia, I want to show you something. You printed all of this in, correct?

A. Yes.

Q. And one of the key points that I have been just asking you about is if you just read the prior investigation by Jim Jazwinski, true?

A. Yes.

Q. And the fact that Jim Jazwinski had made a finding that the two family house was not illegal as a pre-existing non-conforming use, true?

A. I don't remember what Mr. Jim Jazwinski --

Q. You didn't see it according to your testimony now. I'm just going to explore the credibility of your testimony, okay? You see a line here that says previous cases? You see where you whited-out something? I wonder was that the 2006 Jazwinski investigation? Are you calling for him to object?

A. No, I'm calling for you to see it.

MR. KENDRIC: Objection.

A. You said something about whited-out.

Q. You see up here on the third line where you whited-out.

THE COURT: People in the audience there are no talking during this trial, at all.

A. What am I looking at?

Q. Previous cases.

A. Okay.

Q. You don't see where the line was whited-out?

THE COURT: Let him see it.

What's your question about the third line.

Q. You see the line the material that was whited-out it was done sloppy you hit the line?

A. I don't recall whiting out anything.

Q. It would just be a coincidence then you claim to have not read Mr. Jazwinski 2006 case and that particular line happens to appear to be whited-out, is that right?

A. I don't remember whether or not I read Jazwinski's

notes or not.

Q. I didn't ask you that. Did you write it in there and then white out the fact that Jazwinski's investigation -- did you write in 2006-1598 memo - 1458 I mean?

A. No.

MR. KUTNER: May I now show it to the jury?

Q. In your handwriting in the name of the owner contact information you have Marlene and Darren, do you not?

A. Yes.

Q. I'm sorry?

A. Yes.

Q. And the date that the entries the material the information that you wrote on there was put in on October 24, 2007, date entered, you see that on the fourth line?

A. No, it was not.

Q. No. There was a cover sheet done case information sheet done, you're telling us that wasn't the first thing you did when you got the case?

A. That's not my handwriting that's from the office. They write that in there.

Q. But this was written out before you filed criminal charges, was it not?

A. I'm sorry what was written out?

Q. That. Exhibit W.

A. Yes.

Q. So your testimony you only charged Darren you didn't charge Marlene?

A. That's correct.

Q. Why? What's the different between the two of them besides man and woman, obviously? What possible difference are there between the two of them?

MR. KENDRIC: Objection. Excuse me. Your Honor, I'd like to object and I'll like to be heard.

MR. KUTNER: Judge, I'll withdraw the question.

THE COURT: I think we should just move on, please.

Q. At one point you have sworn that the reason that you named Darren is because the tax records of the town only contain Darren's, name is that true?

A. I remember testifying that way, I remember in the deposition I believe.

Q. But in this case, right on your own scratch sheet or case information sheet you have names, Darren and Marlene?

A. That's correct.

Q. So before you filed the charges even if the taxes only had one name you already knew there were two owners?

A. I did know.

Q. You didn't even pull the deed to find out who the owners was of that house?

A. I don't remember.

Q. Did you ever see the deed?
A. I don't remember.
Q. Would you agree that the deed, you have been told the deed are in both names do you have any reason to dispute that?
A. I would believe that if you say.
Q. Now another possible source of relevant information to determine whether this house was or was not non-conforming was the SBL file the section block and lot?
MR. KENDRIC: I'm going to object to the form of the question "non-conforming use."
MR. KUTNER: Non-conforming use. That's what we're here for. That's the only issue.
Q. If I forget the word "use", would you understand Mr. Gioia, that is the only reason why we are here?
MR. KENDRIC: I'm looking out for the record, your Honor.
Q. There are other sources of information besides the letter one of them would be the SBL file, right?
A. Yes.
Q. Could you show me anywhere --
THE COURT: Mr. Kutner, you want for the jury, so they know what SBL is.
MR. KUTNER: Section block and lot.
Q. You understood section block and lot file?
A. Yes.

Q. That's a file kept in the town records?

A. Correct.

Q. And could you show us anywhere in your notes where you referenced and listed where you looked in the section block and lot file, yes or no?

A. I don't believe my notes state that.

Q. Now, another source would be we already went through the 1930 building permit, number 54 you never saw it if it existed. What about the file or any notes that Ed Gainor might have made and attached to his letter regarding that 1968 letter, did you ever see that?

A. I don't know who Ed Gainor is.

Q. The head of the Building Department the one who signed that 1968 letter?

A. Right. Signed over there. What are you asking me?

Q. You obviously didn't see any materials that he used to come to that if there are any in the town file because you didn't look at the SBL file, right?

A. No, I did look at the SBL file --

Q. You did?

A. You want me to finish?

THE COURT: Let him finish.

A. I looked at the SBL file but I didn't see any notes, I didn't see any records, I didn't see any paperwork that Edward Gainor submitted to the town of Oyster Bay.

Q. So this would be two strikes, Mr. Gioia --

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained, Mr. Kutner.

Q. You said you didn't see it in the computer, meaning Exhibit A the 1968 letter, that's one? You didn't see the '68 letter before you filed the charges? We already established that?

A. Yes, you didn't let me think.

Q. Now number 2, there is a CC at the bottom of that letter --

MR. KENDRIC: Your Honor, objection. He asked a question, the witness is processing the question and before he even answers he is onto the next question.

MR. KUTNER: I'll slow down.

Q. Did you finish your last answer?

A. No. You have to rephrase the question. Repeat it and slow down for me.

Q. If you look at the bottom of that particular, letter Exhibit A. You see where it says CC, carbon copy colon?

THE COURT: Would you show him that.

MR. KUTNER: I'm sorry.

A. Yes.

Q. That would be the second place that that letter a copy of that letter went into the SBL file. So besides the computer there was also an SBL file but you didn't see it there either?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. You just said you looked in the SBL file, did you not?

A. The physical SBL file?

Q. Right.

A. The SBL file was not put in the computer back then.

Q. I didn't say that.

A. You keep saying the computer --

Q. In the physical SBL file, you didn't see a copy of that letter even though that letter says a copy is put in the SBL file, so I'm asking you --

A. I don't remember whether or not I saw that letter or not.

Q. Did you check out how many times building permits were issued on this particular property?

A. I researched the SBL file. I researched the computer to see how many building permits were taken out on this property. Yes, I have and I did that thoroughly.

Q. Tell me the year and what the purposes were on every permit that was put on this particular?

A. The permits that I know?

Q. I'm sorry?

A. What permits?

Q. Yes.

A. I remember the permits of the double car garage

certificate of occupancy of the double car garage not much of anything else.

Q. You remember that because you're emphasizing that premises zone for one family use, right? That's why you remember that particular --

A. I remember very clearly because it's written very clearly in 1986 with many details.

Q. So you did see a list of building permits then?

A. I don't remember seeing a list of building permits.

Q. You only remember the one that helps your case?

A. That's not true.

Q. How about 1968, '69 after Mr. Sodkitis, who was the owner then, Mr. Sodkitis who was the owner, he sold to Mr. Stokey, how about the electrical service changeover permit from 50 amps to 100 amps in '68, '69 given to Stokey, do you remember seeing that?

MR. KENDRIC: Objection. Assume facts not in evidence. There is all sorts of hearsay.

THE COURT: Sustained.

MR. KUTNER: You know what, Judge, then we can call him back after I put Mr. Altadonna on the stand, he is going to certify the records.

Q. Did you see anything in the electrical permits?

A. I don't remember seeing anything.

Q. Did you see an underwriter certificate filed for that

electrical permit listing the house as a two family?

A. I don't remember seeing it.

Q. You don't remember seeing it?

A. I don't believe I saw that.

Q. That's because it wasn't in your agenda?

MR. KENDRIC: Objection to agenda.

Q. Was that because it would undermine your conclusion to charge Mr. Thomas with an illegal two-family home?

A. No, of course not.

Q. What about the 1980 sewer hook up permit, did you pull that file?

A. That's from the -- that's not from the Town of Oyster Bay Building Department.

Q. You want me to tell you the permit number?

A. I don't know that then.

Q. You didn't pull that file?

A. I don't know where that came from.

Q. From the town records. I dug. We got it eventually. Okay. I'm just finding out why you couldn't find it, sir.

A. It might had been in the attic somewhere.

Q. I got it. You work there. 1980, that's before your time. You probably weren't even born then, but in any event all of Hicksville got sewered at that time, do you know about the history in the town? The people were hooking up the sewer mains that were just being installed, do you remember that?

A. I remember my parents doing it.

Q. And in your job experience have you come across the building permit application that was filed back then for a sewer permit opening?

A. Can I see what you're referring to?

MR. KUTNER: Sure. Could we have this marked as a next exhibit please.

THE COURT OFFICER: X marked for ID.

THE COURT: Show it to defense to the People.

MR. KENDRIC: No objection, Judge. I stip it into Evidence.

THE COURT: It's in Evidence, Mr. Kutner. Do you want to show it to the witness?

MR. KUTNER: Yes.

THE COURT: You want to publish it to the jury?

MR. KUTNER: No, show it to Mr. Gioia first.

THE COURT: Mr. Kutner let him have a minute. You are moving a little too quick.

A. Okay.

Q. Mr. Gioia, do you see on the left-hand side down - it's the box under the 5th line, the location of the job is the 4th and 5th lines. Underneath that says type of residence of a building and there are two boxes to check off, one family two family, do you see that, sir?

A. Yes.

Q. And the applicant would have to check off one or two family use. Would they not?

A. I guess so.

Q. And so the then owner which I believe was Mr. Montoro -- no, I'm sorry. Yeah, Ms. Montoro, would have checked the box but you haven't produced that permit application have you? As a matter of fact you haven't even sign the file?

MR. KENDRIC: Objection. He testified about five times that he did see the files.

MR. KUTNER: He did?

Q. Did you say you sewer?

A. I don't remember whether or not I saw this. This is a blank form.

Q. But there was a permit number --

THE COURT: Mr. Kutner, do you have this record with you?

MR. KUTNER: No, it wasn't given to me.

THE COURT: I'm just asking if you have it.

MR. KUTNER: Sewer H 03088 you never saw that file.

A. Did I see -- I don't remember if I saw a sue we are permit for this house, no don't remember.

Q. Do you recall the building permit for the garage whether it had a similar box, one family or two family?

A. I would have to see you say permit you didn't say C O.

Q. Did you notice whether on that form one or two family was checked off?

A. Are you talking about the serve okay fan ^ cease ^ sees.

MR. KUTNER: No I'm talking about the building permit.

THE COURT: The two family garage.

MR. KUTNER: The two family dwelling.

THE COURT: When it was reconstructed.

MR. KUTNER: Yes.

THE COURT: In 1986.

A. Certificate of occupancy.

MR. KUTNER: No just the application.

THE COURT: He wants to know about the building permit that may had been filed for the 1986 rebuilt garage.

A. I don't remember it.

Q. Now soon after your first visit to the house I believe is June 2nd, 2008?

A. Probably.

Q. And then your second visit was July 2nd and the third was July 24th I believe; is that right? If you could show him, Officer, Exhibit 1?

A. The 29th may be.

Q. Mr. Gioia, any time you need any records to refresh your memory please ask.

A. I'm ready.

Q. The end of July date was July what, 24, 27?

A. Twenty-ninth.

Q. In between July 2nd and July 14th -- I'm sorry July 29th. You received a letter from me dated July 14th, 2008; is that right?

MR. KENDRIC: Objection multiple grounds.

THE COURT: Sustained. Mr. Kutner, we are going to have to deal with this at another time.

MR. KUTNER: I'll continue with something else.

THE COURT: I think so.

MR. KUTNER: And whenever we take an afternoon break we'll deal with that at that time.

THE COURT: Right, because I want to see if we can move this along.

MR. KUTNER: Fine.

THE COURT: Mr. Kutner, do you have an idea how much longer you are going to be the witness?

MR. KUTNER: I'm certainly going to be the rest of the afternoon.

THE COURT: Members of the jury, do you need a bathroom break at all? You're okay.

MR. KUTNER: Judge, if they raise their hands they can signal to us.

THE COURT: Yes, if you need to go take a break

just let us know and raise your hand.

Q. Now, back in 2008, isn't it true you didn't know what a non-conforming use was?

A. No, that's not true.

Q. As a result of the communication the issue of whether this was a non-conforming use was raised?

MR. KENDRIC: Objection.

THE COURT: Sustained. Mr. Kutner we said we would deal with this on another time.

Q. Page 160?

THE COURT: In the deposition?

MR. KUTNER: Yes, sir. 160 line 7 to 167 line.

THE COURT: Again, this is from the prior deposition this witness gave.

Q. Mr. Gioia, I'm going to read you a further portion of your testimony from back then question and answer form. If you would just listen to it and I'll ask you some questions based on that, okay?

A. Yes.

MR. KUTNER: "QUESTION: As a result of your training" -- excuse me one second.

"QUESTION: As a result of your training, did you learn about the difference between pre-existing non-conforming dwellings, conforming dwellings, residence, one-family residence, two-family zones is that all part of

your training?

ANSWER: Yes.

QUESTION: Would you tell us what your understanding is of a non-conforming use generally?

ANSWER: The use of the premises itself is non-conforming use.

QUESTION: Non-conforming to what?

ANSWER: I don't know exactly the definition of non-conforming use.

QUESTION: Would it refresh your recollection to be asked -- is a non-conforming use a use presently that doesn't conform with these present zoning but was legitimate before the zoning was changed? In other words change from legitimate to permitted or was permitted before the zoning was changed?

ANSWER: I don't know."

MR. KUTNER: Do you remember being asked those questions and giving these answers, sir?

A. Yes.

Q. And now after hearing that, you want to change your answer that you knew what a non-conforming use was?

A. I have an understanding of what a non-conforming use is but the exact definition of it.

Q. Let's just get the timetable. 2008 you did the investigation? In 2011 --

THE COURT: Mr. Kutner, out of fairness there is some more of the testimony that should be read if you want I'll continue it.

MR. KUTNER: No I'll do it.

THE COURT: Please go all the way down.

MR. KUTNER: Fine.

"QUESTION: Are you familiar with the term grandfathered in? Do you know what that means in the zoning circles?

ANSWER: Yes.

QUESTION: Tell me what your understanding is of the term or principle?

ANSWER: I would believe something that was existing before the codes or before something was enacted.

QUESTION: And that is permitted to remain in that condition?

ANSWER: I believe so.

QUESTION: Was there a definition in the Town of Oyster Bay Building code that defined in 2007 and 2008 what consisted of a pre-existing non-conforming use?

ANSWER: I don't remember."

MR. KUTNER: Did you hear those questions and give those answers?

A. Yes.

Q. Under oath?

A. Yes.

Q. As a result of any communication, did you ever do any research to find out if this was a pre-existing non-conforming use?

A. Yes.

Q. You did read your deposition, did you not?

A. One time, a long time ago.

Q. And do you remember that you stated that you did not do any research of the non-conforming use after being alerted?

A. Of the house itself you're speaking of?

Q. The house itself that's all we're talking about.

A. Uh-huh.

Q. You didn't do any further research when it was raised with you that it was a pre-existing non-conforming use you said you did not do any research to determine if this claim was correct?

A. I don't remember if that's what I said.

MR. KUTNER: I'll follow up when we do the ruling later.

Can we hand Mr. Gioia Exhibit - it's People's Exhibit it's only for ID, 8 it's long form information.

Q. Mr. Gioia, you typed out this complaint, the criminal complaint yourself, did you not?

A. No.

Q. Who typed it out?

A. I'm not sure.
Q. Is it done in a computer?
A. Yes.
Q. Was it done on a computer?
A. Yes.
Q. Was it down by a typing pool in the Town of Oyster Bay?
A. Yes.
Q. How would they know the information to put in that particular complaint if you didn't tell them?
A. There would had been something that I would had written.
Q. Did you write it out long hand and then hand it to them for them to type up from handwriting?
A. I don't recall if I did. That but that would be the normal procedure but I don't recall if that is exactly what I did.
Q. In any event this complaint was somewhat similar but also particularized for this particular case was it not?
A. This complaint? I don't understand the question.
Q. The two page -- the two pages of typewriting signed by you at the end count one and count two, you see that?
A. Yes.
Q. That was from information you gave to the typist whoever that person was?

A. Correct.

Q. Now, I just want to go into a couple of things. On page 1 -

MR. KUTNER: I put some line number on a photocopy of it so we can speed up the examination.

MR. KENDRIC: Judge, I offered it into evidence Mr. Kutner objected your Honor sustained the objection. Now he is looking for the witness to read something that is not in evidence, I object.

MR. KUTNER: I didn't ask him to read it, Judge, I am just going to question him about his allegations.

MR. KENDRIC: Well, sir, if defense counsel is going to read parts of a court information then he is reading from something which is not evidence it's as simple as that.

Q. Mr. Gioia, did you swear that you did personal research on this particular topic?

A. Yes.

Q. And you said you checked Nassau County property tax records, correct?

A. Yes.

Q. And the information that you convey from that was limited to that the property had been built in 1926, do you see that at the bottom, personal research by your Department. See that sentence? Just read it to yourself, please.

A. Yes, I see that.

Q. Could you tell me, personal research by your department, you already had Exhibit R, remember Exhibit R?

MR. KENDRIC: What's R? The blank sewer page?

Q. You testified that you already had R in your file before the criminal charges were filed, correct, sir?

A. Yes.

Q. Out of all the information on Exhibit R that you choose to include was the date of it being built in 1926, correct?

A. That's correct.

Q. You didn't include the information on that same sheet that they have it listed as a legal two-family dwelling duplex, two-family unit, taxed two-family, coded two-family, none of that information was put in that information?

MR. KENDRIC: Objection.

Q. Correct?

MR. KENDRIC: Objection.

THE COURT: Well it was or wasn't. I'll allow it.

A. That's correct.

Q. Because that would have undermine the charge would it not?

A. That's not the reason.

Q. You're charging him with an illegal two-family house in a one-family zone. The information on the tax record showing

that they are considering it was a two-family would have undermine that charge would it not? Just yes or no.

A. Can you rephrase that question?

Q. No, I think we'll just move on, sir.

You also sworn that you personally researched the section block and lot filed and building files and records kept in the regular course of business by the Division of Buildings in the Town of Oyster bay, did you not? That's a little bit about six, eight lines above the last sentence I asked you about?

A. Yes.

Q. And we've already went through that we don't need to hammer that again. Next, if you turn the page to the second count please, page two. I believe yesterday I asked you if this property use predated May 25, 1943 there would be no CO required and you agreed, true?

A. I agreed that no CO is required for the building itself.

Q. But you also agreed as did Mr. Esposito by the way, that if the use predated May 25, 1943 that also would not need a CO, do you agree?

A. I'm not sure.

Q. So if you are not sure, sir, how do you expect the people to prove this beyond a reasonable doubt?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. And you noted in count two that no certificate of occupancy has been issued for a two-family use, do you see that?

A. Yes.

Q. None is required for a two-family use if it is a pre-existing non-conforming use that predated 1943, true?

A. This is for the use for the premises that's what I charged not for the building itself so the answer is no.

Q. Well how do you have a two-family house if you are not using it for a two-family house, could you explain that to the jury? You're making a distinction you have a two-family dwelling, a structure, that could be a two-family you have a CO, but you can't use it as a two-family, is that what you're saying, sir?

MR. KENDRIC: Objection to the form of the question.

A. That's not what I am saying.

THE COURT: He answered. Let's move on.

Q. Did you swear that after all of your research of the Town of Nassau County clerk records and all, that Mr. Thomas is the owner of the above-mentioned premises, you swore that is true?

A. That is correct.

Q. That was false was it not?

A. No, it was not.

Q. A false statement under oath?
A. No, it is not a false statement.
Q. You just said before that Marlene and Darren were the owners?
A. I believe they are both owners, correct, and you said the deed.
Q. And you said you researched this thoroughly and you had it on the worksheet so you knew there was two owners and yet you swore that only that man was the owner, why would you do that?
A. No, that's not my answer. That's not the case.
Q. Was your aim - I'm not using the word "agenda", was your aim was to drive Mr. Thomas out of the town?
MR. KENDRIC: Objection.
THE COURT: Sustained.
Q. Are you aware that chapter 246 - including the section 246-5.2 which is the section you charged in count one, was passed on March 27, 2001. You have certified copies of yours?
MR. KUTNER: Judge, I'll withdraw that question for now and we'll do that at some point.
Q. Do you think, Mr. Gioia, in conducting an investigation to find out whether this house was always a two-family it would had been prudent and professional to contact some of the prior owners of this particular house?
MR. KENDRIC: Objection, your Honor. Are we going

to continually retread on the same ground this has been asked and answer multiple times.

THE COURT: Mr. Kutner you did cover a couple of -- are you talking about the prior owners of this house --

MR. KUTNER: Of 121 4th Street, yes I didn't touch that.

THE COURT: Mr. Kutner to the extent let's move this along.

Q. Do you know that the family that owned this house continually, from '26 to '62, was named Koch, they were a farming family out in Hicksville?

A. Was I aware, no.

Q. Did you become aware that they were the owners at that time?

A. No.

Q. Did you find out, did you see that Mr. Sodkitis was the owner in 1968 on that Exhibit R, I believe. The letter is addressed to Mr. Sodkitis?

A. I'd have to see it.

Q. You see that it's addressed to Mr. Sodkitis?

A. Yes.

Q. And the Stokey family, Mr. and Mrs. Stokey they were referenced they were the ones who were under contract to buy it at that point; do you see them referenced? Up in the right it's handwritten in on the left?

A. Yes.

Q. After that you didn't contact either of those families nor the Bondfeds, Zebarts or Cahillanes did you?

A. No.

Q. Did you even go to the County Clerks Office and find out the identities of the prior owners so you could try to Google them look them up and call them to find out their knowledge of the two-family use?

A. No.

Q. You didn't need to know that did you?

A. I don't see the relevance.

Q. Your purpose was crystal clear as they said in a Few Good Men?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. I don't know if we went -- excuse me one second. A normal way that a complaint of an illegal two-family home was and still is handled in the Town of Oyster Bay is a building inspector I'm sorry, a code compliance officer like yourself at the time, would go out and knock on the door and tell the people you're doing an investigation, is that right?

A. No.

Q. No. Do you call them on the phone?

A. Sometimes.

Q. Look up their phone numbers?

A. Not usually.
Q. I'm sorry?
A. Not usually, no.
Q. So what is the first step you take normally?
A. If I get the folder and there's a complaint form in there, I read over the complaint form. Sometimes I do research then go out in the field, write the reports, visualize what I see, take photos, knock on someone's door hopefully the homeowners are around and home and have a conversation with them. And leave a card usually and let them know I'm here because there is a complaint against your property.
Q. And you tell them that you're investigating a complaint that their house is an illegal two-family, would you not?
A. I usually would say that there is a request in the complaint that there is an illegal apartment at that house that's what I usually do.
Q. Many times the owner would voluntary dismantle the apartment, correct that's the resolution?
A. Yes.
Q. That's the easiest way that they resolve, true?
A. Correct.
Q. And that was done, are you aware, under Mr. Jazwinski with the basement apartment in this same house?
A. What I'm aware of that there was a prior investigation

by Jazwinski. I believe Jazwinski was in the house and I believe the complaint was of an illegal basement apartment that's what I believe.

Q. Mr. Cahillane dismantled the apartment, sealed up the walls and it went no further?

A. I don't know what happened, what occurred and how it got resolved.

Q. If the homeowner doesn't move quickly enough or doesn't agree to do it the next step normally is serving a notice of violation on the homeowner, correct?

A. Not always.

Q. Not always but that is the usual second step?

A. I like to give a notice of violation after I give my business card if there is a violation or an alleged violation I do give a notice of violation.

Q. You don't do that on the first visit because when you knock on the door and say we found out about your illegal apartment and they say we are going to dismantle it, you diary that for about two weeks later to monitor the progress of the dismantle, do you agree?

A. Sometimes I give a notice of violation sometimes I don't. Sometimes I leave my business card.

Q. And in this particular house in 2006, were you aware that Jazwinski served a notice of violation on Mr. Cahillane?

A. No, I don't. I'm not aware, I don't remember.

Q. On this case, you have certain information in front of you that says this was legal other information, the complaint only, saying that it was illegal, correct?

A. There's a complaint alleged illegal two-family house.

Q. Illegal?

A. That's what I'm investigating. That's what I'm going to the house for based on the request and investigation form, yes.

Q. And other than the complaint, you couldn't find any records that agreed with that complaint, could you? Yes or no, sir.

A. We --

Q. Yes or no.

A. Agree that what?

Q. That you could find any records in the town files that agree that it was an illegal two-family?

A. I found records in the Town of Oyster Bay that indicate that it's a one-family house and that's what I served the summons for.

Q. You found records, sir, what records that indicate that it's a one-family?

A. The Nassau County Tax Assessor --

Q. I thought you just said you found it in the Town of Oyster Bay?

A. I looked in the computer.

Q. You didn't look at the building permits --

THE COURT: Mr. Kutner, he needs to answer your question, please.

A. So in the computer there's an icon it's the Nassau County Tax Assessor's office records we have access to those records so that's where I researched that file. I have not seen the old tax records that shows that the way it's being taxed.

Q. But you did pull up that Nassau County Assessor's card that said it was two-family?

A. That one. There's another tax assessor's card that I haven't seen yet that it says -- should I continue?

THE COURT: Mr. Kutner, let him finish.

MR. KUTNER: He answered my question so far I'm going to give you the opportunity right now.

Q. The prior one listed as the 210 one?

A. That is correct, yes.

Q. Up to 1988?

A. I don't remember if it changed.

Q. Just the tax designation changed. Now, did you ever find any record that the use ever changed on this house from 1930 to 19 -- to today, 2019; did the use ever change from a two-family to something else?

A. No, that's not the research I found. The research I found is when the original the older records that's in the corner information that shows as 210 and it shows that it was

built with one kitchen no extra sink and one bathroom --

MR. KUTNER: Objection move to strike everything.

MR. KENDRIC: No, that entirely responsive.

THE COURT: Overruled. It stays.

Q. It was originally built in 1930, why didn't you just produce the building permit, that would be the definitive proof, sir?

A. I don't believe there is a building permit for that house. The original --

Q. So that would be 60 years ago, 51 years ago Mr. Gainor was wrong when he was closer to the time and he is mentioned building permit number 54?

A. I don't believe that that's building permit that you're showing me that's a letter.

Q. That's not the building permit?

A. Okay. You keep referencing it as a building permit.

Q. Reference? What does it say? The first line. Does it say building permit 54 issued 1930 to Carl Koch?

A. That says it's referenced, right?

Q. Yes.

A. Referenced, that's what it says.

Q. What do you mean by that?

A. I believe that from the way I read this letter is that this person is asking in reply to your request regarding asking claiming that it's a two-family house and that's it. That's a

letter saying it's a two-family house.

Q. You said it was a two-family use in 1968?

A. No, I believe that the owner --

MR. KENDRIC: Objection. He is dispersing of the house with the use. The witness is clear, Judge.

THE COURT: Sustained. Mr. Kutner.

Q. This isn't my -- this is a letter from the Town of Oyster Bay, you see that headline up there, sir?

A. Yes.

Q. Do you realize that there were only typewriters in those days. There were no computers or word processors?

A. Of course.

Q. So you realize that the person who typed this was an employer because there is Edward J Gainor's initials with his typist's initials next to it as it is accustomed till this day, you see that?

A. I see that.

Q. So this was issued by the head of the Building Department in 1968 which is 51 years ago, a lot closer to 1930 than we are now. Do you agree? 51 years ago.

A. Sure, no problem.

Q. So he references - he typed out or he wrote out and his typist types it like you did, building permit 54 issued to Carl Koch. I didn't happen to get this by accident, we would never have known about that would we?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. The second line says two-family dwelling?

THE COURT: We have been over this.

Q. You just said that it's referring -- Mr. Kendric jump up to tell it's a two-family structure not a two-family use. I'm asking you, how could you have a two-family dwelling without a two-family use?

MR. KENDRIC: Again, Judge, objection, asked and answered.

THE COURT: Sustained.

Q. In this particular case you didn't serve Mr. Thomas a notice of violation, did you?

A. No, I did not.

Q. That didn't suit your purpose.

MR. KENDRIC: Objection.

Q. Wouldn't you agree, Mr. Gioia, if it oinks, has a curlicue tail and a flat nose and acts like a pig that it's a pig?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Well in this particular case you claim you did a thorough investigation, sir?

A. Yes, I did a thorough investigation.

Q. And yet we seen all of the materials that you closed

your eyes to, agree?

MR. KENDRIC: Objection, Judge.

THE COURT: Sustained.

Q. Why did you jump right to the prosecution then if this was going to be handled like a normal case if this wasn't an agenda case?

MR. KENDRIC: Objection.

THE COURT: What are you asking why did he approach this matter, is that what you're asking him?

Q. Why didn't you serve a notice of violation? Why did you jump to the unheard of prosecution?

THE COURT: Mr. Kutner, please on your form rephrase it. This is a good time to break. You want to finish this line it's 4:20 now.

Q. You didn't serve him with a notice of violation, the usual practice, you went right into having him so-called arrested by filing criminal charges against him?

THE COURT: Sustained. He didn't say it was normal practice. He said different things going on.

Q. Remember being asked - withdrawn. 179, 21 to 184, 2? I'm going to ask you a series of questions and answers, Mr. Gioia.

THE COURT: Mr. Kutner, what page?

MR. KUTNER: 179.

THE COURT: Mr. Kutner, how about this, you are

going to do a lot of reading it's getting close to the time.

MR. KUTNER: It's your prerogative.

THE COURT: We are going to continue tomorrow at two o'clock. Sir, you are not to talk to anybody else about your testimony with your attorneys or anybody else. I'll see you tomorrow at 2:00. I have to read the jury some instructions.

Same routine as yesterday and the day before, but I have to read them. During the time you sit as jurors on this case, there are certain rules of conduct you will hear this over and over again at every break. You're not to discuss this case amongst yourself or with anyone else. Do not converse with yourselves or anyone else anything related to this case. You may tell the people with whom you live and your employer that you are on jury duty and to give them information about when you are required to be in court. But you may not talk with them or anyone else about anything relating to the case. Do not at any time during the trial, request, accept, agree to accept or discuss with any person a receipt or acceptance of any payment or benefit in return of supplying any information concerning the trial.

You must promptly report directly to the Court any incidents, including your knowledge involving any persons

improperly influencing you or any member of the jury. You're not to permit any part of discuss the case with you or attempt to influence you, if anyone does, you're to immediately report it to the court and not to the jurors. Do not visit or view the premises or place where the charged crime is allegedly committed or any other premises or place involved in the case. You must not use internet maps, or Google Earth or any other device to search for and view any locations to discussed in the testimony. You're not to read or listen to any comments regarding any media. Do not review or listen to any accounts or discussions on the case reported by newspaper, television, radio the internet or any other news media. Your decision must be based solely on the testimony or other evidence presented in this courtroom. Do not attempt to research any fact issued on the law related to this case whereby discussions of others from researching the library or on the internet or any other means sought. In this stage of means of communication I want to emphasize that in addition of not conversing face to face with anyone about the case you must not communicate with anyone about the case or by any other means including by telephone, text messages, emails, internet chat or chat rooms, blogs, social websites like Facebook or Twitter. You must not also Google or otherwise search any information about the case, the law which

applies to the case or the people involved in this case, including the defendant, the witnesses, the lawyers or the judge. You must not provide any information about the case to anyone by any means whatsoever and that includes the posting of information about the case or what you are doing in this case or any other device or internet site including blogs, chat rooms, social media or other means. You're to keep an open mind until all of the evidence has been presented and you're charged as to the law. Again, I'm keeping you under these rules of govern. See you all tomorrow at two o'clock.

THE CLERK: Is there anything else for the record?

MR. KUTNER: Do you want to address these things now?

THE COURT: No, tomorrow. It's a long day and I'm tired right now, frankly I want to do it with a fresh mind.

MR. KUTNER: Fair enough.

THE CLERK: Tomorrow at 2:00.

(WHEREUPON, THE PROCEEDINGS CONCLUDED).

* * *

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

-against-

DARREN E. THOMAS,

Defendant.
----------x

March 28, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T
Darren E. Thomas - Defendant

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record, docket 22F of 2009 the People of the State of New York versus Darren Thomas. Appearances for the record, please.

MR. KENDRIC: Christopher Kendric from Kendric Law Group P.C. co-counsel for the People.

MR. ROZEA: Matthew Rozea Deputy Town Attorney, also for the People.

MR. KUTNER: Harry Kutner, Mineola, New York for Mr. Thomas with Ms. Channer.

THE COURT: Right now we have on for the record the defense counsel has given me his request to charge and then the People I understand that you're going to site some section of law you want me to take judicial notice of.

MR. KENDRIC: And I will put this in written form also for the Court, I am asking that the Court take judicial notice of the following sections from the Town of Oyster Bay town code, section 246.16.1, entitled Legislative Findings your Honor this is what I read to the jury during my opening what the Court referred to as a policy statement which I agree with that characterization. Next we have section 246-16.2.1, Illegal Occupancy. Then section 246-16.

MS. CHANNER: 246?

MR. KENDRIC: Dash 16.2.1.1 and that has to do with more than one electric meter being indicia of a two

family use. Then section 246-16.2.1.3 more than one door bell similar comment. And 246-16.2.3 homeowner may request an inspection. Then Judge section 246-4.2.1 and 4.2.1 and this has to do with nonconforming uses.

MR. KUTNER: Could you repeat that, please, 246.

MR. KENDRIC: Dash 4.2.1.1.1 and I notice that this has been requested on by defense counsel this is his request.

MR. KUTNER: Is the charge first count?

MR. KENDRIC: Right. Next, your Honor, section 286-4.2.2.5 which has to do with the interruption of a pre-existing nonconforming use the more than one-year period. Then, your Honor, we're requesting that the court take judicial notice of section 246-5.2 and it's accompaniment which is the schedule of uses. And lastly requesting the Court take judicial notice of section 93-28 which deals with certificate of occupancy.

THE COURT: Are all those sections you have copies there?

MR. KENDRIC: Yes.

THE COURT: Do you have copies for me of all those sections.

MR. KENDRIC: I was going to give you these copies.

THE COURT: Those are for me to use for the jury

charge?

MR. KENDRIC: Yes. And for the record, these have been certified by the department town clerk of the town of Oyster Bay as having these various code sections that were in effect as of December 5, 2008.

MR. KUTNER: They are not certified by the town clerk?

MR. KENDRIC: James Altadonna town clerk.

MR. KUTNER: Judge, there's a ruling in Supreme Court that the deputy town clerk is a political appointed and he is -- Mr. Altadonna will not certified unless he sees the originals that's why they didn't go to Altadonna. It's already been ruled by Supreme Court that they have to go to town clerk you can't bypass --

MR. KENDRIC: What ruling are you talking about?

MR. KUTNER: You know exactly what I'm talking about.

MR. KENDRIC: No, I don't.

MR. KUTNER: It was in News Day, I will provide it on the defense case with Mr. Altadonna.

MR. ROZEA: Hold on. I think that maybe Mr. Kutner should educate himself on the law, because there was a decision just this week, by Justice Brown in the Supreme Court saying that any municipal law office attesting to the accuracies of a record can for the purpose

of freedom of information while certifying for the record that's a certification made by the deputy town clerk it is wholly proper and admissible.

MR. KUTNER: Mr. Rozea, I just want --

MR. ROZEA: And I will also -- no, I'll finish. Several years ago --

MR. KUTNER: The weasel speaks.

MR. ROZEA: The weasel speaks?

THE COURT: Folks, one a time, please.

MR. ROZEA: Judge Alexandre several years ago accepted similar certifications in a similar trial that I tried. There were no issue about who certified things, it was on official town form with the seal these are admissible.

THE COURT: Let me give some thought.

MR. KUTNER: Judge, when we go through the charge conference, if the Court permits, I'll address it when the People rest. I don't want to give them any tips right now.

THE COURT: The only issue is whether these are the laws in effect at that time.

MR. KENDRIC: That's why they are certified copies.

MR. KUTNER: That is the issue going on in the town right now. Mr. Altadonna is there is a political situation going on in town. Mr. Altadonna will not certify

many of the records unless the original records are brought to him, the original records in many cases, and we believe in this case, were destroyed by Mr. Ippolito, that's why we don't have building permit 54 from 1930. When it comes to this, I don't know if we can trust the certification.

THE COURT: You have your exception.

MR. KUTNER: Before you do on the charge conference I'd like to be heard but I don't want to be heard now.

THE COURT: I'm going to take them. Right now I'm going to take them as authentic if you can show me they are not authentic I'll listen to you.

MR. KUTNER: Okay.

THE COURT: Counsel, I need complete copies I need to work with this. This is a complicated charge. This is a complicated charge that we're getting into with a lot of stuff that you all want. Mr. Kutner, Mr. Kendric, I'm just wondering I think I said yesterday, I said half hour on a charge conference I think it might take all afternoon, there are some issues especially on the jury trial on nonconforming use is complicated I have been working on a lot and it's not that simple. It's not a two second charge. I worked it out and I want to go through that in detail with you to make sure it is satisfactory on both sides so we don't have a problem. I'm beginning to think

we need a whole afternoon on this, and we will excuse the jury, does that make sense?

MR. KENDRIC: Makes sense.

MR. KUTNER: Absolutely.

THE COURT: We'll meet on an afternoon at 2:00 and work this out. I can see there are a lot of issues here, maybe potential issues. Mr. Kutner, just to get an idea, I understand I have to rule on your letters I'll hear argument on that right now and get that issue right out of the way, besides the letters, do you have some other things you want to talk to the witness about?

MR. KUTNER: Yes.

THE COURT: And you think, what, half hour, 20 minutes, half hour?

MR. KUTNER: Hopefully on the shorter end. Yes then I have witnesses for this afternoon myself.

THE COURT: I'm suggesting to you you made your points with the jury on the issues I don't think you need to belabor things. Again, you try your case the way you want I think you covered it thoroughly, unless you have new material.

MR. KUTNER: So you'll grant my TOD?

THE COURT: My question is, Mr. Kutner --

MR. KUTNER: Yes, sir.

THE COURT: We'll start today with your witnesses

give me an idea, I know you're trying to plan this all out.

MR. KUTNER: I eliminated a couple this morning. I have three lined up for this afternoon none of which should take 10 minutes 15 minutes. That's from my lips to God's ears. I'm doubling my estimate it should be four, five minutes on direct.

THE COURT: Mr. Kutner, you may have two or three today?

MR. KUTNER: Yes.

THE COURT: And tomorrow who do you think you'll have?

MR. KUTNER: Fill up tomorrow afternoon with any overflow that I don't cover I don't get to finish tomorrow we'll bring over Monday. Then I have one or two, Mr. Colwell Mr. Guckenberger if he is out of the hospital Monday.

MR. KENDRIC: Judge, because defense counsel simply does not want to communicate with the People, I do not know whether it is productive for me to make a motion to quash or more than one motion to quash because there were subpoenas served I think back in October of 2018 or thereabouts on town employees at least one former town employee. And the case has, through by reason of the Court's ruling, right from the very beginning, has dwindled down to certainly more manageable and certainly less

collateral type issues being presented to the jury. So once again, depending upon who Mr. Kutner plans on to call I may have one or more motion to quash.

THE COURT: Okay. We'll deal with it at the time. If you don't mind my asking at this point, do you plan -- are you just producing witness on the issue of nonconforming use or some other issues?

MR. KUTNER: Nonconforming use.

THE COURT: I wasn't sure if there was anything else happening. I am just trying to find out. Are you bringing in any town employees in here?

MR. KUTNER: Yes.

THE COURT: Who are you bringing in.

MR. KUTNER: They know.

MR. KENDRIC: Just tell us just to humor me.

THE COURT: Mr. Kutner, please talk to me.

MR. KUTNER: Judge, I am not sure. I know the town clerk is going to be testifying at least right now. Probably Mr. Stefanich I wanted him here this afternoon. When an attorney subpoenas the witness the witness is controlled by that attorney. As a courtesy they want to know I could give them a courtesy but I was told they won't even agree to come in, everything has to go through Mr. Rozea it doesn't have to go. Mr. Rozea, I was under the direction that I had to go through him to set up my

witnesses they are subpoenaed by me, I don't need him to tell me what time of day it is nor would I go through that gentleman.

MR. ROZEA: And we got a letter at 12:15 this afternoon that has misleading statement that I somehow prevented witness from being here today. The truth is, at least of those two witnesses, with whom I spoke, about 12:30 received no contact are from Mr. Kutner's or his office, one of them I believe may be out of state and the other one is out conducting field investigations because he too was not contacted by Mr. Kutner's office. Let's have the record be very clear, I nor anyone in the Town office interfered with his subpoena.

MR. KUTNER: Judge, my secretary is off on Wednesdays, she came in yesterday when we found out that they didn't give me any notice that they were not going to call anymore witnesses. They mislead us into believing that this was going on for most of the rest of the week. I called my secretary she came in on her day off to make calls to the Town and every Town person that was subpoenaed told her we can't do anything, we've been told that Mr. Rozea has to clear our appearance. And I said no.

MR. ROZEA: That is incorrect.

THE COURT: There is a very simple way of doing this, if he want the witness in here just produce the

witness.

MR. KUTNER: Thank you, Judge.

MR. ROZEA: Subject to the motion to quash we have no problem with that. But these individuals --

THE COURT: If he is talking about who's going to the win the World Series this year, obviously we're not going to do that, because it's relevant to the defense of a nonconforming use saying that --

MR. ROZEA: I understand. We can't get letters at 12:15.

THE COURT: I know. Some of his subpoenas in the beginning were questionable and I said that to him but we worked it out, that's what I want to work out here. I'm practical. I want to work things out and get this done. We are not trying a nonjury we have a jury.

MR. ROZEA: Understood. Who do we want tomorrow?

MR. KUTNER: Mr. Stefanich, however you pronounce his name, the town treasurer. Ms. Maccarone. Ms. Van Loan is going to be here today, I believe she is a former town employee so she is not within your control. Mr. Altadonna I can contact.

MR. ROZEA: Ms. Maccarone has a family obligation tomorrow I know that.

MR. KUTNER: Maybe she can come in Monday.

THE COURT: Mr. Kutner, as long as these witnesses

are going to testify to relevant material I have no problem with it but if we are going to go off track and get into other things I am going to stop this right away. I want to get this to the jury as soon as I can. What's your best estimate now?

MR. KUTNER: Monday afternoon. It could spill offer to Tuesday, because of witnesses taking longer than I thought this was going on three weeks.

THE COURT: This collapsed.

MR. KUTNER: Yes, it collapsed, I focused.

THE COURT: When do you think we should have the jury conference on Tuesday afternoon?

MR. KUTNER: Possibly Tuesday afternoon.

THE COURT: We'll spend the afternoon doing it banging it out trying to get an agreement on the jury charge.

MR. KENDRIC: When is that?

THE COURT: I don't know, Tuesday or Wednesday afternoon.

MR. KUTNER: Could I make a suggestion, your Honor, could you tell the jury that we will have one day next week they will be excused.

MR. KENDRIC: This certainly would be an appropriate time to bring a motion to quash and here's exactly why.

THE COURT: Quash who or what?

MR. KENDRIC: Motion to quash the subpoena served on Arlene Van Loan.

THE COURT: Who is she?

MR. KENDRIC: She is the former assistant town attorney that Mr. Kutner is bringing in ostensibly to talk about the hiding of documents. I can't think of any other reason why he would bring her in.

THE COURT: You know what, I'm not quashing anything right now. Bring the witnesses in let me hear what they are going to say. I'm telling you, I want to get this thing done with. I want to get it to the point and get it to the jury. I'm telling you, you're going to lose this jury. Let's do the letters, Mr. Kutner, succinctly, tell me why I should allow you to ask these witnesses about the letters that you sent after the fact?

MR. KUTNER: They deal only with the pre-existing nonconforming use. They have nothing to do with racism whatsoever.

THE COURT: I understand they are sent after the fact?

MR. KUTNER: No, they are sent during the investigation. I'm sorry. The July 14, 2008 letter was sent before the charges were brought when he was allegedly investigated. I asked him about this in his deposition and

asked him after getting the letter did he then do any research whatsoever to determine if the claim that it was a pre-existing nonconforming it's a very simple letter. He testified he did nothing.

THE COURT: What's your position on this?

MR. ROZEA: We object to this. First of all, it's clearly self-serving it's the defendant's attorney's Exhibit letter being introduced in evidence. But more to the point, just ask the question.

THE COURT: Mr. Kutner, you know the other thing I just asked you a question about this actually I have been thinking about, I have been giving a lot of thought to the letters, what's to stop them from calling you as a witness here? We'll get into issue I think we're going down -- I'm not going to let these letters in.

MR. KUTNER: Could you let me be heard before you make a ruling? I think your Honor's ruling that way would be in error. Because it's not as much of the contents of the letter it's to put him on notice. It has nothing to do with the witness testifying. Sheryl you want to address it.

MS. CHANNER: Again, it goes back to the nature of his investigation and what he does.

THE COURT: You made your point on that.

MS. CHANNER: Judge, please, I appreciate it.

Thank you. The issue is what avenues or what path his investigation takes. He said that he wasn't aware that the issue was the nonconforming use or he didn't know what it was. My thing was he was put on notice for it as part of your investigation. If you didn't have a predisposed disposition of where you were going with the case, you would look into when somebody put you on notice that this could had been a pre-existing nonconforming use.

THE COURT: I'm not letting it in. I get it. I think it's collateral --

MR. KUTNER: Would you at least let me ask him, did you receive a letter without putting the exhibit in, that your attention was brought to the possibility of the nonconforming use in July of 2008 and did nothing. That was used as the postmark. That was there and they did not object to the question.

MR. KENDRIC: He was dispose on the context of a federal law suit.

MS. CHANNER: But he was still a witness.

MR. KUTNER: It's about this particular item.

THE COURT: I'm not going to allow you to get into this. You can ask him if he did any investigation of nonconforming use.

MR. KUTNER: Judge, if his attention wasn't brought to the nonconforming use by a letter, he can say

nobody brought it to my attention. They can argue how is he supposed acknowledge that unless he was told about it. We have to ge the defense in. You're now precluding my client on his sixth amendment from a defense in this particular case and alerting the People to the fact that there was a defense of a nonconforming use. Talking about a handicap, you're shooting a torpedo a bullet in my client's heart. Judge, it destroy's the defense.

MR. KENDRIC: The People disagree. Just to try and put some rational light on this thing, your Honor, has already picked up on the fact, number 1, self-serving, number 2, it's hearsay, number 3, he can't be a witness and the attorney at the same time. Should he be disqualified from representing Mr. Thomas?

MR. KUTNER: Why didn't you move before the trial then, Mr. Kendric, you fell down on the job.

MR. KENDRIC: I had no idea that this is an issue.

MR. KUTNER: Judge, you said and I disagree with you, that it's an affirmative defense on non-conforming. It's a simple defense under the CPL but we'll get into this on the charge conference. How do I get in the defense of nonconforming use, unless he's alerted to it in the middle of this investigation before he even brought a criminal charge, he didn't even start drafting it yet. So can I ask him, did you receive a letter from the defendant, not from

me, from the defendant alerting him to that he claimed it was a nonconforming use?

THE COURT: And what happens if he says no?

MR. KUTNER: Then I confront him because he is lying and you know he is.

MR. ROZEA: It's a false question and it's a trap it's clearly from Mr. Kutner.

THE COURT: I'm ruling no.

MR. ROZEA: Mr. Kutner, when do you plan on calling, Mr. Altadonna?

MR. KUTNER: I don't know.

THE CLERK: Good afternoon, Mr. Gioia. As always you will be reminded you are still under oath.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Good afternoon everybody. We started a little late because we had a lot of evidentiary issue we had to resolved and scheduling issues. Okay. So the trial is moving very well. The defense may start their case today. We are moving ahead quickly. I will tell you next week, some afternoon it may be Tuesday or Wednesday I have to spend the afternoon with the attorneys on the jury charge because I have to give you the law on the case you

know what the different legal principles are and the lawyers and I have what we call bang it out and try to get an agreement with all the legal principles, it's complicated. It's not that simple where you make a cookie it takes a lot of time and effort. One of the days next week you are going to be excused in the afternoon it may be Tuesday or Wednesday, I don't know yet, it depends on how the witness goes. Wednesday or Tuesday you won't come here you come back the next day and I will give you the law and then you'll get the case.

THE JUROR: How do we know which day?

THE COURT: I don't know.

THE JUROR: Prior to coming or we still come here and then we find out.

THE COURT: No, you will be told the day before. You will be told the day before.

THE JUROR: Someone will call?

THE COURT: No, I will tell you don't come tomorrow. Monday I can tell you not to come Tuesday or Tuesday I will tell you not to come Wednesday, so I can work on the jury charge with the attorney. Okay? So the attorneys and I have really have been trying to move this along for you. I appreciate your time and effort. I know it is a burden for you to be here. I know you are working and family schedules. Thank you.

CONTINUED CROSS EXAMINATION

BY MR. KUTNER:

Q. Mr. Gioia good afternoon, sir. At any time while you made these multiple inspections on 4th Street of the 121 house, did you notice any other multimeter houses on the block?

A. I don't remember if I have.

Q. You don't remember, sir, or they weren't there or they where there and you did anything about it?

MR. ROZEA: Judge, objection.

THE COURT: Sustained. That was already covered yesterday and I sustained the objection. Mr. Kutner please move.

MR. KUTNER: Judge, it wasn't covered Mrs. Channer told me yesterday when we broke I did not cover that yesterday.

THE COURT: Let's move on, please.

Q. Mr. Gioia, are you familiar with the town code section 246-42.1.3?

A. I have to see it.

Q. Regarding special use permit?

A. I have to see it. I have to view it.

Q. Let me ask you something else. I withdraw the question. Mr. Gioia, as of 2008, when you drafted the criminal charges, December 5, 2008 it was your position that Mr. Thomas's house was illegal as a two-family, correct?

MR. KENDRIC: Objection to the form of the question.

THE COURT: No, I'm going to allow that.

A. Could you repeat that please?

Q. As of the day you drafted the papers I believe the visit was made December 5th, you drafted it on December 8, 2008, correct?

A. Yes.

Q. As a result of that position that the house was an illegal two-family, correct was that your position?

A. I believe the house was being used as an illegal two-family house.

Q. You dropped your voice again.

A. I believe the house was being used as an illegal two family house.

Q. Isn't it that the same -- isn't that what I just asked you? You can't constitutionally say yes to a question when I ask you an obvious question.

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Mr. Gioia, we can get through this fast if you just answer it directly, please, sir. So as the Town's position you're the representative of the Town, the house is illegal, correct?

THE COURT: Mr. Kutner, can you say that again?

Q. As of the time you drafted the charges in December of 2008, it was your position that the two-family house was illegal?

A. Right, yes.

Q. There was a CO on the garage was there not?

A. Yes.

Q. You're aware that if an illegal use is at the premises, the Town can move to revoke the CO. Did the Town of Oyster Bay ever move to revoke the CO for the garage?

MR. KENDRIC: Objection to the form of the question.

THE COURT: Sustained. You had two questions in there. Do it one at a time.

MR. KUTNER: Sure.

Q. You're aware of the town code section which permits town revocation of a CO, yes or no?

A. Vaguely.

Q. It's there, right?

A. I know there is a code, yes.

Q. And one of the reasons for revoking the CO is an illegal use of the premises in any way, we agree?

A. I don't know. I'm not sure.

Q. But to your knowledge the town has never moved to revoke the CO for the garage since 2008?

A. No, never.

Q. Had it ever sort a search warrant to see how this property has been used?

A. Say what?

Q. Has the town ever moved for a search warrant to determine how the property was being used?

A. No.

Q. During this action -- during this law suit, this criminal action, prosecution -- could you mark this for identification please?

THE COURT OFFICER: Defendant's Exhibit AA is marked for identification.

THE COURT: Show it to Mr. Kendric.

MR. KUTNER: I have a copy for him, Judge.

THE COURT OFFICER: Showing the witness.

THE COURT: Yes. Let him look at it.

MR. KUTNER: I was going to ask you to look at it and ask you if you recognize it, sir.

A. Yes.

Q. And your -- the letter was addressed to the commissioner with a copy to you, sir?

MR. KENDRIC: Objection, your Honor. There is no foundation at all.

THE COURT: Do we need to go --

MR. KENDRIC: That's up to the Court. Why don't we find out if this witness ever seen this document before.

MR. KUTNER: Judge, why don't he tell him what to say. Judge, I ask that he be sanctioned. That is clearly trying to exclude the witness.

THE COURT: Go ask your question.

Q. Do you recognize this, Mr. Gioia?

A. Yes, I do.

Q. Do you remember seeing this back in February 2010?

A. I don't remember seeing but we usually get this back all the time.

Q. So you did you get this back in February 2009?

A. Yes.

Q. And this is regarding this particular case, was it not?

A. This is, yes.

MR. KUTNER: I offer that in evidence at this time.

THE COURT: Any objection?

MR. KENDRIC: Yes, to the relevance of the document. Judge, relevance attorney/client.

THE COURT: We need to talk.

THE COURT OFFICER: Ladies and gentlemen of the jury please stand.

(WHEREUPON, THE JURY EXITED THE COURTROOM.)

THE COURT: Mr. Kendric, what I am not understanding is, this says this is from Donna Swatson,

District Town Attorney, it's a memo regarding the nonconforming status I guess of the Thomas property. Now this is attorney/client, how did this get out?

MR. KENDRIC: Well here's -- my objection is two-fold, Judge. Number 1, this is written by Assistant Town Attorney Donna Swanson to it looks like to the commissioner Ippolito. I don't know if there was a separate intention to send this to the Department Planning Development or whether that's subsumed within Ipollito. And then it says attention Christopher Gioia. So it's either to one or two or three people, but nevertheless it's the attorney for the Town communicating an adjourn date to one or two or three different people.

THE COURT: But it make reference to the nonconforming status of the property.

MR. KENDRIC: How so?

THE COURT: It's right there. It says please contact the undersign immediately as ascertained the nonconforming status of this property which is the whole issue in this case.

MR. ROZEA: Your Honor, if I may, I suggest on what that means is the prosecutor attorney who is asking Mr. Gioia as the charging officer to inform her what the status was. It's not to determine whether if it was or wasn't.

THE COURT: Overruled. I'm going to allow it. Bring the jury in.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present.

THE COURT: Witness you can come back up. Document is in evidence.

THE COURT OFFICER: Defendant's A.A. has been marked in evidence. Would you like it shown back to the witness?

MR. KUTNER: No. If we can just pass it down to the jury.

THE COURT OFFICER: Publishing Exhibit defense A.A. to the jury.

Defendant's Exhibit A.A. has been published to the jury.

THE COURT: Mr. Kutner, you want it shown back to the witness or move on to something else?

MR. KUTNER: No, with that, Judge, Mr. Gioia thank you very much for your time.

THE COURT: Redirect?

MR. KENDRIC: Just a little bit.

REDIRECT EXAMINATION

BY MR. KENDRIC:

Q. Mr. Gioia, good afternoon.

A. Good afternoon.

Q. Before going ahead and charging the defendant with violations of the town code, did you review a certificate of occupancy?

A. Yes.

MR. KENDRIC: Officer would you please show the witness People's 3 in evidence.

THE COURT OFFICER: Showing the witness People's Exhibit 3.

Q. And my question is Mr. Gioia to you, sir, is that the certificate of occupancy that you did review some 11 years ago?

A. Yes.

MR. KENDRIC: Permission to publish?

THE COURT: Okay.

THE COURT OFFICER: Publishing People's 4 to the jury.

THE COURT: Mr. Kutner and Mr. Kendric, again, I want to make sure there is nobody in the audience that is going to be a witness.

MR. KUTNER: No, sir.

THE COURT OFFICER: People's Exhibit 3 has been shown to the jury.

MR. KENDRIC: Back to the witness.

THE COURT OFFICER: Showing the witness.

Q. Mr. Gioia, from your review of that certificate of

occupancy, did you get any information as to how the property located at 121 4th Street in Hicksville was zoned?

A. Yes.

Q. What information?

A. On the bottom of it says that the premises is zoned for one family use.

Q. Speak up, please.

A. The bottom of the line of the certificate of occupancy says the premises is zoned for a one family use.

Q. Thank you. You mentioned that some 11 years ago you reviewed a property card prior to charging the defendant, is that correct?

A. Yes.

MR. KENDRIC: Officer, would you please show the witness People's 6 in evidence.

THE COURT OFFICER: Showing the witness People's Exhibit 6.

A. Yes.

Q. So Mr. Gioia, is that the property card that you reviewed prior to charge the defendant?

A. Yes, it is.

THE COURT: Speak up everybody speak up.

A. Yes.

Q. At some point during Mr. Kutner's questioning of you yesterday, you stated that there was another property card that

had not up to that point in time yesterday, been shown to you during the trial, is that the property card?

A. Yes.

Q. Now does that property card bear a property classification?

THE COURT: The one that he is holding right now?

MR. KENDRIC: The one that he is holding now, 210.11.

A. Yes.

Q. Would you tell the jury please what does property classification 210.11 correspond to?

A. It's my understanding that 210.11 is a one family house that the Nassau County Tax Assessor's Offices is taxing this as a one family house.

Q. Now does the fact that, I'm not talking about the document, just asking you a question, Mr. Gioia, does the fact that Nassau County Tax Assessor Office has decided to tax this property as a one family or as a two family, does that fact affect how the Town of Oyster Bay regards this property in terms of compliance with the town zoning code?

MR. KUTNER: That's leading. I object.

THE COURT: Why don't you rephrase please.

Q. So, Mr. Gioia, you've seen a property card with a property classification corresponding to a one family use, correct?

A. Yes.

Q. You've seen a property card with a classification of a two-family use?

A. Yes.

Q. So, Mr. Gioia, regardless of how Nassau County tax assessor decides to tax this particular property, does that fact have anything at all to do with how the town regards the property in terms of compliance with zoning?

MR. KUTNER: Objection. Leading.

THE COURT: That's a proper question.

A. The answer is no.

Q. Mr. Gioia, does Nassau County tell the town of Oyster Bay how a property in the town should be zoned?

MR. KUTNER: Objection, your Honor. First of all, this man is not qualified to answer that and it's leading.

THE COURT: If you know.

A. Not to my knowledge.

Q. The county does not tell the town?

A. No.

MR. KUTNER: Objection. Who's testifying here? Judge, that's leading.

MR. KENDRIC: Mr. Kutner, please sit down.

MR. KUTNER: Excuse me? Did you hear what he just said? Mr. Kutner, please sit down. Is there something wrong with you?

THE COURT: Mr. Kutner, Mr. Kendric, please. We have a jury trial here, let's go.

Q. Does Nassau County tell the town of Oyster Bay how property located within the town needs to be zoned?

MR. KUTNER: Objection.

A. No.

THE COURT: Overruled. That question is fine.

MR. KENDRIC: Thank you very much.

THE COURT: Is that it?

RECROSS EXAMINATION

BY MR. KUTNER:

Q. Mr. Gioia, you had two cards in front of you according to your testimony just now, one, 210 of a single family according to you, and one, 220, is that what you are telling us before you filed the criminal charges?

A. No.

Q. Are you aware --

A. Wait. Are you talking about here?

Q. Yes.

A. You're saying this is one and two?

Q. Yes. That says one, correct?

A. Yes this is one.

Q. That says 210. And that doesn't go past 1980 does it, sir?

A. Can you show me where it says that?

Q. Now you're the one who is testifying that you know is on the card so tell the jury.

A. I'm testifying this is an old property card.

Q. They stopped using that in '87, are you aware of that, sir?

A. No.

Q. And you had the another one, the one that you had in your file 2009/10 the tax roll listing it as a 220, correct?

A. Yes.

Q. And you said yesterday you had that one before you filed the criminal charge, correct?

A. I don't think I said that but I viewed both of them. I might had viewed one first and then the other one.

Q. The one I'm talking about is Exhibit R. Could you show that to the witness, please?

THE COURT OFFICER: Showing the witness Exhibit R.

Q. Do you remember that?

A. Yes.

Q. Do you need to look at that before I ask you any questions?

A. I'm alright.

Q. Yesterday you testified you had that during the course of your investigation, you turned that up from the Nassau County Assessor's?

A. Yes.

Q. And remember I asked you the nine/ten rule, it comes out in '08 that's how you had it before you filed the charges?

A. Yes.

Q. If you were conducting a fair, independent, professional investigation, you had two different documents, one that says it was a two-family, according to you that went out in '87, 21 years before you filed a charge, and one that was current in 2008, that says it was a two-family, did you take any steps to determine which of those classifications apply in 2008?

MR. KENDRIC: Objection, your Honor.

THE COURT: Overruled. I'm going to allow it.

Q. Yes or no first.

A. Can you rephrase that question?

Q. Yes. You had the one that went out of use in '87, the 210, one, right?

A. Yes.

Q. You had this one that was current in 2008, that says it was a 220, did you take any steps to find out which one was in effect at the time you filed the charges?

A. No.

Q. Forget about what's in effect or not, did it as least cause you an issue where you went out to research and talk to any prior owners of the house talk to anyone as to whether or not the house was a two-family nonconforming use?

MR. KENDRIC: Objection. Beyond the scope.

THE COURT: Overruled. That's a proper question.

A. No.

Q. And the reason was because you had your mind made up correct, sir?

MR. KENDRIC: Objection.

THE COURT: Sustained.

Q. Do you understand that we agree that the property was zoned for a two-family, are you aware of that?

MR. KENDRIC: Excuse me, it's not.

THE COURT: Sustained.

MR. KUTNER: I'm sorry, did I say two-family?

THE COURT: Yeah you did say that.

MR. KUTNER: And you're right, Mr. Kendric, I apologize.

Q. The premises, the land, the property is zoned as a one-family zone, it's R1-7 zone?

A. Yes.

Q. And that is a one-family resident zone?

A. Yes.

Q. And we admit that, and the reason we're here is because this is a two-family house which we claim is nonconforming, meaning it is legal in the one family zone, are you aware of that?

A. I'm not aware of that.

MR. KUTNER: No further questions.

THE COURT: Thank you for coming.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

THE COURT: People, any other witnesses?

MR. KENDRIC: May I ask, has the Court taken judicial notice of the town code sections that I recited on the record?

THE COURT: Yes, I am taking notice.

MR. KENDRIC: At this point, the People rest subject to rebuttal.

THE COURT: Okay. Mr. Kutner.

MR. KUTNER: Judge, we have motion at the close of the People's case.

THE COURT: Could we take the jury out. Off the record.

(WHEREUPON, THE JURY EXITED THE COURTROOM AND A DISCUSSION TOOK PLACE WHICH WAS HELD OFF THE RECORD.)

THE COURT: Mr. Kutner, be succinct on this. I've heard the case and I'm very much aware of it.

MR. KUTNER: Judge, we have two counts here, your Honor. And I'm asking that the Court find that there was not even a prima facie case made out as to either one of them. There's been no records certified by the Town entered by the People indicating that for count one that the that there is no CO for a two-family use. There's a charge here but there's been no proof that there's no CO on

record with the Town. There's no town clerk who testified. Secondly, the charge contains conflicting positions that the Town Board or the Town ZBA didn't grant a permit that a no permit allegation is hearsay in the charge and there's been no evidence that there has been no permit granted here. There's been no as to -- I'm sorry. I got them mixed up count one is the special use permit. There's no testimony that the special use permit was issued.

There's ample evidence from the Town's own letter in 1968 that this is a pre-existing nonconforming use not only structure but a use because it's referenced.

THE COURT: In the letter you're saying?

MR. KUTNER: In the letter. And they did not - they have not introduced any evidence whatsoever to overcome their own letter that was issued by the town. As to count two, that I would suggest to the Court clearly has to be dismissed. The charge starts out that no -- count two says that no building hereafter erected, enlarged, extended or altered shall be occupied or used and prefaced the entire section. There's absolutely no testimony that this building, the house, was erected, enlarged, extended or altered. It was originally amended in May 6, 1980.

THE COURT: Don't say or used shall be occupied or used.

MR. KUTNER: Shall be occupied or used. But no

building the building part has to be erected, enlarged, extended or altered, that's it up to shall. That's the qualifying clause, it's clear by rules of English, no building hereafter, erected number 1, enlarged number 2, extended number 3, or altered number 4.

THE COURT: Or used.

MR. KUTNER: No, shall be occupied or used.

THE COURT: Or used.

MR. KUTNER: So, Judge, that's part of the modification of the building that's the verb; shall be occupied or used. Now, it has to be the prefaced the conditional proceeding for the People is to prove that this particular house was erected, which it was, it was erected in 1930. Repeatedly, I've asked Mr. Esposito until the Court admonished him and said you've already been through this Mr. Kutner and Mr. Gioia a couple of times, no evidence that it was erected, enlarge, extended or altered in any way after 1930 that house.

THE COURT: Okay, Mr. Kendric?

MR. KUTNER: No, I'm not finished.

THE COURT: I'm sorry.

MR. KUTNER: First and secondly next the inspector plainly, I wouldn't say lied but certainly was in error when he alleged, under oath, that Darren Thomas is the owner of the property. He has now admitted that Darren

Thomas is not the owner of the property. He is the owner with his wife, they're the owners together of the property. There's no sole ownership. So by his statement his misstatement he's proven in that the basis for any information that has to be on personal knowledge of the deponent has been proven and undermine fatally. Obviously he didn't have personal knowledge. He didn't go to the County Clerk's office.

THE COURT: Can I ask you a question? You are saying that both had to be charge?

MR. KUTNER: No, I'm saying that he didn't know who was the owner of the property if he just said Darren Thomas because he didn't check, it's just his guess. It undermines the sufficiency of the accusatory instrument itself.

Town code section 93-28 under which this charge on which this charge relies was amended in '77, again in '80 and then repassed in 2001 with the entire code. So either the no building hereafter erected with the four preconditions, if it's to be applied rigorously like you're supposed to interpreted the statutes, then they haven't proved since 2001 this building had been erected, altered enlarged in any way since 2001 it hasn't been since 1930. Lastly, the statute, if the Court reads 9328 with a hawk eye, is defective in its authorship and its writing, its

draftsmanship. It curiously does not even mandate the CO be issued for the particular current use of the building. They're not joint, not at all in the statute and I ask the Court to note that particularly.

It does not declare the CO must be for this case a two-family use, the statute doesn't provided that. And since this building doesn't need a CO then there can't be no violation of 93-28. The Town has tried to wiggle out of the impact of the 627 '68 letter which is the called in the real estate department a letter in lieu, L-I-E-U. That applies to the structure not to the two-family use but that I would submit the Court already seen. It's clearly as even Mr. Esposito reluctantly agreed is disproved by the reference, typed by the Town regarding the two-family residence. Two-family can only be a use can also be a structure but can be a use.

Based upon all those particular grounds, I ask that the Court enter a trial order of dismissal but with this reservation, your Honor, I ask that if the Court is inclined to do it on either or both counts that you reserve the decision until after the jury comes in so that we a have a verdict that we can rely on that we don't have to retry this case.

MR. KENDRIC: Let me address counts one having to do with Town Code section 246-5.2 the use. Your Honor,

during this trial, the jury has heard testimony that Mr. Gioia visually observed --

THE COURT: Two door bells which is presumptive evidence that it is an illegal two-family house.

MR. KENDRIC: Thank you very much. We put in photographs established substantiating his testimony. In addition, there is no issue at all that the Thomas house is zoned R-1.7, which is a one-family zone because, number 1, we put in the map and number 2, not just even ten minutes ago, Mr. Kutner states in open court, we admit the property is in a R1-7 one-family zone. In terms -- in addition to the visual indicia and the rebuttable presumption set up under the Town Code, we also heard from Mr. Kutner that his client freely admits using the property as a two-family dwelling and that was during the cross examination of Mike Esposito. In addition, during his opening argument Mr. Kutner stated and these are all judicial admissions because here we are at trial stated during his opening that his client, like many other young couples, they use the property as a two-family to help pay the mortgage and indeed up until recently his clients would not be able to afford to stay in the house without the rental income of a tenant, so that's on the first count.

MR. ROZEA: Yes and your Honor just on the second count before I begin really for the purpose of the

record --

THE COURT: Just identify yourself.

MR. ROZEA: Deputy Town Attorney Matthew Rozea. People V Wade that the standard on a trial order of dismissal is whether the evidence in light most favorable to the prosecution there is a valid line of reasoning permissible inferences from which a rational jury could find the evidence of a crime beyond a reasonable doubt. People V Danielson makes clear as well that the sufficiency inquiry requires a Court to marshal competent facts most favorable to the People and determine whether as a matter of law the jury could logically prove that the People sustained its burden of proof.

The Court with respect to the certificate of occupancy has already highlighted the fact that this concerns the use of the building. This code further provides that the certificate of occupancy just states the purposes which the building may be used in it's several parts. And the evidence here shows that Mr. Gioia, when he reviewed that certificate of occupancy from the 1980s he saw that the zone was for a one-family use and combined with the visual evidence that he obtained from the exterior without entry on to the property. That there was presumptive evidence that it is a two-family home and the People believe that the jury could conclude that a crime

has been committed. We object to a post motion.

THE COURT: Okay could we have your witness.

MR. KUTNER: Call Fidelity Title Insurance -- wait.

MR. KENDRIC: I apologize, is the next witness Stephen Zeikowitz?

MR. KUTNER: Yes.

MR. KENDRIC: Where does he appear on the defense witness list?

MR. KUTNER: I don't know if he does. He is from Fidelity Title.

MR. KENDRIC: Where does Fidelity Title show up on the witness list?

THE COURT: Are you opposing?

MR. KENDRIC: I'm making an application to preclude the witness.

THE COURT: No, I want to hear him. Bring the jury in. Overruled.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE COURT OFFICER: Jurors and alternates are present.

MR. KUTNER: I'm asking that this document be marked for V.V. for identification purposes.

I call Steven Zeikowitz to the stand,

Z-E-I-K-O-W-I-T-Z.

THE COURT OFFICER: Defendant's Exhibit.

THE CLERK: Raise your right hand.

S T E V E N Z E I K O W I T Z, called as a witness by and on behalf of the defendant, was duly sworn and testified as follows:

THE CLERK: Lower your hand. Have a seat. Please state your name and spell your last name.

THE WITNESS: Steven Zeikowitz, Z-E-I-K-O-W-I-T-Z.

MR. KENDRIC: Sidebar please.

MR. KUTNER: I'm sorry?

THE COURT: Take the jury out.

(WHEREUPON, THE JURY LEFT THE COURTROOM.)

THE COURT: Mr. Kutner, apparently, counsel said they weren't on the witness list but I'm giving you the opportunity to put him because it's your defense and I'm not going to preclude you. But let me ask you a question, out of fairness to the prosecution, are there any other witnesses that are not on that list?

MR. KUTNER: I don't believe so. No, as a matter of fact I eliminated a lot of the witnesses.

THE COURT: I know. But out of fairness to him he has a right to know who you are calling.

MR. KUTNER: Actually, Judge under the case law in the constitution he doesn't but I gave him the curtesy.

THE COURT: We do that here. What is it you are going to have him testify to the title search?

MR. KENDRIC: This is a title insurance policy.

THE COURT: What does that have to do with anything?

MR. KUTNER: The CPLR 4323 says I could put it in, that's what we are doing.

THE COURT: As to what?

MR. KUTNER: The issue of non-conforming use.

THE COURT: What? That title company searched and found what?

MR. KUTNER: Found the material that was in all of the records that were on the property at the time 2007. Certainly relevant.

MR. KENDRIC: Just by you saying certainly doesn't make it so.

THE COURT: Please counsel. So what documents are in there? Let me see it.

MR. KUTNER: It's the inception page. Tax search. The covenant restrictions source of title.

MR. KENDRIC: I suspect that he's trying to put it in as a complete hearsay document that whoever did this title search or issued this insurance policy, found a 220 classification. How do we have to go through this, Judge? This is cumulative. This is not probative to any of the

defense.

THE COURT: You guys are saying please counsel. This has been a difficult trial for everybody counsel I found this a very difficult trial to try it's been a very hard trial for everybody. We don't have mistrials here. You want to go through this again? Any of you really want to go through I don't think so, I think we get this wrapped up as best as we can. That's classification 220 you're right it says here. (Indicating.)

MR. KUTNER: Which page?

THE COURT: I'm looking at Sunrise Research Corp. It does say classification 220 two-family you already got that in evidence with the Town Card.

MR. KUTNER: But guess what, it's not hearsay. The CPLR says it's absolutely admissible. 4523 says search by a title insurance company or abstract company.

THE COURT: Mr. Kutner, you're not listening to me.

MR. KUTNER: Judge, I apologize.

THE COURT: I'm really getting upset about all this nonsense between you guys. I know you are all under pressure but we have to stay professional on this, please.

MR. KUTNER: Judge, if I could read into the record 4523 is entitled: Search by a Title Insurance Company, Title Insurance or Abstract company. A search

affecting real property when made and certified to by a title insurance abstract or searching company, organize under the laws of this state may be use in place of and with the same legal effect as an official search. That's what Mr. Zeikowitz is going to testify to.

THE COURT: Let me see it.

MR. KUTNER: There's no hearsay.

THE COURT: The search affecting real property when made or certified as an official search of what the Town of Oyster Bay. It says it may be under the law it may be used in place and with the same legal effect as an official search. An official search of what?

MR. KUTNER: Municipalities. I'm guessing county clerk. That's what the law says. It's routinely down. They bring it in that's a title search made by them and they are certifying it is correct and they can cross examine. I didn't even have to put a live witness I could just put in this certification but I want a live witness here.

THE COURT: You want to look at it.

MR. KENDRIC: No, because this is I don't know -- I don't know even know what this is other than a collection of documents that defense counsel has handed up. It doesn't bear any sort of certification. It didn't come in through the subpoenaed records room. This is just a

cumulation of papers that Mr. Kutner seems to staple together. There is no relevance as your Honor picked up on the fact he already got the 220 classification in multiple times there's no point to this document.

MR. KUTNER: There's no point to it, then just put it in.

THE COURT: Mr. Kutner, humor me. What particular document are important?

MR. KUTNER: That entire thing to show.

THE COURT: That's not what I'm asking. Bankruptcy search so that's important?

MR. KUTNER: I can't take that out, Judge. That's part of --

THE COURT: What I'm asking you, specifically, please, Mr. Kutner, I'm asking this legitimately, what documents are necessary?

MR. KUTNER: The tax search and the Nassau County Board of Assessors.

THE COURT: You already have the Nassau County.

MR. KUTNER: I have 2009 and 2010 I don't have the 2006, and 2007.

THE COURT: So you want to get in the 2006, 2007.

MR. KUTNER: I want to get in what my client saw when he bought the house. And he is entitled to do it.

THE COURT: Show me that card?

MR. KUTNER: It's the same older version of R.

THE COURT: I can't even read it. Mr. Kutner, you can't even read this. The property class code here is unreadable. I'm not going to have this guy come in and take a guess. I can't read it.

MR. KUTNER: Judge, I have a legible copy of it.

THE COURT: You gave me this as the report now you have something else.

MR. KUTNER: That's in their favor. If they can't read the 220, that's for weight that's not for admissibility I would submit to the Court. Finally under the under the CPLR this document if the proper foundation is laid it is admissible and I will laid the foundation.

MR. KENDRIC: Not to mention we tried to streamline this trial.

THE COURT: Mr. Kutner, it does say a two-family dwelling obstructing to accommodate year round occupancy did you /PHREBGS owner.

MR. KENDRIC: It's hearsay document it has all sorts of dollar figures in there. We tried to streamline this trial by stipulating into evidence certified copies of the deed.

THE COURT: Let me ask you a question, again, I'm trying to work through this I may have a comprise. That's why I am talking to you. Sometimes we talk things out we

might be able to agree to something. Mr. Kutner, besides this one page here, from 2007, 2008, is there any other document here?

MR. KUTNER: Judge, I can't make it clearer. I want the entire exhibit in evidence.

THE COURT: Mr. Kutner, I'm not sure bankruptcy, give me a break.

MR. KUTNER: Judge, the CPLR says it's admissible.

THE COURT: I know what you are saying. But I'm asking you a question. I'm trying to help. Would you please listen to me on this. What I'm asking you besides this document, is there any other page in here that's relevant on the issue of non-conforming use?

MR. KUTNER: The entire document.

THE COURT: It is not.

MS. CHANNER: Just give us a second.

THE COURT: Counsel, let me tell you what I'm trying to do.

MR. KUTNER: Judge, I think what you're trying to do --

THE COURT: No, you do not.

MR. KUTNER: The law is --

THE COURT: Mr. Kutner, would you please. What I'm trying to do is this page relevant in portion from this title page from 2007, 2008, I just want to know if we can

stipulate into the record from Nassau County and that's what I'm trying to do. Why don't you go talk.

MR. KUTNER: Judge, I don't need to talk. The law is clear.

THE COURT: Could you stipulate that into the record?

MR. KENDRIC: Judge, as a comprise, this one single page, we'll withdraw the objection to it going into evidence as long as the jury is instructed that this is a Nassau County tax document.

THE COURT: That's what it is. So that will go in, Mr. Kutner.

MR. KUTNER: Judge, the law governs your conduct and I'm submitting that --

THE COURT: It doesn't preclude me on ruling what's relevant and not relevant for the trial and that's my ruling. I will allow the tax card.

MR. KUTNER: What about the tax search from Sunrise Tax that's the information relied on when he bought this house.

THE COURT: I asked you specifically what documents and I am asking you again.

MR. KUTNER: This page by Sunrise. This page, certificate of occupancy by Sunrise. The copy of the certificate of occupancy for the garage by Sunrise. The

Nassau County card and the addendum to the Nassau County card, those pages.

MR. ROZEA: Where's the representative of Sunrise Research Report?

MS. CHANNER: Judge, I thought we were doing a comprise it's not the entire document goes in under the CPL.

MR. ROZEA: The comprise is that we stipulate to the tax.

MR. KUTNER: Not one page.

MR. ROZEA: Was a Nassau County property tax but now we have a document from another company.

MR. KUTNER: Which is part of the certified title company operating under the laws of the State of New York and pursuant to 4520 I'm entitled to put it in in it's entirety. You want a comprise, Judge, I'd like all those pages otherwise the whole report should go in by law.

Judge, what the counselor for the People don't recognize, this is a criminal case and fifth amendment rights trump just about everything the defendant's right to defend the charges is restricted in any way and that's what they are treading on. And if it is not important and doesn't matter.

MR. ROZEA: Let's not confuse the jury with more than is necessary.

THE COURT: This information I'll allow in.

MR. KUTNER: Pardon me, Judge?

THE COURT: This part I will allow in.

MR. KUTNER: The ones I asked for.

THE COURT: Yes.

MR. KUTNER: Thank you.

THE COURT: I don't think it hurts your case either way.

MR. KENDRIC: The People have an objection to dollar amounts going before the jury, they should be redacted.

MR. KUTNER: It's already in evidence. He doesn't even read their own documents. The People put it in.

That's part of the official title search that is allowed to go in as in.

MR. KENDRIC: I'll amend my stipulation. I'll also let this in without objection provided that the Court identify it as a Nassau County tax document.

THE COURT: It will be.

MR. KENDRIC: Mr. Kutner is having a conniption over the Court not readily agreeing to put in a completely eligible copy of the certificate of occupancy.

THE COURT: You already have one.

MR. KENDRIC: Right a clear one.

THE COURT: You can bring that in.

MR. KENDRIC: Sunrise Research complete hearsay. Sunrise Research Bankruptcy completely not relevant.

THE COURT: That's not going in.

MR. KENDRIC: So the People agree to these two and urge the Court --

MR. KUTNER: Judge, can I separate them now?

THE COURT: This is what we are going to do. Is this what you want to put in?

MR. KUTNER: Yes. That's the title page so we know.

THE COURT: Why do you need that?

MR. KUTNER: You don't need that, fine.

THE COURT: Do me a favor we'll mark this as BB and show it to the People.

THE COURT OFFICER: Defense Exhibit BB is marked for ID.

THE COURT: You have an objection to this going into evidence?

MR. KENDRIC: I'm repetitive of what I already said. These dollar amounts need to be redacted from the document. The jury shouldn't see how much was paid for the house or how much he is paying in taxes.

THE COURT: Yes, Mr. Kutner, what about that, that's not relevant to the issue how much he paid in taxes. I'm letting the other stuff go in. I think you have a

point on that.

MR. KUTNER: We can lay a foundation now and I'll redact it I'll talk to Mr. Kendric and redact it and submit it, fair enough?

THE COURT: Yes. Let's bring the jury in, please.

MR. KUTNER: I'm going to ask him one question.

MR. KENDRIC: And your Honor, would you instruct the jury that this property card is Nassau County not.

THE COURT: You can ask him. You can cross examine all you want you can cross him until the cows come home.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURORS ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: The witness will be right in. We resolved the major evidentiary issues. That's why sometimes these things happen.

THE CLERK: Sir, be reminded you are still under oath. Just for a clean record your name again, please, and address.

THE WITNESS: Steven Zeikowitz.

THE CLERK: Address, sir.

MR. KUTNER: Your professional address.

THE WITNESS: 1415 Kellum Place, Suite 202, Garden

City.

THE CLERK: Steven with a V or P?

THE WITNESS: With a V.

DIRECT EXAMINATION

BY MR. KUTNER:

Q. Mr. Zeikowitz, we never met?

A. Correct.

Q. And you work for what company?

A. Fidelity National Title which is also Chicago Title Insurance Company.

Q. Is that a license title insurance company licensed under the laws of the State of New York?

A. Yes.

Q. And how long have you worked at that title company, sir?

A. Fourteen years.

Q. By profession, what are you?

A. An attorney.

Q. How long ago did you become an attorney?

A. 1995.

Q. And have you worked in a title field ever since?

A. No.

Q. For the last 14 years you have?

A. Twenty.

Q. What type of job and duties do you have with Fidelity?

A. I am currently the branch manager of two locations.
Q. Which two locations?
A. Garden City, Riverhead, New York.
Q. And in your capacity -- you're also an officer of Fidelity Title Insurance?
A. I am.
Q. As a result of a subpoena served by my office, did you research your records with regard to a title insurance search done in 2007 under title number 3506-00384?
A. I see a lot of numbers. I was served with -- can I just verify that the title number?
THE COURT: Do you need to see a report?
THE WITNESS: Yes, I don't remember the number.
MR. KUTNER: Can you show the witness Defense Exhibit BB.
THE COURT OFFICER: Showing the witness Defense Exhibit BB.
Q. Now, is that an abstract or a skeletal version of the title search that was issued in this particular case?
A. This is an owners title insurance policy.
Q. Regarding what property?
A. Well we insured by legal description but it is also for 121 4th Street, Hicksville.
Q. Is that section 46 block 270, lots one through three?
A. Correct.

Q. And your insured who bought the house at that time, who was what?

A. Darren E. Thomas and Marlene Thomas.

Q. Would you spell Marlene, please?

A. M-A-R-L-E-N-E.

Q. And they were the purchasers and the insureds on your policy, correct?

A. Correct.

Q. And in the course of the Fidelity Title insurance business, did you research that particular type of policy, did you not?

MR. KENDRIC: Judge, I didn't object for the preliminaries but he can ask a non-leading question.

THE COURT: Let's just go.

Q. You're familiar with CPLR 4518, sir?

A. No, not offhand.

Q. In the course of the title company's business, they issue title searches do they not?

A. Yes.

Q. And this was issued during the course of your business?

A. Yes.

Q. And as a result of that, there was a title insurance policy issued at the day of closing when the title transferred from the Cahillanes' to the Thomas', correct?

A. Presumably that's the way we operate.

MR. KUTNER: I offer that in evidence.

MR. KENDRIC: Quick voir dire, Judge.

VOIR DIRE EXAMINATION

BY MR. KENDRIC:

Q. Mr. Zeikowitz, good afternoon. My name is Chris Kendric. Just one or two questions. Prior to today, did your company, Fidelity Title, deposit into the court a certified copy of the policy of which these are a few pages?

MR. KUTNER: Judge, objection. There's no obligation for him to do that. It's irrelevant.

THE COURT: I'm going to allow this question.

MR. KUTNER: Then it's improper voir dire, your Honor.

THE COURT: I will allow the question.

A. I have not. I can't speak for our litigation group. If I may? The subpoenas comes to me I forward it to a litigation department to answer. I'm not privy to what they may or may not have done.

Q. And did you bring with you today here a certified copy of the title insurance policy?

A. Not a certified. I printed out what we had in our system.

THE COURT: So this is a printout from your computer system?

THE WITNESS: The stuff that the officer grabbed.

MR. KUTNER: This is yours?

A. That is mine. So some of that was printed out of the system and some was not.

Q. How about those pages?

A. Again some yes, some no. I could go through.

Q. The pages with the hand scribbly on it.

A. So we do not keep -- because the file is over ten years, we don't have the physical file what is in the system would not be the handwritten marked up stuff.

MR. KENDRIC: Thank you.

THE COURT: Any objection?

MR. KENDRIC: I'm standing on my objection, Judge.

THE COURT: Okay. It's in evidence.

Mr. Kutner, any other questions of this gentleman?

MR. KUTNER: No. Mr. Zeikowitz, thank you for coming.

THE COURT: Any cross examination?

MR. KENDRIC: Now, I'm really going to brief.

CROSS EXAMINATION

BY MR. KENDRIC:

Q. The last two pages of that stapled together thing Defendants' BB in evidence, is it the last two pages. Can I approach, Judge?

THE COURT OFFICER: I'll show you.

Q. Mr. Zeikowitz, do you know whose document those two pages -- I said it so badly. Let me start again. Do you know whose document that is, those two pages?

A. This looks to be a printout from town records when we run a certificate of occupancy search.

Q. Do you know whether those are Nassau County tax records?

A. I don't know offhand.

Q. Very good. You don't know if they are town records or Nassau County records?

A. I do not currently.

MR. KUTNER: Judge, can I see what he is looking at. Judge, I'll stipulate that's a county records.

MR. KENDRIC: County record.

THE COURT: Anything else?

MR. KENDRIC: No, Judge.

MR. KUTNER: Judge, just one thing. I would like to have this marked as BB-1 please -- it was previously marked as Q, I guess we'll leave it as Q. This is an enlargement of what Mr. Kendric was questioning Mr. Zeikowitz about. I just offer it in evidence since it is the same thing.

THE COURT: It's in Evidence.

THE COURT OFFICER: Marked into evidence.

MR. KUTNER: Thank you. No further questions.

Thank you. I call Barbara Beisel, please.

THE COURT OFFICER: Witness entering.

THE CLERK: Raise your right hand.

B A R B A R A B E I S E L, called as a witness by and on behalf of the defendant, was duly sworn and testified as follows.

THE CLERK: Have a seat. Please state your name and spell your last name for me.

THE WITNESS: Sure. Barbara Beisel, B-E-I-S-E-L. Address is 78 Flamingo Road, Levittown, New York 11756.

DIRECT EXAMINATION

BY MR. KUTNER:

Q. Ms. Beisel, we never met before?

A. No, we have not.

Q. We spoke a couple of times in order to arrange for your appearance?

A. We have.

Q. Thank you for coming.

A. You're welcome.

Q. Can you explain for the jury, did there come a time when you lived at 121 4th Street in Hicksville?

A. I did.

Q. And how old were you when you lived there?

A. Fifteen.

Q. With whom were you living?

A. My mother.
Q. Your mother's first name?
A. Ann.
Q. With an E or without?
A. Without.
Q. When did you and your mom move into that particular address?
A. In 1984.
Q. Where did you live within that house?
A. On the second floor.
Q. In an apartment?
A. In an apartment.
Q. Was that house at that time, a one-family or a two-family?
A. It was a two-family.
Q. Who was living downstairs from you?
A. The landlord.
Q. And the landlord's name?
A. Patrick Cahillane.
Q. Did you move in when the Zebarts were the owners or the Cahillanes?
A. Oh, yes, right when we moved in Nuala and Zebart.
Q. Nuala, N-U-A-L-A and her husband Edward?
A. Edward.
Q. And you moved in '84 at some point Mr. Cahillane

became the owner?

A. Yes.

Q. About '86?

A. I was going to say about two years later.

Q. How many years did you and your mom lived there?

A. I lived there until 1993.

Q. And what was your occasion for moving out in 1993?

A. I moved in with my boyfriend.

Q. And your mom continued to reside there?

A. She did.

Q. Until when?

A. About 1998, '99.

Q. During the entire time you were there, was there two doorbells in the front door one for your apartment and one for the first floor?

A. Yes.

Q. There were separate doorbells?

A. There were separate doorbells.

Q. Do you remember if your mom received a separate -- did you mom know anything about electric meters?

A. I do not remember. I want to say she did not because she would have paid more than one amount rent.

Q. In '97, '98, '99 whenever you said mom left, why did she leave?

A. She was ill wasn't working anymore and she couldn't

afford the rent.

Q. She moved in with family?

A. She moved in to an apartment in Glendale, Queens owned by a family member, yes.

Q. How did your mom and you find the apartment if you know?

A. My parents divorced in 1983 and we moved to Flower Street in Hicksville and one of my friends that I went to school with her sister's best friend, Nuala, owned the house on 4th Street and they were looking for a tenant on the second floor.

Q. Were you there when the garage was rebuilt in '86?

A. Yes.

Q. Do you remember ever seeing building inspectors coming in and going?

A. I do not.

MR. KUTNER: I have no further questions. Thank you very much for coming. Your witness.

CROSS EXAMINATION

BY MR. KENDRIC:

Q. Ms. Beisel, good afternoon. I've known your name for years. It's nice to finally meet you.

A. You as well.

Q. You and your mom moved in did you say 1984?

A. In 1984.

Q. And ma'am, you left in 1993 to go live with a

boyfriend?

A. I did.

Q. But your mom she continued living in the premises until 1998 or 1999?

A. Yes. I can't remember. My son was probably about two or three when she moved out and he was born in 1997 so I don't remember the exact date.

MR. KENDRIC: Thank you. Again, nice to meet you.

THE WITNESS: You too. Thank you.

MR. KUTNER: I have no further questions.

THE WITNESS: Okay, thank you so much.

MR. KUTNER: Judge, next witness is Arlene Van Loan.

MR. KENDRIC: And, your Honor, we started at side bar we started discussing this witness.

THE COURT OFFICER: Witness entering.

THE CLERK: Good afternoon. Raise your right hand.

A R L E N E V A N L O A N, called as a witness by and on behalf of the defendant, was duly sworn and testified as follows.

THE CLERK: Lower your hand. Have a seat. Please state your name and address if you could spell your last name for us.

THE WITNESS: Arlene Van Loan, V-A-N L-O-A-N. 316

Danbury Road, Massapequa, New York 11758.

MR. KUTNER: May I inquire?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. KUTNER:

Q. Ms. Van Loan, are you an attorney licensed to practice law in the State of New York?

A. I am.

Q. And at one time were you the prosecutor on this particular case?

A. I don't remember if I was a prosecutor but if it comes to mind about I was involved somehow about nine years ago I was working for the Town at that time.

Q. Are you still working for the Town?

A. I do zoning work solely. I am not working in the capacity for the Town attorney.

Q. I want to show you a particular exhibit, Defendant's Exhibit A in Evidence and ask you if you remember seeing that back in 2009 through 2011 when you were handling the case?

A. I honestly don't remember it.

Q. At any time was that --

THE COURT: She said she doesn't remember.

MR. KUTNER: Yes, if she doesn't remember she doesn't remember.

Q. Do you remember making a request of the officials in

Town Hall for records involving Mr. Thomas' home?

A. I don't remember what capacity I was even dealing with Mr. Thomas.

MR. KUTNER: Then I'm sorry to trouble you and bring you here. I'm sorry, Ms. Van Loan. I have no further questions.

MR. KENDRIC: No questions.

THE COURT: Have a very nice afternoon.

Mr. Kutner, any other witnesses today?

MR. KUTNER: Not today.

THE COURT: I'm just going to read to you again the charge on the conduct rules and then you will be on your way. Tomorrow at two o'clock, Mr. Kutner is going to bring in a number of witnesses tomorrow, so the trial should really be through now.

You're not to discuss this case amongst yourself or with anyone else. Do not converse amongst yourselves or with anyone else about anything related to the case. You may tell the people with whom you live and your employer that you're a juror and give them information about when you would be requested to be in court, but do not talk to them about anything else related to the case. Do not at any time during the trial request, accept, agree to accept or discuss with any person in receipt of any payment in return of supplying any information concerning the trial.

You must promptly report directly to the court any incident by any person and probably to influence you or any members of the jury. Do not permit any party to discuss the case with you or attempt to influence. If anybody else, does you are immediately to report it to the Court and not the other jurors. You're not to visit the cite of the incident. Do not visit or view the premises or the place or the charged crime alleged to have been committed or any of the other placed mentioned. And you must not use internet maps or Google Earth or other programs or device to search for and view any location discussed in the testimony. Do not read or listen to any comments regarding the news media, do not review or listen to any news accounts or discussion of the case before you by newspapers, televisions or radio the internet or any other news media. Your decision must be based solely on the testimony and other evidence presented in this courtroom.

Do not attempt to research any facts issues or law related to this case whereby discussion with others by researching the library or on the internet or any other means or resource. In this stage of input you have electronics communication in research and I want to emphasize in addition do not conversing with anyone face to face about the case. You must not communicate with anyone about the case by any other means including by telephone,

text messages, E-mails, internet chat, chat rooms, blogs by Facebook or Twitter. You must also not Google or otherwise research any information about the information about the law or the people involved in the case, including the defendant, witnesses, the lawyers or the judge.

You must not provide any information about the case with anyone by any means whatsoever and that includes as well as information about the case or what you are doing about the case on any devices internet sites, including blogs, chat rooms, social websites. You're to keep an open mind until all the evidence have been presented and you're charged under the law. And again you're under the rules of conduct. See you tomorrow at two o'clock.

THE CLERK: Anything else for the record before we break today?

MR. KUTNER: No, your Honor.

THE COURT: Mr. Kutner, how many witnesses do you expect tomorrow?

MR. KUTNER: I think four.

THE COURT: Four.

MR. KUTNER: Two quick. We might actually end early tomorrow. I can't get any other witnesses for tomorrow.

THE COURT: So you have three or four tomorrow?

MR. KUTNER: Yes.

THE COURT: And then how many Monday?

MR. KUTNER: Two I believe.

THE COURT: And that would be it?

MR. KUTNER: I'll let you know tomorrow, Judge. My secretary has done nothing but calling people back and forth. Mr. Cahillane is going to be here tomorrow he'll be a little longer. The former owner who sold to Mr. Thomas.

MR. ROZEA: Just so I'm clear, the only town witness would be Stefanich?

MR. KUTNER: Is he coming tomorrow? If he can come tomorrow, please. And Jazwinski and Stefanich.

MR. ROZEA: I'll do my best to get in touch with him.

MR. KUTNER: Jazwinski Monday.

THE COURT: So if you get your witness tomorrow and Monday you would have the charge conference on Tuesday and then I would charge the jury on Wednesday.

MR. ROZEA: So the only other Town witnesses were Ms. Maccarone and Mr. Altadonna?

MR. KUTNER: Yes and I may or may not be calling them depending on what goes on with Mr. Jazwinski and Stefanich.

MR. KENDRIC: So in any event they are not needed tomorrow?

MR. KUTNER: No. Stefanich is coming tomorrow and

Jazwinski Monday?

MR. ROZEA: Yes.

THE COURT: I'll see you tomorrow at two.

(WHEREUPON, THE PROCEEDINGS CONCLUDED.)

* * *

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

-against-

DARREN E. THOMAS,

Defendant.
----------x

March 29, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T:

Darren E. Thomas - Defendant

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record docket 22F of 2009 the People of the State of New York versus Darren E. Thomas. Appearances for the record.

MR. KENDRIC: Christopher Kendric, Kendric Law Group P.C. co-counsel for the People.

MR. ROZEA: Mathew Rozea, Deputy Town Attorney also for the People.

MR. KUTNER: Harry Kutner, K-U-T-N-E-R, Mineola, New York for Mr. Thomas.

MS. CHANNER: Sheryl Channer.

THE COURT: Are there any housekeeping matters before we begin?

MR. ROZEA: Judge, yesterday, you asked that I give you certified copies of the ordinances. I would ask that you take judicial notices. I have a set for everyone.

THE COURT: Gentleman, one thing I got on the jury charges, I want specific jury charges from you not just a listing. Mr. Kutner, do you have specific jury charges for the alleged crime please give to me how you want me to read it to the jury or if you have specific jury charges for the non-conforming use.

MR. KUTNER: Okay.

THE COURT: I would ask that you make it up and give to me.

MR. KUTNER: You want it written out?

THE COURT: Yes, I do. And also the prosecution same thing for the two alleged crimes, I want specific jury instructions how you want me to construct it and also non-conforming use both sides. I want to hear what you have to say. Okay, do you have any problem with that?

MR. KUTNER: No, Judge.

THE CLERK: Are these code are they entered?

THE COURT: I thought they were part of the evidence.

MR. ROZEA: Right we moved those and the Court took judicial notice of it and they're in evidence.

MS. CHANNER: I believe they said it was part of the jury charge.

THE COURT: It is the law.

MR. KUTNER: The jury can't have copies of the law and if they are marked in evidence then the jury, I guess, can see it -- they could be a Court Exhibit if you want.

THE COURT: They could be court exhibit.

THE CLERK: We're going to mark these collectively as Court Exhibit 8.

THE COURT: I saw some new people come in, do we have possible new witnesses here?

MR. KUTNER: No, sir.

THE COURT: Mr. Kutner, how many witnesses do you have today?

MR. KUTNER: Two.

THE COURT: Two witnesses today, and are any of these people coming in new witnesses?

MR. KUTNER: No, they're not.

THE COURT: Question, how many witnesses for Monday do you think?

MR. KUTNER: I think there's four, but it might be reduced to three. I'm trying to reduce. Mr. Colwell will be here possibly Mr. Guckenberger and Mr. Jazwinski.

MR. ROZEA: And again that's the only Town employee who you're calling as a witness for Monday.

MR. KUTNER: Yes.

THE COURT: What witness do you want brought in?

MR. KUTNER: Patrick Cahillane.

THE COURT: I guess we could bring the jury in.

MR. KUTNER: I think we have to seek the jury before we call the witness in.

THE COURT: Yes.

THE COURT OFFICER: Jurors entering.

(WHEREUPON, THE JURORS ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: It's Friday you are going to have a good weekend coming up it's warm tomorrow you can go to the beach and relax. We have two witnesses today. We may be

ending early I have no idea, we'll see.

MR. KUTNER: Patrick Cahillane, please.

THE CLERK: Good afternoon, sir. Raise your right hand.

P A T R I C K C A H I L L A N E, called as a witness by and on behalf of the defendant, was duly sworn and testified as follows.

THE CLERK: Lower your hand. Have a seat. State your name and if you could spell your last name, please and also your address.

THE WITNESS: Patrick Cahillane, C-A-H-I-L-L-A-N-E. Address is 98 Sanford Avenue, Islandia, New York.

MR. KUTNER: With the Court's permission, may I begin?

THE COURT: Yes, please.

DIRECT EXAMINATION

BY MR. KUTNER:

Q. Mr. Cahillane, before about 45 minutes ago, you and I never met, correct?

A. I believe we met at the closing.

Q. You're right. Other than that?

A. No.

Q. And that closing was March 9, 2007?

A. Yes.

Q. And that was when you sold the house known as 121 4th Street to Mr. and Mrs. Thomas?

A. That's correct.

Q. Before we get to the particulars, if you could tell the jury, please, what is your background; where did you grow up?

A. I was born in the Bronx I grew up in Queens.

Q. If you could keep your voice up there's a blower over here and it might be difficult to hear.

A. I was born in the Bronx then we moved to Queens to Jamaica, and I lived there fore probably 25 years and I bought my house in Hicksville.

Q. You did what?

A. I bought the house in Hicksville and I lived there fore about 14, 15 years and now I live in Islandia.

Q. You live where?

A. Now, I live in Islandia.

Q. I thank you for coming. I understand you've had tragedy recently in your life and it's a difficult time in your life.

A. Yes.

Q. Let's get to a different subject maybe it will take your mind off of it. Where were you educated, sir?

A. Grade school I did St. Nicholas of Tolentine in Queens. I did my college undergraduate at New York University

and I did my master's degree at St. John's University.

Q. In what field?

A. IT in accounting.

Q. You're an accountant?

A. No, I'm an information systems consultant.

Q. A what?

A. IT consultant.

Q. And do you travel in your job?

A. I do.

Q. And what is your territory?

A. Wherever the client is. Most of my clients is in the middle of the country, Chicago.

Q. And do you also do international IT business.

A. I have, yes.

Q. And at the present time are you still employed, sir?

A. I took some down time at the moment based on personal things going on.

Q. Did there come a time in 1986 that you looked to buy a house?

A. Yes.

Q. How did that come about?

A. I was working for Grubben. I started at Grubben in 1982. I liked the area. I probably started looking for a house around 1984, '85. I had seen a lot of different things. I guess in '86, I was working as a musician at a local restaurant

who the owners were also friends of my parents and they knew that I was looking for a house in the area and their daughter who lived down the block from them was getting ready to sell her house and they told me about it. I was kind of little overwhelmed with the price because I was young et cetera. And I went over to look at the house and I liked it and it wasn't exactly what I wanted and that's how I came to purchase in '86.

Q. The name of those people is that the Zebarts?

A. Yes, Zebarts.

Q. What was Mrs. Zebart's first name, do you remember?

A. Nuala.

Q. N-U-A-L-A?

A. Yes.

Q. Did you agree upon a price eventually?

A. Yes, we did.

Q. Were you able to afford it?

A. Doing the math based on what I was going to get for rents based on the math what I would get for rents would help me pay the mortgage but I wasn't able to get the mortgage on my own income at that point in time.

Q. How did you get to buy that house?

A. My parents co-signed on the mortgage with me.

Q. At that time how old were you, sir?

A. Twenty-five.

Q. What type of house did you want to buy. What were you

looking to buy?

A. I was interested in getting into the real estate stuff more for investment. A lot of friends of my parents made good money in renting; my brother in law, parents owned apartments houses like that, I was looking at that to generate income for me. At that time I had the big dream use that house and go onto the next house buy a couple of properties but I stopped at the first one.

Q. And did you look for a legal two-family?

A. I didn't start out looking for a legal two-family. I was looking at mother/daughter type situations where I would have rent but this came across the fact that it was a legal two family gave me the opportunity to make better rents.

Q. So this kind of fell into your lap this two-family?

A. You can say that, it was through friends.

Q. Did there come a time that you signed a contract for the purchase of the house from the Zebarts?

A. Yes.

MR. KUTNER: May we have this marked. I think we are up to CC marked for identification.

THE COURT OFFICER: CC for ID.

THE COURT: Do you have a copy?

MR. KUTNER: I gave Mr. Kendric a copy, your Honor.

THE COURT OFFICER: Would you like it shown to the

witness?

MR. KUTNER: Yes, would you please.

THE COURT OFFICER: CC being shown to the witness CC for ID.

Q. Mr. Cahillane, I'm asking you to look at Defendant's CC for identification and ask you if you recognize that sheet of papers, please?

A. It's been a long time since I seen them, but yeah I guess that's my contract.

Q. For the purchase or the sale?

A. I think this was the contract for -- I don't really remember. I think this was the first step, this was going to contract and then the sale documents was something else.

Q. If you look at that first long page, right up in that area sir, you see the date and the names of the people involved?

A. Yes. It's the 10th of April, that would of been the contract.

Q. That was what?

A. That is when we went into contract.

Q. With the Zebarts?

A. With the Zebarts.

MR. KUTNER: I offer it in evidence.

MR. KENDRIC: Objection to relevance.

THE COURT: It's the contract for the house, it's in evidence.

THE COURT OFFICER: CC marked in evidence.

MR. KENDRIC: So the Court is aware, this is when this gentleman purchased the house.

THE COURT: Right. I get it he's buying this house.

Q. When you purchased the house, was there part of the contract consisting of a letter from the Town? Do you know what I'm asking you; if you don't know just ask me?

A. Going through the documents, myself, before I got here, I remember being a bit concerned about it making sure that it was legal and the attorney, my attorney at the time was also my friend, counselled me on it and that documentation was there. There was some kind of letter in there about saying I was concerned about the language, non-conforming legal two-family; and I wanted to get that explained to me. And there was a document there that said it was established and my attorney said that it was.

Q. You bought it after reading that particular letter, correct?

A. Correct.

Q. And you were represented by what was the gentleman's name?

A. Joseph Quatela.

MR. KUTNER: Q-U-A-T-E-L-A.

Q. You closed on that contact and actually took the deed

on June 26th, 1986?

A. That's correct, sir.

Q. From 1986 until you sold on March 9, 2007, was the second floor apartment always rented?

A. Absolutely.

Q. And the first floor, who occupied that?

A. Initially when I first bought it I had tenants there for probably the first five, six, seven years and then I moved into it myself.

Q. At some point -- withdrawn. I left something out. The deed that you took in 1986, was that in your name alone?

A. No, it wasn't.

Q. Who else was on the title?

A. My mother and father.

Q. And did they have any intention of ever living there?

A. No.

Q. Did they ever live there?

A. No.

Q. And again I think you said they signed just as co-signers for you on the loan?

A. Correct.

Q. In 1990, did there come a time that you took the sole title of the house from your parents?

A. I did, yes.

Q. And what was the circumstances there?

A. My parents filed for divorce and I didn't want my house getting stuck in the mist of the war of the roses so I had the house signed over to me so it wasn't part of their assets.

Q. And that was recorded with the county clerk?

A. Yes.

MR. KUTNER: Judge, could we take five minutes? I'm getting a bloody nose. I'm sorry.

THE COURT: No problem. Let's take the jury out.

(WHEREUPON, A BRIEF RECESS WAS HELD.)

(WHEREUPON, THE JURY LEFT THE COURTROOM.)

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Mr. Kutner, go ahead.

Q. I believe I was asking you about the 1990 transferred from your parents. After that you continued to own the house until 2007, correct?

A. Yes.

Q. Now, sometime in 2006 -- oh, wait, I'm sorry let me withdraw the question.

In 1986 when you purchased the house, were there tenants on the second floor in the apartment?

A. Yes, there were.

Q. And their names please?

A. Ann and Barbara Beisel.
Q. B-E-I-S-E-L?
A. Yes.
Q. How old was Barbara at the time?
A. I'd say she was beginning high school.
Q. How long were they tenants of yours to the best of your recollection?
A. Oh, a good long time, probably seven to eight years.
Q. If your memory fails you at all, I have notes here that when you filed the affidavits of yours that I could hand you refresh your recollection, okay?
A. Okay.
Q. Now at all times, when they were there there were two electrical meters?
A. Absolutely, yes.
Q. And when you bought the house the two meters were there?
A. Yes.
Q. And the two meters there when you sold the house?
A. Yes.
Q. And there was no time in between when there weren't two meters?
A. There was no time in between when there wasn't two meters.
Q. And what about two doorbells, were there always two

doorbells?

A. Yes, there were.

Q. And did one ring on the second floor and one on the first?

A. Yes.

Q. And did you have two mailboxes?

A. No.

Q. It was one mailbox for the both of you?

A. Correct.

Q. You and the Beisel's. Did you ever take any measures to hide the fact that you had two electric meters such as like planting shrubs and covering up the two electric meters?

A. No.

Q. Was there any reason to hide the electric meters?

A. No.

Q. Why?

A. Because the house was legal.

Q. And you knew that because what?

A. Because I did my research before I bought it.

Q. Now in 2006, why did you decide to sell the house? Withdrawn. Let me back up.

You said you intended at one point to this be the start of a dynasty or a lot of holdings or whatever?

A. Yeah.

Q. And at some point did you decide that you no longer

were going to follow that path?

A. Yeah, it's a different story when you're living in the house with the tenants and manage what's going on then when you're not living there, 25 miles out on the island from there different things going on different things became a headache.

Q. What year did you move out of the first floor apartment and move out on Long Island?

A. It was after 911, I guess it was probably January.

Q. January of what, I'm sorry?

A. I'm trying to thing, probably 2002.

Q. So the January following the 911?

A. Yes.

Q. And what kind of problems were you having with the tenants?

A. Well the upstairs tenants and the main floor tenants weren't getting along because the guy on the first floor was a real pain in the neck and he acted like he owned the place and was kind of making the rules of the land. So I had to keep negotiating that who was going to park in the driveway who wasn't. He thought he owned the parking spot in front of the house, that was going on. I got called over there to iron out the situation several times. I'm sorry, ask your question again.

Q. That first floor tenant, the heated first floor tenant at the time, you decided to sell the house in 2006?

A. Yes.
Q. His name?
A. Vargus, something like that.
Q. At some point in 2006, did you tell Mr. Vargus that you were going to sell the house?
A. Yes.
Q. How did he take it?
A. He changed locks on the door so the real estate agent couldn't come in to sell the house and he stopped paying rent.
Q. And did he also do something else with the Town of Oyster Bay?
A. I had to get him evicted and he moved out I believe in November. And when I went back to the house after he moved out, aside from the house being completely trashed by him I had a notice on my door from the Town of Oyster Bay to call them about a possible violation.
Q. What was that regarding the violation?
A. I had finished the basement while I owned the house and there was an apartment in the basement.
Q. Was the nature of the violation an illegal basement apartment?
A. I don't remember what the actual verbiage was?
Q. Did you meet a building inspector named Jim?
A. I think that was his name.
Q. Jim Jazwinski?

A. A really nice older gentleman, yeah.
Q. And when you met him, what did you decide to do?
A. Well when I called him, he said to me he kind of apologized for the call. He said that the Town doesn't really look to investigate these things it's only when somebody complains about it that he goes out. He said to me take as much time as you want, just give me a call back when you're ready and when I go there I can't see this that and the other thing. And so he told me what to I needed to do before he came to inspect it and I took action and did it.
Q. What were those things you had to do?
A. I had to remove the kitchen in the basement. I had to get rid of the refrigerator off the property. And I had to make sure that all the pipes were behind the walls and the walls were sheet rocked.
Q. And did you do that?
A. Yes.
Q. And was that during November into December of 2006?
A. I mean it was some time before I sold it, I don't remember the exact dates.
Q. Do you remember the period of time while that notice of violation was being investigated by Mr. Jazwinski, did he come and inspect and confirm that there were apartments on the first and second floor, separate apartments?
A. Yes, he inspected the whole house.

Q. Do you remember that it was on December 21, 2006?
A. Not exactly with the date.
Q. You gave him access?
A. Yes, I was with him.
Q. And you had nothing to hide, correct?
A. Correct.
Q. You freely showed him the first and second floor apartment?
A. Yeah, as I call it stupid language non-conforming legal two, I brought my letter along with me just in case he had any questions about it.
MR. KUTNER: May I have Exhibit A please, Judge, in evidence.
Q. I'm showing you an enlargement of a letter dated June 27, 1968 and ask you if that's the letter that you're talking about?
A. Yes, it is.
Q. And was that the one that was in the contract when you bought from the Zebart's?
A. Yes, that's what the attorney told me was my saving grace as far as it was always a two-family as long as I didn't convert it to a one-family.
Q. You gave a copy of this to Mr. Jazwinski?
A. Yes.
Q. Were you ever served with a violation for having an

illegal two-family house after that?

A. No.

Q. Were you ever prosecuted and brought to court being charged with misdemeanors for having a two-family house?

A. No.

Q. And was there also a copy of this letter indicating Exhibit A that you put in the contract when you sold to Mr. and Mrs. Thomas?

A. Yes.

MR. KUTNER: May we have this marked DD I believe we're up to.

THE CLERK: DD marked for ID. Show to the witness?

MR. KUTNER: Yes, please.

Q. Are you finished looking at it?

A. Yes.

Q. Is that a duplicate -- withdrawn. Do you recognize that document, sir?

A. I mean it's the contract that we did with the buyers quite honestly my lawyer took care of it I just signed what he told me to sign.

Q. If you could look at the last two pages it kind of gives you direction of what it is. See the last two pages of the people who signed it? Is that your signature on those pages?

A. Yes, it is.
Q. And it's also signed by Darren Thomas?
A. That's correct, yeah.
Q. Is that the contract of sale for when you sold the house in 2006 closing in 2007, to Mr. and Mrs. Thomas?
A. Again, that's what it says I don't have a mental picture of what it looked like.
MR. KUTNER: I offer it into evidence.
MR. KENDRIC: No objection.
THE COURT: It's in evidence.
MR. KUTNER: No further questions. Your witness.
MR. KENDRIC: Thank you.
CROSS EXAMINATION
BY MR. KENDRIC:
Q. Mr. Cahillane, good afternoon to you, sir.
A. Good afternoon.
Q. I heard you say that you had no reason to stop planting bushes around the second meter because you were confident that the house was a legal two-family?
A. That's correct.
Q. And your confidence comes from this letter? Does this confidence comes from this letter?
A. Yes.
Q. That's fine. And this letter was given to you by what, your attorney?

A. No, this letter was given to us by the sellers.
Q. But you gave a copy of this to Mr. Jazwinski as I understand?
A. Yes.
Q. You did your homework. You did your research?
A. That and plus the fact from what I understood from my lawyer.
Q. I'm not looking for you to say hearsay in front of the jury so that's why I'm trying to limit my questions.
A. Okay.
Q. We can agree, I think, that at least in part, this is the homework that you did, this is the research that you did?
A. In part, yeah.
Q. That's fine. Now, you stated that during the time that you owned the house, you finished the basement?
A. That's correct.
Q. Can you tell me please, what did that involve, finishing the basement?
A. I put in a new furnace in. Redid the piping. Sheet rocked the walls. Put in a sump pump. Just made an apartment out of it.
Q. Did you put in a kitchen in the basement?
A. Yes.
Q. And what exactly was in the kitchen that made it a kitchen?

A. There was a stove, there was a sink, there was a refrigerator.

Q. Anything else?

A. That's to the best of my recollection.

Q. Mr. Cahillane, when you installed the stove and sink and refrigerator did you obtain a building permit from the Town of Oyster bay?

A. No, I didn't.

Q. Now at a certain point in time, this is in the fall of 2006, you come home to a notice of violation taped to your door?

A. Correct.

Q. And did I understand you correctly, in response to that notice of violation, you called and you spoke with Mr. Jazwinski from the Town of Oyster Bay?

A. That's correct.

Q. Question please, did you tell Mr. Jazwinski that you were in the process of selling the house?

A. I don't remember.

Q. At that time when you received the notice of violation were you already having your disagreement with the first floor tenant, Raymond Vargus?

A. I got the notice the day after they moved out, so yeah they were troublesome for about six months.

Q. Cause and effect right? Raymond Vargus filed a written complaint with the Town and then you received a notice

Q. Did he or you place those items in the garage for storage?

A. No.

Q. Got red of them?

A. Yes.

Q. Now I understand there was a full bathroom in the basement?

A. Yes.

Q. With a full bathtub?

A. Yes.

Q. What happened to that bathtub? Did the plumber remove that bathtub?

A. No.

Q. When you had the sink and refrigerator and the stove removed, was that done pursuant to a building permit obtained from the Town of Oyster Bay?

A. I don't understand what that means.

Q. The question is, did you obtain a building permit to remove those items?

A. No.

Q. Now, Mr. Jazwinski comes in and he inspects your house with you present, correct?

A. Correct.

Q. And he notices that there was some pipes which were protruding from the wall?

of violation with the Town?

A. Correct.

Q. So at that point in time, I'm just trying to focus you in when it was you had your dealings with this first floor tenant and when you had your dealings with Mr. Jazwinski; were you in the process of selling your house?

A. Yes, I was.

Q. Did you tell Mr. Jazwinski, the code enforcement inspector for the Town of Oyster Bay, that you were in the process of selling that house?

A. I don't recall.

Q. Did you tell him that you were having a disagreement with that ground floor tenant, Mr. Vargus?

A. I don't recall, I can't see what business it would be for me to tell him.

Q. Did you in response to receiving the notice of violation, did you have a plumber come in and remove that kitchen from the basement apartment?

A. Yes, I did.

Q. So he removed the stove, yes?

A. Yes.

Q. The sink?

A. Yes.

Q. The refrigerator?

A. Yes, the cabinets.

A. Correct.
Q. Is this in the basement apartment?
A. Yes.
Q. What did those pipes - what did they formally service?
A. The one pipe that was left through the wall that the plumber didn't remove was a drain pipe and I had to get that put behind the wall and close it up.
Q. Right. The pipe as I understand it - was it one pipe or more than one pipe?
A. I don't remember.
Q. That's fine. That pipe as I understand needed to be capped off properly, correct?
A. Correct.
Q. And put by an enclosed finished wall, is that correct?
A. Yes.
Q. Did the plumber do that work?
A. Yes. And the wall had to be painted the same color as the rest of the walls.
Q. Mr. Cahillane, can we agree that you made alterations to the house in response to receiving that notice of violation from the Town?
A. That's correct.
Q. Wasn't there a time, sir, where you rented out the entire house?
A. There was a time that I rented out the first and

second floor.

Q. Was there a time that there was a basement tenant, a ground floor tenant and a second floor tenant?

A. I was one of the tenants if you will when all three places were occupied.

Q. Before you moved to Islandia?

A. That's correct.

Q. After you moved to Islandia?

A. Oh, yes, yes, yes, you're right. After I moved to Islandia I rented.

Q. So after you moved to Islandia, there was a period of time of and I'm looking for approximately how long? I'm not looking for a scientific certainty where you rented the second floor to a tenant, rented the first floor to a second tenant and rented the basement apartment to a third tenant?

A. Yes.

Q. For how long of a period of time?

A. The whole time.

Q. I'm sorry?

A. The entire time I was living in Islandia.

Q. Bear with me, when was that again?

A. I think I moved out to Islandia I think I said 2002.

Q. And sold to the Thomas', actually turned the keys over in 2007?

A. Yes.

Q. Not with mathematical certainty, for about five years time, correct?

A. Correct.

MR. KENDRIC: Listen, sir, thank you very much.

MR. KUTNER: No questions. Mr. Cahillane, thank you very much for coming. Defendant would call Mr. Stefanich.

THE CLERK: Raise your right hand.

J A M E S S T E F A N I C H, called as a witness by and on behalf of the defendant, was duly sworn and testified as follows.

THE CLERK: Lower your hand and have a seat. State your name and spell your last name for us and your address as well.

THE WITNESS: The name is James J. S-T-E-F-A-N-I-C-H. You want my home address or my professional address?

MR. KUTNER: Professional.

THE CLERK: Professional is fine.

THE WITNESS: I'm the receiver of taxes for the Town of Oyster Bay. 74 Audry Avenue, Oyster Bay, New York.

DIRECT EXAMINATION

BY MR. KUTNER:

Q. Good afternoon, Mr. Stefanich. Thank you for coming pursuant to the subpoena that you received from my office. My

name is Harry Kutner I represent Mr. Thomas. Before testifying you obviously spoken to the town attorneys regarding the issues here?

A. I only was apprised of the fact that I had to be here.

Q. Have you spoken to them about the issues of the case at all?

A. Not in particular, sir.

Q. What I need from you and we like the jury to find out is some general information, if you don't mind, okay?

A. Yes.

Q. How long have you been the receiver of taxes office?

A. This is my 20th year as the receiver of taxes.

Q. And how long have you been the actual receiver, the chief in the office?

A. Twenty years.

Q. Twenty years. And did you say you were in that division for 28 years or did I miss hear you?

A. Twenty years.

Q. Total?

A. Total.

Q. Before that, what type of occupation did you pursue?

A. I had several professions I had pursuing prior to that. The very last one before becoming receiver of taxes I was a college profession and information data base designer.

Q. I'm sorry, data base what?

A. Data base designer.
Q. What department were you in any college or university?
A. Information technology.
Q. Do you have any background in accounting?
A. Yes, I do.
Q. Do you have a degree in accounting?
A. No, I have taken courses towards a masters.
Q. Did you have to take any special courses in order to become the receiver of taxes?
A. No.
Q. Tell the jury, what does a receiver of taxes do in a township in New York state?
A. I receive all warrants from Nassau County, specifically, signed by the county executive and the county legislator as prepared by the Department of Assessments. That warrant specifies the amount of taxes to be billed and collected. Once I collect money I then distribute it to the appropriate identified government entities.
Q. The money that's paid to the receiver of taxes doesn't just go to the town, it has a lot of different taxing authorities, correct?
A. Correct. No, it goes toward the town, the county special districts and school districts.
Q. Special districts would be fire districts, library districts, things like that?

A. Yes.

Q. And also, you collect the school taxes for the local school districts?

A. Correct.

Q. Within the town?

A. Within the township.

Q. Now, each year the county assessor notifies you of the proposed assessment for every single parcel of property in the town of Oyster Bay, does it not?

A. I receive an itemization of the assessment that also includes the amount of taxes to be collected against that assessment.

Q. And that tentative assessment, that's what it's called -- there are three assessments; preliminary, tentative and the final assessment?

A. I only deal with the final.

Q. And you're aware -- withdrawn. Nassau County is the only county in the state where it has a county of assessor?

A. I believe there is another county in addition to New York City where that's unified combined function. Normally in the rest of the state, it's done within the township or municipality as an example either a town or a village.

Q. Right. So Nassau County is singular in the fact that the county performs the assessment function and the local municipalities through the collection and then the distrubution?

A. No. The distrubution the collected distrubution is done by as separately independently elected receiver of taxes. The town has no jurisdiction over me.

Q. I thought that when my question did that but I wanted to clarify. The county just assesses you collect them and distribute them?

A. Correct.

Q. Isn't it true that you receive every January 2nd, a notice from the County Board of Assessors indicating assessments proposed for the parcels within the Town of Oyster Bay?

A. I receive it sometimes, sometimes I don't.

Q. And that's pursuant to real general real --- withdrawn. You're familiar with the real property tax law in the State of New York?

A. Yes.

Q. That's a separate quote, "chapter" close quotes of the consolidated laws of the State of New York?

A. Correct.

Q. And another chapter would penal law and another chapter would be criminal procedure law?

A. Correct.

Q. Under that section 501, doesn't it require the county assessor to give you a notice on January 2nd of the preliminary assessment to be made against the time with respect to each and individual parcel?

A. I am not familiar with the receiver that is on a formal basis.

Q. After that notice goes out, there is a notice in early January, is there not?

A. Yes.

Q. And the notices go to each individual homeowner within the municipalities, correct?

A. I believe that's correct.

Q. And then there's a grievance period for three months until the end of March, correct?

A. Or different.

Q. And right in the beginning of April you get the final assessment from the county, true?

A. I do not get the final assessment until we actually receive the collection warrant.

Q. And when does that warrant get issued?

A. I receive that warrant in the beginning of January and in the beginning of October.

Q. And how do the two periods --

A. Correction, September, not October, September. I'm sorry.

Q. January for the municipal taxes?

A. For the general tax.

Q. And September for the school taxes?

A. Correct.

Q. Now, isn't it also true that it's required that the County Board of Assessors publish the list of all the properties in the local community newspaper within the Town of Oyster Bay?

MR. ROZEA: Objection. Required by whom?

MR. KUTNER: By law. Section 503.

THE COURT: I'll allow it.

A. I'm not aware of that because I'm not involved with that process.

Q. During the grievance period, the town has the opportunity besides the individual homeowner to notify the county that they screwed up on a particular parcel, is it not?

MR. ROZEA: Objection to form.

A. I'm not aware of that.

THE COURT: Overruled.

Q. And if there's any proposed change to the assessment caused by a homeowner protesting or grieving his particular assessment, that notice of change is required to be served upon your office, is it not?

A. It is.

Q. And that's under section 510 dash lower case a, true?

A. I'm not familiar with that particular section.

Q. Then the one in early - isn't there a final assessment a final roll sent to you in early April?

A. I don't receive that, sir.

Q. Now before testifying today, in your subpoena that was

sent to your office, did you research this particular property to determine if the homeowner had ever grieved its taxes?

A. I was never informed of the property in question.

Q. So you didn't check to see whether the Town ever objected to the house being classified as a one or two-family?

A. I won't be aware and if they did I'm not generally notified of that.

Q. With the Court's permission, I'm going to leave it open, Mr. Stefanich, if you could do us all a favor and check if you can find out when you get back to your office and through you attorney let us know if the Town ever objected to any of the assessments since 1988.

A. Sir, I have no records of any type of objection of that nature. And it's not within my area of responsibility and authority to pursue that.

MR. KUTNER: I have no further questions. Thanks Mr. Stefanich for coming in.

MR. ROZEA: Very brief, your Honor.

CROSS EXAMINATION

BY MR. ROZEA:

Q. Mr. Stefanich, good afternoon.

A. Good afternoon.

Q. You have been the receiver of taxes you said for 20 years, right?

A. Correct, sir.

Q. That's an elected position?
A. That's an elected position.
Q. In other words, the people of the Town of Oyster Bay choose you to be the receiver or taxes?
A. Yes.
Q. You're not selected by the Town Board?
A. Not at all.
Q. You're not selected by appointment, it's a selected position?
A. Yes, sir.
Q. I just want for the jury - let's just go through what your job the functions of the receiver of taxes. Do you set tax rates?
A. No.
Q. Do you tell the county what tax rates they should assess?
A. No.
Q. You get a document referred to as a warrant, correct?
A. Yes.
Q. And that warrant is generated by, which government entity, the Town of Oyster Bay?
A. No.
Q. Who is it?
A. It's by Nassau County.
Q. And Nassau County sends you this warrant, correct?

A. Correct.

Q. And what did you do with the warrant?

A. The information on the warrant contains the total amount to be collected, I should say building collected. And there is subsection by government entity and then for each parcel within the town the amount to be billed. And in a general tax situation by each line item. I then take that information, it is loaded into our computer system, and we add up all the numbers from the detail level to see that it matches the subtotal level and the total level. Once that happens we know we have --

Q. Let me interrupt you there. Is it fair to say that you are verifying the warrant?

A. Correct.

Q. Do you do that at your discretion or is it required to you by law to verify that warrant?

A. It's not required by law but I am held responsible on a personal basis for the correctness of my billing and collection. So I do it because it's the right thing to do.

Q. Now I interrupted. You were explaining what you do with the warrants?

A. One step is validated I do some other housekeeping chores like do a printing test bills to see everything that's in the database that's been validated is, in fact, printing correctly on the bills.

Q. So in other words on the information the county gave you is coming out on paper correctly?

A. Correct. After that process, we print all the bills and we mail them to all of the persons or organizations that has been designated responsibile for paying the taxes.

Q. If there's a part of your verification in printing test bills you notice an error, are you able to correct the error?

A. No, we have to research it and if we don't have the basis within the data we have to identify with the errors or if there's an error in software, we then have to contact the Department of Assessment and have them resolve the error.

Q. Right, that's the Nassau County Department?

A. Correct.

Q. Because your job is simply to take the data that Nassau County gives you and produce tax bills, right?

A. Correct.

Q. Again, you don't set tax rates?

A. No, I don't.

Q. You don't determine how much each property is taxed, that's Nassau County, correct?

A. That's the assessor's function.

Q. Does Nassau County -- withdrawn. Does the Department of Assessment dictate to you as the receiver of taxes how property is to be billed?

A. No.

Q. And in your role as the receiver of taxes, do you have anything to do with zoning?

A. None whatsoever.

Q. Do you have any discretion to look at the warrant and make decisions about how property should be taxed, either one-family, two-family, commercial, industrial?

A. No.

Q. Because that comes from Nassau County, correct?

A. That's given to me.

Q. Zoning and taxation, two separate items, right?

A. Yes.

MR. ROZEA: Thank you.

MR. KUTNER: Just a couple, Judge, please.

REDIRECT EXAMINATION

BY MR. KUTNER:

Q. Mr. Stefanich, with regard to your entire statements as to your limited knowledge about this particular piece of property, you're unaware of any notice from the Town, from the Town attorney, from the prosecution to change the assessment from two-family to one-family since 2007?

A. I have no knowledge of that.

Q. That would be an unusual request would it not?

A. Explain that further.

Q. Do you get a request from the Town attorney saying

this property is assessed I'm properly. It should be assessed as a one-family. Shouldn't be collected taxes as a two-family that would be a little unusual would it not?

A. I would never receive that.

Q. And you were the receiver of taxes in 2007, correct?

A. Correct.

Q. And as to your knowledge, you never received any such notice on any piece of property from the Town of Oyster Bay in the last ten years?

A. Under those circumstances I have not received any notification in that nature.

Q. I should have said 12 years. Have you ever -- did you ever?

A. Ever, no.

MR. KUTNER: No further questions.

MR. ROZEA: I have no questions. Thank you.

MR. KUTNER: Thank you, Mr. Stefanich.

THE COURT: Thank you for coming.

MR. KUTNER: Judge, because Mr. Guckenberger was retained in the hospital, he's inpatient right now, we have no one else for this afternoon. Unfortunately, we would have to let the jury leave early.

THE COURT: They are very upset about that. I will read you this quick instruction. And you all have a good weekend. We want to get this over and done with. And

by the way, thank you for coming, everybody is depending on you for being here. You're not to discuss this case among yourself or with anyone else. Do not converse either amongst yourself or with anyone else about anything related to this case. You may tell the people with whom you live and your employer that you're a juror and give the information about when you are required to be in court. But you may not talk with them or anybody else anything related about this case.

Do not at any time during the trial request, accept agree to accept to discuss with any person the receipt or acceptance with any payment or benefit in return for supplying any information concerning this trial. You must properly report directly to the court any incident within your knowledge involving any persons improperly influencing you or any members of the jury. You're not to permit any party to discuss the case with you or attempt to influence you. If anyone does, you're immediately report it to the court and not tell the jurors. You're not to visit the cite of the incident you're not to visit the premises where the charged crime was committed involved in the case. And you must not use internet maps or Google Earth or any other programs or device to either search for and view any location discussed in the testimony. You're not to agree to listen any comment regarding this case in

the media. Do not review or listen to any counts or discussion of this case reported by newspapers, television radio, internet or other news media.

Your decision must be made solely on the testimony and any other evidence presented inside this courtroom. Do not attempt to research any fact issue or law related to this case whereby discussion with others by research or in the library or on the internet with any means or resource.

In this stage of internet of research, I want to emphasize that in addition to do not converse face to face with anyone about the case, you must not communicate with anyone about the case, by any means including telephone, text messages, e-mail, internet chat or chat rooms, blogs such as Facebook or Twitter, you must also not Google or search any information about the case, the law which applies to this case the people involved in this case including the defendant, the witnesses the lawyer or the judge. You must not provide any information about the case by anyone by any means whatsoever and that includes posting information about the case or what you do on this case on any devices or internet, including blogs, chat rooms, social websites or other means. You are to keep an open mind until all the evidence has been presented and you are charged as to the law in this entire jury matter.

See you Monday at two o'clock.

THE CLERK: Is there anything else for the record before we break today?

MR. KENDRIC: No, sir.

MR. KUTNER: No, sir.

MS. CHANNER: It's not for the record. Can we approach, Judge? I just need clarification on something you said.

THE COURT: Come on up.

(WHEREUPON, THE PROCEEDINGS CONCLUDED.)

* * *

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/09F

-against-

DARREN E. THOMAS,

Defendant.
----------x

April 1, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T:

Darren E. Thomas

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record, docket 22F of 2009 the People of the State of New York against Darren E. Thomas. Appearances for the record, please.

MR. KENDRIC: Christopher Kendric, Kendric Law Group P.C. co-counsel for the People.

MR. ROZEA: And also for the People, Mathew Rozea Deputy Town Attorney. Good afternoon.

MR. KUTNER: For the defendant, who is here in person, Harry Kutner, Mineola, New York, with Sheryl Channer.

THE COURT: I guess your proposed jury charges.

MR. KENDRIC: Right I just handed up, your Honor, and I have given a copy to defense copy.

THE COURT: We'll mark this as Court Exhibit.

THE CLERK: I have People request to charge and propose is special jury interrogatories marked as Court Exhibit Number 9 and the Defendant's request to charge as Court Exhibit 10.

THE COURT: Mr. Kutner, how many witnesses do you expect to call today?

MR. KUTNER: One Judge.

THE COURT: One only?

MR. KUTNER: Yes.

THE COURT: And then there are others?

MR. KUTNER: I'm going to offer something.

THE COURT: And for the People any rebuttal?

MR. KENDRIC: This is the situation, Mr. Kutner had subpoenaed a James Jazwinski who is a code inspector for the Town of Oyster Bay. And that gentleman is here in the courthouse present pursuant to the subpoena I'd like a minute or two to think about whether Mr. Kutner does not call Jazwinski we call him but we do have a rebuttal witness scheduled tomorrow this is Diana Aquiar.

THE COURT: So she is going to definitely testify?

MR. KENDRIC: Yes.

MR. KUTNER: Judge, may I ask for an offer of proof on Diana Aquiar to see if it is relevant.

MR. KENDRIC: I'm prepared to give an offer of proof the way we have been doing this consistent with trial the witness shows up.

THE COURT: You want me to differ it until tomorrow? Let's see if they will produce her, there is no sense of doing things if we don't have to. Who do you have today?

MR. KUTNER: Mr. James Colwell.

THE COURT: We'll call this person in when the jury comes in. Counselor, any other housekeeping matters? Let me ask you a question, you're going to have a witness tomorrow and you will probably cross examine the witness it seems to me that we do the charge conference Wednesday and

charge the jury Thursday, does it makes sense? Frankly, what we have here, I think it is going to take some time to go through this is this is complicated. It's not like the standard charge you read the DWI and don't worry about it. We have some very important issues here. I think both of you need time to look at each others, by the way, do you both have copies of each others charges?

MR. KENDRIC: Yes.

MR. KUTNER: Yes.

THE COURT: Does that make sense, Mr. Kutner Mr. Kendric, to have this one witness today. We'll finish up tomorrow with the testimony and then Wednesday afternoon we'll do the proposed conference charge?

MR. KENDRIC: Okay, that's fine. That sounds very reasonable.

THE COURT: And then Thursday we'll charge the jury. Any objection to that scheduling?

MR. KUTNER: No.

MS. CHANNER: No.

THE COURT: I think we are going to need the afternoon to sit down and think about the charges that are acceptable with everybody.

MR. KUTNER: Judge, before I rest, I also have to address the issue of Mr. Guckenberger. So I don't know if you want to do that now or after you want to bring the jury

in and send them back out.

THE COURT: Is it going to take long?

MR. KUTNER: Yes, maybe a good twenty minutes, twenty-five minutes. I anticipate, opposition entered, Mr. Kendric.

THE COURT: You want to address his testimony?

MR. KUTNER: Yes. What we can do, Judge, if I could make a suggestion, maybe I won't rest this afternoon, call Mr. Colwell and let the jury go away and we'll stay and deal with Guckenberger issue and it either gets admitted or not.

THE COURT: I rather do it today. It's one less issue I have to worry about.

MR. ROZEA: Judge, we are not going to call Mr. Jazwinski. If we can we have permission to let him go home or back to work.

THE COURT: Is that acceptable by you, Mr. Kutner?

MR. KUTNER: Yes.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Good Monday morning for you. I hope you had a good weekend. I am just trying to give you a whole scenario were we are going to go with the case. From

what I understand, Mr. Kutner, is going to call one witness today and the People will cross examine as you've seen in the past, that's it. We expected other witnesses but there's going to be one witness today. Tomorrow, there's one witness that we expect. So this maybe both, Monday and Tuesday may be fairly short. Wednesday afternoon I'm going to meet with the attorneys to go over the law. I have some very big documents here on the law that the attorneys gave me and I have to do my research, so that's Wednesday. Thursday you will come back here and I will give you the jury charge. I will read the law to you and once we're done on Thursday once I give you the law you can start deliberating. Is everybody okay with that?

THE JUROR: We're both alternates, do we come for deliberation?

THE COURT: You have to be here. Because if one of the jurors gets sick you're the alternate.

THE JUROR: One more question, we were all wondering on the certificate it says that we didn't have to come in on Wednesday.

THE COURT: Wednesday you wouldn't have to come in. We'll have to find that out for you. So that's the schedule right now. I think that's pretty set in stone right now. I think something may come up, right now that's where we are going. Is everybody agreeable to that?

Again, myself as the judge, the attorneys and the defendant everybody wants to thank you for your service. We all know this is going into the third week, this week and it's been a long trial, but we really do appreciate you sitting and listening to an extremely important case. So that's why we really thank you again.

Mr. Kutner, are you ready for your witness?

MR. KUTNER: Yes, Judge. At this time, we call James Colwell, please.

THE COURT OFFICER: Remain standing.

THE CLERK: Good afternoon. Raise your right hand.

J A M E S C O L W E L L, called as a witness by and on behalf of the defendant, was duly sworn and testified as follows:

THE CLERK: Lower your hand. Have a seat, sir. Just state your name and address for us please. Spell your last name.

THE WITNESS: James Colwell. 21 Spruce Street in Hicksville.

THE CLERK: Thank you. Your last name is spelled C-O-L-W-E-L-L?

THE WITNESS: Correct.

MR. KUTNER: Judge, before I examine the witness, I would like to change my position on Friday and join in with the People in offering Exhibit Court 8 and I believe

it's also People's 8 in Evidence. I withdraw my objection and join in the application.

MR. KENDRIC: We can take this up later.

THE COURT: Take it up later.

DIRECT EXAMINATION

BY MR. KUTNER:

Q. Mr. Colwell, if I don't raise my voice enough, if just single me and I'll try to keep my voice raised, okay?

A. Okay.

Q. The acoustics is bad in here we have a fan blowing and it can eat up noise.

You live in Hicksville, sir?

A. Yes.

Q. And what was the address again, please?

A. At 21 Spruce Street.

Q. At 21 Spruce Street. At some point did you live on 235 Jerusalem Avenue in Hicksville?

A. Yes.

Q. Is that at the southeast corner of 4th Street and Jerusalem Avenue?

A. Yes.

Q. And face on Jerusalem?

A. Yes.

Q. How long did you move from there?

A. Five years ago I think.

Q. And the back of your house faced the Thomas' house, is that right?

A. Yes.

Q. You're abutting neighbors or adjoining neighbors, true?

A. Yes.

Q. You were at that time?

A. Yes.

Q. Now your house faces west?

A. Yes.

Q. And Mr. Thomas' house faces north?

A. Yes.

Q. Now in October 31, 1973 -- October 15, 1973, did you move into that house at 235, Jerusalem?

A. Yes in 1973.

Q. Where had you moved from, sir?

A. 10th Street.

Q. I'm sorry?

A. 10th Street in Hicksville.

Q. And at the time you moved in, did you know the then neighbors who were living at 121 4th Street?

A. I met them when I moved in.

Q. That was Barry and Angel Stokey?

A. Yes.

Q. And did you talk to them and have dealings with them

at the time during the time they were the owners?

A. I spoke with them, yes.

Q. And when you moved in, was 121 4th Street a two-family home?

A. Yes.

Q. How do you know that, sir?

MR. KENDRIC: Objection.

THE COURT: I'm going to allow it. Go ahead.

A. Just from visibly seeing.

THE COURT: You have to speak up. Please speak up.

A. Visually seeing two families living in there.

MR. KUTNER: Judge, is the microphone not working.

THE CLERK: Microphone is just for the recordings.

Q. Did you see two electric meters on that house at that time?

A. I don't remember.

Q. And did you see that there was a different person or a family living up on the second floor?

A. Yes, it appeared there was.

Q. Now, the Stokey's next sold to the Bosted's, B-O-S-T-E-D.

A. Yes.

Q. And did you know them also?

A. Yes.

Q. And during the time that they owned the house, did they also rent it as a two-family?
A. Yes.
Q. Then the Bosted's sold to the Zebarts', Nuala and Ed?
A. Yes, what was their name?
Q. Nuala?
A. Nuala, yes.
Q. And while they owned the house was it a two-family?
MR. KENDRIC: Objection to leading, your Honor.
THE COURT: I'm going to allow it.
A. As I remember, yes.
Q. And after they sold -- I'm sorry. After the Zebarts' moved in, they sold it a short time later to Patrick Cahillane?
A. Yes.
Q. And he owned it until up to the time Mr. Thomas moved in, correct?
A. Yes.
Q. Now all those years until you moved out five years ago, was the house always a two-family house?
A. Yes, to the best of my knowledge, yes.
Q. You remember a tenant named Ann and Barbara Beisel?
A. Yes, a mother and daughter, yes.
Q. And where did they live?
A. Upstairs.
Q. In which house?

A. In the Bosted's house or the house in question.
Q. The 121 4th Street?
A. Yes, 121 4th Street.
Q. And did there come a time that you had some kind of relationship with them where you recognized them, you knew them, you introduced yourself and said hello to them?
A. Yes.
Q. At any time did you become aware of any prosecution by the Town of the owners of 121 4th Street?
MR. KENDRIC: Objection.
THE COURT: That's based on his personal knowledge. To the extent of your personal knowledge. Overruled. Only if you know.
A. What is the question?
Q. You become aware ever of a prosecution by the Town of the owners any of the owners of 121 4th Street for a two-family dwelling?
MR. KENDRIC: Objection.
A. No.
THE COURT: Overruled. It's allowed.
MR. KUTNER: No further questions, Mr. Colwell, thank you for coming. Mr. Kendric will probably ask you some questions now.

CROSS EXAMINATION

BY MR. KENDRIC:

Q. Mr. Colwell, nice to see you again, sir. When did Mr. Thomas and his family move into the house at 121 4th Street, in Hicksville?

A. Are you asking me when, is that what you are saying?

Q. When?

A. I don't have any idea exactly when they moved in, no, not at all.

Q. Before Mr. Thomas and his family moved in the house at 121 4th Street in Hicksville, for how long was it continually used as a two-family?

A. To the best of my knowledge there was always a tenant up there.

Q. Mr. Colwell, could it have been intermittently used as a two-family based upon what you saw and what you knew?

MR. KUTNER: Judge, it's called for speculation.

THE COURT: No, I'm going to allow it.

A. As far as I am concerned there was always an apartment up there. I don't remember it being emptied for any period of time.

Q. So Mr. Colwell, you remember being deposed in this matter, previously?

A. Yes.

Q. We sat together in the basement of Mr. Kutner's law office and you were put under oath to tell the truth, do you remember that?

A. Yes.

THE COURT: Does anybody have a copy of the deposition for me?

MR. KUTNER: I handed it up.

THE COURT: This is not. This is Raymond.

MR. KUTNER: I'm sorry, Judge. I have it right here.

THE COURT: So that the jury knows, apparently there was a deposition taken of this individual back in March 27, 2012, okay. So the attorney's going to ask him questions in relation to this, okay.

Q. Before we go into the actual questions, you were questioned under oath in March of 2012, here we are April 1, 2019, do you think your memory is better now, seven years later or back at the time of the deposition, seven years ago?

A. I'm sure it was better back then.

Q. So with that understanding, let me ask you, if you recall being asked these questions and giving these answers, Mr. Colwell.

THE COURT: Okay, what page and line number?

MR. KENDRIC: Of course, your Honor. I'm at page 32, starting at line 23.

THE COURT: Okay.

MR. KENDRIC: "QUESTION: Fair enough --"

THE COURT: Mr. Kutner, page 32, line 23.

MR. KUTNER: I got it now.

MR. KENDRIC: "QUESTION: Fair enough. I get the sense from you Mr. Colwell that you're sort of a live and let live guy?

ANSWER -- no there was no answer. Now I continue with question, is that fair?

ANSWER: Basically.

QUESTION: So if someone was doing something with their property that they ought not to be doing, as long as it didn't have anything to do with you will leave it alone and not mention it, is that fair?

ANSWER: Yes."

MR. KENDRIC: Skipping to line 13:

"QUESTION: So now would you regularly keep tabs over the years, from 1973, all the way through to when Mr. Thomas bought his house, as to what your backyard neighbor or your side yard neighbor was doing with his property?

ANSWER: No.

QUESTION: You were minding your own business and you were hoping that everyone else would mind their own business, right?

ANSWER: Yes.

QUESTION: Do you know, now I'm asking a very specific question, do you know that prior to Mr. Darren

Thomas and his family buying and moving into that house at 121 4th Street, listen to me question, do you know that it was continually used as a two-family home for some period of time?

ANSWER: I don't understand your question.

QUESTION: I'll rephrase the question. When I'm asking you do you know something I'm asking you to please refrain from speculating, please refrain from assuming things, please refrain from just parenting to me what someone else may have told you. I'm asking you prior to Mr. Darren Thomas moving into his house with his family, do you know that his home, that dwelling was being used as a two-family home for some period of time?

ANSWER: To the best of my knowledge.

QUESTION: Okay. What's that knowledge based on?

ANSWER: Always seeing someone upstairs.

QUESTION: Could it had been a visitor?

ANSWER: Could have been anybody.

QUESTION: For how long was it continually used as a two-family?

ANSWER: I don't know.

QUESTION: Could it have been intermittently used as a two-family, based on what you saw and what you knew?

ANSWER: I have no way of knowing what you're asking me.

QUESTION: Why not?

ANSWER: How would I know if it was continuously, used, you know, I don't go looking up seeing what's up there every day or who's parked outside. You asked me something I just don't know.

QUESTION: And that's fine. Understand by me asking you questions we're getting the information that's all, believe me it's no criticism at all. None. No criticism. Can you tell me with any degree of certainty, that some finite or definite period of time prior to Mr. Thomas and his family moving into that house at 121 4th Street, that the home was, indeed, being used as a two-family home on a continuous basis?

ANSWER: I can't tell you that."

Q. Now Mr. Colwell, were those the questions that I asked you seven years ago and were those the truthful answers that you gave me seven years ago?

A. Yes.

MR. KENDRIC: Thank you very much. Thank you.

MR. KUTNER: Not a question, Judge. Thank you Mr. Colwell for coming.

(WHEREUPON, THE WITNESS WAS EXCUSED.)

MR. KUTNER: Judge, because I intended to call Mr. Guckenberger and he's in the hospital so now we have to address that.

THE COURT: We can't until we let the jury leave. Mr. Kendric?

MR. KENDRIC: That's fine, Judge.

THE COURT: Can I see the attorneys up here for a second.

(WHEREUPON, A DISCUSSION TOOK PLACE WHICH WAS HELD OFF THE RECORD.)

THE COURT: Jurors, I'm just going to excuse you for a few minutes we may call you back in here to hear something but I have to make a very important ruling on an issue. So I'm not allowed to have you hear the argument so I'm going to excuse you for a few minutes. I'm will handle this and call you back in here.

(WHEREUPON, THE JURORS LEFT THE COURTROOM.)

MR. KUTNER: Judge, because of the gravity of Mr. Guckenberger's situation, he's now in the hands of a surgeon. They are possibly opening his chest this afternoon for an open heart surgery depending upon how badly clogged his carotid arteries are to the brain. They were going to do a CAT scan yesterday they did it and I spoke to his son this morning. There's no way he is going to be able to testify while this trial is on. Therefore, I'm going to ask the Court that based upon the case of People versus Wrotten, believe or not --

THE COURT: R-O-T-T-E-N?

MR. KUTNER: No, not like fall rotten, it's W-R-O-T-T-E-N. Which I'm giving a copy to Mr. Kendric and one for the Court's use.

THE CLERK: This will be Court Exhibit 11.

THE COURT: Mr. Kutner, this is Court Exhibit 11. Go ahead, Mr. Kutner.

MR. KUTNER: Judge, in that particular case, in the Court of Appeals in 2009, the issue was whether or not a person could testify remotely through video conferencing, which was a grand new procedure ten years ago. Citing the Court's inherent power in judiciary law section two dash lower case b, a copy of which I have here for everybody.

THE COURT: So that will be another Court Exhibit for us?

THE CLERK: Court Exhibit 12 in Evidence.

THE COURT: Okay, Mr. Kutner, go ahead.

MR. KUTNER: The Court of Appeals cited the inherent power of the Court to ensure that basically that justice is done. And referred to that even though there was no specific procedure for it, it was on that side it was used by the People in order to bring in prosecution an elderly gentleman who had been assaulted and had then moved to California. Even though it's not cited specifically in Wrotten, it appears that the Court was relying upon a line of cases from the U.S. Supreme Court we're told that and

I'm quoting, "A few rights are more fundamental then that of an accused to present witnesses in his own defense." And this is being quoted from Chambers versus Mississippi, 410 U.S. 284 from 1973. And they cited it as their precedence, Webb, W-E-B-B V Texas and Washington V Texas where there's testimony critical to a defense. The Supreme Court said in these circumstances where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the end of justice.

Further along in that case, they talked about the other rules that could be used to technically preclude critical relevant evidence necessary in the support of a defendant and how those rules provided that the credibility and also the accuracy of the testimony is preserved those rules should be relaxed and the defense should be allowed to present the proof. In this case we have the prime opportunity --

THE COURT: Was the deposition ever sent to the witness for signature?

MR. KUTNER: Yes, sir.

THE COURT: It was sent to him?

MR. KUTNER: Yes, sir.

THE COURT: Do you have proof of that?

MR. KUTNER: Yes, sir.

THE COURT: Could I see that?

MR. KUTNER: Sure. I'm handing up to the Court the original deposition signed and notarized by Mr. Guckenberger, my enclosure letter dated August 2nd, 2012 and his correction sheet.

THE COURT: Was that given to Mr. Kendric?

MR. KUTNER: I don't know, Judge. I believe the correction sheet was filed and served on him, because the copy was served on him.

MR. KENDRIC: I can state as a matter of fact that I never received this correction sheet.

MR. KUTNER: In any event the two corrections are of no relevance to the trial whatsoever. It's just about the diversion of service. In any event, your Honor, the -- not just one but two attorneys for the Town took part in the cross examination of Mr. Guckenberger.

THE COURT: I know, I read it.

MR. KUTNER: My direct examination of Mr. Guckenberger was about 25 percent of the number of pages and the Town cross examined him for the other three quarters of time. So there's a guarantee of reliability and no denial of confrontation to the People by presenting this testimony.

So in light of Wrotten and Chambers against Mississippi, I would ask that the Court permit the

testimony of Mr. Guckenberger be read to the jury. The Court's read it and just for the record, Mr. Guckenberger's family bought the house next door in 1944. In this day of mobility of homes apparently the national average is every six years, Mr. Guckenberger, himself, moved in with his family right after the war in 1947 and had lived there ever since to the present time, he's still a resident. That's all I have to say. Mr. Kendric.

MR. KENDRIC: All right, Judge, the first thing that I notice in Wrotten the case cited by defense counsel, there was expert medical testimony to the Court establishing that the witness at that time 85 years old, frail, unsteady on his feet and with a history of coronary disease could not travel to be present at the court. Here, defense counsel did not move pretrial for a conditional examination of Mr. Guckenberger. Moreover, defense counsel did not follow any of the procedures set forth in CPL article 660. Wrotten is distinguishable because in Wrotten it wasn't reading in a cold transcript, Judge, of a witness it was --

THE COURT: Live testimony.

MR. KENDRIC: It was live televised testimony where you did have give and take in front of the jury and you did have the effect of the effective cross examination. Here we have none of that. And also as the Court is aware,

I'm certain, I previously during this trial handed up a memorandum explaining the People's position that Guckenberger's deposition testimony is unreliable and also not probative of the issues that the defendant seems to want to call him, to testify about. We don't have anything in the nature of an affidavit or an affirmation which this Court specifically asked for about a week ago attesting to Mr. Guckenberger's medical condition and that is my position, Judge. I object.

THE COURT: Yes, I did ask for that, I asked specifically for a doctor's affirmation and affidavit I remember that.

MR. KUTNER: We've been trying to get it, Judge.

THE COURT: That's required. I'm going to exclude his testimony based on that.

MR. KUTNER: Judge, would you give me until tomorrow afternoon, please?

THE COURT: Counsel, we had until today, I mean it was supposed to be done.

MR. KUTNER: Judge, because the doctor, you know, the doctor's uncooperative non cooperation of his office -- I'll go to the office this afternoon an try to get the affidavit.

MR. ROZEA: Judge, if I may, I would suggest that even if that affirmation were to be delivered to the court,

Wrotten explains that the video testimony would preserve the judge's right, the jury's right and the effective's opportunity to view the witness and that won't happen with Mr. Kutner reading the deposition transcript.

MR. KUTNER: And I would note just one additional thing, your Honor, Mr. Kendric said it doesn't have anything to do with the case then why is he opposing it? If it isn't damaging to the People --

THE COURT: Let me ask this question, Mr. Kendric this is really a very finite situation, I have to tell you I have been wrestling all week on what to do on this issue. And I have been thinking about it all weekend and I have done research on it myself, I'm glad you sent it to the witness so we didn't have to deal with that issue because that was a whole other ball of wax. The second Department ruled and the New York county ruled if you didn't send it out to the witness it is definitely excluded so that issue is out of the way. I did read the testimony and you did cross examine the witness fairly, extensively would that make a difference at all?

MR. KENDRIC: Not as far as I'm concerned, Judge.

THE COURT: Why?

MR. KENDRIC: I think the law is the law. We need to follow the law. It is not as though Mr. Guckenberger advanced age or potential ill health is a surprise to

defense counsel.

THE COURT: I know. This is a real problem for me.

MR. KENDRIC: Mr. Rozea makes a good point I think with Mr. Colwell. Mr. Colwell was just our last witness on the stand. I cross examined him based on his prior inconsistent statement and the jury is able to see the effect of the cross examination. Here that is completely lost with Guckenberger we're just reading out of a cold transcript.

THE COURT: I'm excluding the testimony.

MR. KUTNER: Judge -

THE COURT: No we're done on the issue. We had enough time on this. No. I made it clear I wanted an affirmation today was the day, I'm not doing it. No.

MR. KUTNER: I may have to call Mr. Jazwinski back Judge, so can I have overnight until 2:00 to decide this.

MR. KENDRIC: Sure thing, Judge, see the rules keep shifting. What does Jazwinski have to do with Guckenberger?

THE COURT: To that extent I will give that to you. I'm excluding his testimony, but please, do me a favor let them know so we can get them in here, it's not fair to have this witness back and forth.

MR. ROZEA: I need to really know by 10:00 o'clock

in the morning the latest.

THE COURT: Mr. Kutner, could you guys go outside and work this out today, so we can get him here tomorrow morning.

MR. KUTNER: I'll call him by tomorrow morning at 10:00 o'clock.

THE COURT: You have the cell number and everything?

MR. KUTNER: We have the office number, yes. We have the e-mail, Judge.

THE COURT: I don't want this to be an issue here. Let me call the jury back in and excuse them for the day.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Okay, we had an extensive argument on evidentiary issue, that's it for today. Tomorrow we may have -- we will definitely have one witness we may have two witnesses tomorrow. But tomorrow is the last day of testimony, okay. So we are keeping to our game plan. Wednesday you will not be here. I know you asked a question. And then Thursday you'll be here promptly at two please, I want to give you the jury charge and I want to get the case to you so you can make a fair and partial

decision. So see you tomorrow at two o'clock.

During the time you sit as a juror in this case, there are certain rules of conduct you will hear this over and over again on every break if you are selected to sit on a trial as a jury. You are you not to discuss this case amongst yourselves or with any witness else. Do not converse amongst yourselves or with anyone else related to this case. You may tell the people with whom you live with and your employer that you are a juror and give them information about when you will be required to be in court but you may not talk with them or anyone else about anything related to the case.

Do not at anytime during the trial accept, agree to accept or discuss with any person the receipt or acceptance of any payment or benefit in return of supplying information concerning the trial. You must promptly report through the court officer to the Court any attempt within your knowledge involving any attempts by any person to influence you or any member of the jury. You're not to permit the party to discuss the case in the attempts to influence you, if anyone does you are to immediately to report it to the Court. You're not to visit the cite of the accident. Do not visit or view the premises of the place where the charged crime nor visit any of the premises that was involved in this case. You must not use any

internet maps, Google Earth or any other programs or devices to search or do any alterations in discussing the testimony. You're not to read or listen to any comments regarding anything in the media. Do not review or listen to any other accounts or discussions of the case whereby reported by newspaper, telephone -- excuse me, newspaper, television, radio the internet or news media.

Your decision must be based solely on the testimony and any other evidence presented in this courtroom. Do not attempt to research any fact issue or law related to this case whereby discussion with others, or any research in the library any internet or by any other source or media. In this age of instant electronic communication research, I want to emphasize to not converse face to face with anyone about the case. You must not communicate with anyone about the case by any means including by telephone, text messages, E-mails, internet chat or chat rooms, blogs, Facebook or Twitter. You must also not Google or otherwise search for any information about the case, the law or the people involved in this case including the defendant, the witnesses, the lawyers or the Judge. You must not provide any information about the case with anyone by any means whatsoever and that includes the posting information about the case or what you're doing with this case, on any device internet site including

blogs, chat rooms, social websites and any other means. You must also keep in mind with all the evidence that has been presented and your charge as to the law and you are under the rules of this conduct. See you tomorrow at two o'clock.

THE CLERK: All rise.

(WHEREUPON, THE JURY LEFT THE COURTROOM.)

THE COURT: Gentleman see you tomorrow at two.

MR. KUTNER: Judge, before we close the record for the day, on Friday I noticed something, I'm sure the Court just ad lib and there was some remarks made where you said to the jury you are going to try to get this trial done quickly as possible, something along that line. I just want to make sure that you at some point tell them, look, there's no rush, take your time.

THE COURT: No, I meant in terms of scheduling the witnesses.

MR. KUTNER: Right, I think that's what you meant, but I thought it could have been misinterpreted by the jury, you can cover it tomorrow.

THE COURT: Okay, I'll tell them tomorrow that's what I meant. I was trying to expedite the witnesses.

MR. KUTNER: Thank you, Judge.

(WHEREUPON, THE PROCEEDINGS CONCLUDED.)

* * *

STATE OF NEW YORK : NASSAU COUNTY
DISTRICT COURT : CRIMINAL PART 4th District
----------x
THE PEOPLE OF THE STATE OF NEW YORK,

DOCKET NO.
000022/F

-against-

DARREN E. THOMAS,

Defendant.
----------x

April 2, 2019
Hempstead, New York

B E F O R E:

THE HONORABLE SCOTT FAIRGRIEVE
DISTRICT COURT JUDGE

A P P E A R A N C E S:

AS PREVIOUSLY NOTED

A L S O P R E S E N T:

Darren E. Thomas - Defendant

JASMIN TROVATO
OFFICIAL COURT REPORTER

THE CLERK: For the record docket 22/09 the People of State of New York versus Darren E. Thomas. Appearance of the People for the record.

MR. KENDRIC: Christopher Kendric, Kendric Law Group PC, co-counsel for the People.

MR. ROZEA: Also for the People, Mathew Rozea Deputy Town Attorney.

MR. KUTNER: For Mr. Thomas, Harry Kutner, K-U-T-N-E-R and with Sheryl Channer. Before the jury comes in, Judge, may I to address an issue.

THE COURT: Yes.

MR. KUTNER: After court yesterday, based upon the knowledge I was given that day, I went to -- I'm going to hand this to Mr. Kendric and also to the clerk to be marked as a court exhibit. The reason I was unable -- we contacted the doctor directly and said why couldn't we get that letter about Mr. Guckenberger's condition and the doctor said because we didn't until this morning what was going on. Now I can give you a letter because we know what his condition is. I asked him why? He told me they had just done the CAT scan of the neck and also an aortic sonogram, I believe, they said. In an any event I got the letter from the doctor who said he would then issue the letter and went to see Mr. Guckenberger just to give him the prayers and best wishes of everybody who's in recovery.

The letter, as the Court will see, indicates this morning he was operated on. He had open heart surgery. They put in a bypass, they were stitching him up as of 11:45 and the son promised to keep me updated. And that's the letter. Based on the letter I am sure Mr. Kendric was being thorough and was not sailing my credibility or professional representation, but I wasn't representing anything to the Court that I didn't know and I wasn't told. And this confirms the condition yesterday and based upon that I'm asking the Court to please permit the deposition to be entered under the case law which I now made copies for the Court and Mr. Kendric, if you like. You want me to hand up case law?

THE CLERK: Just for the record, this letter is being marked as Court Exhibit 13.

MR. KUTNER: I apologize yesterday, Judge, for not having the copies that's the first time at trial I usually don't make that kind of mistake.

THE COURT: For what?

MR. KUTNER: I'm sorry. For not having copies of the case law which is a courtesy that I never seem to overlook. My secretary, I asked her to even yellow in the portion which I highlighted. First, I'm handing up Chambers against Mississippi to Mr. Kendric and to the Court. Next is Pennsylvania versus Ritchie, R-I-T-C-H-I-E

this is all Supreme Court cases, your Honor.

THE COURT: You want them marked as Court Exhibit or not really?

MR. KUTNER: I don't think you need to. And the last is Taylor, T-A-Y-L-O-R versus Illinois. All three stand for the general proposition in that it's hyper technical or hypergnostic rules should be relaxed when it comes to critically exculpatory or viable evidence for a man who's being excused of a crime before the courts of this country. They are all US Supreme Court cases, your Honor. And based upon that and the fact that other than the fact that was no 660 order in this case there's no other difference because the information was taken from Mr. Guckenberger and a full and expansive cross examination was had by the Town through not just one but two attorneys which in retrospect I should have objected to but I didn't, but now in hindsight it appears to have been just a stroke of luck in that it gave them two points of view to cross examination.

THE COURT: I got it. Counsel.

MR. ROZEA: Your Honor, yesterday Mr. Kutner asked the Court for leave to bring this letter in and the Court rightly excluded the deposition testimony.

THE COURT: Right, but now that was because there was nothing presented to me. Let me ask you a question

counselor, what's the difference between yesterday and today, he hasn't rested yet and you have rebuttal witness here.

MR. ROZEA: That is all true your Honor, but what I do suggest to the Court and what I think the Court must strongly consider is the fact that the jury will be deprived the opportunity as well the Court and as well the litigants.

THE COURT: I get it. This is the problem that the statute allows for use of deposition testimony and you're not -- I know it's not an affirmation, I get it. But I read the deposition you had the Town the Town had extensive opportunity to allow -- I'm going to allow the testimony in. I think it is appropriate.

MR. KUTNER: Thank you, Judge.

THE COURT: To be fair to both sides, I have to allow it. Counsel, I will tell you right now, if they didn't bring the letter in that ruling would stand. I gave an order but I think out of fairness of Mr. Thomas' case, that the jury gets the full exclusive picture. There is a lot of evidence here and you will be able to sum it up to the jury and you have a rebuttal witness here and I think that's the fair evident way.

MR. KENDRIC: I'll take exception.

THE COURT: I get it. I understand you not liking

my ruling but I think it is the fair thing to do here. Mr. Kutner, what we're going to do is I'm going to bring the jury in I'm going to take care of that comment you asked me to explain to the jury about not rushing and you're going to read the testimony of the witness.

MR. KUTNER: Yes, sir.

THE COURT: And then after that -- but remember the testimony is subject to objection now.

MR. KUTNER: Yes, sir, I understand.

THE COURT: And then you have a right to read in portions that you crossed on, okay, and counsel that's one of the reasons I think it's fair my ruling because you did have a complete opportunity to examine. I'm just going to be blunt, if you didn't do it because I may had excluded his whole testimony but you had a chance.

MR. KENDRIC: All right, Judge, just hear me out for one more second. I understand the Court's ruling I disagree with the ruling. The most significant problem here is, set aside the fact that this was not done pretrial. Set aside the fact that article 660 was not in any way complied with. Set aside the fact that it now, when we're almost wrapping up this case, now we get a letter not an affirmation or affidavit from some doctor set aside the fact that the jury does not get to see the witness --

THE COURT: I understand that. But that's what the statute is there to allow the testimony. It's even aside I will tell you right now, if Mr. Kutner had not sent it out to the witness to be signed I would had exclude it out based upon the law. I researched it hours over the weekend this whole thing. I think it is appropriate my ruling stands. Let's bring in the jury.

Why don't we mark it as a court exhibit.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Good afternoon. Let me tell you one thing I made a comment the other day about trying to expedite the trial, what I was trying to do is talking about scaling the witness I'm not talking about rushing the judgment on this, so we want you to take full opportunity to weigh all the evidence to reach a fair and partial verdict. So two things are going to happen this afternoon, Mr. Kutner has a witness who they alleged has some information on this case and they weren't able to bring him today because the man had some medical issue which preclude him from being here. So I'm allowing Mr. Kutner to read portions of that testimony but it's subject to objection by the People, if they want to. And then the People, if they

want to, can read from other portions of the transcript, okay.

After we finish with that, then I believe the People have one rebuttal witness for you to hear and that would be the testimony this afternoon and then I'll read you the admonishments again which you probably could read to me now. You won't come here tomorrow. The attorneys and I are going to spend a few hours going over the law that I have to give you this case. Charging the jury are made upon lawyers and judges' meeting and trying to come to a conclusion as to what should be given to you, okay. It's like making a cake, something like that. Putting it together and all the pieces.

Then on Thursday you will have summations from both the attorneys and then I will charge you the law and maybe you will be able to deliberate that day somewhat and then we take it from there. Okay? Fair enough? Any questions at all?

THE JUROR: What we're about to hear is this from years ago or is this from yesterday?

MR. KUTNER: I'll make it clear.

THE COURT: You'll hear it.

MR. KUTNER: With the Court's permission.

THE COURT: Yes.

MR. KUTNER: This is a deposition taken on July

25th, 2012 at 136 Willis Avenue, Mineola, New York, of Raymond Guckenberger.

THE COURT: Right he is a non-party witness.

MR. KUTNER: Non-party witness taken under oath. The appearances were myself and Mr. Thomas, Goldberg & Segalla which was Mr. Kendric's law firm at the time by Mr. Kendric and the Town attorney's office by former Deputy Town attorney named Jordan S. Lewis and Mr. Thomas was present.

Raymond Guckenberger, the witness herein, having been first duly sworn by Jeanette L. Hoolan a Notary Public in and for the State of New York, was examined and testified as follows: Examination by Mr. Kutner.

"QUESTION: Please state your name for the record.

ANSWER: Raymond Joseph Guckenberger.

QUESTION: Please state your address for the record.

ANSWER: 119 4th Street, Hicksville, Long Island.

QUESTION: Mr. Guckenberger, we're going on the record now. I met you for the first time today; is that right?

ANSWER: That's correct.

QUESTION: And we spoke on the phone at one or two occasions within the last couple of years, if I recall correctly?

ANSWER: Yes, that's correct.

QUESTION: Prior to testifying today you were given an affidavit based upon information that you supplied to me and signed that in August of 2010. I'm going to have it marked as Plaintiff's Exhibit number 2 for your deposition and ask if you just look at it and identify it as the affidavit that you signed?"

MR. KUTNER: Affidavit was marked and shown to the witness.

"QUESTION: I'm showing you what's been labeled as Plaintiff's Exhibit 2 for identification for your deposition and ask you if you'd just look at that briefly and if you do, if you recognize it tell us what it is, please.

ANSWER: That's correct.

QUESTION: What do you recognize it to be, sir?

ANSWER: I'm sorry?

QUESTION: Do you recognize it to be your affidavit?

ANSWER: Yes, yes.

QUESTION: Is that your signature, copy of your signature on the second page?

ANSWER: Yes.

QUESTION: And it's a true and accurate copy of the original that you signed and submitted at our request;

is that correct?

ANSWER: That's correct.

QUESTION: And the information is still true that's contained in the affidavit, there are no mistakes or any corrections you need to make?

ANSWER: Well, I lived there since '47 like I said, but my dad bought the house in '44, '45 and we rented it out prior to that, that's the difference, the only difference."

MR. KENDRIC: Objection.

MR. KUTNER: "QUESTION: From a deed you saw today" --

MR. KUTNER: I'm sorry?

MR. KENDRIC: Leading. So the objection is to the form of the question.

MR. KUTNER: Judge, leading is waive. It's only to form.

MR. KENDRIC: Pardon me, it's not waived especially under these circumstances, Judge.

THE COURT: Overruled. I'll allow it.

MR. KUTNER: "QUESTION: From the deed you saw today, your parents bought the house in 1944, correct?

ANSWER: Correct.

QUESTION: And between 1944 and 1947, what was your house used for?

ANSWER: They rented it out. It was a house. What do you mean, what was it used for?

QUESTION: Was it rented out to somebody?

ANSWER: Yes.

QUESTION: How many people?

ANSWER: I really don't recall. I mean I was a young kid, I have no idea.

QUESTION: In 1947, when your family moved into the house, what floor did your parents occupy of your home?

ANSWER: We lived on the first floor and then they rented the second floor, my father rented the second floor out.

QUESTION: Do you remember when you moved in, what year you were in school?

Answer: '47. I went to high school in '47. When we moved there I was a freshman in high school.

QUESTION: And where was the Hicksville High School located at that time?

ANSWER: Across the street. I walked through the tennis courts.

QUESTION: The school across the street from you now is no longer the high school, now it's the you junior high or middle school?

ANSWER: Middle school, uh-huh.

QUESTION: Now, since you moved in in 1947 have

you lived there ever since?

ANSWER: Well, I lived there as a single young fella and thin we were married. I forget the years now.

QUESTION: We're not going to tell your wife.

ANSWER: My wife has passed anyway.

QUESTION: I'm sorry.

ANSWER: That's all right. But I'm trying to think. We lived in Mineola for a while after I married. Then we moved back to my mother's house. I lived upstairs in the second floor and she lived downstairs, which my dad had died. I guess we lived there for about a year. Then I bought a house in Hicksville on Chestnut Street, 73, lived there for, I don't know, 20-some odd years. Then my mom rented out the upstairs after I had left, rented to my niece. It was always rented out. And then she got sick, she moved in with me.

QUESTION: Who is the she?

ANSWER: My mom. My mom got sick.

QUESTION: Okay.

ANSWER: Moved in with us. I bought the house from my mother.

QUESTION: Do you remember what year that was? We'll have the deed brought down here in a moment.

ANSWER: 60-something, I think, I'm not sure.

QUESTION: '69?

ANSWER: Yes, I think it was '69. Against my wife's wishes by the way. She said we'll never do it, but we did it, and at that time I owned it, but we still lived at Chestnut Street. I rented it out, rented out my house.

QUESTION: When you say my house, you mean the family home at 119 4th Street?

ANSWER: At 119 4th Street.

QUESTION: And when you rented it out, how many families did you rent your house out to?

ANSWER: Two."

MR. KENDRIC: Judge, objection. This is his own house at 119, how is it probative on the Thomas' house?

MR. KUTNER: Judge, it's just background.

THE COURT: Sustained on that.

MR. KUTNER: You said sustained, your Honor?

THE COURT: Yeah. Go to a relevant portion.

MR. KUTNER: "So in your affidavit the way I drafted it I guess I misunderstood you. It says I have therefore lived there for 63 years. You lived there on and off for 63 years, right?"

MR. KENDRIC: Objection. Where were we now?

MR. KUTNER: On page nine lines 18 through 23.

"QUESTION: Since 1947 you lived there for a period while you were in school, then you moved out like you told us before, you went back and forth.

ANSWER: Right.

QUESTION: But at all times when you weren't actually living at 119 4th Street you were still visiting your parents?

ANSWER: Oh, absolutely. Then when my dad passed away I took care of the house for my mother until she became sick.

QUESTION: And at all times when your parents were living in the house and you weren't, was it still a two-family house, your house I'm talking about?

ANSWER: Yes.

QUESTION: Now we get to your fourth paragraph in your affidavit. You said in 1947 when you moved into your home there were two separate apartments in the Thomas -- which is now the Thomas house, which is located next door to you, your home?

ANSWER: That's correct.

QUESTION: Would you describe where do you live from the corner of is it Jerusalem?

ANSWER: Jerusalem.

QUESTION: Jerusalem and 4th Street, what house are -- are you the first house, second house or third house in from the corner?

ANSWER: If you count the corner house, I'm the third.

QUESTION: The corner house is Coldwell?

ANSWER: Yes. That actually faces Jerusalem Avenue and then the Thomas' house and then my house."

MR. KENDRIC: Objection lead.

THE COURT: Overrule.

MR. KUTNER: QUESTION: Now, when you moved in you said you were familiar with the house that now you call the Thomas house. It was owned by the Koch's, that's correct?

ANSWER: That's correct.

QUESTION: And you were familiar that that also was a two-family house at that time?

ANSWER: Yes."

MR. KUTNER: Skipping to page 12, line 5, your Honor.

"QUESTION: Do you recall the number of meters on the Thomas house when you moved in, do you remember that at all?

ANSWER: At that point I wasn't interested of meters.

QUESTION: At all times since your father purchased in 1944 --

ANSWER: Uh-huh.

QUESTION: I'm sorry, let's narrow it to the period from '44 through '47. Did you have any interaction with the house at that time.

ANSWER: No.

QUESTION: And the Thomas house, were you familiar with the house at that time?

ANSWER: Not at all.

QUESTION: In from '47 when you moved in, that's when your familiarity began, is that right?

ANSWER: That's correct.

QUESTION: At all times, then were there two families in that house?

ANSWER: The Thomas' house?

QUESTION: The Thomas house.

ANSWER: Yes.

QUESTION: Do you remember the names of the other owners of the house after the Koch's and the names of your neighbors over the years?

ANSWER: No, I really don't.

QUESTION: Do you remember the people that lived there at all?

ANSWER: Well, I remember certain incidents.

QUESTION: Which people do you remember in particular?

ANSWER: Well, the one fellow, I don't even remember his name, he burnt the garage down. At the time I was renting my house out and I got a call.

QUESTION: You say my house, which house are you

talking about?

ANSWER: 119 4th Street. I was renting that house and a man called me at night and says, Mr. Guck (sic), your -- a garage is on fire. I thought he meant my garage, but he said no, no, the house next to it is on fire and your fence is burning. So I ran over and the fire department put everything out. I don't even remember that fella's name, but he burnt the garage down. So that's the only one I really had any -- you know, I always said hello to my neighbors, but I never got close, you know.

QUESTION: Okay. That incident you just told us about, that was when the owner of that house tried to kill his wife and son.

ANSWER: Well, I heard that afterwards. I didn't know he set the fire at that time, but then we heard he did set the fire and he tried to kill his wife and son.

QUESTION: Now, do you remember the owners after that, the Zebarts at all?

ANSWER: No, I don't.

QUESTION: And how about the Cahillanes, Patrick C-A-H-I-L-L-A-N-E?

ANSWER: Patrick, yes, yes, I knew him very well.

QUESTION: When he owned the house it was two-family?

ANSWER: Yes.

QUESTION: Have you been in contact with any of the prior owners after they left?

ANSWER: No.

QUESTION: Ever maintain a friendship or correspondence with any of them?

ANSWER: No.

QUESTION: Do you have any pictures of your family or family gatherings which might contain or might have a depiction of the Thomas' house in the background.

ANSWER: Gee, I don't know, I doubt it.

QUESTION: If you happen to stumble across them if you would, you let us know, everybody would like so see that.

ANSWER: Absolutely.

QUESTION: Were you ever prosecuted for maintaining a two-family home for your home?

ANSWER: Never.

QUESTION: Were you ever given any violation of any sort for having a two-family home answer.

ANSWER: Never.

QUESTION: To the best of your knowledge, were any of the owners of next door house, which is now known as the Thomas house, ever given a violation or prosecuted before Mr. Thomas for a two-family home?

ANSWER: Not that I know of.

QUESTION: As far as you know, was anybody on your block ever prosecuted for having a two-family home?

ANSWER: No.

QUESTION: Do you know Mr. Coldwell at all, James Coldwell on the corner?

ANSWER: Yes, just to say hello or whatever.

QUESTION: Did he maintain a multi-family house also?

ANSWER: I believe so, uh-huh.

QUESTION: Are you aware of whether he was ever given a notice of violation or prosecuted.

ANSWER: No, I don't know.

QUESTION: The mailman you have at your house, has that person been a mailman for an extended period of time.

ANSWER: No, they have been changing him. They move them around.

QUESTION: Are you familiar with any mailman who was on your route covering your block that you know the name of who's there for a long period of time?

ANSWER: No, I don't, know.

QUESTION: By the way, where did you work? Where were you employed?

ANSWER: Long Island Lighting.

QUESTION: When did you start working for Long Island Lighting?

ANSWER: 1951.

QUESTION: In what position did you start at?

ANSWER: I was a meter reader.

QUESTION: And when did you stop working for Long Island Lighting?

ANSWER: Well, I'm retired 20 years now.

QUESTION: So 1992 was when you retired?

ANSWER: Yes, yes.

QUESTION: What position did you retire at?

ANSWER: District office manager customer relations.

QUESTION: Were you employed continuously by Long Island Lighting from 1951 till the time you retired?

ANSWER: Absolutely. Well, I went into the service.

QUESTION: What branch?

ANSWER: Coast Guard, United States Coast Guard.

QUESTION: Thanks you for your service.

What years did you go into the Coast Guard?

ANSWER: '52 to '55.

QUESTION: When your parents purchased the house in 1944, how many electric meters were on your house?

ANSWER: I believe two. Like I say --

QUESTION: How many meters are on the house now?

ANSWER: Right now, three.

QUESTION: When was the third one added, if you know?

ANSWER: I added it when the version of service started hitting the --

QUESTION: What does that mean?

ANSWER: When you have two families living in your home and you have the basement open the theory being that whenever you turn the lights on in the basement it's going on the first floor tenant or the second tenant. Not the landlord. You understand, the landlord is absentee.

QUESTION: I see, okay.

ANSWER: Basements are wide open space with the do boiler, et cetera, down there and the boiler might be running off the first floor's tenant or the second, so I put a third meter in to take care of the basement.

QUESTION: And that was required in order not to --

ANSWER: It wasn't required. As I say --

QUESTION: You thought it was appropriate to do?

ANSWER: Yes, because I worked for LILCO and we had a lot of cases where we, LILCO, had to figure out how much it was costing a tenant on his meter to run an oil burner and some lights down or whatever else is in the basement, so we you used to try to figure out the cost and tell the landlord that you got to reduce the rent by

whatever. It was a pain in the neck, so I put a third meter for that reason.

QUESTION: The third meter is just for the basement?

ANSWER: That's all.

QUESTION: And who paid for the electric bills for the third meter after that was installed?

ANSWER: Me.

QUESTION: Meaning the landlord?

QUESTION: Who paid the bills for the first and second floor meters?"

MR. KENDRIC: Objection.

THE COURT: Sustained.

MR. KENDRIC: Has to do with his house this is not the Thomas house.

MR. KUTNER: Judge, I was just intending to read the whole thing but I'll skip to the pertinent parts.

Examination by Mr. Kendric. This will be cross examination.

"QUESTION: Mr. Guckenberger, Christopher Kendric representing Supervisor Venditto, representing the town and possibly some others. If you don't understand my questions, please don't be bashful. Immediately make that known to me.

ANSWER: I'm never bashful.

QUESTION: Now you told us you were in the service from '52 to '55?

ANSWER: Three years, yes.

QUESTION: And that was in the Coast Guard, right?

ANSWER: Yes.

QUESTION: Now, where were you stationed at that time?

ANSWER: In the Coast Guard?

QUESTION: Yes.

ANSWER: I was in Boston for a while. Then I volunteered for an ice breaker and then I went to Baltimore, Maryland. We worked on the ice breaker for about a year down there and then I went up to -- we were transferred to Brooklyn Navy yard was our home base and then I went to the Arctic twice and I'm on film by the way from Walt Disney if you want to take look at me.

QUESTION: How so?

ANSWER: Walt Disney was on our ice breaker when we got caught up in the ice. Men Against the Arctic if you want to look at it.

QUESTION: Now, from 1952 to 1955 --

ANSWER: Correct.

QUESTION: -- when you were away --

ANSWER: Right.

QUESTION: -- serving the country, who was living

in your house at 119 4th Street?

ANSWER: My parents.

QUESTION: Mom and dad?

ANSWER: Mom and dad.

QUESTION: Now, during the time --

ANSWER: My sister might have been there, yet too, I don't think she was married yet?

QUESTION: Now, during the time you were away, do you have any direct firsthand knowledge as to how many families were living in the house at 121 4th Street?

ANSWER: When I was away?

QUESTION: Yes, sir.

ANSWER: No, not really, no.

QUESTION: I guess what I'm asking is --

ANSWER: Go ahead.

QUESTION: If the house at 121 4th Street prior to you leaving to go into the service was, as an example, owner occupied; the owners are in one portion of the house and they're renting out to tenants in another portion of the house. Do you know during the three-year period of time that you were away serving the country, do you know, sir, if that sort of use continued uninterrupted, or whether perhaps there were breaks."

MR. KUTNER: Although there was an objection by me to the form, I'm reading it in any event.

ANSWER: No, I believe it was continued because when it was stationed in Boston I was coming home every week or two or whatever and then, of course, in the Brooklyn Navy Yard I was coming home and at that time the same owners were there, I believe it was the Koch's there.

QUESTION: Koch's were still in --

ANSWER: I believe they were there, I'm not sure. Maybe they weren't, but I think they were.

QUESTION: Let me try and press you just a little bit. There's a difference between saying I'm not sure, maybe, possibly, and yes, I do have a clear memory. I'm trying to find out this record under oath do you have a clear memory or are you speculating?

ANSWER: Well, I'm not speculating. That's a tough word.

QUESTION: Not meant to be a tough word.

ANSWER: Sounds tough to me. As far as I remember, the Koch's were still there, because my father had some problems with the Koch's.

QUESTION: All right. So during that three year period, for example, do you know if the Koch's ever had any vacancy that the tenant left and then they had a two year period or a two month period --

ANSWER: That I can't answer, I have no idea."

MR. KUTNER: Continuing on line 16, page 24.

"QUESTION: Would it be fair and accurate to say that during the three year period, you don't have any direct firsthand knowledge that the Koch house, now the Thomas' house, was continuously being used as a two-family, owner-occupied and tenant-occupied?

ANSWER: Like I say I come home on weekends. When you're in the service you come home on weekends and you really don't look at the house next door.

QUESTION: Were you friendly with any of the Koch's tenants?

ANSWER: No, not at all.

QUESTION: Mr. Guckenberger, do you have knowledge one way or the other as to whether there were periods of time where the Koch's didn't have a tenant in that house and they occupied the house exclusively as the Koch family for whatever period of time.

ANSWER: I have no -- I don't know.

QUESTION: No knowledge one way or the other.

ANSWER: No.

QUESTION: All right. Now, I'd like to just speak with you for a moment about that period of time in your life recently married where your mom lived downstairs and you and your new bride lived upstairs, all right? Was that at 119 4th Street or at some other location?

ANSWER: 119 4th Street.

QUESTION: You're not that old.

ANSWER: I'm 79, I'm old.

QUESTION: You're doing great, better than me.

ANSWER: I lived in Williston Park when we were first married and I think we were married in '58. I'm not sure. My wife's dead, she can't yell at me. Then we lived there for about a year and then we lost the baby, died after 18 days, and then we moved back in my mother.

So I might have had the apartment for six months in Williston Park. Then we moved back with my mother which I said before and we lived there for a year or so and then I bought a house because my wife was pregnant again and had a baby.

QUESTION: Was that the house in Mineola.

ANSWER: No, I bought the house in Hicksville. A little house in Hicksville.

QUESTION: So let's say for about a year --

ANSWER: I lived upstairs.

QUESTION: Your lived upstairs with your wife and your mom lived downstairs?

ANSWER: Correct.

QUESTION: Your father already had passed on?

ANSWER: Correct.

QUESTION: And so during that period of about a year, did you have any tenants any paying tenants in the

house at 119 4th Street?

ANSWER: Did I have any?

QUESTION: Or your mom?

ANSWER: My mom owned the house. I lived upstairs and I paid her rent.

QUESTION: Okay.

ANSWER: Plus I did the lawn.

QUESTION: That's worth something.

ANSWER: That was worth about five bucks in those days maybe not even that.

QUESTION: Now, you told us before, and I think I've got an accurate quote here from you.

ANSWER: Uh-huh.

QUESTION: Asked the question, do you know if any of your neighbors on 4th Street ever received a notice of violation or received a summons --

ANSWER: Yes.

QUESTION: -- for using their house in a particular way. Your answer, I believe, was not to my knowledge.

ANSWER: Correct.

QUESTION: Now, let me ask you this, Mr. Guckenberger, would you necessarily know if one of your neighbors received a notice of violation or a summons?"

MR. KUTNER: Waiving the objection.

"ANSWER: Would I know?

QUESTION: Would you know?

ANSWER: Only if they talked to me.

QUESTION: Supposing that they didn't talk to you?

ANSWER: Then I wouldn't know. That's what I said.

QUESTION: And that's what you meant by, not to my knowledge?

ANSWER: Right.

QUESTION: Do you know whether there are two electric service meters on the Thomas house located at 121 4th Street?

ANSWER: I do not know.

QUESTION: Have you ever known.

ANSWER: Nope, never looked. None of my business.

QUESTION: Speaking again about the Thomas property at 121 4th Street, were you friendly with any of the prior tenants that the prior owners had rented out to?

ANSWER: Yes.

QUESTION: Tell me.

ANSWER: I don't know their name, but my sons were very friend with a young girl that lived there with her mother. I don't know the name. Happened to be a very pretty girl and my boys were very friendly. In fact, I think they went to school wither her when they were in high

school.

QUESTION: Okay.

ANSWER: I know the woman was a single mother. Whether she was divorced, widowed, I don't know, but that's probably the only time.

QUESTION: Indirectly through your sons?

ANSWER: Right.

QUESTION: Mr. Guckenberger, again, not trying to use the harsh word -- 4.

ANSWER: Don't use the hash word.

QUESTION: Do you know one way or the other whether there were any gaps, any periods of time from 1947 through let's just say 20011 any periods of time where the Thomas' property even before Mr. Darren Thomas owned it, did not have a tenant in there?

ANSWER: To my knowledge, no, unless it was like vacant for a month or so between tenants. I couldn't swear it was always rented, I have no idea, as far as I know there was always somebody going through the front door.

QUESTION: Tell me why you say, I could not swear, I have no idea, why do you say that to us?

ANSWER: Why do I say that?

QUESTION: Yes.

ANSWER: Because, I don't know, could have been vacant for a month and then somebody moved in.

QUESTION: Could it have been vacant for three months, all these years?

ANSWER: I don't recall it being vacant that long because it happened to be a very nice apartment, very nice location and usually there's no problem in renting it.

QUESTION: Are you speculating or do you have a clear memory going back to 1947 that there was no time where the Thomas house was not being rented out to some tenant."

MR. KUTNER: Objection by me, counsel.

ANSWER: I can verify, as far as I know, it was always rented. It's like I say, except between tenants or else they were doing some work up there to fix is it up or something like that.

QUESTION: What's the longest period of time that the there was no tenant in there?

ANSWER: I have no idea, I just told that you that.

QUESTION: You suggested that you knew, Mr. Guckenberger.

ANSWER: I knew it was always rented.

QUESTION: Okay, continuously, that's the gist of my question.

ANSWER: Continuously.

QUESTION: And I'm asking you, what was the

longest period of time it went unrented, the house at 121 4th Street."

MR. KUTNER: I do waive objection, your Honor.

"ANSWER: I don't know.

QUESTION: Do you know for a fact that it was not three months?"

MR. KUTNER: Waiving objection; argumentative.

"ANSWER: Do I know for a fact?

QUESTION: Yes.

ANSWER: I can almost swear it was never empty for three months because usually, like I said, it was a prime area.

QUESTION: I'm going to do this, I'm going to direct your attention to the affidavit Plaintiff's 2 for identification.

ANSWER: Plaintiff's 2, God, I didn't know I was going to get grilled here.

QUESTION: It's not really grilling.

ANSWER: It isn't? I watch Judy every day.

QUESTION: Paragraph Number 4.

ANSWER: One, two, three, four.

QUESTION: You make reference to what the Koch's told us, okay? Who's the are "us" in paragraph number 4.

ANSWER: There were two separate apartments -- my parents. My parents owned the house.

QUESTION. Okay. Were you there when the Koch's told your parents?

ANSWER: Well, you know, you talk as neighbors.

QUESTION: That's what I'm trying to get to, when did this conversation take place.

ANSWER: I was in high school, playing football, basketball, baseball, you think I know when this took place. You know, maybe when I was mowing the lawn, maybe my mother went out, my father went out. I don't know when it took place, but they knew there were two families over there and we had two families."

MR. KENDRIC: Objection. This is just blatant hearsay, Judge.

THE COURT: I'm going to allow it. Let's go.

MR. KUTNER: Continuing examination by Mr. Kendric, page 33 line 14:

"QUESTION: You say that they knew there were two families over here and we had two families. What does that mean?

ANSWER: The Koch's had a two-family and my mother and father had two-family and my mother would never do anything illegal, she was an Irish Catholic lady and didn't do nothing illegal.

QUESTION: Did the Kochs' ever tell you --"

MR. KENDRIC: Objection.

THE COURT: Sustained. That's sustained.

MR. KUTNER: Continuing on page 34 line 2:

"QUESTION: So any information that you received from the Koch's on the subject, paragraph number 4 of your affidavit, this is information which came to you indirectly from hearing from your parents?

ANSWER: Yeah, at the dinner table, you know, they got two families two families next door, the Koch's, blah blah, blah, I don't know, that's all I know.

QUESTION: All right. Mom and dad bought the house in '44?

ANSWER: I believe so, yes.

QUESTION: You came in 1947?

ANSWER: Correct."

MR. KUTNER: Waiving the objection.

"QUESTION: You, yourself, started living at the property 119 4th Street, in 1947?

ANSWER: Correct.

QUESTION: And tell me, please, do you have any direct personal knowledge about how the house at 121 4th Street, direct personal knowledge as to how that house has been used prior to you moving in 1947?

ANSWER: No.

QUESTION: None, right?

ANSWER: None."

MR. KUTNER: Mr. Kendric says all right. Thank you very much, sir. The witness thank you. Examination by Mr. Lewis the other Town attorney who grilled him secondarily examination by Mr. Lewis on line 11:

"QUESTION: Just a couple of more questions. I also represent some of the defendants along with Mr. Kendric. My name is Jordan Lewis.

ANSWER: Who's the defendants?

QUESTION: Well, it is a little complicated in this case, there are two cases going on here."

THE COURT: Mr. Kutner.

MR. KUTNER: Can I skip that?

THE COURT: Yes, please. I don't want to get into any of that stuff.

MR. KUTNER: Skipping over to page 36, line 4:

THE COURT: Hang on just a minute. No.

MR. KUTNER: Down to line 12.

THE COURT: Yes, go ahead.

MR. KUTNER: "QUESTION: Are you aware of what the Town of Oyster Bay zoning code is in your particular area where your home is located?

ANSWER: Absolutely not.

QUESTION: Do you have any idea when your home, that being 119 4th Street, was constructed?

ANSWER: In the 20s.

QUESTION: How do you know that?

ANSWER: How do I know that? Well, if you go to the library there's a picture showing Hicksville High School. Across the street there's houses and one of those happen to be ours and we did find a newspaper in the wall time. When it was 1920 -- I think it was '28 or '29, so on my house they have circa 1927 and stuff like that.

QUESTION: Have you ever heard of the term of non-conforming use?

ANSWER: No.

QUESTION: Have you ever heard the term pre-existing yes?

ANSWER: Pre-existing?

QUESTION: Yes. In reference to your home or any of the homes in your neighborhood?

ANSWER: I guess not. I don't know. I don't think so.

QUESTION: Are you aware --

ANSWER: I heard of pre-existing medical conditions.

QUESTION: That's not what we're talking about. Are you aware of any type of records or documents being issued by the Town of Oyster BAY in reference to your home 119 4th Street being a pre-existing or non-conforming two-family home?

ANSWER: No, as far as I know, we never received anything.

QUESTION: Just a couple of more questions.

ANSWER: That's fine.

QUESTION: So you lived at Chestnut Street you said for around twenty years in Hicksville?

ANSWER: Probably 73 Chestnut Street, I'm not sure. Like I say, after a while every roles together.

QUESTION: And how often did you visit 119 4th Street during the period when you were living at Chestnut.

ANSWER: Once a week at least, maybe more but at least once a week to see my mother and she moved with me. I bought the house, I maintained the house.

QUESTION: And you testified a few minutes ago that you remember a Patrick Cahillan?

ANSWER: Yes.

QUESTION: Who was the former owner of Mr. Thomas' home or what is now Mr. Thomas' home?

ANSWER: Yes.

QUESTION: But you said you don't remember the Zebarts who were also former owns of the house?

ANSWER: I don't remember. One of them owned a Stack O'Barley, it was a bar in Hicksville. I'm pretty sure his daughter, he bought that house for his daughter. I'm not sure of the name though.

QUESTION: Now, you said you're not aware if the Colwell's were ever prosecuted for any use of their home?

ANSWER: I have no knowledge of them.

QUESTION: How would you have knowledge whether the Colwell's were prosecuted?"

MR. KUTNER: Rephrasing the question.

"QUESTION: And to your knowledge, none of the homes on your block were ever prosecuted, correct?

ANSWER: To my knowledge, no, never heard of anybody.

QUESTION: And if they were, if there ever were prosecutions of the owners of those homes, how would you know about that?

ANSWER: Just as neighbors talking on the street, that's all.

QUESTION: Were there any neighbors that you talked to a lot?

ANSWER: This guy here.

QUESTION: Right, but prior to the Thomas' moving in, were you ever particularly friendly?

ANSWER: Patrick, what's his name, Cahillan or something like that, Patrick."

MR. KUTNER: Mr. Lewis that's it for now. Further examination by Mr. Kutner. This is on page 40, line 8:

"QUESTION: I just have a couple of extra

questions, Mr. Guckenberger. Just as far as the most recent questions asked of you by Mr. Lewis, he's asking you if you had any knowledge if any of the neighbors had ever been prosecuted, the Town would have that knowledge, wouldn't they, you would expect they would?

ANSWER: I hope so. I hope so.

QUESTION: When you were owning Chestnut Street and not personally living in the house 119, your mom was living downstairs?

ANSWER: Yes.

QUESTION: She had or you had a tenant upstairs?

ANSWER: She did.

QUESTION: She did?

ANSWER: She did.

QUESTION: You said you visited the house a minimum of once a week?

ANSWER: Yes.

QUESTION: What did you do when you visited the house?

ANSWER: Oh, number one, I checked on my mom. You know and then I mowed the lawn and painted the house?

QUESTION: You were the owner at that point correct?

ANSWER: No, she was the owner and when she became sick then I purchased the house. That's when I maintained

it and did everything.

QUESTION: Before you owned it did you maintain it for your mom?

ANSWER: Yes.

QUESTION: What type of maintenance did you do on the house?

ANSWER: Mowed the lawn. We had old storm windows, wooden and screen, I put them up and down.

QUESTION: You had to remove them seasonally?

ANSWER: Seasonally.

QUESTION: So they were the old wood frame types that you had to hook on the top?

ANSWER: Oh yeah, yeah, clip them up there. Before you guys.

QUESTION: No, I had them too. As you faced your home answer.

ANSWER: Right.

QUESTION: -- from the street looking south toward the front door of your house answer?

ANSWER: Right.

QUESTION: Where has the lawn always been on your house, front, back and which side?

ANSWER: Right side.

QUESTION: Right side is the side adjoining what property?

ANSWER: The Thomas'.

QUESTION: The young lady who was a tenant in the Thomas' home whom your son dated, was her name Barbara --

ANSWER: She didn't date. It was Barbara, yes.

QUESTION: Was her name Barbara Beisel, B-E-I-S-E-L?

ANSWER: Barbara, yes, could be, yes.

QUESTION: She lived there with her mom?

ANSWER: Yes.

QUESTION: Went to Hicksville High School.

ANSWER: Sure, they would have loved to date her, but she was a knockout, one step ahead of them. They became very friendly. Okay, go ahead.

QUESTION: You said between '44 and '47 when you weren't living at the house you were asked if you had any personal knowledge of the two-family status of the then Koch house? Did you ever visit the house after your parents bought it?

ANSWER: No.

QUESTION: Before you moved in?

ANSWER: No.

QUESTION: Where were you and your parents living at that time?

ANSWER: We were living on Broadway in Hicksville above my father's ice cream parlor, living in an apartment?

QUESTION: Where?

ANSWER: 74 Broadway, which is no longer there.

QUESTION: Is that across the street or within a block or so from St. Ignatius Church?

ANSWER: Yes.

QUESTION: And where is it from St. Ignatius Church or where would it have been, it's knocked down now I understand?

ANSWER: Yes, that whole side is taken down. It's between Herzog Place and Maurice Street.

QUESTION: During those three years, did you ever visit at the house with your dad at any time?

ANSWER: Never. I actually never even knew where he bought. Wasn't my business.

QUESTION: I want to show you a photocopy of a deed we've marked as Plaintiff's Exhibit Number 3 for the purposes of your deposition and ask you if you recognize that particular document, sir?

ANSWER: That's the deed to my house.

QUESTION: And is the deed from whom to whom?

ANSWER: My mom to me, to me.

QUESTION: And the date on top of that deed on the first page on the top?

ANSWER: Second day of September 1969.

QUESTION: That's the time that you were talking

about before when you purchased the house from your mom?

ANSWER: Yes."

MR. KUTNER: I have no other questions, thank you very much. Any follow up? Mr. Kendric, no, thank you very much. Concluded at 11:04 a.m.. Thank you, Judge.

THE COURT: Mr. Kutner, any other witnesses?

MR. KUTNER: No, sir.

THE COURT: So you rest on your case, correct?

MR. KUTNER: Subject to the rebuttal, if any.

THE COURT: Okay. Thank you.

MR. KENDRIC: Does the jury need a break at all? Very quick just a few lines.

MR. KUTNER: Judge, may I ask I read the whole transcript except where he objected?

THE COURT: Counsel, I'm going to allow it.

MR. KUTNER: So he is going to repeat it?

THE COURT: No, they can do it.

MR. KENDRIC: Page seven line three.

"QUESTION: In 1947 when your family moved into the house, what floor did your parents occupy of your home?

ANSWER: We lived on the first floor and they rented the second floor. My family -- my father rented the second floor out.

QUESTION: Do you remember when you moved in, what year you were in school?

ANSWER: '47. I went to high school in '47 when we moved there I was a freshman in high school."

MR. KENDRIC: Page 12 line 13.

THE COURT: Page 12 line 13?

MR. KENDRIC: Line 13.

"QUESTION: I'm sorry, let's narrow it to the period from '44 to '47. Did you have any interaction with the house at that time?

ANSWER: No.

QUESTION: And the Thomas house, were you familiar with the house at that time?

ANSWER: Not at all.

QUESTION: In from '47 when you moved in that's when your familiarity began, is that right?

ANSWER: That's correct."

MR. KENDRIC: Page 13 line four:

"QUESTION: Do you remember the names of the other owners of the house after the Koch's and the names --"

THE COURT: Mr. Kendric speak up.

MR. KENDRIC: Sure thing. Page 13 line four.

"QUESTION: Do you remember the names of the other owners of the house after the Koch's and the names of your neighbors over the years?

ANSWER: No, I really don't.

QUESTION: Do you remember the people who lived

there at all?

ANSWER: Well I remember certain incidents."

MR. KENDRIC: Page 34 line 11:

"QUESTION: All right. Mom and dad bought the house in '44?

ANSWER: I believe so, yes.

QUESTION: You come in in 1947?

ANSWER: Correct.

QUESTION: You, yourself, started living at the property 119 4th Street, in 1947?

ANSWER: Correct.

QUESTION: And tell me please, do you have any direct personal knowledge about how the house at 121 4th Street, direct personal knowledge as to how that house had been used prior to you moving in in 1947?

ANSWER: No.

QUESTION: None, right?

ANSWER: None.

MR. KENDRIC: Page 22.

THE COURT: 22?

MR. KENDRIC: 22 line six:

"QUESTION: --"

MR. KUTNER: Give me one second please.

MR. KENDRIC: "QUESTION: Now, from 1952 to 1955 --

ANSWER: Correct.

QUESTION: -- when you were away --

ANSWER: Right.

QUESTION: -- serving the country, who was living in your house at 119 4th Street?

ANSWER: My parents.

QUESTION: Mom and dad.

ANSWER: Mom and dad.

QUESTION: Now during the time --

ANSWER: My sister might have been there yet too, I don't think she was married yet.

QUESTION: Now during the time that you were away, do you have any direct firsthand knowledge as to how many families were living in the house at 121 4th Street?

ANSWER: When I was away?

QUESTION: Yes, sir.

ANSWER: No, not really, no.

MR. KENDRIC: Page 23 line three.

QUESTION: If the house at 121 4th Street prior to your leaving to go into the service was as an example, owner occupied; the owners are in one portion of the house and they're renting out to tenants in another portion of the house. Do you know during the three year period of time that you were away serving the country, do you know sir, if that sort of use continued uninterrupted or whether

perhaps there were breaks?

ANSWER: No, I believe it was continued because when I was station in Boston I was coming home every week or two or whatever. And then, of course, in the Brooklyn Navy Yard I was coming home and at that time the same owners were there, I believe it was the Koch's there.

QUESTION: The Koch's were still in there?

ANSWER: I believe they were in there, I'm not sure, maybe they weren't, but I think they were.

QUESTION: Let me try and press you a little bit. There is a difference between saying I'm not sure, maybe, possibly and yes, I do have a clear memory, I'm trying to find out on this record, under oath, do you have a clear memory or are you speculating?

ANSWER: Well I'm not speculating that's a tough word.

QUESTION: Not meant to be a tough word.

ANSWER: Sounds tough to me. As far as I remember the Koch's were still there, because my father had some problems with the Koch's.

QUESTION: All right. So during that three year period, for example, do you know if the Koch's ever had any vacancy that the tenant left and then they had a two year period or a two month period --

ANSWER: That I can't answer, I have no idea no

idea.

QUESTION: Would it be fair and accurate to say that during the three year period, you don't have any direct firsthand knowledge, that the Koch house, now the Thomas' house, was continuously being used as a two-family owner occupied and tenant occupied?

ANSWER: Like I say, when I come home on weekends. When you're in the service you come home on weekends and you really don't look at the house next door."

MR. KENDRIC: Line 7:

"QUESTION: Mr. Guckenberger, do you have knowledge one way or the other as to whether there were periods of time where the Koch's didn't have a tenant in that house and they occupied the house exclusively as the Koch family for whatever period of time?

ANSWER: I have no -- I don't know.

QUESTION: No knowledge one way the other.

ANSWER: No."

MR. KENDRIC: Page 29 line 22:

QUESTION: Do you know one way the other whether there were any gaps any periods of time from 1947 through to, let's say 2011, any periods of time where the Thomas' property even before Mr. Darren Thomas owned it, did not have a tenant in there?

ANSWER: To my knowledge no, unless it was like

vacant for a month or so between tenants. I couldn't swear it was always rented, I have no idea, but as far as I know there was always somebody going in the front door.

QUESTION: Tell me why you say, "I could not swear, I have no idea," why do you say that to us?

ANSWER: Why do I say that?

QUESTION: Yes.

ANSWER: Because I don't know, could have been vacant for a month and then somebody moved in."

THE COURT: Mr. Kutner anything else.

MR. KUTNER: Nothing. No, thank you.

THE COURT: Mr. Kendric are you ready to call your rebuttal in?

MR. KENDRIC: Yes, sir. Before I do, your Honor, I'd like for the Court to take judicial notice of Town code of Town of Oyster Bay, sections 246-4.2.2.2.

THE COURT: Are those copies that were given to me?

MR. KENDRIC: Yes.

THE COURT: Hang on.

MR. KUTNER: Judge, may I suggest this is an issue of law that may be taken outside of the jury.

MR. KENDRIC: And also section 246-4.2.4.

THE COURT: Are these all the copies that you gave to Mr. Kutner and I?

MR. KENDRIC: Yes.

THE COURT: Are they certified?

MR. KENDRIC: Yes.

MR. KUTNER: Judge, I'd consent to them even though this is not usual practice of going in evidence and the jury can see, I have no objection.

MR. KENDRIC: The next witness is Diana Aquiar.

THE COURT: Do you agree to that the section goes in as evidence?

MR. KENDRIC: I think they're Court Exhibits.

THE COURT: The court takes judicial notice. Let's go let's. Get the witness in here.

MR. KENDRIC: So Judge, the defense rested this is my rebuttal?

THE COURT: Correct.

THE CLERK: Good afternoon. Raise your right hand.

D I A N A A Q U I A R, called as a witness by and on behalf of the People, was duly sworn and testified as follows:

THE CLERK: State your name and address for us please, and could you also spell your last name.

THE WITNESS: Diana Aquiar, A-Q-U-I-A-R. 272 Genova Court, Farmingdale, New York, 11375.

THE CLERK: Thank you.

THE COURT: Keep your voice up, please when you

testify. Thank you. Go ahead Mr. Kendric.

MR. KENDRIC: Thank you.

DIRECT EXAMINATION

BY MR. KENDRIC:

Q. Ms. Aquiar, good afternoon.

A. Good afternoon.

Q. Are you currently employed with the Town of Oyster Bay?

A. No, I'm not.

Q. Did you retire?

A. Yes.

Q. When did you retire?

A. June 2017, maybe.

Q. During the 2008, 2009 time period, what position did you hold with the Town?

A. My title was assistant to the supervisor. And I was assigned to planning and development.

Q. Ms. Aquiar, are you familiar with the charges that were brought against Mr. Thomas?

A. Yes, I am.

Q. Can you tell us about your involvement, if any, with this case?

A. Um, at some point I became head of code enforcement and the summons had been issued to Mr. Thomas and I was here at District Court on that summons on behalf of code enforcement.

Q. So tell us what happened.

A. A summons had been issued and I spoke with Mr. Thomas I think on one occasion only and I think it was by phone I don't think it was in person. And I explained to him --

MR. KUTNER: Judge, objection, your Honor. No 710.30 notice.

MR. KENDRIC: What she explained to him.

THE COURT: We're going to have an argument on this. We're going to have the jury excused on this. Go take a break now. I need to take care of this.

THE CLERK: All rise.

(WHEREUPON, THE JURY EXITED THE COURTROOM.)

MR. KUTNER: Judge, during any argument -- can we excuse the witness, please, as protocol.

THE COURT: Yes, please. Okay. Let's have the argument.

(WHEREUPON, THE WITNESS LEFT THE COURTROOM.)

THE COURT: Okay, lets have the arguments.

MR. KUTNER: I don't see that this has any relevance whatsoever to the charge before the Court.

MR. KENDRIC: Your Honor, during the People's case, defense counsel emphasized how our pal, Mr. Gioia bypassed the notice of violation and went straight to a summons and suggesting that suggesting very strongly and at times over my objection and over the court's ruling that

there was some type of a motivation to go straight to prosecution of these charges.

Now, Ms. Aquiar will testify that the defendant -- it was made clear to the defendants that there were easy ways to remedy this situation and resolve these charges short of going to a prosecution. It's completely relevant.

THE COURT: Mr. Kutner?

MR. KUTNER: Judge, there's been no 710.30 notice served in this case with any particular conversation with Mr. Thomas. 710.30 requires to be set forth in date, time and the exact words as close as they can with what's used and there hasn't been any notice served. Ten years later - this case has been going on ten years and there's no notice and in any event it has to be served within 15 days.

MR. ROZEA: These statements are not relevant. 710.30 as the Court well knows statement by the defendant say at the scene of a drunk driving, yeah, I drank eight beers right before I got in the car. These types of statement and Ms. Aquiar discussed the time of offer has nothing to do with the commission of the defense but rebut the theory by defense counsel regarding the speed of haste with which this case moved to a summons.

MR. KENDRIC: And moreover --

THE COURT: Let me ask you --

MR. KENDRIC: I'll be very careful not to -- I'm

being very careful, Judge, not to have the witness testify as to what anyone said to her I'm asking her what she said to --

THE COURT: Mr. Thomas.

MR. KENDRIC: Yes.

THE COURT: Are you going to ask about any responses Mr. Thomas gave?

MR. KENDRIC: No, Judge. No.

THE COURT: I'm going to allow it.

MR. KUTNER: Judge, if I may be heard briefly, if he doesn't get responses the questions without an answer is of no use.

THE COURT: I'm going to deal with it. Let me see where this goes.

MR. KUTNER: Judge, and also Mr. Gioia was the one who actually filed the charges so she's now going to go into with what was done between the two of them then that's hearsay also.

THE COURT: It's between client. I'm going to allow it. Let's go. Bring the jury in.

MR. KUTNER: Judge, may I also make a record that Mr. Kendric is treading very close to the 5th amendment issue where they make statements that they expect a response or denial from the defendant he has no obligation to say anything and I will be objecting on that ground

also.

THE COURT: Let's get the jury back in here.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present.

THE COURT: Could we get the witness back in here, please.

(WHEREUPON, THE WITNESS TOOK THE WITNESS STAND.)

THE CLERK: Ms. Aquiar, please you are reminded you are under oath.

THE COURT: Okay, Mr. Kendric please proceed.

MR. KENDRIC: Thank you, Judge.

CONTINUED DIRECT EXAMINATION

BY MR. KENDRIC:

Q. Ms. Aquiar in December of 2008, when these charges were filed against the defendant, was there a certificate of occupancy on file with the Town specifying that the property at 121 4th Street in Hicksville could be use as a two-family dwelling?

A. No, there was not.

Q. Okay. I'm going to return from where we were before the break. Please refrain from saying or repeating anything that Mr. Darren Thomas said to you. Okay.

What was your involvement with this case?

A. Well by then I was up in code enforcements and I was

running that department.

THE COURT: When did you start running the department?

THE WITNESS: It was some time the beginning of the summer of that year in 2008. So now I was the one who reviewed the cases.

MR. KUTNER: Excuse me that was in 2008.

THE COURT: 2008. Summer of 2008. Just keep your voice up please.

A. So I would review the cases. Anything that was in court, any new casings that came in I would assign them to inspectors. So in this case, of course, it was always a discussion because it was in court and we would have to give a recent report to the attorney who was coming into District Court at the time.

Q. Right. The summons was December 8, of 2008. Based on inspector Gioia's December 5, 2008 inspection, okay?

A. Okay.

Q. So what happened?

A. So at some point -- I mean it's a code enforcement case. We were absolutely correct, it was a one-family house and so now we're trying to get compliance with the code because it was a one-family house but there were multiple families living in that house. So we would come to court --

MR. KUTNER: Objection, your Honor. There is no

basis for that testimony. She's never been out of the office. It's hearsay.

THE COURT: Sustain. You have to establish a foundation, Mr. Kendric.

Q. Yes. Did you have a meeting on the third floor of town hall concerning this case?

A. Yes, I did have a meeting in town hall on this case with Mr. Thomas' attorney.

MR. KUTNER: Move to strike any further unresponsive, your Honor. His question was asked and answered.

THE COURT: You had a meeting?

A. I had a meeting and in that meeting -

MR. KUTNER: Move to strike -- never mind, Judge.

THE COURT: Just ask the question.

MR. KENDRIC: I did.

Q. Did you have a meeting on the third floor in town hall?

THE COURT: What was the meeting about?

A. The meeting was about the case on Mr. Thomas that was in District Court.

Q. And who were you meeting with?

A. Mr. Thomas' attorney, Mr. Kutner.

Q. Did you make any statements --

MR. KUTNER: Excuse me. Can I have the last

question and answer re-read? She said there was a meeting and I was present?

THE COURT: Correct.

Q. Did you make any statements to Mr. Kutner?

A. Yes. Mr. Kutner, said this was a two-family we had a discussion about, you know, why it wasn't and everything and how we could resolve this, you know, how we could resolve this now.

Q. And what did you tell him?

A. So I told him that it had been my understanding --

MR. KUTNER: Objection.

A. -- I don't know if I can say this.

MR. KUTNER: Your Honor, this is hearsay. I'm not testifying I wasn't there.

THE COURT: Mr. Kutner, please. Please. Let's just get this done.

Q. Yes, continue, please.

THE COURT: Mr. Kendric, I lost it a little bit. I'm asking everybody to be patient, let's just get there, Thank you. Just ask the question, please.

Q. Sure. Would you continue?

A. So I explained that it had been my understanding that a family member was living in that apartment and in that event it can just -- we can just file for parent/child and it would no big deal this is a normal thing. And Mr. Kutner said that, no, it was not a sister that was going to be living there --

MR. KUTNER: Judge, I have to interrupt. We have to have a ruling outside of the presence of the jury this is outlandish.

THE COURT: Okay. You have to remove the jury.

(WHEREUPON, THE JURY LEFT THE COURTROOM.)

MR. KUTNER: Please exclude the witness.

(WHEREUPON, THE WITNESS WAS EXCUSED FROM THE COURTROOM.)

THE COURT: Please exclude the witness. What we are going to do now is take a five minute break. Everybody needs to take five minute break.

MR. KUTNER: Thank you, Judge.

THE COURT: Everybody cool down. We'll come back and discuss this calmly. Off the record.

(WHEREUPON, A BRIEF RECESS WAS HELD.)

THE COURT: Counsel, it's ten to four we need to get this thing resolved. So Mr. Kutner what would you like to say calmly.

MR. KUTNER: I would like the testimony of this witness to be stricken and she be precluded from further testifying. What we have here is an attempted -- it's a last minute gasp of desperation by a party going down, Judge. Number 1, if they had this information before now, then they were negligent and actually malevolent in that not revealing it. They should move to disqualifying

because I'm a witness. Number 2, it's rank hearsay relaying what I said, all of that testimony I would submit have to be stricken. Number 3, I never met her a day in my life and I will get into that, but that's cross examination, but I shouldn't have to do it because we have a 5th amendment.

Judge, if I can give you a simple analogy. This would be like at a criminal trial after all the pretrial hearings, Huntley and otherwise, on a murder case or a homicide the detectives they get up on the stand and said Mr. Kutner after I met with you at your office and you told me that your client committed the homicide. That's basically -- the reason they're bringing this testimony out is to say that they were given information by me and that was proven to be correct. I didn't admit anything. I never met the woman, except the one time when Mr. Ippolito said, "shut up bitch" to her, that I will get in to with her on cross examination. That's the only time that woman has ever seen me and I have ever seen her to my knowledge. And that was in PJ Clarks it wasn't in the office. I've never been to the third floor. I've never been to the office with a meeting in there other than with Mr. Altadonna once.

So the testimony is not only irrelevant, it's a 6th amendment violation. It's concocted. They should have

brought this up long before trial and move to disqualifying it, by not doing it they should be precluded from doing so.

THE COURT: Mr. Kendric I just need you to clarify something. I don't understand - I thought the witness was going to testify about conversation she had directly with Mr. Thomas and all of a sudden now I'm hearing about Mr. Kutner.

MR. KENDRIC: Well, yes. I mean your Honor, first of all, it wasn't that many days ago where defense counsel was trying to put in to evidence copies of his letters, he's known that this could become sticky since the very beginning because he's been involved since the very beginning. Now, I'm being very careful of my questions, Judge, she's skipped over the conversation toward Thomas I'm certainly not going to elicit a remark made by Mr. Thomas. I already moved pass that. Now I'm saying this is exactly why I called the witness, Judge for exactly the reasons I set forth for the record --

THE COURT: Mr. Kendric, one question I'm not sure about this. Maybe I missed this. When did this meeting happen? Was this before the issuance of the accusatory instrument or after? That's what I'm not clear on.

MR. KENDRIC: As the record stands it's unclear. I believe it was in 2009 after the issuance of the summons.

MR. KUTNER: She said it was in the summer of

2008, July of 2008.

MR. KENDRIC: That's when she said they spoke about the case.

MR. KUTNER: She said she had the meeting with me in July of 2008.

THE COURT: I'm not clear on that.

MR. KUTNER: Judge, any meeting between her and me is irrelevant to this case and it's a 6th amendment violation since they didn't move. This wasn't concocted recently as a recent manufacture then they had an obligation to move to disqualify me they didn't do it.

THE COURT: Counsel, maybe there's a way to work through this. I'm suggesting this: If this witness told Mr. Thomas to resolve this he could do A, B, C, D and E that's what you want to get in, is that correct? You follow what I'm getting at?

MR. KENDRIC: Yes, I do follow.

THE COURT: That's what I'm wondering if you could just limit to that the witness told Mr. Thomas at some point without getting into anything Mr. Thomas said that he could wash the car or spray the house with a hose -- I'm being facetious.

MR. KENDRIC: Before the interruption I had two questions left, Judge. I'm not going to elicit any testimony about what Mr. Thomas' legal representative said

back --

THE COURT: Can we get beyond this Mr. Kutner and just say what she told Mr. Thomas how to resolve the case and that would be the end of that.

MR. KUTNER: I would suggest we can't because that's a settlement discussion and those are clearly inadmissible at the time of the trial; whether it is criminal or Civil. An attempted disposition then no discussion could be --

THE COURT: But I understand their position. Their position is to cantor the motive that I'm saying the motive that you supposedly brought up about them going after Mr. Thomas. And that's the sole reason why they're bringing it up.

MR. KENDRIC: That's my position.

THE COURT: I didn't hear you?

MS. CHANNER: But Judge, any discussion pertaining to resolution of a matter is not admissible. That's for example in a criminal case, if the defendant had agreed to plead guilty then during a plea negotiations it fell apart and he goes to trial, the prosecutor does not have the opportunity to come in and say, you know what, he was willing to plea guilty before.

THE COURT: I understand that.

MS. CHANNER: But that's similar to this case.

THE COURT: This is a question I'm trying to work through it with you. Go ahead, Mr. Kutner, you want to look up something?

MR. KUTNER: No, Judge.

THE COURT: I'm trying to work this out between you, if we can't, we can't. There is no working out.

MS. CHANNER: Judge, everything from where I came in is hearsay. And unless can come up with an exception to that rule --

MR. KENDRIC: It's not hearsay if it is coming out of her own mouth.

MS. CHANNER: No, but she's repeating what someone else said.

THE COURT: I'm not going to allow that.

MS. CHANNER: She already testified to that and all of that has to be stricken from the record.

THE COURT: Counsel, this is what I'm going to do. I know how to resolve this. I'm going to strike from the record any meeting with Mr. Kutner. I'm going to tell the jury to disregard it and then while I'm going to allow her to testify that she told Mr. Thomas A, B, C in how to try to resolve his case.

MS. CHANNER: I object of you saying what she told Mr. Thomas how to resolve it, Judge.

THE COURT: I'm not saying how she can answer the

question. I don't know what she is going to say.

MS. CHANNER: But any answer again will attempt to move to incriminate Mr. Thomas.

THE COURT: No. She's not going to testify about anything that Mr. Thomas said to her anything.

MR. KENDRIC: Your Honor, I could lower the temperature on this whole thing, okay. I'll ask the question in a different way that has nothing to do with Mr. Kutner nor with Mr. Thomas, how's that sound?

THE COURT: That's fine but the problem is we already have the testimony in the record. That's why I'm going to strike it from the record and that's what I'm proposing to do.

MR. KUTNER: And you give a curative instruction to the jury.

THE COURT: Right, that they disregard the whole testimony about any meeting with you. But I will allow one question about what, if anything, she told Mr. Thomas.

MR. KUTNER: May I consult with Ms. Channer?

THE COURT: Yes. Sure.

MR. KUTNER: Thank you, Judge. With my objection is noted. Yes.

THE COURT: I'm just going to do that limited because he is contending his counterpoint is of what you brought up.

MR. KENDRIC: Judge, let me make it easy for everybody. You've ruled what if anything did you tell Mr. Thomas, I'm not even going to do that.

THE COURT: What are you going to do?

MR. KENDRIC: What I'm going to do is I'm going to take Kutner and Thomas completely out of the equation alright? That should solve everybody's issue.

THE COURT: What are you going to do?

MR. KENDRIC: What would have been the ways to resolve this without even saying any conversation.

THE COURT: Whatever. Let's go.

MS. CHANNER: May I ask a question? Would this have been before the charges were filed or after?

MR. KUTNER: She said after.

MR. KENDRIC: I'm not doing it either way. I'm not doing it either way. You're asking me to make it a more general question, I am. Now you're saying well what about the specifics of the question.

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present, Judge.

THE COURT: Can we bring the witness in, please. Everybody on the issue about the witness meeting with Mr. Kutner, that's stricken from the record. Any testimony

on that you are to disregard that, please. So everybody understand that? Yes. Everybody is shaking their head yes. Bring in the witness.

THE CLERK: Ms. Aquiar, as I said before, please be reminded you are under oath.

THE WITNESS: Yes.

THE COURT: Okay. Go ahead.

CONTINUED EXAMINATION

BY MR. KENDRIC:

Q. Ms. Aquiar, can you tell us approximately, how much time past between when this code enforcement investigation against Mr. Thomas was first opened and the issuance of Mr. Gioia's summons in December of 2008?

A. I would have to say over a year. It started, I think, some time in it 2007 early 2007. I wasn't with the Town I wasn't even over at planning and development for the most part of that year. So it would had to have been at least a year, at least.

Q. Now, once the summons had been issued were -- let's take it out of the context of Darren Thomas. Let's put it in a broader context of a generic resident within the Town of Oyster Bay having been charged as this gentleman was charged, okay. After the summons was issued, were there ways for the homeowner to voluntarily bring himself within compliance with town codes and thus resolve the charges?

MR. KUTNER: Objection, your Honor.

THE COURT: Overruled. I'm just going to allow a general way.

A. Of course there are ways to come in to compliance, and that's what we guide homeowners toward.

Q. Tell the jury.

A. Well, in some cases maybe it's a deck that doesn't have a permit. So there are steps that a homeowner could take to make that deck legal with permits and then they get the CO and boom there is no more problem.

Q. How about, again, let's keep Darren Thomas out of it. The generic homeowner the resident who gets charged with using his house as a two-family even though the house is exclusively zoned for a one-family?

A. Okay. Typically, remove the kitchen, remove the apartment whatever was in there. In some cases, it is a family member in the apartment so that's a great opportunity to file for a parent/child use which for the most part the Zoning Board approves. Or in some cases, which the Town doesn't allow, but every homeowner has a right to file for a two-family dwelling.

Q. Could the resident file for a special use permit?

A. Absolutely.

MR. KENDRIC: Okay. Thank you, ma'am.

THE COURT: Mr. Kutner, any questions?

MR. KUTNER: Is he finished?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. KUTNER:

Q. Ms. Aquiar, you didn't read any of your records on this case before you testified, did you?

A. That's not true.

Q. Then you didn't read them well, did you?

A. Am I answering the first question or the second?

Q. Second please.

A. I didn't have to read them well, I remember this case almost to the very moment.

Q. It's the only time somebody like Mr. Thomas is being prosecuted for a two-family?

A. I find that very offensive.

Q. That's why it stands out in your memory?

A. No. It stands out in my memory because I remember speaking with you and trying to tell you what he needs to do and how you told me you represented him with the purchase of the house and if it's not a two-family --

Q. Ms. Aquiar, are we getting into that lie again?

A. It's not a lie. It's not my fault you screwed up not me.

Q. Ms. Aquiar, let's get this straight here, please. Have you ever testified before in the courtroom?

A. No.

Q. The lawyers ask a question and you answer them succinctly, meaning yes or now if it calls for a yes or no. Would you agree on that, please.

A. Yes.

Q. Things go a lot more smoothly and you won't have to keep the jury here longer than you have to.

A. Absolutely.

Q. You said this happen in 2008 in July, correct?

A. No, I didn't say that.

Q. You said this happened, this meeting, while you were head of co-compliance, correct?

A. No, I didn't say that.

Q. Oh, you didn't say that.

MR. KENDRIC: Judge, can we approach for a second?

THE CLERK: Judge, the jury leaves?

THE COURT: Yes.

THE CLERK: All rise.

(WHEREUPON, THE JURY LEFT THE COURTROOM.)

THE COURT: Gentleman could I see you up here for a second, please. Off the record.

(WHEREUPON, A DISCUSSION TOOK PLACE WHICH WAS HELD OFF THE RECORD.)

THE COURT OFFICER: Jury entering.

(WHEREUPON, THE JURY ENTERED THE COURTROOM.)

THE CLERK: Jurors and alternates are present.

THE COURT: Thank you. We had to resolve something. Let's go. Let's get the witness in here so we can get this resolved today.

THE CLERK: Ms. Aquiar, please be reminded you are still under oath.

THE WITNESS: Yes.

THE COURT: Mr. Kutner.

MR. KUTNER: Yes, Judge, thank you.

CONTINUED CROSS EXAMINATION

BY MR. KUTNER:

Q. Ms. Aquiar, you gave us an example regarding a deck with no permit and one of the ways by resolving that type of situation is called remediation. A person either may bring the deck into compliance and applies for a certificate of occupancy and building inspector comes over and looks at it or he moves the deck, true?

A. True.

Q. And with a two-family house, the example you gave, kind of fits the prosecution but there's another solution to a two-family house, is there not?

A. I don't know.

Q. You said that the way they do it is they just dismantle the apartment, remove it, or apply for a special use permit, true?

A. Correct.

Q. Do you know what a pre-existing non-conforming --
A. I absolutely do.
Q. Ms. Aquiar, I didn't finish my question. Please, don't be impolite and interrupt me.
A. I won't do that again. Please, don't raise your voice at me again.
Q. Thank you. Now pre-existing non-conforming use, do you know what that is?
A. Yes, I do.
Q. And if a house is a pre-existing non-conforming use then it wouldn't -- non-conforming two-family use, then number 1 it doesn't need a permit, agreed?
A. If it was, yes.
Q. And it doesn't have to get a CO either, does it?
A. No, because it would be non-conforming --
Q. Just yes or no, thank you very much.
You testified about a number of things, one of the things you said you were being the head of code compliance as of July of '08?
A. No. I was put up in code compliance as the head but my title was not head of code compliance.
Q. Are you aware that you didn't take over until October 2009, ma'am?
A. That's when I got the title, yes.
Q. And are you aware that Anthony Castanza was your boss

before that?

A. No, he was not. But he was head code compliance.

Q. So all of the memos after the case had began addressed to Anthony Castanza, Division head Code Enforcement Bureau, he didn't exist? He wasn't there, you were the head? Is that what you are telling us? Yes or no, ma'am.

A. I don't know. What memos are you talking about?

Q. Isn't it a fact that after this case was filed and Mr. Thomas' prosecution began, that the Town still was uncertain whether it was a pre-existing non-conforming use, is that true?

A. Not true.

Q. Not true?

A. Not true.

MR. KUTNER: May we show the witness, please, the prior exhibit Defendant's A.A., please, it's in Evidence?

THE COURT: Two A or one A?

MR. KUTNER: Two A's.

THE COURT OFFICER: A.A. being shown to the witness.

Q. You see that, ma'am?

A. Yes.

Q. First of all you weren't in the two portion. It wasn't directed to you as commission was it?

A. No, because I wasn't commissioner. What's the question?

Q. I'm sorry would you give that back to the, Officer please. And I'm going to ask that this be marked as Defendant's E.E..

THE COURT OFFICER: Defendant's E.E. so marked for identification and shown to the witness.

MR. KUTNER: Yes, please.

THE COURT: Please show it to the People. Could you just tell the Sergent what the document is so she could write it down.

MR. KUTNER: They're reports about this case to the head of code enforcement. They're meant to just show her the dates that occurred.

MR. ROZEA: Objection.

MR. KUTNER: I'm sorry?

MR. ROZEA: There is an objection.

MR. KUTNER: And, Judge, before we do that, can I take this opportunity to strike the portion of that nonresponsive answer where it referred to me again and instruct the witness not to refer to me any conversation with me or Mr. Thomas please.

THE COURT: At this point let's just deal with this. Could I just see them, please? Mr. Kutner, I'm not putting this in. The objection is sustained.

MR. KUTNER: Judge, I am not offering them, I just want to show her and ask her to look at them and ask her a

question to jog her memory as to dates.

THE COURT: Just let her see them.

THE COURT OFFICER: E.E. being shown to the witness.

THE COURT: Go ahead.

Q. Now that you looked at them, ma'am, do you see anything that would refresh your recollection as to when you became the head of code compliance in October of 2009?

A. I already told you --

Q. Yes or no.

THE COURT: Can you just answer yes or no.

A. Yes.

Q. Before that it was Anthony Castanza, was it not?

A. Yes.

Q. And this case was filed in the first week of January 2009 was it not? Are you aware of that?

MR. KENDRIC: Objection, Judge. That's incorrect.

THE COURT: It was in December.

MR. KUTNER: The information is dated in December it has an '09 docket, meaning it was filed with the court in the first week of '09. Number 22 of 09, it was filed in the first week.

MR. KENDRIC: For the Court's information it was December 8, 2008.

Q. But in any event no matter whether if it was in

December of 2008 or January of 2009, correct me if I'm wrong, Ms. Aquiar, October of 2009 is long after the case was filed with the court, ten months later or eleven months later, correct?

A. Almost a year later.

Q. You were guessing when you said you think that the investigation started in early '07, actually it started some time after March 9, 2007, is that true?

A. I don't know.

Q. I'm sorry?

A. I don't know.

Q. You don't know. What records did you read before testifying today, ma'am?

A. Chris Gioia's report.

Q. I'm sorry?

A. Christopher Gioia's report.

Q. Are you aware that his first visit to the house was in June or July of 2008?

A. I did not take note of the dates.

Q. You didn't take note of the dates.

MR. KUTNER: I have no further questions of this witness.

MR. KENDRIC: No further questions.

THE COURT: You're excused. Thank you very much.

Do the people have any more rebuttal witnesses?

MR. KENDRIC: No, sir.

THE COURT: And, Mr. Kutner.

MR. KUTNER: No, sir.

THE COURT: So both sides rest?

MR. KUTNER: Yes, your Honor.

MR. KENDRIC: Correct.

MR. KUTNER: Judge, we had those two offers to be marked in evidence. The accusatory instrument and the Town code sections. Mr. Kendric offered then and I objected and now I'm withdrawing my objection and consenting.

THE COURT: We'll do that another time.

MR. KUTNER: Are you not consenting?

MR. KENDRIC: No.

THE COURT: Mr. Kutner, we'll deal with it tomorrow not now. The testimony is over. I'm just going to read you the admonition that I have to tell you. I will see you Thursday at two o'clock. As I said tomorrow I will do the jury charge. Again, you won't be here tomorrow. You come back Thursday you will have the summation from both attorneys and then after they give you summation I will charge you on the law and you will get the case.

THE CLERK: I spoke with central jury tomorrow you could go back to work. At the end of everything when you're done and the case is over, you're going to get from central jury a certificate of attendance, that will count

for the days of jury duty.

THE COURT: You're not to discuss this case amongst yourself or with anyone else. Do not converse either amongst yourself or with anyone else about anything related about this case. You may tell people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court but you may not talk with them or anything else about anything related about the case. Do not while on trial agree to accept or discuss with any person the receipt or acceptance of any payment or benefit in return supplying any information concerning the trial. You must promptly report directly to the court any incident within your knowledge involving any attempt by any person who improperly influence you or any member of the jury. You are not to permit any party to discuss the case with you or attempt to influence you. If anyone does, you're immediately report to the court not to other jurors.

You are not to visit the site of the incident. Do not visit or view the premise of the place where the alleged crime was committed or any of the premises or place involved with the case. And you must not use internet maps, Google Earth or any programs or devices to search for or view any information discussed in the testimony. You're not to listen any comments regarding the media. Do not

read or listen to any accounts or anything reported by newspapers, telephone, radio, internet or other news media. Your decision must be based solely on the testimony and other evidence presented in this courtroom. Do not attempt to research any fact issue or law related to this case whether by discussions with others by research in a library or on the internet or any means of source.

In this age of instant electronic communication, I want to emphasize at this stage, do not converse face to face with anyone about the case. You must not communicate with anyone about this case by any means including by telephone, text messages, e-mails, internet, chat or chat rooms, blogs or social websites such as Facebook or Twitter. You must also not Google or research any information about the case or the law which apply in the case, the people involved in the case involving the defendant, the witnesses, the lawyer or the judge.

You must not provide any information about the case by any means whatsoever and that includes the posting of information about the case, what you're doing in the case, any device or internet device including blogs, chat rooms, social websites or other means. You're required to keep an open mind until all the evidence has been presented and you're charged as to the law. You are under the rules of conduct. I'll see you Thursday at two o'clock.

THE CLERK: Is there anything else for the record before we break today?

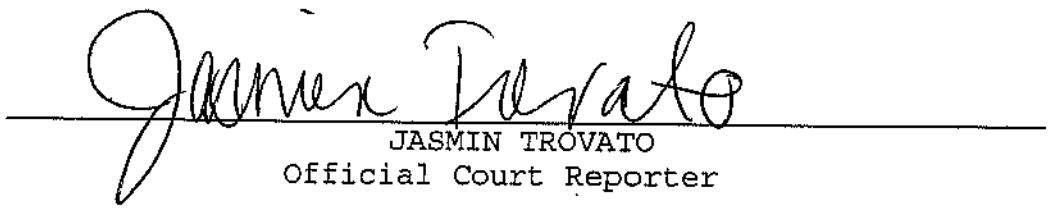
MR. KENDRIC: No.

MR. KUTNER: No, sir.

THE COURT: Two o'clock tomorrow. We'll do a jury charge. Counsel, we'll do it in the conference room. Sit down, bring your water, we'll relax and have the court reporter there and take our time and do the charges and see if we can come up with the charges that are acceptable to both sides.

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.



JASMIN TROVATO
Official Court Reporter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DARREN E. THOMAS and MARLENE THOMAS,

Plaintiff,

- against -

JOHN VENDITTO, LEONARD GENOVA, FREDERICK P. IPPOLITO, CHRISTOPHER GIOIA, and TOWN OF OYSTER BAY,

Defendants.

----------X

AFFIDAVIT

CV 11-06084

WEXLER, J.

BOYLE, M

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

LORA CUSUMANO, being duly sworn, deposes and says:

1. I am a real estate broker continuously licensed in the State of New York since 2006.

2. In 2006, I formed Cusumano Associates, Inc. which used the business name, L.I. House Hunters, located at 445 Broadhollow Road, Melville, New York.

RY H. KUTNER, JR.
TORNEY-AT-LAW
6 WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

3. L.I. House Hunters is a residential "buyers' broker," meaning it exclusively represents prospective home purchasers rather than sellers.

4. In early September, 2006, I was contacted by an attorney, Harry H. Kutner, Jr., who asked if I could help a couple find a two family home to live in with their two sons, so that the apartment rent would help them afford the mortgage payments. I said sure, and he told me they'd be calling soon.

5. Darren and Marlene Thomas contacted me, and on September 7, 2006, I met them, and we all signed an "Exclusive Buyer Broker Agreement."

6. During that first meeting, we discussed their goal of a two family house. Being experienced and a realist, and because Darren is black and Marlene is Hispanic, I advised them that the house they bought had to be an unquestionably legal, two family home to avoid any potential trouble from a racist neighbor in a mixed or predominately white neighborhood: such an individual could report them to the Building Department which would cause them trouble. *This turned out to be extremely ironic in that I*

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

found them a tax-listed legal two family, the one they bought in Hicksville, and yet the Building Department itself was the one who gave them the trouble.

7. By the time the Agreement was signed, I had already found a lead for them: 163 New Hampshire Avenue, Massapequa, a legal two family listed at $579,000. It had been on the market for twenty-one months (first listed on July 5, 2004 at $629,000.00), later reduced on November 30, 2005 to $599,000.00, and then reduced yet again just days before I met the Thomases on August 30, 2006 to $579,000.00. From that listing history, it was obvious that the seller was anxious and pressing to sell, and would almost certainly further reduce the price.

By the end of the month (on September 28, 2006), I had negotiated a sales price acceptable to both sides for $533,000.00 with a net to the seller of $525,005.00.

8. The sole owner-seller was Joseph Saladino.

9. That same day, September 28th, I prepared a "Deal Sheet" listing all pertinent information including the gross sales price of $533,000.00, the seller's net of $525,005.00, and the parties' and attorneys' names.

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

10. An engineer's inspection ordered by me took place on October 2, 2006 and was received on October 4th. It revealed six issues to be addressed. For the next week, extensive negotiations took place between me and Mr. Saladino until he eventually agreed to resolve all of them. In my opinion, he really came across as desperate to sell the house because he agreed to correct the major costly repair issues.

11. On Wednesday, October 11th, the Thomases and I went back to the house. As first time home buyers, they were excited and wanted to go back to see it again. What happened while we were there, I will never forget: Darren Thomas is a medium-to-dark-skinned black man, and Marlene is of Puerto Rican heritage. Mr. Saladino happened to stop by, and when he saw the Thomases, he stopped dead in his tracks, visibly shocked.

He pulled me aside, introduced himself, and asked if they were the buyers. When I said, "Yes," he blurted out, "They're black. Are you kidding, I can't sell to them . . . they can't buy the house . . . the neighbors'll never accept them. Oh my God, I'd never be elected again . . . I'd be finished."

Shocked, I said that we already had a deal (after all, there had been very intense and prolonged negotiations and everything was agreed),

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
136 WILLIS AVENUE
MINEOLA, N.Y. 11501
(516) 741-1400

and he couldn't back out because of the color of their skin. He replied that if he sold the Thomases the house, it was even possible that the neighbors would burn it down, and the Thomases would be lucky if they survived.

Visibly shaken, and unnerved, he hurried to his car and left.

12. I related my conversation with Mr. Saladino to the Thomases, and they were angry.

13. Soon after, Mr. Kutner told me he had received a call from Mr. Saladino's attorney advising him that his client had changed his mind and was not going to sell to the Thomases. In response, I told him what had happened at the house. He said he would discuss it with the Thomases and decide their next step.

14. Shortly before the Wednesday incident with Mr. Saladino, I had spotted a new legal two family listing at 121 Fourth Street, Hicksville. Later discussions with the Thomases led them to decide to walk away from the Saladino situation, and they eventually bought the Hicksville house, closing the following March, 2007.

LORA CUSUMANO

Sworn to before me this
30th day of September, 2011

Notary Public

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

DARREN E. THOMAS and MARLENE THOMAS,

Plaintiff(s)

v.

JOHN VENDITTO, LEONARD GENOVA, CHRISTINA F. NICOLIA, as Executrix of the Estate of FREDERICK P. IPPOLITO, CHRISTOPHER GIOIA, JOSEPH S. SALADINO, and TOWN OF OYSTER BAY

Defendant(s)

Civil Action No. CV 11-6084 ADS ARL

AMENDED

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* JOHN VENDITTO, 115 N. Kings Avenue, Massapequa, NY 11758
LEONARD GENOVA, 148 Richard Place, Massapequa Park, NY 11762
CHRISTINA F. NICOLA, as Executrix of the Estate of FREDERICK P. IPPOLITO
c/o Town of Oyster Bay, 54 Audrey Avenue,
Oyster Bay, NY 11771
CHRISTOPHER GIOIA, c/o Town of Oyster Bay, 54 Audrey Ave, Oyster Bay, NY 11771
JOSEPH S. SALADINO, 163 New Hampshire Avenue, Massapequa, NY 11758
TOWN OF OYSTER BAY, 54 Audrey Avenue, Oyster Bay, NY 11771

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

HARRY H. KUTNER, JR., ESQ.
136 Willis Avenue
Mineola, New York 11501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DOUGLAS C. PALMER
CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. CV 11-6084 ADS ARL

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DARREN E. THOMAS and MARLENE THOMAS,

Plaintiffs,

-against-

JOHN VENDITTO, LEONARD GENOVA, CHRISTINA F. NICOLIA, as Executrix of the Estate of FREDERICK P. IPPOLITO, deceased, CHRISTOPHER GIOIA, JOSEPH S. SALADINO, and TOWN OF OYSTER BAY

Defendants.

----------X

AMENDED COMPLAINT

CV 11-6084

SPATT, J.

LINDSAY, M. J.

Plaintiffs, DARREN E. THOMAS and MARLENE THOMAS, through their attorney, HARRY H. KUTNER, JR., complaining of defendants, respectfully allege:

JURISDICTION

1. That this claim arises under the laws of the United States, particularly 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, 1988, and 3601 *et seq.*, and the Fifth and Fourteenth Amendments to the United States Constitution, along with pendent state claims.

RY H. KUTNER, JR.
TTORNEY-AT-LAW
16 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

2. That this Court has jurisdiction over these claims under and by virtue of 28 USC §§ 1331 and 1343 and the principles of pendent jurisdiction.

JURY DEMAND

3. That plaintiffs demand a trial by jury of all issues.

PARTIES

4. That at all times hereinafter mentioned, plaintiffs were and still are residents of Hicksville, Town of Oyster Bay, County of Nassau, State of New York.

5. That at all times hereinafter mentioned, plaintiffs were citizens and persons within the jurisdiction and entitled to the protection of the laws of the United States of America.

6. That at all times hereinafter mentioned and upon information and belief, defendant, JOHN VENDITTO (hereinafter referred to as "VENDITTO"), was and still is a resident of the County of Nassau, State of New York.

IRY H. KUTNER, JR.
TTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

7. That at all times hereinafter mentioned and upon information and belief, defendant, LEONARD GENOVA (hereinafter referred to as "GENOVA"), was and still is a resident of the County of Nassau, State of New York.

8. That at all times hereinafter mentioned and upon information and belief, defendant, CHRISTINA F. NICOLIA, as Executrix of the Estate of FREDERICK P. IPPOLITO, deceased, and her decedent (hereinafter referred to as "IPPOLITO"), were and still are residents of the State of New York.

9. That at all times hereinafter mentioned and upon information and belief, defendant, CHRISTOPHER GIOIA (hereinafter referred to as "GIOIA"), was and still is a resident of the State of New York.

10. That at all times hereinafter mentioned and upon information and belief, defendant, JOSEPH S. SALADINO (hereinafter referred to as "SALADINO"), was and still is a resident of the County of Nassau, State of New York.

11. That at all times hereinafter mentioned and upon

RY H. KUTNER, JR.
TTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

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information and belief, defendant, TOWN OF OYSTER BAY (hereinafter referred to as "TOWN"), was and still is a municipality within the County of Nassau, State of New York.

12. That at all times hereinafter mentioned, defendants, VENDITTO, GENOVA, IPPOLITO, GIOIA, and SALADINO, were officials and/or employees of defendant, TOWN.

13. That at all times hereinafter mentioned and upon information and belief, each and all of the acts of defendants alleged herein were done by such defendants, in concert with each other under color and pretense of the statutes, laws, ordinances, regulations, customs, and usages of the State of New York and Town of Oyster Bay, and by virtue of their authority as Town officials and/or employees.

INTRODUCTION

A. Nature of Action

14. That this action is brought to address individual defendants' use of defendant, TOWN's zoning laws for the racist purpose of

RY H. KUTNER, JR.
TORNEY-AT-LAW
6 WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

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forcing the non-white plaintiffs out of the residence they purchased at 121 Fourth Street in Hicksville, an unincorporated community wholly within the defendant, TOWN.

B. Plaintiffs: African-American and Puerto Rican

15. That plaintiff, DARREN E. THOMAS, is of African-American descent.

16. That plaintiff, MARLENE THOMAS, is of Puerto Rican descent.

C. Plaintiffs decide to buy their first home

17. That prior to 2007, the young plaintiffs had always dreamed of buying their own home, but thought it was financially out of reach. Then living in an apartment with their two boys that was uninhabitable, they were advised to find a two family home so the rental income would help pay the mortgage and thereby make their dream affordable.

18. A real estate broker located a two family home in Massapequa owned by defendant, SALADINO. Negotiations over six weeks led to a major price reduction and agreed price along with defendant's

RY H. KUTNER, JR.
TTORNEY-AT-LAW
0 WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

agreed-to-make-repairs, and contracts were promised by defendant's attorney. However defendant, never having met plaintiffs, stumbled upon them as plaintiffs were re-visiting the house one last time, and was shocked to see plaintiff, DARREN E. THOMAS was African-American, then declaring to the broker, "They're black . . . I can't sell to them . . . they can't buy the house . . . the neighbors'll never accept them. Oh my God, I'd never be elected again . . . I'd be finished."

19. That upon information and belief, defendant, SALADINO, then instructed his attorney to not send out the contracts.

20. That upon information and belief, defendant, SALADINO, was told that plaintiffs had found another two family house at 121 Fourth Street, Hicksville, and later learned plaintiffs had purchased it.

21. That it is believed that defendant, SALADINO, then a N.Y. State Assembly Member, related that fact as "racist intelligence" to co-defendants who were TOWN leaders and fellow Republican Party honchos and decision-makers.

RY H. KUTNER, JR.
TORNEY-AT-LAW
6 WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

D. Plaintiffs buy subject premises - an existing two family

22. That on March 9, 2007, the plaintiffs purchased a home

located at 121 Fourth Street, Hicksville, Town of Oyster Bay, County of Nassau, State of New York ("subject premises").

23. That the subject premises is located within the defendant, TOWN.

E. Subject premises - always a two family, owned by whites

24. That since the subject premises was built in 1930, i.e., before the 1943 enactment of defendant, TOWN's Zoning Code, it is thereby defined as a "pre-existing" structure.

25. That since the subject premises was used as a two family home before the 1943 TOWN Zoning Code's enactment, it is thereby defined as a "non-conforming use."

26. That even if the subject premises had not been so used as a two family pre-1943 Code, it was so used since 1947 with full knowledge, recognition, acceptance, and approval of defendant, TOWN.

27. That prior to plaintiffs' purchase of the subject premises, it had been always owned by white persons.

28. That at the time of purchase, the subject premises was

RY H. KUTNER, JR.
TTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

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listed on the official tax rolls of the County of Nassau and defendant, TOWN, as a two family dwelling and was taxed as such.

29. That as a pre-existing non-conforming use, there was no other way (other than Tax Rolls) to determine if the subject premises was a legal pre-existing, non-conforming two family home.

30. That plaintiffs specifically purchased the house because it was a two family so the rental income would help pay their mortgage and taxes.

31. That at all times relevant, the property taxes were and are so high on properties in the defendant, TOWN, that many lower middle income families, even with both spouses employed as were and are plaintiffs, need to rent an apartment within the house to be able to afford them.

F. Defendants begin racist-based *criminal* prosecution

32. That after plaintiffs took ownership on March 9, 2007, and in or about June, 2008, defendant, GIOIA, contacted the plaintiffs, warning them to cease their use of the subject premises as a two family on the ground that it was illegal. Plaintiff, DARREN E. THOMAS, responded

RY H. KUTNER, JR.
TTORNEY-AT-LAW
16 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

that the house was a legal two family according to the tax rolls, and that he could not afford to stay in the house if he did not have a tenant.

33. That upon information and belief, defendant, GIOIA, had been sent to plaintiffs' home by defendants, VENDITTO, GENOVA, and IPPOLITO, after being tipped by defendant, SALADINO, to scare the plaintiffs out of the house and TOWN by claiming the house was not a legal two family. Said claim was intentionally and maliciously false, and known to be so by all defendants. Each defendant took personal part: Venditto as the chief TOWN official, directing defendant, Genova as Town Attorney and Ippolito as Building Department head, to prosecute plaintiff, DARREN E. THOMAS. Even after all three defendants were requested to desist due to the racist motive, all three doubled-down and refused to drop the case. After defendant, SALADINO, succeeded VENDITTO as Supervisor, and the racist proceedings were brought to his attention, he likewise refused to drop them.

34. That upon information and belief based on the defendant TOWN's records maliciously hidden by defendants, and later obtained from various sources, that proved the house was a legal two family, defendants conspired to make that false allegation to deprive the African-American

RRY H. KUTNER, JR.
ATTORNEY-AT-LAW
36 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

plaintiff, DARREN E. THOMAS, from being able to afford his mortgage, thereby forcing him out of defendant, TOWN. Why else - would defendants have concealed the records that the house was a legal two family, while simultaneously prosecuting plaintiff, DARREN E. THOMAS, and falsely and perjuriously swearing it was an illegal two family.

35. That on July 14, 2008, plaintiffs' attorney wrote defendants, advising them of the subject premises' legal two family status.

36. That thereafter, due to defendants' illicit conspiracy, defendants forsook the courtesy of a response and ignored the letter.

37. That after several follow-up telephone calls were ignored, and precipitated by another phone call, and on or about December 8, 2008, defendants drafted criminal charges against the African-American plaintiff, DARREN E. THOMAS, only, although both plaintiffs were the record title owners.

38. That the criminal prosecution was filed with the court on January 5, 2009.

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39. That upon information and belief, that prosecution marked the first time defendant, TOWN had ever filed criminal charges against a homeowner for an alleged illegal two family use.

40. That said misdemeanor charges falsely and perjuriously swore violations of the defendant, TOWN's building ordinances, to wit: 1) two family use in a one family zone without a special use permit, and 2) two family use in violation of the house's certificate of occupancy.

41. That in said criminal charges, contradictorily defendants twice-swore that the subject premises is "legally non-conforming and no certificate of occupancy is required."

G. Defendants lie to the state courts

42. That defendants not only falsely and perjuriously swore said criminal charges despite numerous documents in the defendant, TOWN's file establishing that it was a legal pre-existing, non-conforming two family house, but also falsely and perjuriously swore that those numerous documents did not exist.

43. That unknown to plaintiffs until 2011, two years after the criminal case was filed, on June 27, 1968, defendant, TOWN's Building

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Department, by its Head, in response to an inquiry by the then-owners, Sodaitises, who had contracted to sell to the next owners, Stokeys, to assure them that the property was a legal two family home, issued a letter confirming its legality as such. Said record was part of defendant, TOWN's file on the subject premises, but was one of the records desperately concealed by the individual defendants who, with, and through their subordinates, lied under oath to court after court that no records whatsoever existed about the house nor its two family legality.

44. That defendant, TOWN concealed other records including findings by its own officials that the subject premises was a legal two family residence.

45. That upon information and belief and at all times hereinafter mentioned, the subject premises has always been a two family house since prior to the enactment of the defendant, TOWN's Zoning Code in 1943.

46. That upon information and belief and at all times hereinafter mentioned, the subject premises has always had two tenants, two electric meters, two doorbells, and two mailboxes, since prior to 1943.

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6 WILLIS AVENUE
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H. Prior owners of house - all white, never prosecuted

47. That upon information and belief and at all times hereinafter mentioned up until March 9, 2007, the subject premises was always owned by white people.

48. That upon information and belief and at all times hereinafter mentioned, no prior white owners of the subject premises were ever prosecuted for maintaining an illegal two family use.

49. That upon information and belief and since 1943 and specifically in and about 1968 (twice), 1980, 1986, and 2006, defendant, TOWN's building inspectors visited the subject premises dozens and dozens of times, and on each and every visit saw the two family use as evidenced by two electric meters, two doorbells, two mailboxes, and two apartments.

50. That upon information and belief in recognition of the legality of the two family use, said building inspectors did not file any violations against the then white owners.

51. That upon information and belief, said building inspectors approved issuance of Building Permits and a Certificate of Completion that

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36 WILLIS AVENUE
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(516) 741-1400

were not allowed to be issued if any violations, such as an illegal two family use, were observed.

I. Other similarly situated white homeowners, not prosecuted

52. That upon information and belief and at all times hereinafter mentioned, in the immediate area of the subject premises, there are at least seven other homes, displaying the same indicia of multiple family use recited by defendants as cause for the prosecution, namely multiple electric meters, doorbells, and/or mailboxes.

53. That upon information and belief and at all times hereinafter mentioned, none of said other presumptive multi-family homes are legal multi-family dwellings.

54. That upon information and belief and at all times hereinafter mentioned, none of said other presumptive multi-family homes are owned by African-Americans.

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55. That in the underlying state proceedings, even when challenged to do so, defendants repeatedly and stubbornly refused to:

A. disclose how the prosecution was initiated, i.e., they refused to produce an alleged instigatory third party complaint, even though said secret procedure has been constitutionally condemned by New York law;

B. produce either a single instance of any of the other nearby externally indicative presumptive multi-family homes having been prosecuted as *illegal* multi-family dwellings or proof of legal multi-family status;

C. disclose the Building Department file on the subject premises, obviously because it would prove the house was always and is still a legal two family;

D. disclose a single instance since 1943, other than their racist-motivated prosecution of plaintiff, DARREN E. THOMAS, where even one other person was ever prosecuted for a misdemeanor for a two family use.

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56. That upon information and belief, and from the foregoing, it must be concluded that defendants conspired to falsely claim the premises was illegal, then initiated, and then later continued a racist-based selective enforcement of the zoning laws against the plaintiff, DARREN E. THOMAS.

57. That upon information and belief, the state proceedings were designed to drive the African-American plaintiff, DARREN E. THOMAS, from defendant, TOWN.

58. That said conclusion is further proven by the fact that the prosecution was not filed against his wife and co-plaintiff, MARLENE THOMAS, who is not of African-American descent but an equal co-owner of the subject premises. Thus defendants' non-prosecution of co-plaintiff can only be explained by the fact that she is not African-American.

59. That upon information and belief and at all times hereinafter mentioned, the racial composition of plaintiffs' neighborhood, in which there are no African-American homeowners and/or residents, corroborates the racially-based discrimination through selective prosecution.

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3 WILLIS AVENUE
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60. That on April 5, 2019, plaintiff, DARREN E. THOMAS, was acquitted of the two (2) misdemeanors charged and prosecuted by defendants.

61. That since said verdict, defendants obstinately persist in pressing the racist prosecution, and refuse to issue a C.O. and concede what their records unequivocally declare, i.e., that it is a legal, pre-existing, non-conforming, two family house, having since declared that the subject premises is still illegal and that they were considering re-filing the same criminal charges against plaintiff, DARREN E. THOMAS, for the same crimes since it still is being used as a two family.

62. That upon information and belief, all of defendants' actions have been and continue to be racist-based.

63. That defendants' said actions have and will continue to deprive plaintiffs of the rights, privileges, and immunities as provided by the laws of the United States and the State of New York.

64. That defendants' said actions deprived plaintiffs of and violated the following rights, privileges, and immunities under the U.S. Constitution and N.Y. Constitution, and laws made and provided:

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A. the right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and their counterparts in New York; and

B. the right to equal protection of the law under the Fourteenth Amendment to the U.S. Constitution.

C. the right to be treated equally to white persons;

D. the right to own property equally as white persons;

E. the right not to be victimized by racist conspirators;

F. the right not to be subjected to such illegality by defendants' indifference, negligence, and cowardly failure to act to prevent it.

J. House became "illegal" when African-American became owner

65. Based on the foregoing, it is undeniable that defendants suddenly first claimed, knowingly falsely, that the house was "illegal" only when and because of the African-America plaintiff, DARREN E. THOMAS' purchasing it.

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6 WILLIS AVENUE
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AS AND FOR A FIRST CLAIM FOR RELIEF
(42 U.S. Code § 1981 - deprivation of equal rights to non-whites - against individual defendants only)

66. That 42 U.S. Code § 1981, entitled "Equal rights under the law," declares:

> "All persons within the jurisdiction of the United States shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons . . . The rights are protected against impairment by nongovernmental discrimination and impairment under color of State law."

67. That defendants acted individually in their aforesaid racist conspiracy.

68. That such actions violated 42 U.S. Code § 1981.

69. That as a result of the foregoing, plaintiffs have suffered fear, anxiety, worry, emotional distress, and anguish.

70. That as a result of the foregoing, plaintiffs have and will continue to incur attorney's fees and other consequential expenses to defend the criminal charges and prosecute this suit to vindicate violations of their civil rights.

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71. That the actions of defendants were and are malicious, deliberate, and intentional.

72. That as a result of the foregoing, plaintiffs demand that judgment be entered against defendants:

A. in the sum of TEN MILLION ($10,000,000.00) DOLLARS compensatory damages; plus

B. in the sum of TEN MILLION ($10,000,000.00) DOLLARS punitive damages;

C. for consequential damages for the costs and expenses incurred by plaintiffs in the New York State courts; and

D. for an injunction ordering defendants to issue a Certificate of Occupancy for 121 Fourth Street, Hicksville, New York (Section 46 Block 270 Lots -3), declaring it to be a two family home; and

E. for attorney's fees, costs, and disbursements pursuant to 42 USC § 1988; and

F. for any such other and further relief which is just, equitable, and proper.

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AS AND FOR A SECOND CLAIM FOR RELIEF
(42 U.S. Code § 1982 - equal rights to realty - against individual defendants only)

73. That plaintiffs repeat, reiterate, and reallege each and every allegation in paragraphs "1" through "72" as though more fully set forth herein at length.

74. That defendants' actions were solely intended to prevent plaintiff from owning the subject premises.

AS AND FOR A THIRD CLAIM FOR RELIEF
(42 U.S. Code § 1985 - conspiracy to deprive plaintiffs' civil rights - against individual defendants only)

75. That plaintiffs repeat, reiterate, and reallege each and every allegation in paragraphs "1" through "74" as though more fully set forth herein at length.

76. That defendants' actions, from the beginning in defendant, SALADINO's 2006 actions to his later alerting the co-defendants of the address of plaintiff, DARREN E. THOMAS's, new intended purchase, followed by the TOWN's harassment and later baseless criminal protection, constituted a conspiracy to deprive.

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AS AND FOR A FOURTH CLAIM FOR RELIEF
(42 U.S. Code § 1986 - refusal-neglect to prevent conspiracy - against individual defendants only)

77. That plaintiffs repeat, reiterate, and reallege each and every allegation in paragraphs "1" through "76" as though more fully set forth herein at length.

78. That defendants, as TOWN and political party officials, took an oath to uphold the Law and were charged with the protection of residents' civil rights.

79. That defendants were not only intentionally and maliciously derelict in said duty in failing to intervene and block, and/or publicize it in order to end the racist conspiracy against plaintiffs, but they were active and eager co-conspirators therein.

AS AND FOR A FIFTH CLAIM FOR RELIEF
(42 U.S. Code § 3601, *et seq.* - Fair Housing Act - against individual defendants only)

80. That plaintiffs repeat, reiterate, and reallege each and every allegation in paragraphs "1" through "79" as though more fully set forth herein at length.

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81. That defendant, SALADINO's conduct in refusing to sell to plaintiffs due to one plaintiff being African-American, violated the Fair Housing Act, especially §§ 3604 (a) and (b) and 3617.

82. That upon information and belief, when thereafter told the address of the subject premises plaintiffs intended to purchase, defendant, SALADINO, consistent with his blurting out the racist policy of both the defendant, TOWN and Town Republican Party that his political career would be over (*supra*), tipped his co-defendants who then acted as aforesaid to drive plaintiffs from their home.

83. That defendants' said misconduct deprived plaintiffs of their rights to enjoy the rights, privileges, and immunities of United States citizens solely due to plaintiff, DARREN E. THOMAS' race.

AS AND FOR A SIXTH CLAIM FOR RELIEF
(pendent state claim - abuse of process - against individual defendants only)

84. That plaintiffs repeat, reiterate, an reallege each and every allegation as set forth in paragraphs "1" through "83" as though more fully set forth herein at length.

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85. That defendants used the prosecutional power of the State of New York for an illicit purpose.

86. That defendants caused a summons and criminal information to be filed and issued to plaintiff, DARREN E. THOMAS.

87. That such process was issued for the racist purpose of driving plaintiffs from their legal home.

AS AND FOR A SEVENTH CLAIM FOR RELIEF
(pendent state claim based on malicious prosecution on behalf of plaintiff, DARREN E. THOMAS, only - against individual defendants only)

88. That plaintiffs repeat, reiterate an reallege each and every allegation as set forth in paragraphs "1" through "87" as though more fully set forth herein at length.

89. That said underlying prosecution was false and based on the defendants' racist motive to drive plaintiff, DARREN E. THOMAS, an African-American-descended homeowner, out of his home within defendant, TOWN.

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90. That on April 5, 2019, plaintiff, DARREN E. THOMAS, was acquitted of both misdemeanor counts.

AS AND FOR AN EIGHTH CLAIM FOR RELIEF
(*Monell* - against defendant, TOWN only)

91. That plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs "1" through "90" as though more fully set forth herein at length.

92. That at all times hereinbefore mentioned, and as detailed hereinabove and hereinbelow, defendant, TOWN, implemented and executed an official policy, statement, ordinance, regulation or decision through its officials.

93. That at all times hereinbefore mentioned, and as detailed hereinabove and hereinbelow, the official policy, statement, ordinance, regulation or decision of defendant, TOWN, caused plaintiffs to be denied their constitutional rights.

94. That upon information and belief, defendants, VENDITTO, GENOVA, and IPPOLITO originally, and now as continued by defendant,

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SALADINO, have created, importuned, encouraged, and directed a policy to prevent African-American individuals from residing in the Town.

95. That said policy was adopted by said defendants as a means of getting elected and re-elected.

96. That upon information and belief, said policy was developed and refined by said defendants as catering to their perception of the basest prejudices of a portion of defendant, TOWN's electorate.

97. That upon information and belief, said policy was cunningly conveyed by defendants and other Republican Town officials through thinly-veiled but unmistakable references in electoral campaign speeches and civic appearances, exhorting the voters to support their candidacies because "They," "Them," "Those," and other unmistakable contextual code words alluding to African-Americans, would be continued to be kept out of the Town under their rules.

98. That upon information and belief, individual defendants' and their predecessor TOWN officials' policies have been successful in

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keeping "Them" out as the 2010 U.S. Census reported the Town to be 85% white and only 2.3% African American.

99. That upon information and belief, it has been reported that defendant, TOWN has the smallest African-American population of any suburban town in the Northeast United States.

100. That upon information and belief, the 2010 U.S. Census reported that Nassau County in which defendant, TOWN is located, contains an 11.1% African-American population.

101. That upon information and belief, the 2010 U.S. Census reported that New York City's five counties are 25.5% African-American.

102. That upon information and belief, nearly concurrent with the acts complained of herein, defendant, TOWN enacted three programs for affordable housing, two for the general population and the third for senior citizens. However when applicants were selected, despite applications by African-Americans, nearly none were permitted to buy.

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103. It has been oft-observed in caselaw as a matter of common sense that racist individuals rarely if ever reveal their racism, and thus the New York Court of Appeals has ruled that since such motives are difficult to prove, most often only with great difficulty and circumstantially, plaintiffs pressing such claims are to be afforded wide latitude in attempting to prove the difficult issue.

104. That despite the foregoing, statements made by the current Town Supervisor, defendant, SALADINO, have exposed defendants' official TOWN and individuals' policy of excluding African-Americans. On October 11, 2006, plaintiffs were in the process of purchasing a house from defendant, SALADINO, after a period of approximately six weeks during which an engineer's inspection was conducted, major reductions of the purchase price and repairs were negotiated, and a lower price of $533,000.00 was agreed to by defendant, SALADINO. Suddenly as the contracts were about to be signed, defendant, SALADINO, a N.Y. State Assembly Member (Republican) from a District almost wholly contained within defendant, TOWN, suddenly saw plaintiffs as they were once again inspecting the house:

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> "Mr. Saladino stopped dead in his tracks, visibly shocked. He pulled me aside, introduced himself, and asked if they were the buyers. When I said, 'Yes,' he blurted out, 'They're black. Are you kidding, I can't sell to them . . . they can't buy the house . . . the neighbors'll never accept them. Oh my God, I'd never be elected again . . . I'd be finished.' "

Defendant, Saladino's statement exposes the most intimate and unspoken Town Republican Party policy to "Keep 'Them' Out," as he would lose Republican Party backing and end his political career. Defendant, TOWN, is exclusively controlled by the Republican Party.

105. That upon information and belief, thereafter such policy has been confirmed by Democrat Party officials and candidates who had no interest in publicizing such racist bigotry because, in their possibly but sadly correct but cynical view, exposure would only lead to greater electoral support by bigoted voters for their adversaries, the Republicans.

106. That upon information and belief, yet further conclusive proof of defendant, TOWN's racist policy is seen from the longevity of defendants' persecution of plaintiffs. Despite a substantial turnover of the members of the Town Council, and a rooting out of the original convicted-corrupt prior TOWN Administration that began the prosecution, headed by

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TTORNEY-AT-LAW
6 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

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the infamous defendants, VENDITTO, GENOVA, and IPPOLITO, the new administration continued prosecution of plaintiff, DARREN E. THOMAS, and refused to admit that plaintiffs' house is legal. That new TOWN cabal is headed by defendant confessor of racist TOWN policy, SALADINO, who has publicly declared his unequivocal refusal to disavow the VENDITTO-GENOVA-IPPOLITO Era racism and vowed to fight plaintiffs' claim forevermore.

107. That based on the foregoing, both in irrefutable population statistics, the unmistakable racist and baseless prosecution of the African-American plaintiff, and the revelatory remarks of defendant, TOWN's current Supervisor, defendant, SALADINO, the racism targeting plaintiffs was a product and a natural consequence of defendant, TOWN's official government policy to keep African-Americans out.

WHEREFORE, plaintiffs, DARREN E. THOMAS and MARLENE THOMAS, demand that judgment be entered against the defendants:

A. in the sum of TEN MILLION ($10,000,000.00) DOLLARS compensatory damages; plus

RY H. KUTNER, JR.
TORNEY-AT-LAW
WILLIS AVENUE
NEOLA, N.Y. 11501
(516) 741-1400

B. in the sum of TEN MILLION ($10,000,000.00) DOLLARS punitive damages;

C. for consequential damages for the costs and expenses incurred by plaintiffs in the New York State courts; and

D. for an injunction ordering defendants to issue a Certificate of Occupancy for 121 Fourth Street, Hicksville, New York (Section 46 Block 270 Lots -3), declaring it to be a two family home; and

E. for attorney's fees, costs, and disbursements pursuant to 42 USC § 1988; and

F. for any such other and further relief which is just, equitable, and proper.

Dated: Mineola, New York
August 22, 2019

Yours, etc.,

HARRY H. KUTNER, JR., ESQ. (K 9497)
Attorney for plaintiffs
136 Willis Avenue
Mineola, New York 11501
(516) 741-1400

RY H. KUTNER, JR.
TTORNEY-AT-LAW
6 WILLIS AVENUE
INEOLA, N.Y. 11501
(516) 741-1400

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

~~COURT~~
~~STATE OF NEW YORK COUNTY OF~~

Index No. Year

DARREN E. THOMAS and MARLENE THOMAS,

Plaintiffs,

-against-

JOHN VENDITTO, et al.,

Defendants.

AMENDED SUMMONS AND AMENDED COMPLAINT

HARRY H. KUTNER, JR.

Attorney(s) for Plaintiffs

Office and Post Office Address, Telephone
136 WILLIS AVENUE
MINEOLA, NEW YORK 11501
(B) 516-741-1400
(F) 516-741-8712

To

Attorney(s) for

Signature (Rule 130-1.1-a)

Print name beneath

Service of a copy of the within is hereby admitted.

Dated:

PLEASE TAKE NOTICE:

☐ NOTICE OF ENTRY

that the within is a *(certified) true copy of a*
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order
will be presented for settlement to the HON.
within named Court, at
on **at** **M.**

of which the within is a true copy
one of the judges of the

Dated,

Yours, etc.

HARRY H. KUTNER, JR.